

**The Role of Good Faith in the United Nations
Convention on Contracts for the International Sale of
Goods (CISG)**

Thesis submitted for the degree of

Master of Philosophy

at the University of Leicester

By

Obaid Khalfan Almutawa

Faculty of Law

University of Leicester

2015

Abstract

The Role of Good Faith in the United Nations Convention on Contracts for the International Sale of Goods (CISG)

By Obaid Khalfan Almutawa

This thesis examines the concept of good faith as one of the most controversial concepts in the United Nations Convention on Contracts for the International Sale of Goods (CISG). While some CISG scholars argue that the role of good faith is limited to the interpretation of the CISG, others view good faith in the CISG as a general principle which governs the conduct of the contracting parties. This thesis argues that the nature of the concept, its implicit manifestations in the CISG and the understanding of the transnational case law prove that there are good reasons to consider a broader approach of good faith in the CISG.

The thesis tries to explore the concept of good faith by critically analysing its connection with other contractual rules, the implication of applying good faith in contractual agreement and its role in national legal systems and international legal instruments. Following the good faith insight, the author explores the vague structure of Article 7 CISG which caused an element of confusion over the role of good faith. The authentic texts and the draft history of Article 7 critically analysed to show that a wider application of good faith in the CISG is possible. In addition, the general role of good faith is enhanced by classifying and elaborating some of the functions of good faith as it is implicitly manifest in the CISG. A list of CISG transnational cases which referred to the concept of good faith are critically reviewed to establish that the actual jurisprudence is going to adopt good faith as a general principle in the CISG. The conclusion raises important issues related to the need to adopt a general role for good faith and methods to improve our understanding of good faith in the CISG.

Acknowledgements

I owe my deepest gratitude to my supervisors' professor Janet Ulph and Pablo Cortes, whose guidance, encouragement and support enabled me to shape and complete this thesis.

I am indebted to my sponsor Dubai Police for their endless moral and material support, whom without I will not be where I am academically. I am honoured to be part of such great institution.

Table of contents

| | |
|---|-----|
| Abstract..... | ii |
| Acknowledgements..... | iii |
| Table of contents..... | iv |
| Chapter one..... | 1 |
| 1. Introduction..... | 1 |
| 2. Aim of the Study..... | 6 |
| 3. Methodology of the Study..... | 7 |
| 3.1 Critical Legal Methodology;..... | 7 |
| 3.2 Comparative Legal Methodology:..... | 9 |
| 3.3 Case Law Methodology:..... | 10 |
| 4. Original Contribution to Knowledge: Methodological Synthesis..... | 11 |
| 5. The Structure of the Study..... | 13 |
| Chapter Two..... | 17 |
| What is Good Faith?..... | 17 |
| .1 Conceptual Background of Good Faith..... | 17 |
| 1.1 Fair Dealing..... | 21 |
| 1.2 Reasonableness..... | 28 |
| 1.3 Good Faith and Honesty..... | 31 |
| 2. Good Faith Implication Difficulties..... | 33 |
| 2.1 Good Faith and Freedom of the Contract (<i>pacta sunt servanda</i>)..... | 33 |
| 2.2 Good Faith and Certainty of Terms..... | 35 |
| 3. Good Faith and its Application in Civil law, Common Law and International Law..... | 37 |
| 3.1 Civil Law..... | 38 |
| 3.2 Common Law..... | 42 |

| | | |
|---------|--|-----|
| 3.3 | Good Faith in Rules of Law | 56 |
| 3.3.1 | The Principles of International Commercial Contracts..... | 56 |
| 3.3.2 | The Principle of European Contract Law..... | 57 |
| 4. | Academic Divisions over adopting the Legal Principle of Good Faith. | 62 |
| 4.1 | The Academics' Definition of Good Faith..... | 66 |
| 4.1.1 | The excluder approach to good faith..... | 67 |
| 4.1.2 | The Foregone Opportunity Approach to Good Faith..... | 72 |
| 5. | Description or definition of good faith..... | 75 |
| | Chapter Three | 79 |
| | The Role of Good Faith in Article 7 CISG | 79 |
| 1. | Overview of the CISG..... | 79 |
| 2. | Article 7 and the Issue of Interpretation in the CISG..... | 82 |
| 2.1 | International Character..... | 84 |
| 2.2 | The Need to Promote Uniformity of Application | 87 |
| 2.3 | Good Faith..... | 89 |
| 2.3.1 | The Role of Good Faith according to the Textual Interpretation of Article 7 | 89 |
| 2.3.2 | The Role of Good Faith according to the Preparatory Work of the Convention | 95 |
| 2.3.2.1 | The Recourse to the Travaux Préparatoires | 95 |
| 2.3.2.2 | The Legislative History of Article 7 CISG | 98 |
| 2.3.2.3 | The Development by the Working Group..... | 99 |
| 2.3.2.4 | The Secretary General Statement about Good Faith..... | 104 |
| 2.3.2.5 | The Diplomatic Conference and the “Hard Won Compromise” | 107 |
| 3. | The Scholarly Contribution to Interpreting Good Faith in the CISG..... | 114 |
| 3.1 | Good Faith as a Mere Interpretive Tool..... | 115 |
| 3.2 | Good Faith as a General Rule in the CISG | 117 |

| | |
|---|-----|
| Chapter Four | 124 |
| Manifestations of the Standard of Good Faith in the CISG..... | 124 |
| 1. Good Faith as a Recognizable Usage in International Trade (Article 9) | 125 |
| 2. The Principle of Promissory Estoppel, Articles 16 and 29 | 131 |
| 2.1 Irrevocability of the Offer, Article 16 | 131 |
| 2.2 The Oral Modification or Abrogation of the Contract (Principle of Estoppel), Article 29 | 135 |
| 3. The Duty to Communicate the Acceptance of the Offer (Article 18)..... | 138 |
| 4. Good Faith and Purported Acceptance with Non-material Modifications, Article 19(2)..... | 141 |
| 5. Late Acceptance due to Unforeseen Circumstances (Article 21) | 142 |
| 6. Examination of the Goods (Articles 38-40)..... | 144 |
| 7. The Duty to Mitigate the Loss Where Possible (Articles 77 and 85 to 88) | 149 |
| 8. Can the Principle of good faith be excluded from the CISG?..... | 153 |
| Chapter Five..... | 156 |
| The Interpretation of Good Faith in the CISG Case Law | 156 |
| 1. The Role of Transnational Case Law in Interpreting CISG..... | 158 |
| 2. The Quality of Decisions and Homeward Trend Interpretation..... | 161 |
| 3. The Domination of Civil Law Cases and the Possible Influences on the Interpretation of CISG | 165 |
| 4. Trends of Interpretations in CISG Case Law | 167 |
| 4.1 Good Faith as an Instrument of Mere Interpretation..... | 167 |
| 4.2 Good Faith as a General Rule | 170 |
| 5. Good Faith as a Substantive Tool to Resolve Matters Not Governed Expressly by the Convention (Gap-filler) | 171 |

| | |
|--|-----|
| 6. Good Faith as an Obligation to Communicate Relevant Information..... | 174 |
| 7. Good Faith as a Prerequisite to Exercise The Rights..... | 178 |
| 8. Good Faith Role in the Pre-contractual Stage..... | 180 |
| 9. The Role of Good Faith in Establishing a Party’s Fundamental Breach | 182 |
| 10. CISG Case Law and the Adoption of the Dynamic Interpretation in Interpreting Good Faith | 184 |
| Chapter Six | 190 |
| Conclusion | 190 |
| 1. Possible Reforms in the CISG..... | 193 |
| 1.1 Amending Article 7, CISG..... | 193 |
| 1.2 Establishing an independent Body of Interpretation | 195 |
| 1.3 Facilitating the Accessibility of the Transnational CISG Cases and Academic Writings | 197 |
| Bibliography | 200 |
| 1. Primary sources..... | 200 |
| 1.1 International Conventions | 200 |
| 1.2 National Laws | 200 |
| 1.3 International legal instruments..... | 201 |
| 2. Secondary sources..... | 201 |
| 2.1 Books | 201 |
| 2.2 Articles..... | 207 |
| 2.3 Electronic articles | 219 |
| 2.4 Thesis | 220 |
| 2.5 Conference and other papers..... | 221 |
| 2.6 Cases | 223 |

2.7 Websites..... 227

Chapter one

1. Introduction

Few academics might disagree that good faith is one of the most dominant legal principles that participated in the development of commercial law. The concept represents the image of internal morality of law. Good faith exists in every culture, society and religion. Every legislator introduces the concept through different images into the legislation. Every court and tribunal has dealt with one form or another of good faith. Thus, good faith interpretation and scope is always present in the legal writings. However, an academics opinion on the concept is sharply divided and the main question is always what exactly is good faith and how is it to be found?

The concept importance in the national level is reflected on the international level through its inclusion in international legal instruments. One of these international conventions is the United Nations Convention on Contracts for the International Sale of Goods (hereafter CISG)¹. The CISG is commonly referred to as "...one of the most successful multi-lateral treaties ever in the field of agreements designed to unify rules traditionally addressed only in domestic legal systems".² The Convention was adopted in Vienna in 1980 in a diplomatic conference which was attended by representatives of 62 countries and eight international organisations³ after it was accepted by two thirds of the participants.⁴ The announcement of the birth of the CISG came after more than half a century of hard work which was started in 1926 by the International Institute for the

¹ It could be described in this thesis as (the convention).

² Brand, R., & Flechtner .H., 'Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention' (1993) 12 J.L. & Com. 239.

³ Bonell, M., 'The UNIDROIT Principles of International Commercial Contracts and CISG: Alternatives or Complementary Instruments?' (1996) UNIFORM L. Rev. 26, Available at: <http://cisgw3.law.pace.edu/cisg/biblio/ulr96.html>

⁴ King, C., 'The CISG - Another One of Equity's Darlings?' (2004) 8 VJ 249, at 250.

Unification of Private Law (UNIDROIT).⁵ This indicates the massive effort made by the international community to produce a convention that unified the international sales rules. The Convention (as of October 2014) has been ratified by 83 countries including some of the biggest trading states such as the United States of America, France, Germany, Japan and China.⁶

The ratification of many countries and the demand for clear understanding with regard to applying the Convention made the interpretation of its 101 articles in general, and Article 7 in particular, a major area of research for a considerable number of scholars and commercial lawyers see Juenger, Friedrich⁷, Troy Keily⁸, Beatson and Friedman⁹ among others.

Article 7 serves as an interpretive guide to the CISG, referring to the principle of good faith as one of three elements that should be observed in determining the meaning of the Convention's provision¹⁰.

The issue of whether good faith extends to obligation on the actions of the '*contracting parties*' is a contested one. On one hand, some scholars have argued that

⁵ Andersen, C., 'The uniformity of the CISG and its Jurisconsultorium ; An analysis of the terms and a closer look at examination and notification' (PhD thesis, Aarhus School of Business,2006), at 75.

⁶ In fact, only few major trading countries, namely the United Kingdom, India and South Africa, did not ratify the Convention. Thus, it is estimated that the CISG governs three quarter of the international trade. See; Hofmann, N., 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe'(2010) 22 Pace Int'l. L. Rev. 145. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/hofmann.html>. Moss, S., 'Why the United Kingdom Has Not Ratified the CISG' (2005) 25 J. L. & Com. 483. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/moss.html>.

Forte, A., 'The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom' (1997) 26 U. Balt. L. Rev. 51. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/forte.html>.

⁷ Juenger, F.K., 'Listening to Law Professors talk about good faith: Some After Thoughts' (1995) 69 Tul. L. Rev.1253

⁸ Keily, T., 'Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (1999) 1 VJ 15.

⁹ Beatson, J., and Friedman, D. (eds). *Good Faith and Fault in Contract Law* (Oxford University Press, Great Britain, 1995).

¹⁰ Along with the international character of the convention and the need to promote uniformity, see Article 7 CISG.

It appears in principle that Article 7 of the convention only requires good faith to be observed as a criterion to understand the convention and not as something imperative by both parties as they embark on fulfilling the contract¹¹.

Farnsworth argued that good faith is smuggled from the back door¹², while Emily Houh referred to good faith in contract law as synonymous with (nearly) an empty vessel,¹³ all to justify that the observance of good faith by contracting parties is difficult to ascertain. On the other hand, scholars have repeatedly supported the contrary notion that *contracting parties* must be required to act in order for good faith to have any meaningful practical significance as a rule.

For example, Koneru argued that good faith does not exist in a 'vacuum'. Thus, any attempt to interpret article 7(1) in such a way as to allow parties to escape liability would undermine the objective of promoting good faith¹⁴. Keily, a key advocate of the above view, put it rather succinctly as follows:

Even if the position is accepted that article 7(1) does not impose an obligation of good faith on contracting parties, but merely requires provisions of the CISG to be interpreted in good faith, a problem remains. The CISG outlines rights and obligations of parties to an international sale of goods. Article 7(1) provides that the principle of good faith should be used when interpreting these provisions. Surely, it is not possible to interpret the CISG in good faith without also indirectly affecting the conduct of the parties¹⁵.

The concept of good faith included in Article 7 CISG gained a lot of attention from scholars in terms of its meaning, scope, and application. Some examples of these

¹¹ Franco, F., 'Uniform Interpretation of the 1980 Uniform Sales Law'. (1994) 24 Ga J Int Comp Law 183, also published <http://www.cisg.law.pace.edu/cisg/biblio/franco.html>

¹² Farnsworth, E.A., 'The Eason-Weinmann Colloquim on International and Comparative Law: Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, relevant International Conventions, and National Laws' (1995) 3 Tul. J. Int'l & Comp. L. 47.

¹³ Houh, E., 'The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?' (2005) Faculty Articles and Other Publications. Paper 103.

Available at: http://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1101&context=fac_pubs

¹⁴ Koneru, P., 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach based on General Principles' (1997) 6 Minn. J. Global Trade 105.

¹⁵ Keily, T., note no: 8 above.

scholars are Steven D. Walt¹⁶, Alexander S. Komorav¹⁷, Emily Houh,¹⁸; and Jorge Oviedo Alban¹⁹. However, the interpretation of the concept of good faith within the Convention varies between *civil* and *common-law* scholars; each side has different views regarding the interpretation of the concept of good faith.

The common law scholars are of the view that good faith is a matter of moral exhortation and therefore, antithetical to the value of certainty in commercial law²⁰. Thus, they would ask in contemplation what does morality embrace? Whose morality should be enforced? To what extent should standards of morality regulate commercial dealings? Answering these questions in their opinion erodes the certainty they are accustomed to Friedrich Juenger²¹. They also argued that good faith undermines the international character of the CISG since it is bound to be context relevant influenced by national courts legal and social traditions²².

Contrary to above, the civil law scholars are of the view that good faith is universally recognised. Therefore, extending it to an instrument for the regulation of international trade would only compliment the code of conduct²³. They also argued that non-

¹⁶ Steven. D. Walt. 'The Modest Role of Good Faith in Uniform Sales Law' (2014) Virginia Public Law and Legal Theory Research Paper.

Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2390284

¹⁷ Komarov, A., 'Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)' (2006) 25 JLC, 75.

¹⁸ Houh, E., note no: 13 above.

¹⁹ Alban, J., 'The General Principles of the United Nations Convention for the International Sale of Goods' (2011) 4 Cuadernos de Derecho Transnacional 165.

²⁰ Hiscock, M., 'The Keeper of the Flame: Good Faith and Fair Dealing in International Trade' (1996) 29 Loy. L.A. L. Rev 1059.

²¹ Juenger, F.K., note no: 7 above

²² Nives, P., 'Interpretation and Gap Filling under the United Nations Conventions on Contracts for the International Sale of Goods', CISG w3 Data Base, Pace University School of Law. <http://www.cisg.law.pace.edu/cisg/biblio/gap-fill.html>

²³ Keily. T., note no: 8 above

uniformity would be overcome through uniform interpretation and development of the body of case law²⁴.

In view of the above, case law has generated various views regarding the meaning of good faith and its appropriate function in the Convention with a practical dimension to the debate. A body of case law in regards to good faith is developing rapidly and some of the following is some of these cases :

- a) *Automobiles case* heard before a German Provincial Court of Appeal (Munich) where the judge passed a judgement, states that: “Provisions of the convention cannot be interpreted in good faith without that interpretation having consequences on the conduct of contracting parties”²⁵.
- b) *Bonaventure case*²⁶ – where the court appears to have suggested “contracting parties have a positive obligation to regulate their conduct in good faith, and for a party to commence court proceedings in circumstances where they are clearly at fault is not in good faith”²⁷.
- c) The Hungarian Arbitration Tribunal decision²⁸ where the Court justified its reference to Art. 7(1) CISG, pointing out that the observance of good faith is not only a criterion to be used in the interpretation of CISG but is also a standard to be observed by the parties in the performance of the contract.

²⁴ Ibid

²⁵ Ibid, (*Automobiles case*), Germany 8 February 1995 Appellate Court München [7 U 1720/94], <http://cisgw3.law.pace.edu/cases/950208g1.html>.

²⁶ *BRI Production "Bonaventure" v. Pan African Export*, France 22 February 1995 Appellate Court Grenoble, <http://cisgw3.law.pace.edu/cases/950222f1.html>

²⁷ Keily. T., note no: 8 above

²⁸ Arbitral Award, Hungarian Chamber of Commerce and Industry, Court of Arbitration, Hungary, 17th November 1995, in: <http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=Abstract>

2. Aim of the Study

The main aim of the study is to prove that the principle of good faith in the CISG has a general role, which is not limited to the interpretation of the Convention. This argument can be supported by many elements including the draft history of Article 7, the manifestations of good faith in the Convention and the current trend in the CISG transnational case law. As a result, the aim of this study will be elaborated by focusing on the following issues:

- a) Exploring good faith as a legal concept, which is incorporated in many national and international instruments, and to explore the extent to which the CISG, recognises the principle of good faith. This does not mean defining good faith but rather identifying some of its characteristics in the legal context.
- b) Clarifying some of the misconceptions about the role of good faith in Article 7(1) by exploring the Article from a drafting history point of view and evaluating the writings of legal academics in this area of research, thus identifying the complexity of understanding the draft history of Article 7.
- c) Showing the implicit manifestations of good faith through the CISG and some of its functions according to provisions discussed in this thesis. As good faith manifests in number of CISG provisions, each one of these provisions will be analysed to identify how good faith participated in forming that provision.
- d) Exploring the current trend regarding the adopted role of good faith in the CISG in the CISG transnational case law, thus illustrating some of the main functions of good faith according to a number of CISG transnational cases, which have dealt with the issue. The aim is to give those who work in the area of commercial law the predictability needed to determine the outcome of the dispute if the general rule of good faith is adopted.
- e) Developing a deeper understanding of the concept of good faith within the Convention. This is supported by a number of recommendations and suggestions, which, it is proposed, will have a positive impact on the identification and application of the concept of good faith by commercial law scholars, courts and tribunals.

3. Methodology of the Study

The difficulties associated with defining the principle of good faith in general, and identifying its role in the CISG in particular, require the researcher to adopt and apply several research methods to provide clear answers to the questions raised about good faith in relation to the CISG.

3.1 Critical Legal Methodology;

“If we understand the word ‘critical’ as something relating to ‘critique’ rather than ‘criticism’, then we seem to be back at square one. Would not all research need to be ‘critical’ as the etymology of the word already indicates? Is not ‘critiquing’ the very definition of all legal research worth its name?”²⁹

In view of the above and for the purpose of this research critical legal analysis refers to an attempt to conduct a critique of related concepts within a particular legal tradition with an end goal of proposing a change³⁰. This research is essentially an attempt to conduct a *critique* of ‘good faith’ phenomenon rather than a *criticism* of a presumed socio-political power underpinning its practice³¹. The difference between ‘criticism’ and ‘critique’ used as the basis for methodological guidance and analysis in this study is as set out below:

“*Criticism* occurs within a context provided by tradition and that *critique* is at least partially constituted by that which it seeks to resist, reform, or revise. Critique is not fully or completely opposed to tradition; instead it suggest that while there is participation in a shared context, it is participation at a distance”³²

²⁹ Minkkinen, P., ‘Critical Legal Method as Attitude’, In Watkins, D., and Burton, M (Eds.), *Research Methods in Law* (Pp.119-138). (London, Routledge Taylor and Francis, 2013)

³⁰ Ibid

³¹ Morris. C., & Murphy. C., *Getting a PhD in Law*, (2001, Oxford and Portland Oregon: Har Publishing Limited) at: 12.

³² Silbey. S., & Sarat, A., ‘Critical Traditions in Law and Society Research’ (1987), 21 *Law and Society Review* 165, at 165

The critical legal analysis adopted in this research is therefore, an *internal analysis*³³ of the trend for the interpretation of ‘good faith’ its roles, and relationships as a governing rule. The aim is to propose changes in the reform of particularly Article 7 of the CISG. Thus, we can clearly draw parallels in contrasts to a broader stream of Critical Legal Studies (CLS) whose approach involves conducting *external perspective analysis* with focus on emancipating the researcher from obligations towards law (an approach in H.L.A Hart sense not ‘properly legal’)³⁴.

First, “before you can break the rules you have to know what the rules are”³⁵. Therefore the researcher has identified the scholarly legal tradition that argued for a limited role of good faith interpretation to only the CISG convention. This scholarly legal tradition was led by Farnsworth³⁶. Also, the researcher used the outlined critical legal analysis methodology to systematically ‘*critique*’ their positions in the light of the need to reform, amend, revise, or form an independent body of interpretations of the concept of good faith. The researcher embarked upon this task using the following three stages:

The first stage focuses on some of the distinguished characteristics of the concept of good faith. Thus, the history of the concept is briefly reviewed to understand the development of the concept to its current stage. Tracking the development of good faith is enhanced by studying the relationship between good faith and other concepts, such as honesty and reasonableness which seem to share the same characteristics with it. In so doing, the study ‘*critically evaluates*’ some of the legal scholars’ attempts to define the concept of good faith.

³³ Shapiro, S., ‘What is the Internal Point of View?’, (2006), 75, *Fordham Law Review*, 115-70

³⁴ Hart, H., *The Concept of Law*, 2nd edn (1997 Oxford University Press, Oxford), 88-91

³⁵ Farnsworth, E.A., note no: 12 above.

³⁶ *Ibid*

The second stage focuses on critically analysing the role of good faith in Article 7 CISG. As a result, the draft history focusing on Article 7 is traced and analysed to identify the drafters' intention with regard to good faith. This stage includes a critical study of scholarly opinions about the value of drafting Article 7 which defines the meaning of good faith in the CISG.

The third stage is the examination of the implicit manifestations of good faith in the CISG. This study aims at proving that the principle of good faith manifests in a number of provisions other than Article 7. As a result, the study will highlight these provisions and illustrates the functions of good faith based on their interpretation.

3.2 Comparative Legal Methodology:

“Comparative legal analysis is usually conducted for one of two purposes: either looking outside one's own jurisdiction to see how legal problems have been solved elsewhere... – or looking across jurisdictions or families of law for common threads of development or patterns in legal responses to societal issues...”³⁷

The comparative analysis used in this thesis is not intended to refer to the former but the latter. In so doing, the researcher identifies ‘common threads’ of development and or ‘patterns’ of attitude towards good faith nationally and internationally. Consequently, the basic meaning and application of good faith is explored in different jurisdictions (common, civil, and customary) and international legal instruments such as PECL and the UNIDROIT Principles. This exploration of the meaning of good faith on both national and international level should support a greater understanding of the concept of good faith in the CISG as a part of the international private law.

³⁷ Morris. C., & Murphy. C., note no: 31 above at: 56.

As a result, this thesis considers the role of good faith in some common law jurisdictions such as in Australia (where the trend has been changed from the usual common law of rejecting the principle of good faith) and England (where the English judges still reject the imposition of the general principle of good faith on the contracting parties). finally, the study covers the role of good faith in some civil law jurisdictions like that of Germany where the principle of good faith is a fundamental principle.

Success in undertaking such a comparison will provide a complete view of the concept of good faith, (hence new knowledge) which could be used to introduce a uniform approach to understand the meaning of good faith at the international level.

3.3 Case Law Methodology:

The CISG was formed to harmonise the international sale of goods rules. As a result, interpreting any vagueness in the Convention should not be done in isolation of the actual application of the Convention. Thus, this study examines the interpretation of good faith in CISG transnational cases with the aim of highlighting some of its functions as it is understood by judges and arbitrators.

Studying CISG transnational cases will assist in identifying the international judicial trend when it comes to interpreting good faith in the CISG. In other words, judges and arbitrators favour the CISG transnational case law will answer the question about which role of good faith in the CISG. Ultimately, the CISG case law will assist in achieving the uniformity of the CISG application if these cases were made accessible to judges in member states.

The key justification for conducting case law analysis in this study is as Troy Keily puts it, to overcome the non-uniformity of the ‘good faith’ through uniform interpretation

and development of the body of case law. An analysis of trans-national case law interpretation is likely to lead to ‘happy consequence’ informing legislators and judges³⁸

Using case law study will provide legal commentators with guidance, which they require to trace the development in our understanding of the CISG in general, and the interpretation of good faith in particular

4. Original Contribution to Knowledge: Methodological Synthesis

This research borrowed from the three key methodological research strands, namely critical legal, comparative, and case law analyses each with illuminating results. Essentially, all the three methodologies constituted in the generation of original contribution to knowledge.

Firstly, the critical legal analysis and evaluation of the concept of ‘good faith’ has enabled the researcher to contribute to knowledge by critically evaluating the positions of scholars from both common and civil law. This thesis has claimed to have clarified the concept of good faith, and has contributed to the on-going debate on this topical subject matter. Thus, this thesis has succeeded in systematically *critiquing* the tradition of limiting the interpretation of the concept of good faith to a mere interpretation of the CISG and subsequently providing the basis for promoting change.

Secondly, the comparative legal analysis has contributed to the generation of original knowledge following the tenet of scientific and logical exposition of the law within the tradition of Neo-Kantians particularly Hans Kelsen (1881-1973) and Edmund Husserl

³⁸ Keily. T., note no: 8 above.

(1859-1938)³⁹. Kelsen often argues that law is a normative science not factual (not based on observation of social reality)⁴⁰.

Thus, Kelsen argued in view of the above the generation of knowledge in law is regulated by careful study of inter-normative relations. As prescribed in such logical exposition, this research begins the analysis of primary legislations on ‘good faith’ and then seeks for inter-normative relations particularly between what Kelsen would refer to as the *lower norms* – national laws on ‘good faith’ - in some selected countries mainly (UK, US and Germany) in comparison to a *higher norm* (the CISG) which is international.

Finally, the case law analysis advances our knowledge of ‘good faith’ through application of interpretive analysis of case laws in transnational jurisdictions (namely Germany, Italy, Spain, Hungary among others etc). The principal advocate for legal interpretive movement Ronald Dworkin wrote in his “*Justice for Hedgehogs*” that all interpretations including legal interpretations can be referred to as intellectual activities⁴¹.

Interpretation as a legal activity is used here to guide the researcher to advance our knowledge by examining ‘*family resemblance*’ and ‘*unity of interpretation*’ of case laws by judges and legislators in different countries. In so doing, the researcher contributed to advancing the knowledge of ‘conceptual interpretation’ of ‘good faith’⁴². Moreover, this research has contributed to the recovery of the meaning of ‘good faith’ from judges

³⁹ Minkkinen, P., note no: 29 above.

⁴⁰ Ibid.

⁴¹ Solum, S., ‘The Unity of Interpretation’, (2010) 90 B.U. L. Rev 551 at: 551. Available at: <https://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/SOLUM.pdf>

⁴² Ibid, at: 552.

and legislators in its *implicative* sense (implications and consequences) and *teleological sense* (purpose or function)⁴³.

5. The Structure of the Study

Research into the interpretation of the concept of good faith is not an easy task, as it will always involve concepts which are both vague and ambiguous. As a result, the study concentrates on both theoretical and practical aspects of good faith in the CISG in order to achieve the clearest possible interpretation. In order to accomplish this task, the thesis is structured on three dimensions.

The first dimension focuses on the legal nature of the concept of good faith as an essential element to understanding the concept in the CISG. Thus, the development of good faith throughout legal history is traced to identify some of its meanings, applications, and links to other legal concepts in commercial law.

In addition, this dimension critically analyses what scholars have written about good faith to refine the quality of the research and the findings with regard to the concept. Finally, this dimension illustrates our understanding of good faith in international trade law by considering the legislation of some of the major CISG member states such as the United States (UCC) and Germany.

This dimension also covers a number of international legal instruments such as the UNIDROIT Principles and the Principles of European Contract law (PECL). Success in this dimension should firstly remove the ambiguity of the concept of good faith and secondly should establish a firm foundation on which to build the rest of the research.

⁴³ Ibid, at: 561.

The second dimension focuses on good faith in Article 7. This dimension aims at providing a gradual exploration⁴⁴ of the interpretation problem related to good faith in CISG. Thus, this dimension starts with an overview on the CISG, then moves to the smaller picture of the structure of Article 7 and its function in the CISG, before finally considering the smallest picture which contains the core of the research which is the role of good faith.

The third dimension of the research demonstrates the manifestation of good faith in CISG provisions other than Article 7. The aim of this dimension is to illustrate some of the functions of good faith as it manifests in the CISG. This dimension also includes the transnational case law interpretation of the concept of good faith in the CISG context. Consequently, this dimension matches between theory and practice in interpreting good faith in the CISG.

The previous dimensions are presented in this thesis in several chapters. Accordingly, Chapter two presents a description of the legal concept of good faith. The chapter begins with a review of the history of good faith as a part of natural law or morality in order to clarify the genesis of good faith in legal history. Furthermore, this chapter highlights some of the legal principles, namely honesty and reasonableness, which might be similar to good faith and could be considered to have a common line of descent.

Furthermore, this chapter presents some of the legal concepts which might appear as a contradiction to the application of good faith in the commercial contract such as freedom of contract. Finally, the key legal writings about the definition of good faith such as those of Summer, Farnsworth and Burton are critically analysed.

⁴⁴ See: Stebbins, R., *Exploratory Research in the Social Sciences*. (2001 Thousand Oaks: Sage Publications Inc).

In addition, this chapter concentrates on the fact that the CISG is an international legal instrument which combines different legal systems because the drafters of the convention came from different legal backgrounds. This fact requires a closer look at the existence of good faith in these legal systems. As a result, civil and common legal systems are considered in terms of the way which they have dealt with the concept of good faith. Furthermore, the thesis considers the scope and application of the principle of good faith in several legal instruments such as the UNIDROIT Principles and the Principles of European Contract Law (PECL). The goal is to illustrate the general role of good faith in these international instruments which might affect the understanding of the same concept in the CISG.

Chapter three focuses on interpreting good faith in Article 7 CISG. The chapter presents an overview of the CISG by looking into its genesis, the scope of the Convention and the interpretation tools of CISG which are included in Article 7. This logical order leads to the present complexity of the role of good faith in Article 7. The following chapter examines the textual interpretation of Article 7 in all the formal languages recognised by the UNICITRAL. The history of drafting Article 7 is explored and evaluated in order to create a link between the interpretation of good faith that resulted from the textual interpretation, and the result of that role which was obtained from the legislative history.

Before giving any opinion about the role of good faith, this chapter analyses the opinions of a number of scholars⁴⁵ with regard to the role of good faith in the Convention and, more importantly, analyses their supportive arguments in terms of what they believe to be the role of good faith in the CISG. The last part of this chapter

⁴⁵ See page no: 7 of this thesis.

presents the author's opinion about the appropriate role of good faith in the Convention, while the following chapters offer arguments in support of that opinion.

Chapter four demonstrates the application of good faith in other provisions within the CISG. The principle of good faith manifests implicitly in some articles such as Article 16 which is about the non-revocability of an offer, Article 29 (2) which is concerned with the preclusion of a party from relying on the provision in a contract that modification or abrogation of the contract must be in writing, Article 40 which precludes the seller from relying on a notice of non-conformity in certain circumstances, and other provisions.

Chapter Five presents the understanding of transnational case law with regard to the meaning of good faith. Thus, judgments and decisions from different CISG member states are reviewed and analysed to show how the role of good faith in the CISG has been developed, and what might be the trend in understanding good faith in the CISG. As the CISG is an international convention, this chapter does not concentrate only on English cases, but considers the case law of other nations (namely Germany, Spain, Italy, Hungary mentioned but few) that have dealt with the issue of the interpretation of good faith in the Convention. The judgments obtained from these cases are reviewed against the national understanding (when possible) to ensure the fulfilment of these decisions to the requirement of international character of the CISG.

Chapter six includes the research findings. In addition it concludes with the author's opinion about the most appropriate role of the concept of good faith in the CISG, and suggests reforms for a better understanding of the concept of good faith in the CISG.

Chapter Two

What is Good Faith?

1. Conceptual Background of Good Faith

'There would no longer be any security, no longer any commerce between mankind [...] if they did not think themselves obliged to keep faith with each other and to perform their promises'.¹

The genesis of the principle of good faith in human society is hard to determine, as it is related to the complex process of the evolution and development of human society both socially and legally.² Law and legal rules, as a part of human society, aim to organise the relationships among members of a society to maintain equality and guarantee the rights of individuals, which will eventually lead to the flourishing of society.³

In other words, the relationship between humanity and the principle of good faith could be said to be as old as the existence of the first civilization because:

"[T]he development of human culture [...] originated with the formation of human groups. [...] Group-living at any level only becomes possible if there is some sort of minimal co-operation and tolerance. [...] From that necessity, the emergence of [the] concept of good faith would seem to be inevitable".⁴

¹ Van Alstine, M., 'The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection (2005) 93 Geo. L.J. 1885, at 1908.

² O'Connor, J., *Good Faith in International Law* (Dartmouth Publishing, 1991), at 5.

³ Ibid. See also Finns, P., 'Commerce, the Common Law and Morality' (1989) 17 Melb. U.L. Rev. 87, at 88.

⁴ Ibid., at 6. See also Distelhorst, M., 'A Business Ethics Approach to Contractual Good Faith and Fair Dealing: Briefly Modeled in Selected Managed Healthcare Contexts' (2000) 26 Ohio N.U.L. Rev. 57, at 58–9.

The concept of good faith is believed to be a part of the moral and ethical duties that were accepted by early human society as a means of ensuring cooperation, tolerance, and balance among its members.⁵ Eventually, the legislator in early society would upgrade the moral principle of good faith by giving it the legal mandate to ensure that it is enforced in society, and the elements required for its continued existence in society are maintained.⁶ In fact, legalising the principle of good faith would make it capable of generating “concrete legal rights and obligations on its own”.⁷

The Greek philosopher, Aristotle⁸ observed two thousand years ago that “if good faith has been taken away, all intercourse among men ceases to exist”.⁹ Aristotle’s statement emphasises the requirement of society upon its members to act in good faith not just with regard to commercial transactions, but also in any other daily intercourse.¹⁰ The Aristotelian principle of good faith could be considered as part of his philosophy of the virtual ethics, which, according to Aristotle, are important in creating a virtuous society.¹¹

⁵ See Finns, P., note 3 above, at 88.

⁶ Ibid.

⁷ Sim, D., ‘The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods’ (LLM thesis, Harvard Law School, 2000), available at <http://www.cisg.law.pace.edu/cisg/biblio/sim1.html#ii>. There is no doubt that the principle of good faith has a direct impact on generating other legal rules such as reasonable man, estoppel, reasonable expectation, fair dealing, etc. See Finns, P., note 3 above, at 92; Mackaay, E. & Leblanc, V., ‘The Law and Economics of Good Faith in the Civil Law of Contract’ (paper for the 2003 Conference of the European Association of Law and Economics, at Nancy, France), at 18.

⁸ Aristotle (384BC–322BC) was an Ancient Greek philosopher and scientist, one of the greatest intellectual figures of Western history; see *The Encyclopædia Britannica* at <http://www.britannica.com/eb/article-9108312/Aristotle>.

⁹ O’Connor, J., note no: 2 above, at 56.

¹⁰ See Tetley, W., ‘Good Faith in Contract Particularly in the Contracts of Arbitration and Chartering’ (2004) 35 J.M.L.C. 561, at 568.

¹¹ Some of the virtuous ethics that Aristotle mentioned are wittiness, truthfulness and justice. However, these ethics do not concentrate or are required only with regard to certain acts or behaviour, but are required for the person for all acts, regardless of the time or the place, to be a way of life. “It asks what sort of person one ought to be, or what sort of life one ought to live; it does not, at any rate in the first instance, ask what acts one ought to do.” See Putnam, R., ‘Reciprocity and Virtue Ethics’ (1988) 98 *Ethics* 379, at 379; Solomon, R., *Ethics and Excellence: Cooperation and Integrity in Business* (Oxford University Press, 1992), at 200.

Consequently, the court, according to Aristotelian philosophy, and through using these ethical principles (good faith being one of them), is allowed to intervene to reconstruct the contract if it believes that this reformation is needed to bring about fairness and justice. This is to say, in Aristotelian theory, the applying good faith gives the judge discretionary powers;¹² to impose or waive obligations contained in the contract if it is necessary to “recreate the just distribution that existed prior [to the contract]”.¹³

The definition of good faith in Aristotelian philosophy might be measured against what is called the “reasonable expectations” of the parties. According to Aristotle, the principle of good faith imposes on a virtuous contracting party a duty, namely “to relax decently any legal insistence on having the exact measure that is due to one, and to have an attitude of goodwill [in performing his contractual duties]” that would be reasonable for the other party to expect.¹⁴

The Romans in 450BC introduced the concept of good faith in the Twelve Tables to mitigate the harsh requirements of debt contracts.¹⁵ The Roman statesman, Cicero (106BC–43BC)¹⁶ followed the steps of Aristotle by promoting the requirement for a balanced distribution of the contractual duties and rights between the contracted parties. Cicero’s observation, “The foundation of justice is good faith,” is a well-known quote in the literature of good faith. Cicero did not discard the sanctity of the contract in his

¹² In fact, according to the idea of corrective justice, it will be the responsibility of the judicial process to require the windfall profiteer to disgorge the unjust gain. See DiMatteo, L., ‘The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law’ (1999) 60 U. Pitt. L. Rev. 839, at 846.

¹³ Holland observed that the pursuit of equity and avoiding an unjust result from the strict application of law are a “guide to interference with a strict application of law [...] which, according to Aristotle, is not different from Justice, but a better form of it”. Holland, T., *The Elements of Jurisprudence* (13th edn, Oxford Clarendon Press, 1924), at 71.

¹⁴ DiMatteo, L., note no: 12 above, at 845.

¹⁵ see: Klein, J., ‘Good Faith in International Transactions’ (1993) 15 Liv. L. Rev. 115, at 116. Available at <http://cisgw3.law.pace.edu/cisg/biblio/Klein.html>.

¹⁶ Cicero was a Roman statesman, lawyer, scholar, writer, Stoic philosopher and one of Rome’s greatest orators and prose stylists. See <http://www.britannica.com/eb/article-9082616/Marcus-Tullius-Cicero>.

philosophy about using the principle of good faith to interfere in order to create a more balanced contract.

Kant, who based his moral theory of contract law on Cicero's philosophy explained that, while it is true that the contracted parties enter into agreement in order to make a profit, the purpose should be achieved through performing their obligations with dignity, a requirement of which is to deal in good faith¹⁷.

According to Kant, morality is autonomous and is willed freely as a legal norm. Therefore, it belongs to the world of practical reasoning. Thus, "I act in a morally significant - good or bad- way because I 'will' to do so, not because my environment compels me to do so. And one cannot 'know' about this domain of freedom, only 'think' it"¹⁸.

The standard of good faith in Roman society was based on the guidance and direction of the jurists who formulated the substantive content of good faith in Roman society to the judge.¹⁹ Usually, the jurists used good faith to refer to three types of duties that the contracted parties should comply with. First, each party should keep his word. Second, neither should take advantage of the other by misleading him, or by driving too harsh a bargain. Third, each party should abide by the obligations that an honest man would recognise, even if they were not expressly undertaken.²⁰

¹⁷ Kant, I., *Idea for a Universal History with Cosmopolitan Intent*, in *The Philosophy of Kant*, C. Friedrich (trans.) (Modern Library, 1949), at 200.

¹⁸ Minkinen, P., 'Critical Legal Method as Attitude', In Watkins, D., and Burton, M (Eds.), *Research Methods in Law* (Pp.119-138). (London, Routledge Taylor and Francis, 2013)

¹⁹ O'Connor. J., note no: 2 above, at 21.

²⁰ Gordley, J., 'Good Faith in the Medieval IUS COMMUNE', in Zimmerman, R. & Whittaker, S. (eds), *Good Faith in European Contract Law* (Cambridge University Press, 2000), at 94.

The brief conceptual background of good faith shows that good faith was recognised as a social and ethical obligation before it was incorporated into any codified law.²¹ Secondly, the content of this obligation was based on what society would recognise as legitimate expectations of the contracting parties. As a result, the contracted parties are not only obliged by the contractual agreement, but they must also observe the moral ethics of society, including the principle of good faith, in their contractual behaviour.²² Thirdly, the introduction of good faith into legal jurisprudence aimed at enabling the court to minimise the harsh outcome of strict application of the contract law. Thus, the court, by using the concept of good faith, is able to consider the circumstances of the contract and the requirement of fairness and equality.²³

1.1 Fair Dealing

Identifying the meaning of fair dealing would largely depend on the jurisdiction and legal context. The notion has been introduced in a number of national jurisdictions and international instruments. In fact, using the notion of fair dealing is preferable in common law legal systems, particularly when the concept of good faith is branded as

²¹In theory, the legislator in the course of adopting moral or ethical obligations into legal obligations tends to frame that ethic into a precise terminological description. The aim is to guarantee the minimum standard of application to what may be considered acceptable or unacceptable by the relevant society. However, Lord Chief Justice Coleridge stated: "It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation." See *R v. Instan* [1893] 1 QB, at 453.

²² See Klein, J., note no: 15 above, at 117.

²³ Phillips stated: "To understand such an abstract concept as good faith, it helps to visualize it as existing in tension between society's demand for moral behavior by its constituents and the frequently opposing need of contracting parties to effectuate their private expectations. Society, or the community, it is presupposed, requires a moral framework of conduct to vitalize and sustain a civilized order. This moral obligation, expressed by one commentator as a 'contractual morality,' is derived from the 'normative values of society'." One commentator, noting "the amorality which pervades business", sees the response to good faith today as a societal consciousness or "ethical precept" that "promulgates a moral rule". Phillips, R., 'Good Faith and Fair Dealing under the Revised Uniform Partnership Acts' (1993) 64 U.C.O.L.R. 1179, at 1186.

vague.²⁴ This section sets out to identify whether the notion of fair dealing is similar to good faith. To address this, I explore the notion of fair dealing in national jurisdictions (mainly the Uniform Commercial Code (UCC) and English Law) and international instruments, which includes the Principles of European Contract Law (PECL).

The Uniform Commercial Code (UCC) is the best place to start searching for the link between good faith and fair dealing. American jurisprudence has recognised the notion of fair dealing since the nineteenth century. The general assumption is that good faith and fair dealing can be traced back to the judgment of the New York Court of Appeals in *Kirk Lashelle Co. v. Paul Armstrong Co.*,²⁵ which stated:

“In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.”

The UCC includes the notion of fair dealing as a part of the general assumption of the implied covenant of good faith and fair dealing. In another words, the UCC imposes a duty of good faith and fair dealing in the performance and enforcement of contracts. The UCC defines good faith between merchants in Section 2-103(1)(b) as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade”. Moreover, Section 205 of the Restatement of Contracts Second provides: “Every

²⁴ Weitzenbock, E., ‘Good Faith and Fair Dealing in the Context of Contract Formation by Electronic Agents’ (Proceedings of the AISB 2002 Symposium on Intelligent Agents in Virtual Markets, 2–5 April 2002, Imperial College London), at 2.2.

²⁵ 199 N.E. 163 (N.Y. Ct. App. 1933).

contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”²⁶

Accordingly, honesty and fair dealing constitute the meaning of good faith in the UCC; however, neither element is precisely defined. While honesty might refer to the subjective element of good faith, fair dealing represents the objective factor of the same concept.²⁷ Moreover, the notion of fair dealing is linked to the reasonable commercial standards, which indicates how broad a meaning fair dealing might have.

Another observation is that Section 205 of the Restatement equalised between the concepts of good faith and fair dealing. For examples in these two cases (*John B. Conomos Inc, v Sun Co ; Seidenberg v Summit Bank*)²⁸, issues were raised regarding good faith and fair dealing of parties in various categories of application. These category of application include unequal bargaining power, bad faith performance when defendant breach express term, and forgone opportunities. In view of the above, the court citing section 205 of the *Restatement* for support as a guiding principle in its application states:

²⁶ Despite the fact that the Restatement does not have the authority of legislation, it does have significant importance. Farnsworth, E., ‘Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws’ (1995) 3 Tul. J. Int’l & Comp. L. 47, at 53.

²⁷ Dubroff stated: “The Article 1 limitation of good faith to honesty in fact was probably the most controversial aspect of the original U.C.C.’s good faith provisions. The limitation was roundly criticized by commentators, and the revised Article 1, adopted in 2001, expanded the general definition of good faith to require objective good faith (i.e., observance of reasonable commercial standards of fair dealing) as well as subjective good faith. In other words, the general Article 1 definition of good faith now follows the original special definition adopted for purposes of Article 2, except that the requirement of objective good faith is no longer limited to merchants.” Dubroff, H., ‘The Implied Covenant of Good Faith in Contract Interpretation and Gap-filling: Reviling a Revered Relic’ (2006) 80 St. John’s L. Rev. 559, at 24. Available at

http://findarticles.com/p/articles/mi_qa3735/is_200604/ai_n17173797/pg_24/?tag=content;coll.

²⁸ *John B. Conomos, Inc. v. Sun Co.*, [2003] 831 A.2d 696 ; *Seidenberg v Summit Bank* [2002] 791 A.2d 1068

“The guiding principle in the application of the implied covenant of good faith and fair dealing emanates from the fundamental notion that a party to a contract *may not unreasonably frustrate* its purpose”²⁹

Thus, fair dealing becomes a duty on the contracting parties as well as good faith. However, the situation is different in the UCC where fair dealing is only a component of good faith in commercial contracts. In other words, the Restatement application of good faith and fair dealing goes beyond the meaning of the UCC with regard to the same concept.³⁰ The meaning that can be given to fair dealing through the UCC and the Restatement is that fair dealing is a method to objectively evaluate and consider the circumstances of the contract.

Traditionally, English law does not recognise the notion of fair dealing as a legal rule. However, the recognition of such concept in the recent time came as a result of implementing the Unfair Consumer Contract Terms Directive 93/13/EC in English law through the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR). According to the legislation,³¹ a term will be regarded as unfair if it is “contrary to the requirement of good faith”; that is, that it has not been individually negotiated, and that it causes a significant imbalance in the parties’ rights and obligations.

The UTCCR has linked the concept of fair dealing to good faith. However, neither of the concepts is defined by the UTCCR. What the legislation provides is that fairness can be assessed taking “account of the nature of goods and services [, ...] all the circumstances attending the conclusion of the contract and [...] all the other terms of the contract [...] on which it is dependent”.³² Thus, the task of explaining the relation between both concepts is left to the court to fulfil. The most noticeable effort in

²⁹ *Seidenberg v Summit Bank*, note no: 28 above.

³⁰ Phillips, R., note 23 above, at 1192.

³¹ Regulation 5(1).

³² Regulation 6(1).

clarifying the relationship between good faith and fair dealing in the UTCCR is delivered by Lord Bingham's comments on the *First National Bank* case where he stated: "The requirement of good faith in this context is one of fair and open dealing. Openness requires that the terms should be expressed fully, clearly and legibly, containing no concealed pitfalls or traps [...]." ³³ He added:

Fair dealing requires that a supplier should not, whether deliberately or unconsciously, take advantage of the consumer's necessity, indigence, lack of experience, unfamiliarity with the subject matter of the contract, weak bargaining position or any other factor listed in or analogous to those listed in Schedule 2 of the Regulations [...].

Similar to the UCC, the UTCCR considers fair dealing as one of the components of good faith. The notion of fair dealing is a guidance test to assess the good faith of the supplier. As a result, the court will try to establish whether the supplier was in good faith through the different factors of unfair practices or terms listed in Schedule 2 of the UTCCR. The outcome of the fairness test will assist the court to decide whether the supplier was acting in good faith.

Another important statement included in Lord Bingham's comment on the previous case might help to understand the English opinion of the notion of fair dealing in the legal context. Lord Bingham commented that: "Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice." ³⁴

Accordingly, if English academics and legislators do not recognise the general concept of good faith, it is more likely that English jurisprudence will oppose the idea of a

³³ *Director General of Fair Trading v. First National Bank* [2001] UKHL 52.

³⁴ *Ibid*

general concept of fair dealing, at least within the UTCCR.³⁵ It is my view that the notion of fair dealing will gain further attention from English academics the more EU regulations are implemented in the English legal system.³⁶ The previous statement will become more convincing, particularly when considering the fact that fair dealing is included in EU regulation. Thus, it is a natural step to explore how the notion of fair dealing is dealt with in the Principles of European Contract Law (PECL).

The first fact about good faith and fair dealing in the PECL is that it has been included in 16 PECL provisions.³⁷ No obvious differentiation is made between good faith and fair dealing - both concepts are mentioned as one notion (good faith and fair dealing) in all 16 PECL provisions. However, no definition is provided for either of the concepts by the PECL. Despite these facts, fair dealing is an interpretation rule of the law and a behavioural duty on the contracting parties, which makes it a fundamental principle underpinning the PECL.³⁸ The only clarification to the link between good faith and fair dealing comes from the Commission.³⁹ Under the title ‘Good Faith and Fair Dealing Distinguished’, the Commission illustrated that: “Good faith means honesty and fairness in mind, which are subjective concepts [... while] fair dealing means observance of fairness in fact[, which] is an objective test.”⁴⁰

Despite the emphasis placed by the Commission on the difference between good faith and fair dealing in the PECL, it seems that fair dealing is introduced in the PECL to be

³⁵ A reservation should be made that the definition of fair dealing given in the previous case is limited to consumer contracts and should not be generalised or applied to commercial contracts under English Law.

³⁶ Lord Steyn stated: “[S]ince English law serves the international marketplace it cannot remain impervious to ideas of good faith, or of fair dealing.” Steyn, J., ‘Contract Law: Fulfilling the Reasonable Expectations of Honest Men’ (1997) 113 L.Q. Rev. 433, at 438.

³⁷ Articles: 1:102(1), 1:106(1), 1:201(1), 1:305(b), 2:301(2)–(3), 4:102(a)II, 4:107(1)–(3), 4:109(2), 4:110(1), 4:118(2), 5:102(g), 6:102(c), 6:111(2b) and 8:109.

³⁸ Articles 1:106(1) and 1:202(1).

³⁹ The Commission of European Contract Law (the Lando Commission).

⁴⁰ Lando, O. & Beale, H. (eds), *Principles of European Contract Law Parts I and II* (Kluwer Law International, 2000) at 115–16.

more acceptable for common law countries within the EU (United Kingdom). Weitzenbock's statement might support the previous opinion, as she illustrated that: "Many English writers often use the term fair dealing rather than good faith on the basis that the latter term nowadays has a fuzzy sound to the ears of English lawyers."⁴¹

In addition, the Commission referred clearly to the fact that, in the French language version of the PECL, both concepts are covered by the expression "*bonne foi*" and in the German by "*true und Glauben*". In other words, the objective test referred to by fair dealing is covered by the civil law member states under the concept of good faith.

The question that needs to be answered is: Are good faith and fair dealing different duties?

I believe that both concepts are textual representations of the same duty and the superficial differences are only a result of different legal schools. While good faith might refer to the duty of the contracting parties to fulfil the contractual obligations, fair dealing imposes a duty to observe the reasonable standards imposed by the community of the contract in question.

Thus, in legislation where both concepts are used, if no standards can be found then the objective test imposed through fair dealing will no longer be required. In this case, good faith and fair dealing obligations mean only the duty to fulfil the contractual obligations. Good faith might be called the minimum requirement to achieve the reasonable expectations in every contract by fulfilling the contractual obligations, while fair dealing could be considered an obligation designed for specific situations to enhance the possibility of achieving the reasonable contractual expectations.

⁴¹ Weitzenbock, E., note 24 above, at 2.2.

1.2 Reasonableness

Reasonableness is a legal fiction that was developed to provide the court with an objective standard to measure the compatibility of the party's behaviour with the standard imposed by the society of the contract in question.⁴² This legal concept has been included in a number of national and international legal instruments. For example, the Draft Common Frame of Reference (DCFR) included reasonableness as one of its general provisions in Article 1:104. According to this instrument, reasonableness is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices. In addition, the PECL outlines reasonableness as:

to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account.⁴³

Historically, the English court in *Vaughan v. Menlove* refused to rely on the subjective notion of good faith to define the act of gross negligence. The court rejected the defendant's argument that the jury should be instructed to consider "whether he acted bona fide to the best of his judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence"⁴⁴; yet the court introduced an objective standard to examine the defendant's behaviour. Accordingly the court stated:

⁴² "In the spectrum from purely descriptive to purely evaluative, 'reasonableness' seems to belong more toward the evaluative than descriptive pole, not that there is no element of descriptive in it." MacCormick, N., 'Reasonableness and Objectivity' (1998) 74 *Notre Dame L. Rev.* 1575, at 1576. The Draft Common Frame of Reference (DCFR) included reasonableness as one of the general provisions in Article 1:104. Accordingly, reasonableness is to be objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and to any relevant usages and practices.

⁴³ Article 1:302. It is worth mentioning that the terms "reasonable" and "unreasonable" are mentioned 55 times in the PECL, which shows that reasonableness is one of the fundamental principles underlying it.

⁴⁴ [1837] 132 ER 490.

[W]hether the Defendant had acted honestly and bona fide to the best of his own judgment [...] would leave so vague a line as to afford no rule at all[. ... Because the judgments of individuals are ...] as variable as the length of the foot of each [...] we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.⁴⁵

The legal fiction that the court used to replace the subjective notion of good faith was “reasonable person”. Accordingly, the reasonable person who is claiming to act in good faith must behave in conformity with the behaviour of a person in similar circumstances. Thus, the link between good faith and reasonableness can be found in the legal dictionaries’ definition of the concept of good faith. For example, *The Canadian Law Dictionary* states: “[A] thing is done in good faith when it is done honestly and without any notice of any wrongdoing or any knowledge of circumstances which out to put a reasonable man upon inquiry.”⁴⁶ In addition, *Black’s Law Dictionary* defines the concept of good faith thus:

Good faith, *n.* A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or seek unconsciously advantage – also term *bona fides*.⁴⁷

As can be seen, reasonableness becomes part of the wider meaning of good faith. Yet, reasonableness is created to add an objective element to good faith wherein the party’s behaviour is examined through his explicit conduct and measured against the standard behaviour in the specific trade.

In addition to the ‘reasonable person’, the law uses legal terms such as “reasonable time” and “reasonable manner”.⁴⁸ Both terms are believed to be manifestations of a

⁴⁵ This judgment is enhancing the fact that “the law’s exhortation is not simply to do your best or to avoid acting with evil intentions toward others: it is to act according to the common standard of the community, as a ‘reasonable person’ would”. MacCormick, N., note no: 38 above, at 1576.

⁴⁶ Sodhi, D., *The Canadian Law Dictionary* (Law and Business Publications, 1980), at 164.

⁴⁷ Garner, B., *Black’s Law Dictionary* (8th edn, Thomson West, 2004), at 713.

⁴⁸ There are other legal concepts that demand judgment of reasonableness such as: reasonable care, skill, use, care, aid, effort and diligence. See Joachim, W., ‘The “Reasonable Man” in United States and German Commercial Law’ (1992) 15 Comparative Law Yearbook of International Business 341, at 342.

reasonable person.⁴⁹ Accordingly, a reasonable time for a reasonable person would be the time that considers the purpose of the contract and the usages and practice that are commonly accepted in the area of the contract.⁵⁰ Similar criteria can be applied in defining reasonable manner.⁵¹

Felemegas stated:

[In] considering what is reasonable, it should be asked what persons under the same circumstances and acting in good faith would have considered to be reasonable. In deciding what is reasonable, all relevant factors should be taken into consideration, including the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trade or profession.⁵²

To summarise, reasonableness is a developed version of the concept of good faith, yet with an objective character. It was created to give the contracting parties the predictability they require in their contractual agreement. However, it is the author's belief that the character of good faith in the current application has become one of more objective evaluation than ever before. What supports this statement is the fact that the PECL defines good faith as an implied term in Article 6:102, as to "enforce community standards of decency, fairness and reasonableness in commercial transactions".⁵³ The community standard cannot be assessed on a subjective basis, which leaves no doubt that good faith must be defined according to an objective standard. Justice Priestly indicated the link between the meanings of good faith and reasonableness by stating:

⁴⁹ Borisova, B., 'Remarks on the Manner in which the Principles of European Contract Law May Be Used to Interpret or Supplement Article 75 of the CISG' (2003). Available at <http://www.cisg.law.pace.edu/cisg/text/peclcomp75.html#edv>.

⁵⁰ Ibid.

⁵¹ Borisova elaborated that: "Examining the 'reasonable manner', it must be said that the reasonable person's behaviour should be to perform the substitute transaction at the most favourable conditions, i.e., the resale to be made at the highest price reasonably possible in the circumstances, or the cover purchase to be made at the lowest price reasonably possible. The same criteria should be applied for the determination of the fairness of the substitute transaction terms and conditions." Ibid.

⁵² Felemegas, J. (ed.), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (Cambridge University Press, 2007), at 345.

⁵³ Lando, O. & Beale, H. (eds), note no: 40 above, at 113.

“The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith which are regarded in many civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contract.”⁵⁴

As a result, the difference between good faith and reasonableness might be superficial in many aspects of their meaning; however, the difference or similarity between these two concepts will depend on the legal school of the legislation. For example, under Dutch law, good faith might refer to a standard of reasonableness or to subjective good faith.⁵⁵

1.3 Good Faith and Honesty

A large body of legal literatures and legislations link the concept of honesty to that of good faith. The association of both is not modern in development. Under the Canon law, good faith was determined subjectively by each person’s honesty and duty to God.⁵⁶ The relation between good faith and honesty can first be identified in the legal dictionaries. *The Cambridge Dictionary* defines an action to be in good faith if it was done “sincerely and honestly”.⁵⁷ Similarly, *The Oxford English Dictionary* describes good faith as a noun that means “honesty or sincerity of intention”.⁵⁸ Notably, both

⁵⁴ *Renard Constructions v. Minister for Public Works* (1992), 26 NSWLR, 234.

⁵⁵ Weiszberg, C., ‘Le « Raisonnable » en Droit du Commerce International’ (PhD thesis presented to University Panthéon-Assas (Paris II), 2003), at 47–50. Available at <http://www.cisg.law.pace.edu/cisg/biblio/Reasonableness.html>.

⁵⁶ Lillard, M., ‘Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context’ (1992) 57 Mo. L. Rev. 1233, at 1235.

⁵⁷ *Cambridge Advanced Learner’s Dictionary* (online edn) Available at <http://dictionary.cambridge.org/define.asp?key=33784&dict=CALD>.

⁵⁸ *Compact Oxford English Dictionary* (online edn). Available at http://www.askoxford.com/concise_oed/goodfaith?view=uk.

dictionaries confirm that the main element of the concept of good faith is “honesty”, which means “truthful or able to be trusted and not likely to steal, cheat or lie”.⁵⁹

In *Bouvier's Law Dictionary* (1914), the term “good faith” is defined as “an honest intention to abstain from taking any unconscientious advantage of another, even though the forms of technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious”.⁶⁰

The linguistic meaning of good faith seems to suggest that good faith and honesty are interlinked. Accordingly, acting in good faith would require acting honestly. Similarly, the honest person is the person who is acting in good faith. In addition, both concepts are moral concepts in their essence, which has created problems when trying to identify their meaning or functionality. It was stated that: “Trying to identify the scope of ‘honesty’ can suffer the same problems as defining the expression ‘in good faith’; it merely replaces one term with another.”⁶¹

However, the previous difficulties in identifying the difference between good faith and honesty did not deter law drafters from including good faith and honesty in some legal instruments.

At the national level, the Uniform Commercial Code (UCC) defines the concept of “good faith” in Section 1-201(19) as honesty in fact in the conduct or transaction concerned. Good faith according to this article, is recognised to have a subjective

⁵⁹ See <http://dictionary.cambridge.org/define.asp?key=37745&dict=CALD>.

⁶⁰ Bouvier, J., *Bouvier's Law Dictionary and Concise Encyclopaedia*, Vol. I (8th edn, Vernon Law Book Co., 1914), at 1356.

⁶¹ Breakspear, J., ‘Commercial Contracts and the Obligation of Good Faith’ (Chambers Banco, 2010). Available at http://www.banco.net.au/uploads/documents/Commercial_Contract_and_the_Obligation_of_Good_Faith.pdf.

standard often described as the “pure heart, empty head”.⁶² This subjective standard would require the court to look into the circumstances of the case in question to decide whether or not the contracting party was in breach of good faith conduct. However, the subjective standard of good faith in the UCC is combined with an objective standard based on the principles of reasonableness and fair dealing.

2. Good Faith Implication Difficulties

2.1 Good Faith and Freedom of the Contract (*pacta sunt servanda*)

In the legal theory, the Latin doctrine *pacta sunt servanda* could be described as the foundation of every contractual relationship either on the national or international level.⁶³ In international law, the doctrine is defined by the Vienna Convention 1969 that every treaty in force is binding upon the parties to it and must be performed by them in good faith. Similarly, in national laws the doctrine can be incorporated in contract law context so every agreement undertaken must be fulfilled in good faith. Lord Mansfield’s stated in *Carter v Boehm*⁶⁴ that:

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

Thus, the doctrine of *pacta sunt servanda* is based on the rule of good faith and both concepts share common elements such as the moral essence of both concepts. However, good faith has a wider scope of obligations than the scope of application of *pacta sunt servanda*. For example, *pacta sunt servanda* can only generate obligations on the contracting parties from their agreement. On the other hand, good faith can generate

⁶² Flechtner, H., ‘Comparing the General Good Faith Provisions of the PECL and the UCC: Appearance and Reality’ (2002) 13 P.I.L.R. 295, at 302. Available at <http://www.cisg.law.pace.edu/cisg/biblio/flechtner3.html>.

⁶³ *National Iranian Oil Company (NIOC) v. Sapphire Petroleums Ltd. (Sapphire)* (1963) 35 I.L.R 136, at 181.

⁶⁴ (1766) 3 Burr 1905, at 1910.

obligations not only from the contracting parties' agreement but also from other general principles that linked directly or indirectly to good faith such as honesty and reasonableness. As a result, *pacta sunt servanda* is based on good faith, yet the latter is not based on the former.

The doctrine of *pacta sunt servanda* could be said to represent principles of trust, certainty and stability in contract law.⁶⁵ Nonetheless, if the agreement has been concluded between the contracting parties with unfair terms because of unequal bargaining power of the parties, then the court can interfere on the ground that the agreement has been concluded contrary to the requirement of good faith.⁶⁶ In other words, good faith can be used by the court to mitigate the harshness of the rigid application of the doctrine of *pacta sunt servanda*.⁶⁷ Consequently, the principle of freedom of the contract is not absolute but limited to a number of rules including fairness and good faith. These rules are used by the court to prevent a bad faith party from employing his right to freedom to contract to prevent other contracting party from his reasonable contractual rights. Summers stated that:

Without a principle of good faith a judge might, in a particular case, be unable to do justice at all, or he might be able to do it only at the cost of fictionalising existing legal concepts and rules, thereby snarling up the law for future cases. In begetting snarl, fiction may introduce inequity, unclarity or unpredictability...⁶⁸

The relation between good faith and freedom of contract is not based on contradiction but rather on harmony. In some national jurisdictions, good faith is used to identify the

⁶⁵ Bederman, D., 'The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations' (1988) 82 Am. J. Int'l L.1.

⁶⁶ Groves, K., "The doctrine of good faith in four legal systems" (1999) 15 (4) Const. L.J. 265, at: 272-274 & 277-282.

⁶⁷ Ibid.

⁶⁸ Summers, R., 'Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code', (1968) 54 V.L.R 195, at: 198-199.

reasonable intention of the contracting parties. In other words, good faith can be used to fill the gaps in the contract. UCC Section 2-306 provides that

a term which measures the quantity by ... the requirements of the buyer means such actual ... requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior ... requirements may be ... demanded.

The official comment to this section explains that the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade.⁶⁹As a result, in the world of complicated commercial relationships, the party's freedom to decide their contract terms is a must have principle. Equally, in the world of greed and inequality, good faith must be considered when the parties pursue their right to a contract.

2.2 Good Faith and Certainty of Terms

Often, good faith is looked at by legal academics as a concept which causes uncertainty of the contract. In contrast, certainty is often seen as an essential factor to evaluate the intention of the contracting parties and to boost confidence in the commercial relationship. Lord Browne-Wilkinsonwise stated in *Westdeutsche* that:

judges have often warned against the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs.⁷⁰

Commercial certainty incorporates two elements which are interchangeable: certainty in commercial transactions and legal predictability.⁷¹ Certainty in commercial transaction means that the contracting parties need to know where they stand by determining the

⁶⁹ Comment (2) to UCC S2-306.

⁷⁰ *Westdeutsche v. Islington BC*. [1996] A.C. 669.

⁷¹ Mugasha, A., 'Evolving Standards of Conduct (Fiduciary Duty, Good Faith and Reasonableness) and Commercial Certainty in Multi-Lender Contracts', (2000) 45 Wayne L. Rev. 1789, at 1818.

business terms of their contract. “[T]he English Courts have time and again asserted the need for certainty in commercial transactions - for the simple reason that the parties to such transactions are entitled to know where they stand and to act accordingly”.⁷² Thus, certainty in commercial transaction is another picture of freedom of contract where the contracting parties can pre-determine their contractual rights and obligations and where courts respect their agreement and enforce it.⁷³ On the other hand, legal predictability points out what the contracting parties should expect from the court in case of any dispute regarding their contract.

The difficulty in merging good faith with commercial certainty is the absence of a crystal clear definition of the concept of good faith. Thus, the behavioural standard of good faith can only be judged by relying on the context of the commercial relationship and number of other behavioural ideas, including honesty and reasonable expectation. Accordingly, the concept of good faith might give the judge the discretionary power to determine the meaning of the contract terms which contradicts the essence of the legal predictability.

The importance of good faith in commercial transactions should not however be overlooked because of the claim that it hindered the certainty of commercial transactions. A number of reasons can justify the need for good faith in commercial transactions. These reasons include the need for the contracting party to rely on the decency of the other party in performing their duties based on mutual intention. In addition, the limited ability to produce a contract which covers every aspect of the commercial relationship, and the need to fill the legal gaps in the contract collectively justify the need for good faith in commercial transaction. In fact the modern trend of

⁷² *The Scaptrade* [1983] QB 529.

⁷³ Mugasha, A., note no: 71 above, at 1819.

law makers is to include the legal concept of good faith in the legal instruments, which is presented in the following section of this chapter.

3. Good Faith and its Application in Civil law, Common Law and International Law

Despite the existence of the concept of good faith in several legal systems, its scope and application vary from one legal system to another, depending on the commercial traditions and customs of each legal system. In other words, the difference in the nature of each legal system has resulted in diversity in terms of identifying and applying the concept of good faith. In fact, recognising or applying the principle of good faith in commercial contract law is believed to be one of the major differences between civil and common law legal systems around the world.⁷⁴

While most of the civil legal system jurisdictions are recognising good faith, this does not mean that there is an agreement between these civil jurisdictions on the application of good faith in commercial contracts. Likewise, common law jurisdictions, particularly with regard to English common law, might not recognise the general concept of good faith explicitly, as is the case in civil law. However, exploring the English situation will lead to the fact that the English legal system recognises the concept of good faith implicitly, through adopting what is called a piecemeal approach to avoid unfairness which is achieved in civil legal systems by applying the principle of good faith.⁷⁵

⁷⁴ MacQueen, H., *Good Faith in the Scots Law of Contract; An Undisclosed Principle?*, (Hart Publishing Oxford, 1999), at 5-37.

⁷⁵ *Ibid.*

This section does not suggest that the application of good faith in national legal systems would be similar to its interpretation in the CISG,⁷⁶ as the concept should be interpreted in the light of the context and purpose of the law where that concept is incorporated.⁷⁷ However, looking at how legal systems apply the principle of good faith would offer significant support in understanding the application of the principle of good faith in the CISG.⁷⁸

3.1 Civil Law

The development of the principle of good faith in civil law legal systems has occurred mainly as a result of the roman *bona fide* and the standards of external reasonable behaviour in order to identify the duty of good faith imposed on the parties to a commercial contract.⁷⁹

Over the years, the role of good faith in civil law has become limited not only to the relationship between the contracted parties during the performance of the contract, but also has come to mean that the parties are obliged to negotiate their contract in accordance with good faith, which indicates the concept's broad application in civil law systems.⁸⁰ Surprisingly, a defence statement of the usage of the doctrine of good faith in civil law jurisdiction comes from L.J Bingham, a common law judge:

⁷⁶ Chapter three elaborates on the international character of the CISG which defies [defines?] the domestic interpretation of the CISG provisions.

⁷⁷ Schlechtriem, P., 'Good Faith in German Law and in International Uniform Laws' (Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Centre for Comparative and Foreign Law Studies] , 1997). <http://servizi.iit.cnr.it/~crdcs/crdcs/frames24.htm>.

⁷⁸ In support of this idea, Peter Schlechtriem believed that understanding and identifying good faith cannot be done without a comprehensive study of the concept. Consequently, exploring the application of the concept in various national legal systems is part of what the author has undertaken as part of a comprehensive study to interpret the principle of good faith in CISG. See: *ibid*.

⁷⁹ Freyermuth, R., 'Enforcement of Acceleration Provisions and the Rhetoric of Good Faith' (1998) *Byu. L. Rev.* 1035, at 1051.

⁸⁰ Powers, P., 'Defining the Indefinable: Good Faith and the United Nations Convention On the Contracts for International Sales of Goods' (1999) 18 *J.L. & Com.* 333, at 338.

In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts, parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognize; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair,' 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair and open dealing.⁸¹

For two reasons, German Civil Law (BGB)⁸² is the best example for identifying the application of good faith in civil law. First, the German legislators recognised the doctrine of *Treu und Glauben* (good faith) as early as 1900 when the BGB came into effect.⁸³ In fact, this recognition came after a legal argument presented by Rudolf Jhering, the German jurist, and the founder of a modern sociological and historical school of law, against the strict and rigid rules which the (BGB) had used to govern contracts. He argued that "...the only way to understand the law is to interpret it in light of the interests involved; laws were passed by individuals to protect the interests of individuals, the notions of justice and rights must permeate the legal system and be taken into account when applying the law".⁸⁴

⁸¹*Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] Q.B. 433.

⁸² The German and French laws which have been explored in this section are just examples used to view civil law jurisdictions with regard to the concept of good faith. We have not covered other civil law jurisdictions such as those of Italy or Austria (which have different attitudes) due to the limitations on the length of this thesis.

⁸³ It is believed that first implementation of good faith in German law was through the theory of culpa in contrahendo (fault in negotiation) 1861, as the theory requires the contracting parties to act in good faith. See Goderre, D., 'International Negotiations Gone Sour: Pre-Contractual Liability Under the United Nations Sales Convention' (1997) 66 U. Cin. L. Rev. 257, at 266. See also: Musy, A., 'The Good Faith Principle in Contract Law and pre-contractual Duty to Disclose; Comparative Analyses of New Differences in Legal Culture' (2000) 1 G. J. Advances. 1, at 4; Felemegas, J., 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation' (PhD Thesis, University of Nottingham, 2000). Available at; <http://www.cisg.law.pace.edu/>.

⁸⁴ Nedzel, N., 'A comparative study of good faith, fair dealing, and pre contractual liability' (1997) 12 Tul. Eur. & Civ. L.F 97, at 113.

Consequently, the application of the principle of good faith was one of the direct results of replacing the rigid rules with rules that ensure equity and justice on a case by case basis.⁸⁵

Secondly, the long application of the doctrine of good faith in German legislation and in the German courts gave German scholars the opportunity to expand their views about the principle of good faith by analysing and exploring the courts' applications of the principle which led to an enrichment of the good faith literature.⁸⁶

Section 242 of the BGB reads that; "An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration".⁸⁷ Accordingly, the contracted parties under the German civil code would be obliged to perform the contract according to "...the established standards of the community and the confidence bestowed upon her by the other party".⁸⁸ What should be emphasised is that the principle of good faith is part of German public policy, which cannot be exempted, or limited by the contracted parties; hence it is described as the "queen of rules".⁸⁹

Felemegas specified four roles to the doctrine of good faith in German civil law.⁹⁰ These are: as a tool to tackle all possible and imaginable situations. As the code provisions cannot cover all situations that might occur, it acts as a tool to interpret and clarify the meaning of the code in situations in which it is vague. It can also act as a tool to imply obligations on the contracting parties (that they did not have an agreement

⁸⁵ Ibid.

⁸⁶ Some of the great German scholars were Peter Schlechtriem, Ernst von Caemmerer and Ernst Rabel

⁸⁷ BGB, S 242. Available at; http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#BGBEngl_000P242.

⁸⁸ See; Freyermuth, R., note no: 79 above, at 1052.

⁸⁹ Zimmerman, R., 'Good faith in the European contract law; surveying the legal landscape', in Zimmerman R & Whittaker, S. (eds.), at 18-20.

⁹⁰ Felemegas, J., note no: 83 above.

about), as a tool to ensure the performance of the contract, and as a tool to adjust the contract conditions where the circumstances require such change. The most famous example for the latter feature was the German court application of the principle of good faith as a basis for rewriting fixed price contracts which were devalued because of the hyperinflation following the First World War.⁹¹ It can be said that the German legislators imposed good faith on the parties concerned, not just during the performance of the contract, but also during the negotiation of the contract, which is based on "contract to make a contract".⁹²

The German civil law justifies imposing good faith as a pre-contractual obligation, by stating that not acting in good faith will result in "...damages for expenses, lost opportunities to enter into a valid contract, and time wasted in the negotiations which could have been spent in other useful activities".⁹³ Imposing good faith as an obligation in the pre-contractual stage might be considered as a restriction on the principle of parties' autonomy;⁹⁴ nonetheless civil law scholars claim that good faith organises the use of the principle of the party's autonomy through requiring the parties to act in good faith. Consequently, the parties are still free to act in good faith.⁹⁵ Besides that, German civil law has grounded the principle of good faith on the natural rule of "Treat others as you wish to be treated".⁹⁶

⁹¹ See; Freyermuth, R., note no: 79 above, at 1052.

⁹² The pre-contractual relationship in German law is organised by Section (241) that is accompanied by Sections (242) and (311). See Bachechi, C. & Klein, J., 'Pre-contractual Liability and the Duty of Good Faith Negotiation in International Transactions' (1994) 17Hous. J. Int'l. 1, at 16-17.

⁹³ Palmieri, N., 'Good Faith Disclosures Required During Precontractual Negotiations' (1993) 24 Seton Hall. L. Rev. 70, at 204.

⁹⁴ O'Connor, J., note no: 2 above, at 97.

⁹⁵ Palmieri, N., note no: 93 above, at 204.

⁹⁶ Powers, P., note no: 80 above, at 352.

In the French Civil Code, the concept of good faith has been conferred a recognisable role in the formation, performance and interpretation of a contract. Unlike the German Civil Code, the power of the court through the use of good faith in order to impose an obligation or liability is limited. The French Commercial Chamber of the Supreme Court differentiates between the contractual prerogative which the judge has if a contract has been exercised in bad faith, and the substance of rights and obligations which the judge cannot alter using the principle of good faith.⁹⁷ However, in the last two decades, the French courts have witnessed an increase in the number of judgments using good faith to determine the party's obligations, such as relating to co-operation and mutual loyalty.⁹⁸

In fact, it is an important mission for legislators and courts to instigate the emergence of a morality which supports the development of fairness, trust, honesty, and social solidarity, all of which constitute the doctrine of good faith within legal systems. Nevertheless, these maxims are infamous for being unlimited, for lacking a precise definition, and for having standards which differ considerably from one place to another. As a result, incorporating them within legislation will lead to a sacrifice in terms of the certainty required for commercial transactions.⁹⁹

3.2 Common Law

The traditional attitude within common law is to give the parties an absolute freedom to draft their contractual agreement. Thus, the law does not impose any obligation on the parties which they did not agree upon. A number of common law scholars have expressed a negative view with regard to imposing good faith on the legal system. The

⁹⁷ See the Cour de cassation - Chambre commerciale, Arrêt n° 966 du 10 juillet 2007, 06-14.768. Available in http://www.lexinter.net/JF/sanction_de_la_mauvaise_foi_contractuelle.htm.

⁹⁸ Lando, O. & Beale, H. (eds), note no: 40 above, at 119.

⁹⁹ See: Felemegas, J., note no: 78 above.

general opinion in common law about the principle is that "Good Faith is an invitation to judges to abandon the duty of legally reasoned decisions and to produce an unanalytical incantation of personal values".¹⁰⁰

Despite the fact that the United States and England are both common law countries, each country has a different approach toward the role of good faith. Starting with the mother country of common law, English common law does not recognise the concept of good faith as a general duty, and there is no duty on the contracting parties to act according to it.¹⁰¹ English law still describes a person as being in good faith even if he acted negligently or unreasonably. Article 61(3) of the Sale of Goods Act reads: "A thing is deemed to be done in good faith within the meaning of this Act when it is in fact done honestly, whether it is done negligently or not".¹⁰² According to Goode, not recognising the principle of good faith in English law is a privilege to litigators. He stated, "The law may be hard, but foreigners who come to litigate in London...will at least know where they stand...[and] the last thing we want to do is to drive business away by vague concept of fairness which make judicial decisions unpredictable".¹⁰³

In addition, it is common for legal academics, when arguing against the implication of good faith in English law, to refer to the famous dictum of Lord Ackner in *Walford v Miles*,¹⁰⁴ that "...good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party". In fact, English legislators, courts and academics find it difficult to adapt the principle of good faith as a general duty on the contracting parties for two main reasons. The first was due to the vagueness of the

¹⁰⁰ Bridge, M., 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?' (1984) 9 Can. Bus. L. J. 385, at 413.

¹⁰¹ See: Musy, A., note no: 83 above, at 6.

¹⁰² Goode, R., 'The Concept of Good Faith in English Law' (Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Centre for Comparative and Foreign Law Studies] , 1997) <http://w3.uniroma1.it/idc/centro/publications/02goode.pdf>.

¹⁰³ Ibid.

¹⁰⁴ [1992] 2 AC 128, at 138.

principle of good faith. As Goode noted, "We in England find it difficult to adapt a general concept of good faith ...we do not know quite what it means".¹⁰⁵ English law, based on the principle of certainty along with sophisticated legal rules, provides the contractual parties with the assurance about the outcome of their contract.¹⁰⁶ English scholars believe that "...the predictability of the legal outcome of a case is more important than absolute justice",¹⁰⁷ and abandoning the application of good faith will be "...an acceptable price to pay in the interest of the great majority of business litigants".¹⁰⁸ The second reason is the ambition of English legislators to provide commercial parties with more specific and precise statutes that cover all the commercial aspects. If such a statute is produced, it will be easy for the parties involved to understand, and will not give judges broad discretion in interpreting or applying the law.¹⁰⁹ The English legislator believes that such certainty would ease the court's mission in identifying any violation in a contract, through ensuring compliance in terms of the performance of the parties involved and the terms of the contract. In this way, the courts would save time which can be used to judge other claims between the contracting parties.¹¹⁰

A more in-depth consideration of English legislation, however, may disclose that good faith is not completely alien to English law as the latter imposes a duty of good faith on the parties in terms of marine insurance contracts.¹¹¹ Section 17 of the Marine Insurance Act 1906 provides, "...[a] contract of marine insurance is based upon the utmost good

¹⁰⁵ Goode, R., note no: 102 above.

¹⁰⁶ MacQueen, H., note no: 74 above, at 5.

¹⁰⁷ Goode, R., note no: 102 above.

¹⁰⁸ Ibid.

¹⁰⁹ See: Kerr, M., 'Law Reform in Changing Times' (1980) 96 L. Q. Rev. 515, at 527- 28.

¹¹⁰ MacQueen, H., note no: 74 above, at 5. In addition, some scholars do not recognize the concept of good faith as a result of the historical division between Equity and Common Law courts. See: Harrison, R., *Good Faith in Sales* (Sweet and Maxwell, London, 1997), at 5.

¹¹¹ For the role of good faith in terms of marine insurance, see Thomas, J., 'The Doctrine of Utmost Good Faith' (1990) 555 Pli. Comm. 129.

faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party".¹¹²

Under the principle of good faith in the case of marine insurance contracts, the insured is obliged to disclose to the insurer all the material circumstances and confirm that his material representations are true.¹¹³ Nonetheless, the literal meaning of Section 17 does not limit the use of good faith with regard to disclosure. It could also be interpreted to include the performance of the parties, or could impose other obligations which may vary depending on the circumstances. The marine insurance case law refers to the application of the duty of good faith, not just in the pre-contractual stage, but also during the performance and conclusion of the contract, without denying the possibility that good faith imposes an obligation (negative or positive) on the parties in all the contractual stages. In "Star Sea", the Court of Appeal stated:

Since there was a distinction between lack of good faith which was material to the making of an insurance contract and a lack of good faith during the performance of the contract different obligations were involved at pre-contract and post-contract stages.... in the pre-contract stages there was a positive duty to disclose all information.¹¹⁴

In addition, the effect of European directives on English law should not be overlooked when exploring the English legislators' attitude towards good faith. The United Kingdom, as part of the European Union, had to incorporate European Directive 93/13 on Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999 which includes the legal concept of good faith.

Article 3(1) of the Regulations states that, "[A] contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of

¹¹² Marine Insurance Act 1906, section 17.

¹¹³ Thomas, J., note no: 111 above, at 132

¹¹⁴ *Manifest Shipping Co Ltd v. Uni-Polaris Insurance Co Ltd "Star Sea"*, [2003] 1 A.C. 469, at 470.

good faith...." In addition, Article 6(1) provides that, "...Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer..".¹¹⁵ These Articles would accelerate the acceptance of good faith and urge English academics to interpret it within the common meaning understood by all European Union members.

By indirectly incorporating good faith into the English law, the English law overrides the uncertainty which the incorporation of good faith might cause or the injustice which might appear in the absence of good faith as a legal rule.

English law has developed sophisticated legal rules that promote reasonable expectation and fair dealing in the English legal system, which have similar results as might be obtained by incorporating good faith.¹¹⁶ English law compensates for the absence of good faith by establishing rules such as fiduciary obligations, waivers and estoppels, fundamental breach, warranties, conditions and innominate terms, duress, undue influence, mistake, misrepresentation and equity.¹¹⁷ English courts refer to these rules by stating that English law

...has developed piecemeal solutions in response to demonstrated problems of unfairness... [For example] equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements... and in many other ways.¹¹⁸

Looking at the application of good faith in the pre-contractual stage, English law has exactly the same attitude as it has toward the concept in the performance of the contract.

English law will not offer any damages to those parties that have suffered a loss as a

¹¹⁵See: Harrison, R., note no: 110, at 11.

¹¹⁶ Tetley, W., note no: 10 above, at 571.

¹¹⁷ Ibid.

¹¹⁸ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 2 W.L.R. 615.

result of another party's behaviour in the negotiation stage, except if there is an agreement about remedy due to unreasonable behaviour.¹¹⁹ The House of Lords addressed the issue of good faith liability in pre-contract by stating that

[T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations.... A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.¹²⁰

However, there are still English judges such as Lord Steyn who believe that developments in legal understanding are going to change the attitude of the English judiciary toward the acceptance of the principle of good faith; he stated that “[T]here are winds of change which may produce a climate more receptive to notions of good faith and fair dealing in England”.¹²¹

Recently in *Yam Seng Pte Limited v International Trade Corporation Limited*¹²² the English court has acknowledged the reasons why the English law does not recognise good faith in all commercial contracts. Nonetheless, the judgment encouraged the common lawyers not to abandon the usage of the concept for the following reasons:

1. The content of the duty is heavily dependent on context and is established through a process of construction of the contract, its recognition is entirely consistent with the case by case approach favoured by the common law. There is therefore no need for common lawyers to abandon their characteristic methods and adopt those of civil law systems in order to accommodate the principle.
2. As the basis of the duty of good faith is the presumed intention of the parties and meaning of their contract, its recognition is not an illegitimate restriction on the

¹¹⁹ Goderre, D., note no: 83 above, at 268.

¹²⁰ *Walford and Others Appellants v. Miles and Another Respondent*, [1992] 2 A.C. 128.

¹²¹ Steyn, J., ‘The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy’ (1991) Denning. L. J. 131, at 133.

¹²² [2013] EWHC 111 (QB)

freedom of the parties to pursue their own interests. The essence of contracting is that the parties bind themselves in order to co-operate to their mutual benefit. The obligations which they undertake include those which are implicit in their agreement as well as those which they have made explicit.

3. Owing to the fact that the duty is based on the parties' presumed intention, it is open to the parties to modify the scope of the duty by the expressed terms of their contract and, in principle at least, to exclude it altogether. The judge said "in principle at least" because in practice it is hardly conceivable that contracting parties would attempt expressly to exclude the core requirement of acting honestly.
4. The court saw no advantages and received objection in describing the duty as one of good faith "and fair dealing". According to the judge, the duty does not involve the court in imposing its view of what is substantively fair on the parties. What constitutes fair dealing is defined by the contract and by those standards of conduct to which, objectively, the parties must reasonably have assumed compliance without the need to state them. The advantage of including reference to fair dealing is that it draws attention to the fact that the standard is objective and distinguishes the relevant concept of good faith from other senses in which the expression "good faith" is used.
5. As English law may be less willing than some other legal systems to interpret the duty of good faith as requiring openness of the kind described by Bingham LJ in the *Interfoto* case as "playing fair" "coming clean" or "putting one's cards face upwards on the table", this should be seen as a difference of opinion, which may reflect different cultural norms, about what constitutes good

faith and fair dealing in some contractual contexts rather than a refusal to recognise that good faith and fair dealing are required.

6. The fear that recognising a duty of good faith would generate excessive uncertainty is unjustified. There is nothing unduly vague or unworkable about the concept. Its application involves no more uncertainty than is inherent in the process of contractual interpretation

The previous case is a prime example of the current relaxed attitude of the English courts to adapt or at least recognise good faith as a contractual legal principle. In fact, this is the first case in which an English court defends the use of good faith in the contractual relationship by answering all the major critics that were directed to it as a legal concept.

In contrast, the attitude of American law towards good faith is completely different from that of English law.¹²³ Farnsworth, in a conference about good faith in American Law, stated that "...you might be fooled into thinking that you were going to hear that same thing that American law has the same attitude as English law regarding good faith, but with an American accent rather than an English accent. Nothing could be further from the truth".¹²⁴ American law does not just recognise the principle of good faith the Uniform Commercial Code (UCC) also mentions the concept of good faith specifically in over 50 different UCC provisions. Section 1(203) of the UCC shows the recognition

¹²³ Although it said that the traditional attitude of American Law was to refuse to recognise good faith. See: Tetley, W., note no: 10 above, at 585.

¹²⁴ Farnsworth, E., 'The Concept of Good Faith in English Law' (Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Centre for Comparative and Foreign Law Studies] , 1997) <http://w3.uniroma1.it/idc/centro/publications/10farnsworth.pdf>.

of good faith in American law by stating that "...every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement".¹²⁵

The UCC recognises two types of good faith depending on the party of the contract (merchant or non-merchant). For the merchant, the UCC imposed a higher standard of good faith to be met by the party. According to Section 2-103(1)(b) " 'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."¹²⁶ None merchant party is obliged with softer standard of good faith, as section 1-201(19) provides: "Good faith means honesty in fact in the conduct or transaction concerned."

The American case law has numerous clarifications of the meaning of good faith in the UCC. For example; the non-merchant party will fulfil the obligation of good faith if he or she acted honestly but unreasonable belief that he or she is acting in good faith.¹²⁷

Another case elaborated the non-merchant duty of good faith by stating that good faith not only "requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement," "but also [imposes] the duty to do everything that the contract presupposes that he will do to accomplish its purpose."¹²⁸

¹²⁵ Uniform Commercial Code (UCC).

¹²⁶ Ibid, Section 1-201.

¹²⁷ *Wateska First Natl Bank v Ruda*, 135 Ill2d 140, 156-157, 552 NE2d 775, 781 (1990)

¹²⁸ *Los Angeles Memorial Coliseum Comm'n v NFL*, 791 F2d 1356, 1361 (9th Cir1986), cert den 484 US 826 108 S Ct 92, 98 LEd2d 53 (1987)

The Appeal court of Wisconsin gave some examples of what could constitute a breach of the duty of good faith such as “taking unfair advantage of another, through technicalities of the law, by failure to provide information or to give notice, or by other activities which render the transaction unfair”.¹²⁹ The Eastern District Court of Pennsylvania cited more examples such as evasion of the spirit of the bargain; lack of diligence and slacking off wilful rendering of imperfect performance; abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.¹³⁰

Despite the effort of American legislators and courts to define the concept of good faith however, the role of good faith continues to be the subject of mass debate among American scholars. Farnsworth divided American scholars' attitudes toward good faith in the UCC into three major categories.¹³¹

Farnsworth, along with a number of courts, believed that good faith is a source for different types of implied terms.¹³² Summers led the second category with support from the comments on the Second Restatement. According to that opinion, good faith does not have a positive role to play as an obligation on the parties, but its function is to exclude (depending on the context of the contract) improper behaviours which could be regarded as a bad faith performance which contradicts what the statute requires in the contract.¹³³ Furthermore, it is impossible to compile a list that includes all unreasonable behaviours.¹³⁴ Summers gave examples of what could be considered behaviours that

¹²⁹ *Schaller v. Marine Nat. Bank of Neenah* [1986] 131 Wis.2d 389, 388 N.W.2d 645, 1 UCC Rep.Serv.2d 1283.

¹³⁰ *City of Rome v Glanton*, 958 FSupp 1026, 1038 (EDPenn1997)

¹³¹ Farnsworth, E., note no: 124 above.

¹³² *Ibid*, Implied terms are terms implied by law, custom or trade, or terms implied in fact. For further information see: Davis, T., ‘The Illusive Warranty of Workmanlike Performance: Constructing a Conceptual Framework’ (1993) 72 Neb. L. Rev. 981.

¹³³ Farnsworth, E., note no: 124 above

¹³⁴ *Ibid*.

violate the concept of good faith; "...evasion of the spirit of the deal, lack of diligence and slacking off, wilful rendering of only substantial performance abuse of power to specify terms, abuse of power to determine compliance, and interference with or failure to cooperate in the other party's performance".¹³⁵

The third category, led by Burton, states that the role of good faith should neither be decided by the courts nor by the commentators. Rather, the role of good faith should be decided by and based on the expectations of the parties. The parties, according to this opinion, are only able to specify what kind of performance they expect from each other when they contracted, and anything other than what they expect is bad faith.¹³⁶ Surprisingly, the American court adopted a wider methodology which could combine all the above arguments, as the court identified the role of good faith through looking at the circumstances and the context of the contract.¹³⁷

Unlike its attitude towards applying the duty of good faith on the performance of the contract, American law does not impose any duty of good faith in the negotiation stage of the contract. The reason for this was that the American legislators wanted the parties concerned to enter into negotiation with full freedom and without the fear of pre-contractual liability.¹³⁸ As a result, the party who enters into negotiation will bear any loss resulting from another party's improper behaviour that led to the breaking off of the negotiations, and the first party cannot rely on the principle of good faith.¹³⁹

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Farnsworth, E., note no: 124 above, at 60.

¹³⁸ Goderre, D., note no: 83 above, at 268 & 269.

¹³⁹ Nedzel, N., 'A comparative study of good faith, fair dealing, and pre contractual liability' (1997) 12 Tul. Eur. & Civ. L.F 97, at 205.

Nonetheless, the party who suffers a loss because of another party's bad faith in negotiation might build his claim on the doctrine of promissory estoppels.¹⁴⁰

To sum up, it is apparent from the discussion above that the English legal system and the American legal system differ significantly regarding good faith.

First, good faith (at least) is not a recognisable concept with clear indication or application in the legal system. This is due to the English assumption that the concept of good faith is wide and vague and will do more harm than good in the commercial transactions. Thus, good faith in the English legal system is replaced by piece meal approach (promissory estoppel, consideration..etc) to ensure fair and reasonable outcome of the contract similar to what could be achieved by using good faith in those legal systems that adopt such concept. In addition, there is no rule of good faith that is generally applicable. The duty to act in good faith can only exist by an expressly agreed contractual term. Good faith in the American legal system is a recognisable concept with specific inclusion in several laws. One example of these is found in article 1-203 in the Uniform Commercial Code (UCC) which applies the principle of good faith directly to several provisions such as the right to cure a defective delivery of goods (section 2-508), the duty of a merchant buyer who has rejected goods to effect salvage operations (Section 2-603), the failure of presupposed conditions (Section 2-615). However, those applications are not exclusive as good faith has broader application and applies generally to the performance or the enforcement of every contract within the UCC.¹⁴¹

Secondly, good faith does not have a definition even in legal systems, including consumer protection law, insurance law where the concept has been mentioned (this directly reflects the reluctance to adopt such concept in the English legal system. In the

¹⁴⁰ Ibid.

¹⁴¹ The official commentary on section 1-203 UCC

opposite, the UCC in has defined good faith in article 2 as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade”Thirdly, the duty of good faith under the UCC cannot be waived or disclaimed. The UCC Section 1-102(3) provides:

The effect of the provisions of this act may be varied by agreement, except as otherwise provided in this act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable. In addition, UCC Section 4-103(1) maintains that: "the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack of failure."

Fourth, under the UCC which represents the American legal system in this section does not support good faith as an independent cause of action for failure to perform or enforce the contract. In fact, Section 1-203 directs the courts to interpret contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness, which can be independently breached. In other words, a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power.¹⁴²

How completely different are the English Law and the US Law on Good Faith?

¹⁴² The official commentary on section 1-203 UCC

In view of the above one can conclude that the English common law is completely different from the US law in matters of “*legislative technique*”. Technique encompasses broad basic assumptions and approaches to jurisprudence applied under both common law and civil law. Hon. Mr Justice Steyn identifies the following differences in techniques between the two contested legal traditions

- 1) *‘Empiricism’* vs. Broad basic *‘Principles’*: Thus Justice Steyn states that “English law favours empirical and concrete solutions; the civil law proceeds deductively from broad first principles. This difference in approach extends to statute law”¹⁴³. English technique favours concrete empirical proofs while US law is a principle-based approach.
- 2) *Philosophical Approach*: While the English common lawyers would begin their interpretation of contracts completely excluding evidence of prior negotiations, the US lawyers would embody prior negotiations and subsequent conducts as essential logical probative material.
- 3) *Objectivity* vs. *Subjectivity*: English common law considers the objective existence of an enforceable contract while the US law is built on the basis of subjective *‘consensus ad idem’*.
- 4) *Reasonable man* vs. *The reasonable expectation of an honest man*: The English common law inclined to the idea of reasonable man and “Caveat emptor” is predominant while the US law inclined to subjectively protect the reasonable expectation of an honest man.

¹⁴³ Steyn, J. note no; 121 above.

3.3 Good Faith in Rules of Law

3.3.1 The Principles of International Commercial Contracts

The similarity in the application of good faith between the UNIDROIT Principles of International Commercial Contracts (hereafter PICC)¹⁴⁴ and the civil law system is that both share the belief that the principle of good faith is a positive duty which is directed to the contracted parties.¹⁴⁵ The PICC recognises the concept as a duty on the part of the contracted parties which they are obliged to carry out.

Article 1.7 provides that, "Each party must act in accordance with good faith and fair dealing in international trade". In addition, Article 1.7 (2) reads that "...the parties may not exclude or limit this duty". Consequently, the principle of good faith according to Article 1.7 is a compulsory obligation implied by the Principles on the contracted, which parties have to respect, even if it was not included in their contractual agreement.

Despite the fact that the PICC supports the idea of parties negotiating with full freedom without the fear of liability,¹⁴⁶ the PICC limits the freedom of negotiation in terms of being in good faith. The PICC stated that the party will bear any loss caused to another party if he "...negotiates or breaks off negotiations in bad faith",¹⁴⁷ and the party will be behaving in bad faith if he "...enter[ed] into or continue[ed] negotiations intending not to reach an agreement with the other party".¹⁴⁸

Under the PICC, good faith is not just an obligation imposed on the parties during the negotiation and the performance of the contract, but is also an interpretive tool, as the

¹⁴⁴ These principles have been set by the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) in 1994.

¹⁴⁵ Magnus, U., 'Remarks on good faith'(2000);
http://www.cisg.law.pace.edu/cisg/principles/uni7.html#um*.

¹⁴⁶ Article 2.15(1).

¹⁴⁷ Article 2.15(2).

¹⁴⁸ Article 2.15(3).

principle of good faith should be considered when it comes to determining the meaning of the contract terms.¹⁴⁹ The Convention also used the principle of good faith as grounds for implying contractual obligations that parties did not imply themselves.¹⁵⁰

The weakness of the PICC regarding the concept of good faith is that the Convention did not define the concept or identify its applications, which raises the same criticisms about the vagueness of the concept.

3.3.2 The Principle of European Contract Law

It is said that the Principle of European Contract Law (hereafter PECL) has included the best applications of good faith in both civil and common law systems.¹⁵¹ The PECL combines imposing the concept of good faith on the parties as a mandatory rule, and applying the principle of good faith as a helpful tool for interpreting and supplementing the PECL.¹⁵² The parties affected by the PECL are under an obligation to perform their duties, and show reasonable standards of fair dealing towards each other's interests in good faith.¹⁵³ Article 1:201 reads that, "[E]ach party must act in accordance with good faith and fair dealing".

¹⁴⁹ Article 4.8(3). See; Magnus, U., note no: 138 above.

¹⁵⁰ Article 5.2. Magnus, in addition to what has been mentioned, observed several matters in the PICC that indicates the function of good faith, called Express Contractual Obligations, Material Validity, Non-performance Caused by Creditor, and Mitigation of Damage. See; Magnus, U., note no: 138 above.

¹⁵¹ Zeller, B., 'Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods' (2003); <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>.

¹⁵² Ibid.

¹⁵³ Storme, M., 'Good Faith and the Contents of Contracts in European Private Law' (2003) 7 EJCL.1. Available at: <http://www.ejcl.org/71/abs71-1.html>.

Moreover, the contracted parties under the PECL cannot limit or exclude the obligation to act in good faith,¹⁵⁴ although the reading of Article 1:201 does not mean abandoning the principle of freedom of contract. The PECL as a principle supports the party's freedom to determine their contractual agreement and decide their rights and obligations with regard to the contract. However, this freedom under the PECL is "...subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles".¹⁵⁵ In other words, good faith can be used by the court in case of a harsh outcome of the freedom of contract.¹⁵⁶

In addition, the PECL mentioned other provisions based on good faith that eliminate the absolute freedom of contract. For example:

- a. The concept of "reasonableness" is to be judged by persons acting in good faith and fair dealing.¹⁵⁷
- b. A party may avoid a contract for reasons of mistake of fact or law, if the other party, in bad faith, did not inform him about the error.¹⁵⁸
- c. A party may avoid a contract for fraud if the other party, in contradiction of good faith, did not disclose information which led to the fraud.¹⁵⁹
- d. A party may avoid the contract if the other party took unfair advantage resulting from the first party's weakness.¹⁶⁰

What should be noticed is that the PECL does not limit good faith only to the performance and the enforcement of the contract. In fact, good faith under the PECL can be implied as a duty on the contracted parties during the negotiation of the contract.

¹⁵⁴ PECL article 1.201(2).

¹⁵⁵ PECL article 1.102(1).

¹⁵⁶ Storme, M., note no; 153 above.

¹⁵⁷ Article 1.302.

¹⁵⁸ Article 4.103.

¹⁵⁹ Article 4.107.

¹⁶⁰ Article 4.109. For the previous functions of good faith in PECL, see Storme, M., note no: 281 above.

Article 2:301 reads, "A party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party".¹⁶¹ Thus, it can be stated that the PECL imposes good faith as a general duty on the contracted parties. In addition, good faith has another function related to the interpretation of the Convention. Article 1-106 (1) states:

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

The main problem with the reference to good faith in the PECL (as in the PICC) is that it lacks a definition. Thus, courts and academics will find it difficult to apply such a concept without clear guidance regarding the concept's function and the mechanism of application.

In 2003, the Commission on European Contract Law called for an '...action plan on a more coherent European Contract Law'.¹⁶² Four years later, the Study Group on a European Civil Code (the 'Study Group') and the Research Group on Existing EC Private Law (the 'Acquis Group') presented the academic Draft of Common Frame of Reference (DCFR) which aims to present more precise and coherent definitions, fundamental principles and model rules for a European private law.¹⁶³

The DCFR referred first to the concept of good faith in the general provisions (Book I) then throughout the DCFR provisions. However, good faith is always attached to the concept of "fair dealing". For example, Article (1-103) of the DCFR general provisions states;

¹⁶¹ Article 2.301.

¹⁶² COM (2003) final, OJ C 63/1.

¹⁶³ See: Smith, J., 'The Draft-common Frame of reference for a European Private Law: Fit for Purpose?' (2008) 15 M. J. 2, at 147.

(1) The expression “good faith and fair dealing” refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.

(2) It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party’s prior statements or conduct when the other party has reasonably relied on them to that other party’s detriment.

According to the commentary of the DCFR, good faith is a subjective principle which “...refers to a subjective state of mind generally characterised by honesty and lack of knowledge that an apparent situation is not the true situation”.¹⁶⁴ However, the composite expression “good faith and fair dealing” used by the DCFR combines both a subjective and objective foundation to its meaning. Thus, good faith and fair dealing is defined as “...a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in questions”.¹⁶⁵ This definition describes three characteristics of good faith and fair dealing. The definition of ‘honesty’, as an element of good faith is not extended here, although conduct which is mentioned in the other articles as being contrary to good faith and fair dealing is described as dishonest conduct.¹⁶⁶ Openness, as the second characteristic, is meant to provide transparency with regard to the party’s conduct. The third and final characteristic is the basic consideration of the other party’s interests, depending on the circumstances and nature of the contract in question.¹⁶⁷

The aim of including good faith and fair dealing in the DCFR was to enhance two of the main purposes of the draft. The first is the security of the contract, where the contracted

¹⁶⁴ Bar, C V. & Clive, E. (eds.) *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Oxford University Press, 2009), Volume 1, at 89.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

party is expected to co-operate and act in accordance with good faith and fair dealing.¹⁶⁸

The second is justice, where good faith and fair dealing combined are used to prevent a contracted party from relying on his own unlawful, dishonest or unreasonable conduct.¹⁶⁹

As a result of the importance of good faith and fair dealing to the aims of the DCFR, the contracted parties have a duty to act according to these principles without the right to exclude or limit this duty.¹⁷⁰ In other words, the duty to act according to good faith must be observed by the contracted parties, through the formation, performance and the enforcement of the contract.¹⁷¹ Furthermore, good faith and fair dealing is one of the criteria which need to be considered when interpreting the contract.¹⁷²

What should be noted is the unique approach which the DCFR has considered in dealing with the breach of the duty of good faith. According to Article (1:103) Section (3), the breach of the duty of good faith does not directly give the right to rectify non-performance. However the party that breaches the duty of good faith will be precluded from exercising or relying on a right, remedy or defence which that person would

¹⁶⁸ The underlying principles which the DCFR aim to establish in the European Private Law are freedom, security, justice and efficiency. See Bar, V. et al. (eds.), Outline Edition of the Draft Common Frame of Reference (DCFR); http://webh01.ua.ac.be/storme/2009_02_DCFR_OutlineEdition.pdf, at 13-16 & 72.

¹⁶⁹ Ibid, at 85.

¹⁷⁰ Section 1 & 2 of Articles 1-103, Book (3), reads;

(1) A person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship.

(2) The duty may not be excluded or limited by contract or other juridical act.

In addition, section (2),(4) of Article (3:301), Book II states;

(2) A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. This duty may not be excluded or limited by contract.

(4) It is contrary to good faith and fair dealing, in particular, for a person to enter into continue negotiations with no real intention of reaching an agreement with the other party.

¹⁷¹ See: Bar, V. et al. (eds.), Outline Edition of the Draft Common Frame of Reference (DCFR); http://webh01.ua.ac.be/storme/2009_02_DCFR_OutlineEdition.pdf, at 86.

¹⁷² See Article 8:102, Book 2.

otherwise have. Thus, if good faith imposed an obligation, then it is the non-performance of that obligation which gives the right for remedy.¹⁷³

As far as the concept of good faith is concerned, the DCFR, as a potential law, provides the clearest structure as to how the concept might be applied in a legal system. The DCFR illustrates the definition of the concept, decides its scope of application, the party that is obliged to honour it, and describes the penalty for any party that breaches it. The structure provided by the DCFR might not prevent some academics from arguing that the concept is still vague and will eliminate the freedom and certainty of the contract. However, the repeated argument will be raised again - that the freedom of contract is not absolute and complete certainty is not always visible. Furthermore, what should be known is that the divisions over the concept of good faith are more of a result of different legal backgrounds than a result of vagueness with regard to the concept.

4. Academic Divisions over adopting the Legal Principle of Good Faith.

Legal scholars around the world are divided into two groups in terms of whether or not the principle of good faith should be incorporated into law instruments and used by the courts. Scholars from a common law background often object to the implications of the principle of good faith, mainly because the concept lacks precision in its meaning and application. According to this view, it is difficult if not impossible to identify the exact meaning of a broad concept like good faith as it could "...mean different things to different people in different moods at different times and in different places".¹⁷⁴ There is

¹⁷³ For further details, see Bar, V., note no; 164 above, at 678.

¹⁷⁴ Bridge, M., note no: 100 above, at 407.

concern among those scholars that applying the indefinable concept of good faith could open the door to legal uncertainty.¹⁷⁵

In addition, it is argued that the principle of good faith contradicts one of the main features of contract which is the strong attendance of the parties to their own self-interest when forming and performing the contract. Consequently, imposing a duty of good faith on a party would restrict that party from pursuing his interests with regard to the contract but, at the same time, consider the other party's interests and expectations.¹⁷⁶ Moreover, it is argued that good faith incorporates ethical standards which are difficult for the contracted parties to identify at the time of the contract, because these ethics and their interpretations differ from person to another. As a result, this may cause serious difficulties in achieving uniformity in interpreting the contractual obligations.¹⁷⁷

Another criticism is the claim that good faith has a subjective character which requires the court to look at the state of mind of the party when it comes to deciding whether his actions were compatible with the requirements of the principle of good faith. Indeed, considering the subjective reasons of the party for his contractual behaviour would add to the already difficult mission of the court.¹⁷⁸

The final and most important criticism of the implication of good faith in contract law is the contradiction between good faith and the main feature of contract law, which is the party's autonomy and freedom of contract. It is claimed that implying good faith with the ability to impose obligations on the contracted parties, and giving the court

¹⁷⁵ Hoch, M., 'Is fair dealing a workable concept for European contract law?' (2005) 5 G. L. Advances. 1. http://www.accessmylibrary.com/coms2/summary_0286-13973195_ITM

¹⁷⁶ Brownsword, R., *Good faith in contract: concept and context* (Ashgate/Dartmouth, 1999), at 15.

¹⁷⁷ *Ibid*, at 16.

¹⁷⁸ *Ibid*, at 17-18.

discretionary power to interpret the contract, would distort the essence of contract law which is based mainly on giving the contracted parties the freedom to frame their contractual relationship without the interference of the court.¹⁷⁹

Indeed the arguments objecting to the integration of the principle of good faith into contract law might appear problematic and may cause more harm than good to the contractual relationship and the courts. However, the situation does not appear as problematic when the other side of the argument is considered.

The incorporation of good faith into contract law is supported by a number of arguments which are adopted by this research. The argument which might be raised here is that this definition is complicated and still vague. In addition, it will weaken the principle of freedom of contract and will negatively influence the predictability and certainty of the commercial contract.

Answers to these allegations can follow a number of approaches. Regarding the first approach, Schlechtriem stated:

...even the most detailed code or contract will not deal with every issue imaginable. Details of minor importance can be left to the courts....[and] the concept of good faith and fair dealing may help to clarify or to develop the meaning of certain phrases and words in order to make them cover and solve new issues not considered by the drafters.¹⁸⁰

Despite the limitless efforts by legislators and legal academics to develop contract law, the certainty in commercial contracts is far from being achieved, particularly because contract law is governed by different principles which might contradict each other in certain cases. For example, the principle of freedom of contract is meant to give the contracting parties the ability to select the law they want to govern their agreement. However, the principle of equity is eliminating that freedom to achieve justice

¹⁷⁹ Ibid, at 18-20.

¹⁸⁰ Schlechtriem, P., note no: 77 above, at 9-13.

according to the law. As a result, the freedom of contract is not absolute, but rather is limited by other contractual principles, one of which is the standard of good faith.

Furthermore, the ultimate certainty is only applicable in mathematical science because it is based on natural facts and figures which are impossible to change or at least to change in a short period of time; however, the same is impossible in the case of social sciences such as Law, as the latter is based on continuous changes in circumstance, and great difficulties in foreseeing all the developments that might occur in the future regarding a contract. Consequently, it is important to have a standard like good faith or a similar one in order to give the court the flexibility needed to assist the parties to achieve the goals of their agreement.

With regard to the vagueness of good faith, it could be argued that language is inherently uncertain, and that legal instruments at both national and international levels have included similar concepts to good faith without defining these concepts. For example, concepts like "reasonableness", "honesty", "intemperance" and many other legal concepts cause no problems. Even on a daily basis, communication between people uses a considerable amount of vague linguistic terms, but people still understand the meaning. For example, saying that "the weather is hot" is not a precise statement, but people still understand it, even though there is no agreed standard as to what can be considered to be hot weather.

In his article *Understanding Vagueness*, Felkins asked: Can society function with vague definitions and statements in our legal code?¹⁸¹ Apparently we can, as our laws are often very vague. You can be arrested for "driving recklessly", putting "indecent" material on

¹⁸¹ Felkins, L., 'Understanding Vagueness' (1996); <http://perspicuity.net/paradox/vagueness.html>.

the internet, "public drunkenness", plagiarising copyright material, sexual harassment, killing a member of an "endangered species", among numerous other examples.

Consequently, dealing with vague concepts is not a new issue in all branches of law and conventions. In fact, no matter how strong and creative a person is regarding his linguistic ability, he will not be able to offer a perfect or comprehensive definition of the concept of good faith that covers all aspects, without trying to limit the subject in terms of application, time and jurisdiction which is what this thesis has set out to do.

In *Towne v Eisner*,¹⁸² Holmes J. argued that, "A word is not a crystal, transparent and unchained, it is the skin of the living thought and may vary greatly in colour and content according to the circumstances and time in which it is used". The uncertainty of language is further evidence of the standard of good faith when it comes to interpreting the agreement of the parties in a contract, as the standard represents another way of interpreting the contract beyond literalism.

4.1 The Academics' Definition of Good Faith

This section of the thesis explores some of the main theories presented by legal academics in their attempts to identify the principle of good faith. These theories mainly deal with the application of the principle of good faith in the Uniform Commercial Code (UCC). However, the focus here is on defining the concept as a legal term, and identifying the legal mechanisms which the court can use in order to interpret good faith.

¹⁸² [1918] 245 US 418, at 425.

4.1.1 The excluder approach to good faith

Robert Summers is one of the leading figures in interpreting the principle of good faith. He used a case law survey methodology to identify a mechanism which could be used to identify and define the principle of good faith in all stages of the commercial contract.¹⁸³ According to Summers, good faith does not have a simple meaning that can be embodied in a single comprehensive definition.¹⁸⁴ Summers had the idea that the principle of good faith needs to be open-ended rather than sealed off in order to help the judge to do justice according to the law by excluding many forms of bad faith conduct.¹⁸⁵ In this regard, he stated that "The black letter is limited,...I don't think you can find a case in the whole history of the common law in which a court says that good faith is not required in the performance of a contract or in enforcement of a contract".¹⁸⁶ Summers believed that the proper method to identify good faith is through the absence of bad faith conduct.¹⁸⁷ He added that the principle of good faith is best interpreted as an *excluder* principle which has "...no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith".¹⁸⁸

¹⁸³Summers has over 120 academic writings in the legal field and the following are some of his publications in sales law: Summers, R., & White, J., *Principles of Sales Law*, (Thomson/West, 2009) ; Summers, R., & White, J., *Uniform commercial code*, (5th edn, West Publishing Co., 2007); *Essays on the nature of law and legal reasoning*, (Berlin : Duncker & Humblot, 1992); 'Good Faith Revisited: Some Brief Remarks Dedicated to the Late Richard E. Speidel-- Friend, Co-Author, and U.C.C. Specialist' (2009) 46 *San Diego L. Rev.* 723-732; *Contract and Related Obligation : Theory, Doctrine, and Practice*, with Hillman, R., (West Publication, 1992). For further publications, see: <http://library2.lawschool.cornell.edu/facib/faculty.asp?facid=18>.

¹⁸⁴ See; Bridge M., 'good faith in commercial contracts', in Brownsword R., note no: 169 above, at 141.

¹⁸⁵ Summers, R., note no: 63 above, at: 196, 198&215.

In addition, Summers referred to the limitations of the language to embody all the roles of the principle of good faith in commercial conducts. See: Summers, R., 'The General Duty of Good Faith: Its Recognition and Conceptualization' (1982) 67 *Cornell L. Rev.* 810, at 816.

¹⁸⁶ *Ibid*, at: 816.

¹⁸⁷ Summers, R., note no: 68 above, at: 201.

¹⁸⁸ *Ibid*, at: 196.

As a result, for a judge to determine the meaning of good faith in a particular case, he should concentrate on the bad faith conduct which needs to be excluded.¹⁸⁹ Summers gave an example of the list of the forms of conduct which the American courts have ruled out in certain cases, because these forms of conduct were forms of bad faith which the judge believed were in contradiction of the requirement of good faith.¹⁹⁰ According to Summers, adopting this list will "...provide judges with indispensable guidance and may serve as a kind of unifying 'theory' that, if anything can, ties various [judicial] decisions together".¹⁹¹

Reiter sorted these types of bad faith conduct provided by Summers into four categories.¹⁹² The first is concerned with bad faith conduct during the negotiation and formation of the contract. This includes actions such as abusing the privilege to withdraw an offer, the non-disclosure of material fact and entering into a deal without serious intention to adhere to the terms of the deal. The second category involves bad faith conduct during the performance of the contract such as evading the spirit of the deal lack of diligence; abusing the power to determine contractual compliance, and interfering with, or failing to cooperate with, the other party's performance.¹⁹³ The third category includes bad faith conduct that can occur when raising or resolving contractual disputes, such as taking advantage of another to secure a favourable settlement of a dispute and adopting over-reaching and weaselling interpretation and construction of contractual language. The fourth category is concerned with bad faith conduct that might arise while taking remedial action, such as wilfully failing to mitigate damages, wrongfully refusing to accept contractual performance, and abusing the power to terminate the contract. Summers intention was not to offer a comprehensive list of bad faith conduct. However, this list is intended to be used as examples of bad faith conduct which the court could use as the foundation for similar cases.¹⁹⁴

¹⁸⁹ Ibid, at: 202.

¹⁹⁰ Ibid.

¹⁹¹ Summers, R., note no: 185, at 827.

¹⁹² Reiter, B., 'Good Faith in Contracts' (1983) 17 Val. U.L. Rev. 705, at 710.

¹⁹³ Summers, R., note no: 185 above, at 816.

¹⁹⁴ Van Alstine, M., 'Of Textualism, Party Autonomy, and Good Faith' (1999) 40 Wm. & Mary. L. Rev. 1223, at 1251.

Summers hoped that this list would be developed into a comprehensive one using the increased number of judgments which have ruled out bad faith conduct.¹⁹⁵ Summers stated: “[O]nce we accumulate a body of holdings on what forms of conduct are in bad faith, we should then have the certainty [one would] want, at least as to those forms of conduct”.¹⁹⁶

In Summers' view, the principle of good faith represents “...a piece with explicit requirements of “contractual morality” such as the unconscionability doctrine and various general equitable principles” and These principles achieve what he described as “the most fundamental objectives a legal system can have - justice, and justice according to law”.¹⁹⁷ The principle of good faith has been described as a safety valve which the judge could “...turn to fill gaps and qualify or limit rights and duties otherwise arising under rules of law and specific contract language”.¹⁹⁸ According to the excluder approach, good faith can impose limitations on a party’s autonomy in contract law if the former principle contradicts principles such as decency, reasonableness and fairness.¹⁹⁹

“A critical question arises regarding the implementation of the excluder approach: In the absence of a positive definition of good faith, what is the source of bad faith categories? Put differently, what justifies court in determining that particular conduct is bad faith? The answer to this question is crucial in two respects. First, without an identifiable source, existing categories of good faith can be neither defended nor criticized. We cannot determine whether they are

¹⁹⁵ Ibid.

¹⁹⁶ Summers, R., note no: 68 above, at: 264.

¹⁹⁷ Summers, R., note no: 185 above, at 812.

¹⁹⁸ Ibid, at 813. Summers elaborated that good faith is “...an explicit general requirement, [which] it has all the advantages of a direct and overt tool rather than an indirect and covert one. In the long history of contract, judges who have not had such a tool ready to hand have either had to leave bad faith unredressed or resort to indirect and covert means”.

¹⁹⁹ Ibid, at 822.

correct or incorrect, justified or unjustified, good or bad. The concept of good faith may seem arbitrary, not to say illusory”²⁰⁰

In view of the above, one can argue that theoretically, the excluder approach seems to provide a detailed clarification of the meaning of good faith. However, this approach falls short in practice, because it does not address the main problem that involves the definition of good faith.

Some of the criticisms directed at the excluder analysis is that it lacks a standard or formula which the courts can use as a guideline to determine the conduct which forms bad faith behaviour, until the conduct become widely recognised as bad faith conduct.²⁰¹ Consequently, the outcome of any dispute over a contract is going to be unpredictable for the contracted parties.

Lack of guidance and definitive rules to determine when a particular conduct represents a violation of good faith would give the court the discretion to impose un-agreed obligations on the contracted parties, or would prohibit a party from his contractual interests. This contradicts some of the sacred principles of modern contract law such as certainty, party autonomy and predictability.²⁰² Furthermore, the approach failed to answer to what extent the application of good faith could be used by the court to interfere in the freedom of the contracted parties by imposing or altering a contractual obligation.

In addition, adopting the excluder approach to good faith would cause serious confusion between the contracted parties with regard to what would be acceptable conduct that would not be interpreted as a breach of contract by the court, when relying on the

²⁰⁰ Miller. A., & Perry. R., ‘Good Faith Performance’ (2012) 98 IOWA Law Review 689, at 703

²⁰¹ Diamond & Foss., ‘Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing has Been Violated: A Framework for Resolving the Mystery’ (1996) 47 Hastings L.J. 585.at 592.

²⁰² Ibid, at 593.

application of good faith in this manner.²⁰³ As a result of all the previous shortfalls, the application of the principle of good faith according to the excluder approach will cause serious confusion in understanding a commercial contract on the part of the contracted parties. Hence, this would lead to an increase in commercial contract disputes, which need to be looked at, by the court.²⁰⁴

Furthermore, some scholars such as Emily Houh have provided a descriptive ‘*critique*’ of the extent to which the courts applying good faith have reduced it to a mere analytical proxy for material breach while ignoring the theory and policy underlying it. According to Emily Houh, “Good faith is an empty vessel which functions rhetorically and analytically as a proxy for simple breach of contract and has not been used by the courts to actuate the theory or policy underlying it”²⁰⁵.

The above ‘critique’ is valid if one considers the fact that the underlying theory and policy as developed by Summers was about promoting justice and community standards of decency, which instead the courts have used differently to promote the construction of economically ideal contracts²⁰⁶.

In view of the above one can conclude that the courts have employed Summers analysis within a context promoting the ideals of traditional ‘law and economics’²⁰⁷ analysis at the expense of the original rationale establishing it²⁰⁸.

²⁰³ Ibid.

²⁰⁴ See: Diamond & Foss., note no: 201 above, at 593.

²⁰⁵ Houh, E., note no: 13 above

²⁰⁶ Ibid.

²⁰⁷ Coote, R., & Ulen, T., *Law and Economics*, at 261-64, 275-77 (3rd ed. 2000, Addison Wesley).

²⁰⁸ Mallow, R., *Law and Economics: A Comparative Approach to Theory and Practice*, (1990, West Publishing Corporation) at 32.

4.1.2 The Foregone Opportunity Approach to Good Faith

Unlike Summers, whose excluder approach was based on the wide principle of justice, Burton tried to identify the principle of good faith by relying on the law and the economic analysis of good faith.²⁰⁹ According to this approach, the principle of good faith could be identified by looking at the party exercising a contractual discretion which has been allocated to him at the time of entering the contract.²¹⁰ Consequently, the party would be performing in good faith when he exercised his contractual discretion within the reasonable contemplation of the parties, which includes ordinary business reasons.²¹¹ On the other hand, the party with contractual discretion would be violating a good faith performance if he exercised that discretion to recapture foregone opportunities.²¹² According to this approach, recapturing a foregone opportunity is when the defendant attempts to recapture the "cost" of performance allocated to him (upon entering into the contract) to enter other contractual agreements.²¹³

Burton explained that the attempt to forego opportunities could occur in every contract, particularly when the exchange of resources such as goods or services is planned in the future as part of the contract.²¹⁴ The simplest example could be recapturing the foregone opportunities through the breach of expressed contractual terms.²¹⁵ If the promisor in a future performance contract believed that the contract performance would not benefit

²⁰⁹The economic view of this approach suggests that the principle of good faith should be viewed as a tool to enhance economic efficiency by reducing the costs of contracting which includes the costs of exchange, gathering information, negotiating and drafting contracts, and risk taking with respect to the future. See; Burton, S., 'Breach of Contract and the Common Law Duty to Perform in Good Faith' (1980) 94 Harv. L. Rev. 369 Houh, E., note no: 13 above, at 2-3., N J L R C, 'Draft Final Report and Recommendations relating to Uniform Commercial Code Article 1', (2001) October 2005, at 7. Available at: www.lawrev.state.nj.us/ucc1/ucc1DFR101105.doc.

²¹⁰ Burton, S., note no: 209 above, at 370.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid, at 388. For further explanations, see: Houh, E., note no: 13 above, at 11; Van Alstine, M., note no: 194 above, at 1255.

²¹⁴ Burton, S., note no: 209 above, at 376.

²¹⁵ Ibid, 378.

him (which might be due to market conditions), the promisor might attempt to recapture foregone opportunities by using the resources committed to the promised performance and, eventually, fail to perform the promise.²¹⁶

In the previous example it was easy to identify bad faith conduct on the part of the promisor. However, the issue would be more complicated in the case of a vague or unclearly expressed contract, or when the contract assigns to one of the contracted parties the discretionary authority for making a decision over a particular aspect in the contract such as the price, quantity or time.²¹⁷ As a result, the "...bad faith performance occurs precisely when discretion is used to recapture opportunities foregone upon contracting ...when the discretion-exercising party refuses to pay the expected cost of performance".²¹⁸

The question that emerges from this, then, is how to link exercising of contractual discretion and the recapturing of forgone opportunities which would represent violation of the covenant principle of good faith. In Burton's view, the contractual discretion must be exercised according to the contractual expectation interests at the time of the formation. Burton asserted that,

Discretion in performance may be exercised legitimately for the purposes reasonably contemplated by the parties, including ordinary business reasons.[Nonetheless] It cannot be exercised for the purpose of recapturing foregone opportunities, for such conduct harms the expectation interest of the dependent party.²¹⁹

In addition, the contractual expectation interests according to this approach, do not consist only of property, services, or money to be received by the promisee, but also

²¹⁶ Ibid, at 378, Burton gave a number of examples explaining his theory in this regard.

²¹⁷ Ibid, 381.

²¹⁸ Ibid, 374.

²¹⁹ Ibid, at 403.

includes the expected cost of performance on the part of the promisor.²²⁰ Unfortunately, this approach falls short of proposing a firm mechanism for understanding two of its own pillars (foregone opportunity and reasonable expectations) which make the approach in general fragile in terms of acting as a guide for the court to determine the application of good faith. The approach does not provide a guideline as to how the court could ascertain that a particular conduct represents a foregone opportunity, particularly when there is no reference to the permissibility of such conduct in the contract.²²¹ Moreover, there are no guidelines in terms of identifying the reasonable expectations of the contracted parties upon entering into the contract, to decide "...whether the parties reasonably expected that the conduct would constitute a foregone opportunity".²²²

Another criticism was made by Summers, who argued that Burton's approach is not as comprehensive as it seems to be, which might produce uncertainty or confusion with regard to commercial contracts.²²³ Summers elaborated his criticism by referring to the fact that the foregone opportunities model was based mainly on cases where one of the contracted parties has a contractual discretion over a specific term. However, not all the cases involving the issue of good faith performance are related to discretion performance. In contrast, it might be the case that the party with discretion might withhold all benefits for good reasons.²²⁴ In addition, Summers criticised the process of identifying the compliance of the conduct with the requirement of good faith through the mechanism of investigating the party exercising discretion which, he believed, to be subject to a subjective mechanism which "...may lack independent significance".²²⁵

²²⁰ Ibid, at 369-370.

²²¹ Diamond & Foss, note no: 201 above, at 594-595.

²²² Ibid.

²²³ Summers, R., note no: 185 above, at 834.

²²⁴ Ibid, at 835.

²²⁵ Ibid.

One might argue that the above-mentioned theories of the principle of good faith have failed to define the concept. Nonetheless, they were also partly successful in introducing mechanisms which the court could use to apply the principle of good faith. The court, as always, will have to be extra careful in using these mechanisms as some might lack certain standards for legal rules such as complexity, generality and definiteness.²²⁶

5. Description or definition of good faith

It is only by understanding the development of good faith in legal history and realising the complicity of its components that one would realise that good faith cannot be ‘defined’; rather it can be ‘described’. The differences between defining good faith and describing are vast. While defining it would mean presenting an absolute or comprehensive meaning of it, describing it only involves identifying some of its main elements or components. In fact, one must exercise caution when attempting to define the concept of good faith. This is because the concept is prone to different meanings depending on the time and jurisdiction in which it is interpreted. Accordingly, good faith can be described as:

a fundamental principle of the law of contract which is based on other legal principles such as; *pacta sunt servanda*, honesty, reasonableness and fairness. Thus, to apply the concept of good faith, one needs to understand these principles these principles vis-à-vis the contractual relationship between two parties in a community in the community at a particular time. This description of good faith combines several distinguished characteristics of its nature. First, it highlights one significant pitfall in the literature of good faith, namely the definitions of the concept of good faith by most legal academics failed to consider the fact that good faith has different forms depending on the time, community and contract type. Understanding law in general, differs from time to time and from one legal system to another, and the same rule applies with regard to

²²⁶ See; Summers, R., *Essay in legal theory*, (1st edn, Kluwer Academic Publishers, Netherland, 2000), at 125.

understanding and defining good faith.²²⁷ The meaning of good faith has developed through history until the present day a social norm then became a moral norm and later became a legal principle with several interpretations, depending on which angle the concept was looked at when the attempt to define it was made.²²⁸

In addition, this description suggests that the meaning of good faith differs according to the subject of the contract. For example, the meaning of good faith in an insurance contract will differ from its principle meaning in a sale of goods contract or a financing contract. Good faith according to this description is a standard which needs to be identified through other elements, rather than a specific legal rule. Exploring the issue of finding a comprehensive description of good faith will allow us to participate in narrowing down the search area for a meaning for good faith, without losing the essence of its meaning. Thus, based on this point, the researcher needs to decide the jurisdiction, time and type of contract as a prerequisite for identifying the closest meaning of good faith in terms of the case in hand.

Second, the researcher needs to consider a number of factors to identify the exact meaning of good faith in a specific contract. These factors include the contractual intention, goods in question, communication, customary usage,²²⁹ and contractual necessities. These factors will assist the researcher into what constitutes good faith and identify the common understanding (intention) of the contracted parties associated with the agreement terms. Examples of the questions which might help to decide the whether a party in a sale contract was in good faith are:

²²⁷ It could be said that good faith is a prime example of internalisation, where people tend to accept a new definition of the concept over a period of time.

²²⁸ See Zeller, B., note no: 151 above. See also: Ellinghaus, E., 'In Defense of Unconscionability' (1969) 78 Yale. L.J. 757.

²²⁹ This can be defined as "...a practice that in fact is so widespread and prevailing that it has become established as the practice to be followed in its circle of influence". See Hoffman, W., 'On the Use and Abuse of Custom and Usage in Reinsurance Contracts' (1997) 33 Tort & Ins. L.J. 283, at 11.

- Were the goods delivered fit for any particular purpose expressly or impliedly made known to the seller?
- Was the communication regarding the formation or performance or conclusion of the contract carried out according to the rules agreed upon by the contracted parties and common practice?²³⁰
- Was the behaviour of a party in contradiction of widespread practice in the commercial community of similar contract?
- Is the party's behaviour in contradiction of achieving the goal of the contract or with the implied terms?

What should be noticed regarding the elements mentioned to identify the principle of good faith is that using these elements should be based on objective standards. The aim is to ensure that the freedom of contract is guaranteed to a great extent together with the predictability of the outcome of the contract. Despite good faith being subjective by nature (a state of mind) and differing from one individual to another, in order to ensure the predictability needed in a commercial contract, good faith must be decided according to objective factors. Furthermore, these elements are not exclusive, as there are other elements which can be derived from the circumstances of each contractual dispute because "...good faith is bound into the framework created by the parties, and the agreement plays an important part in its application to the particular context".²³¹

The third issue which this description raises is the power which the standard of good faith gives to the court. Good faith, in any contractual dispute, would have the ability to give the court the discretionary power needed to solve the contractual dispute whenever the contractual terms do not cover the subject of the dispute. It is undeniable that no contract that can ever cover every issue or aspect of its subject, and the same rule also

²³⁰ For a further illustration of the role of communication in interpreting the contract, see Kramer, A., 'Common sense principles of contract interpretation (and how we've been using them all along)' (2003) 23(2) Oxford J. Legal Stud. 173.

²³¹ Sims, V., 'Good Faith In Contract Law: Of Triggers and Concentric Circles' (2005) 16 KCLJ 293, at 295.

applies to the legislation which, in some cases, becomes a disputable issue between the parties. As mentioned earlier good faith is derived from other principles, such as *Pacta sunt servanda*, honesty, reasonableness and fairness. These principles give good faith the framework which the court could use to enforce the contract according to its term and the parties expectations. Accordingly, the standard of good faith could be used to implement a new minor obligation, particularly where the court finds this obligation to be important in terms of achieving the main goal of the contract. In other words, good faith functions as a gap-filler for any legal holes in the contract. As a result, these minor gaps would be filled by the court by looking into the contract terms and trying to extract the implicit intention of the contracted parties, then examining the result against the standard of good faith. The contractual gaps which could be filled by using the standard of good faith refers not only to gaps which are the result of negligence or disagreement with regard to issues while drafting the contract, but also to the gaps which result from factual developments which could not be foreseen at the time of drafting the contract.²³² Consequently, the standard of good faith is a tool in the hands of the court to fill the legal gaps in the contract which might include imposing new obligations necessary to achieve the aim of the parties from the contract, and to interpret any vague contractual terms or concepts.²³³

It is worth mentioning, however, that it is not the responsibility of the court to formulate the standards of good faith as this standard already exists in the contract. When there is a disagreement between the parties over its scope and application, the court will then intervene to clarify the meaning of good faith by considering the intention of the parties which is reflected in the context of the contract.

²³² Generally see: Schlechtriem, P., note no: 77 above.

²³³ Ibid.

Chapter Three

The Role of Good Faith in Article 7 CISG

1. Overview of the CISG

The exact history of the CISG is not easy to trace. The idea of introducing a uniform law to govern commerce across international borders may be founded in *lex mercatoria* or merchant law, which was developed in medieval Europe to regulate the commerce on common principles agreed by all the merchants.¹

In recent history the German commercial lawyer and comparativist, Ernst Rabel and a group of European scholars in the International Institute for the Unification of Private Law (UNIDROIT) began a project in 1927 to unify international sales law.² By 1935 this committee had produced the first draft of uniform rules for the international sale of goods.³ However, the project ceased from 1939 to 1951 because of the Second World War and its aftermath.⁴

The project was resurrected in the 1950s and 1960s. Then, at The Hague in 1964, 28 countries adopted two Conventions known as the Uniform Law on the International

¹ Keily, T., 'Harmonization and the United Nations Convention on Contracts for the International Sale of Goods' (2003) 1 Nordic J. Com. L. 1. Available at http://www.njcl.fi/1_2003/article3.pdf.

² The famous American Jurisprudential Karl N. Llewellyn (1893–1962) was among those scholars. In addition, Jeffery noted that "all the participants came from the industrialized, capitalist countries of Western Europe", which will be reason later to reject the first draft presented by this committee because the draft reflected specific legal culture (the drafters' legal culture), which had a strong influence on the failure of this draft. See Harjani, S., 'The Convention on Contracts for International Sale of Goods in United States Courts' (2000) 23 Hous. J. Int'l L. 49, at 53; Honnold, J., *Uniform Law for International Sales* (3rd edn, Kluwer Law International, 1999), at 5; Schlechtriem, P., 'Interpretation, Gap-filling and Further Development of the UN Sales Convention' (2004). Available at <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem6.html>; Ansaldi, M., 'The German LLEWELLYN'. Available at <http://dzl.legaltheory.com.cn/info.asp?id=4915>; Jeffery, S., 'Measuring Damages under the United Nations Convention on the International Sale of Goods' (1989) 50 Ohio St. L.J. 737. Available at <http://cisgw3.law.pace.edu/cisg/biblio/sutton.html>.

³ Ibid.

⁴ Ibid.

Sale of Goods (ULIS), and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF). Nonetheless, only a few countries, mostly from Western Europe, ratified these Conventions. Honnold explained that “[m]any of the countries in Africa and Asia did not exist as independent states when the uniform laws were made; other parts of the world – nearly all of the common law world, Eastern Europe and Latin America – for a variety of reasons did not participate”.⁵ The failure of these two conventions to be ratified was due to the following reasons: lack of participation of none European countries in the process of creating the ULIS and ULF which resulted in distrust from the developing countries toward conventions that have been created by industrial countries.⁶ The material deficiencies specified within these agreements, such as the inattention to overseas shipments, the imbalance between the rights of buyers and sellers, the insensitivity to commercial practice, and the scope of their application.⁷ Despite these deficiencies, the ULIS and the ULF had greatly influenced the legal practices of these few member states, particularly Germany, the Benelux countries and Italy.⁸

In 1966, The United Nations established the International Trade Law Commission (UNCITRAL). The aim of the Commission was to ensure worldwide participation in producing a uniform law for the international sale of goods and to avoid the nations that had adopted the Hague Convention drawing back and limiting their involvement in

⁵ Honnold, J., ‘The Sales Convention: Background, Status, Application’ (1988) 8 J.L. & Com. 1. Available at <http://cisgw3.law.pace.edu/cisg/biblio/honnond-background.html#5>. Other scholars have referred to the deficiencies of these two Conventions in certain aspects, being Eurocentric in province and (in the mind of some) in favour of the developed countries whose main trading interest was the export of industrial products. See David, P. & Steward, R., *International Logistics: The Management of International Trade Operations* (3rd edn, Atomic Dog, 2010), at 95; Gillies, P. & Moens, G., *International Trade and Business: Law, Policy, and Ethics* (Routledge-Cavendish, 1998), at 1.

⁶ Eiselen, S., ‘Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa’ (1999) 116 South African Law Journal 323, at 336.

⁷ Ibid

⁸ Schlechtriem, P., *Commentary on the UN Convention on the Contracts for the International Sale of Goods* (2nd edn, Oxford University Press, 2005), at: 2.

either drafting or ratifying it.⁹ UNCITRAL assigned the task of drawing up a uniform law for the international sale of goods to a Working Group (from 14 countries), which was required to report progress to UNCITRAL at an annual meeting held for this purpose.¹⁰

Between 1970 and 1977 the Working Group presented several drafts for discussion at the annual conferences of UNCITRAL. By 1978 the Working Group had reviewed two draft Conventions based on the sale of goods (ULIS) and the formation of contracts (ULF. These drafts were subsequently merged into one Draft Convention on Contracts for the International Sale of Goods, which UNCITRAL accepted.¹¹ In 1980 the UN member states represented at the Diplomatic Conference in Vienna, approved the UNCITRAL Draft and announced the birth of the CISG,¹² as “the most successful international instruments which produce uniform substantive rules for international trade”.¹³

The CISG’s provisions, however, were not as accurate as everyone would have expected after more than 50 years of intensive work. Scholars like Andersen rightly observed that the “UNCITRAL’s drafting is purely diplomatic”,¹⁴ which, combined with the “inequality of bargaining power”¹⁵ among the countries’ representatives involved in that drafting, had resulted in “years of debate and compromise”.¹⁶ In fact, the compromises among the draftsmen affected the language used in the CISG’s provisions. The draftsmen tended to use general terms and imprecise language in

⁹ Honnold, J., note no: 2 above, at: 6.

¹⁰ Schlechtriem, P., note no: 8 above, at: 2.

¹¹ Honnold, J., note no: 2 above, at: 10.

¹² Ibid.

¹³ Mistelis, L., ‘CISG-AC Publishes First Opinions’. Available at: <http://cisgw3.law.pace.edu/cisg/CISG-AC.html>.

¹⁴ Andersen, C., ‘The Uniformity of the CISG and its Jurisconsultorium: An Analysis of the Terms and a Closer Look at Examination and Notification’ (PhD thesis, Aarhus School of Business, 2006), at 75.

¹⁵ Ibid.

¹⁶ Ibid.

drafting the Convention to avoid further disagreements among themselves.¹⁷ An obvious example was the manner in which the concept of good faith was included in Article 7.

2. Article 7 and the Issue of Interpretation in the CISG

The importance of Article 7 comes from its reference to the process that should be followed to interpret the Convention.¹⁸ The limited number of provisions within the CISG and the unlimited issues related to the formation and performance of international sale contracts¹⁹ leaves no doubt that Article 7 is “the single most important provision in ensuring the future success of the Convention”.²⁰ However, the draftsmen did not foresee how the Article could be used for “developing the convention to meet new challenges from issues of technical and economic developments”.²¹ In general, the legislative provisions, whether for domestic or international use, needed to be drafted as precisely as possible. To enable whoever was dealing with the legislation to understand it without great difficulty, “[t]he rules were meant to be simple, accessible, and

¹⁷ Amato, P., ‘U.N. Convention on Contracts for International Sale of Goods: The Open Price Term and Uniform Application: An Early Interpretation by the Hungarian Courts’ (1993) 13 J.L. & Com. 1, at 4. Honnold stated that the compromise was a methodology used by the drafters of the CISG to “overcome the conceptual barriers of their various national legal backgrounds and to discover common solutions to typical problems”. See Kastely, A., ‘The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention’ (1988) 63 Wash. L. Rev. 607, at 608 Available at: <http://cisgw3.law.pace.edu/cisg/biblio/kastely1.html>.

¹⁸ Felemegas stated: “Article 7 [...] is probably the most important one since it not only stresses the character of the Convention and its all-important goal of uniform application, but it also describes the process by which those called upon to apply the Convention to a particular case ascertain the meaning and legal effect to be given to its individual articles.” See: Felemegas, J., ‘The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation’, Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), at Chapter 3, para 1. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html#ch3> (last accessed 26/08/07).

¹⁹ Van Alstine, M., *The International Sale Contract including the United Nations Convention on the International Sale of Goods* (The Maryland Institute for the Continuing Professional Education of Lawyers, 2005).

²⁰ Koneru, P., ‘The International Interpretation of the UN Convention on the Contracts for the International Sale of Goods: An Approach based on General Principles’ (1997) 6 Minn. J. Global Trade 105. Available at: <http://cisgw3.law.pace.edu/cisg/biblio/koneru.html>.

²¹ Schlechtriem, P., note no: 8 above, at: 94.

effective”.²² Moreover, it was presumed that the wording of the Convention’s provisions reflected the final and most reliable expression of the draftsmen’s intentions.

In contrast, the wording of Article 7 is not clear enough to be interpreted easily,²³ despite the fact that it is meant to be used for interpreting the Convention’s provisions.²⁴ Therefore, the ambiguity and vagueness of how to interpret Article 7 might lead to similar ambiguity in interpreting the CISG’s other provisions if those provisions have no clear meaning. Komarov remarks, “From the outset it was argued that the application of Article 7(1) could be unpredictable because it was inevitably vague and, as a consequence, would have been open to surprising results.”²⁵ As such, a situation is created whereby; the vague concept of good faith, when applied to other CISG provisions, can be viewed as injecting this ambiguity into other areas.

However, not all ambiguity in the CISG can be attributed to Article 7. Commentators on the clarity of the CISG remark that other ambiguities in the treaty exist beyond the scope of Article 7. For example, it is noted by Gillette and Scott “neither the term “sale” nor the term “goods” is defined within the CISG, except for exclusions of particular transactions, and the definition of “place of business” leaves significant ambiguity about what law governs where a party has multiple places of business.”²⁶

²² See Audit, B., ‘The Vienna Sales Convention and the Lex Mercatoria’, in Carbonneau, T. (ed.), *Lex Mercatoria and Arbitration* (Juris Publishing, 1998), at 179. Available at: <http://cisgw3.law.pace.edu/cisg/biblio/audit.html>.

²³ Rosset, A., ‘Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods’ (1984) 45 Ohio St. L.J. 265, at 281.

²⁴ “The rules were meant to be simple, accessible, and effective.” See Audit, B., note 27 above, at 179.

²⁵ Komarov, A., ‘Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)’ (2005) 25 J.L. & Com. 75, at 76. See also, Eörsi, G., ‘General Provisions’, in Galston & Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Matthew Bender, 1984), at 2–8. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/eorsi1.html>

²⁶ It should be mentioned that the ambiguity of some CISG provisions did not preclude scholars like Magnus from believing that the CISG “is well on the way to becoming the Magna Carta of international trade”. See: Karollus, M., ‘Judicial Interpretation and Application of the CISG in Germany 1988–1994’, *Cornell Review of the Convention on Contracts for the International Sale of Goods* (1995), at 68.

Article 7 has two functions: firstly, to interpret the Convention as seen in Article 7(1); secondly, to set out the gap-filling methodology whenever a judge is faced with a legal matter that is not addressed by the Convention's provisions.²⁷

Article 7 CISG states:

(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.²⁸

With regard to interpreting the CISG, Article 7(1) sets three standards that the interpreter must consider when interpreting the Convention. These are: international character, uniformity, and observance of good faith. A brief explanation of the first two standards is given in the following section, which is the key theme of this paper.

2.1 International Character

Usually, in interpreting domestic legislation, the courts rely on the legal techniques and principles that are derived from the legal aspects within their jurisdiction and that are

Available at: <http://www.cisg.law.pace.edu/cisg/text/karollus1.html>; Zeller, B., 'The CISG: Getting Off the Fence' (2000) 74(9) L.I.J. 73. Available at: <http://cisgw3.law.pace.edu/cisg/biblio/zeller4-07.html>. Also, Professor V. Pothress wrote a nice article about the literal meaning that is worth looking at. Available at: http://the-highway.com/literal1_Poythress.html. Zeller, B. (2001). Good Faith--The Scarlet Pimpernel of the CISG. *Int'l. Trade & Bus. L. Ann.*, 6, 227. at.452.

²⁷ Hillman, R., 'Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity' (1995) Cornell Review of the Convention on Contracts for the International Sale of Goods 21. Available at: http://www.cisg.law.pace.edu/cisg/biblio/hillman1.html#*.

²⁸ The principle of good faith is expressed only in Article 7; however, the Secretary General pointed out that the principle is manifest in other provisions in the CISG. See the Text of the Secretariat Commentary on Article 6 of the 1978 Draft. Available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html>. See: analysis of the Secretary General comment about good faith at page:103 in this thesis, and good faith as a gap filler at: 171.

well recognised, defined and understood by them.²⁹ Consequently, the courts will interpret domestic legislation clearly and accurately based on the obvious rules, which they already understand. In contrast, such techniques and legal principles cannot be used to interpret International Conventions such as the CISG because people from different legal backgrounds are responsible for drafting their provisions.³⁰ Unlike domestic legislation, the CISG does not have a literal legal foundation that the courts are aware of and can use to create a clear and definite interpretation of its provisions.³¹ In addition, the CISG's history shows that most of its provisions were formed from compromise agreements between the various legal systems that participated in the drafting process.³² In other words, the terms used in forming the provisions are not derived from one particular legal system and might have a different usage from one legal system to another.³³

The CISG's drafters wanted to avoid such interpretative problems by stating that the interpreter should take into account the international character of the Convention, which means two things. Firstly, the interpreter should not read the Convention in the context of legal principles or methods used by a domestic legal system.³⁴ The reason to avoid the use of domestic jurisdiction interpretation techniques is not just because they are limited to legal matters in sale contracts in a specific domestic context, but also because such methods are at variance with the international nature of the CISG.³⁵ In fact, the CISG, by prohibiting the use of domestic interpretation techniques, known as

²⁹ Schlechtriem, P., note no: 8 above, at 96.

³⁰ See: Felemegas, J., note no: 18 above.

³¹ *ibid.*

³² *ibid.*

³³ Zeller, B., 'Four-Corners: The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods' (2003). Available at: <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>.

³⁴ See: Felemegas, J., note no: 18 above.

³⁵ *Ibid.*

“homeward-trend” techniques,³⁶ blocked the adoption of a rigid interpretation methodology as used by the common law system, which, depending on the wording, tends to interpret legislation narrowly.³⁷

The interpreter of the CISG should bear in mind that “[t]he Convention is a piece of legislation which has been prepared and agreed upon at an international level. It remains an autonomous body of law even after its formal incorporation into the different national legal systems.”³⁸ Consequently, the interpreter must not interpret the CISG’s terms that are similar to the terms in domestic law based on his understanding of these terms in that context.³⁹

The interpreter’s familiarity with the domestic law meaning of some legal terms included in the CISG might easily influence his interpretation of these terms in the CISG,⁴⁰ which, in fact, should be interpreted according to “the context of the Convention itself.”⁴¹

However, given the international origin of the CISG and the fact that its drafters sought out to “to find autonomous, original terms without using a single system of laws or legal terminology makes an autonomous method of interpretation necessary.” One can assume from this motivation for international autonomy that the role of domestic law in the interpretation will certainly be limited. However, interpretation of CISG provisions

³⁶ Diedrich, F., ‘Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG’ (1996) 8 Pace Int’l. L. Rev. 303, at 304. Available at: <http://cisgw3.law.pace.edu/cisg/biblio/Diedrich.html>. Ferrari, F., ‘Homeward Trend and Lex Forism despite Uniform Sales Law’ (2009) 13(1) V.J. 15. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/ferrari17.html>.

³⁷ Felemegas, J., note no: 18 above; Honnold, J., note no: 2 above, at 90.

³⁸ Bianca, C. & Bonell, M., *Commentary on the International Sales Law* (Giuffrè, 1987), at 73. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/bonell-bb7.html>.

³⁹ Zeller, B., note no: 32 above.

⁴⁰ Ibid. It should be mentioned that several courts around the world have stressed that any interpretation must take into account the international character of the CISG. See Ferrari, F., ‘Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With’ (2001) 20 J.L. & Com. 225, at para 2.

⁴¹ Bianca, C. & Bonell, M., note no: 38 above.

through the use of domestic law is not viewed as something that is desired by the intent of the drafters; however it is not forbidden *per se*. In fact, one can point to the gap filling function of Article 7(2)

Article 7(2) allows for “gap-filling” in matters of interpretation.”⁴² Article 7(2) fulfills this function by firstly stating that the questions that are governed by the Convention but are not expressly settled by it can be settled by using the general principles on which the CISG is based. There is no need for the interpreters to resort to the domestic law principles if the general principles of the CISG are capable of settling the question at hand.⁴³ The important point to remember is that only those questions and matters are to be interpreted using Article 7 (2) that are not expressly settled by the convention but are the subject-matter of it. Article 7 (2) also provides a backup plan. It says that if the general principles of the CISG are incapable of sorting out the issue, then the domestic law principles can be used to settle the relevant questions. It simply states that such questions must be settled in conformity with the general principles on which the convention is based.⁴⁴

2.2 The Need to Promote Uniformity of Application

The ultimate goal of the CISG - in fact the reason for its existence - is to encourage countries around the world to adopt uniform rules to govern contracts for the international sale of goods.⁴⁵ Consequently, promoting all member states to apply the

⁴² Lookofsky, J. Walking the Article 7 (2) Tightrope Between CISG and Domestic Law. (2005) JL & Com., 25, at 87.

⁴³ Rosenberg, M. The Vienna Convention: Uniformity in Interpretation for Gap-filling - An Analysis and Application, 20 Australian Business Law Review (1992) 442-460.

⁴⁴ Ibid.

⁴⁵ See: Felemegas, J., note no: 23 above; Bazinas, S., ‘Uniformity in the Interpretation and the Application of the CISG: The Role of CLOUT and the Digest’ (research presented in *Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods*, 2005). Available at: <http://cisgw3.law.pace.edu/cisg/biblio/bazinas.html>.

Convention's uniformity⁴⁶ is a logical first requirement of interpreting the Convention according to its international character.⁴⁷

It might be true that the Convention should be interpreted autonomously by the courts in all member states. However, this could mean that different member states would have different autonomous interpretations, which would not result in the Convention being applied uniformly.⁴⁸ Therefore, since there is no supreme court to make a final decision about divergent interpretations, uniform application of the CISG can only be achieved if the courts take into consideration the other courts' decisions in respect of similar issues.⁴⁹

Some scholars believe that the

[j]udicial decisions and arbitral awards on the 1980 Vienna Sales Convention are commencing to emerge in volume. Praxis of different States creates the body of international case law which should have a persuasive value if not a force of binding precedent."⁵⁰

Incidentally, UNCITRAL has helped to ease the task of judges, arbitrators, lawyers, parties to commercial transactions and other persons interested in promoting a uniform interpretation and application of the Convention, by establishing a service to collect and disseminate information from all member states on court decisions and arbitral awards relating to Conventions and Model Laws that have emanated from its work.⁵¹

⁴⁶ The definition of uniformity is not the concern of this paper; however, a scholar of the CISG, Andersen, defines uniformity as "specific legal rules or instruments of some form [not necessarily defined as law in all jurisdictions] deliberately designed to be voluntarily shared across boundaries of different jurisdictions which, when applied, result in varying degrees of similar effect on a legal phenomenon". See: Andersen, C., note no: 14 above, at 58.

⁴⁷ Bianca, C. & Bonell, M., note no: 38 above,

⁴⁸ Ferrari, F., 'Uniform Interpretation of the 1980 Uniform Sales Law' (1994) 24 Ga. J. Int'l & Comp. L. 183, at para 7, available at <http://cisgw3.law.pace.edu/cisg/biblio/franco.html>.

⁴⁹ Schlechtriem, P., note no: 8 above, at 97.

⁵⁰ Povrzenic, N., 'Interpretation and Gap-Filling under the United Nations Convention on Contracts for the International Sale of Goods', at para 3/a. Available at: <http://cisgw3.law.pace.edu/cisg/biblio/gap-fill.html>.

⁵¹ Komarov, A., note no: 26 above, at 79.

Therefore, as described in this thesis, the role of good faith in the CISG should be compatible with the requirement of promoting the uniform application of the CISG. I believe the role of good faith needs to be identified through studying case law, which in itself will identify the uniform application of good faith that has been accepted by member states' courts.

2.3 Good Faith

2.3.1 The Role of Good Faith according to the Textual Interpretation of Article 7

According to Michel De Montalgne, “[o]ur lawsuits are born only from the debate over the interpretation of the laws”.⁵² Using the textual interpretation of Article 7 of the CISG to identify the role of good faith has a recourse from Article 31(1) of the Vienna Convention on the Law of Treaties 1969 (VCLT), which states that “a treaty shall be interpreted [...] 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”.

Some might argue that the VCLT governs the international agreements concluded between states. Consequently, the VCLT rules must be applied only on agreements that organise aspects derived from international common law, whilst the CISG is directed to individuals to organise aspects derived from international private law. However, the CISG could be described as a mixed-nature Convention because it incorporates two types of rule: the first is directed at the parties to a commercial contract⁵³ while the second is directed at the Convention's member states.⁵⁴ Therefore, the VCLT rules of

⁵² De Montalgne, M., *Les Essais 12* (Editions Slatkine, 1987), quoted in Shelton, D., ‘Reconcilable Differences? The Interpretation of Multilingual Treaties’ (1997) 20 *Hastings Int'l & Comp. L. Rev.* 611, at 618, available at <http://cisgw3.law.pace.edu/cisg/biblio/shelton.html#40>.

⁵³ These rules concern the obligations of the buyer and the seller, non-conformities, delivery, notices, remedies, etc. See Articles 25–88.

⁵⁴ Rules of ratification, entry into force and the reservations. See Articles 89–101.

interpretation apply to the CISG's provisions that are directed at member states, which include Article 7.⁵⁵ Honnold relied on the mutual obligations that Article 7 imposed on the member states in deciding how to interpret the Convention. He concluded that the VCLT was linked implicitly to the CISG:

Article 7 of the Sales Convention embodies mutual obligations of the Contracting States as to how their tribunals will construe the Convention. Hence the Law of Treaties would be pertinent to a question concerning the construction of Article 7, but the Law of Treaties would not govern the interpretation of the articles dealing with the obligations of the parties to the sales contract, for these articles are to be construed according to the principles of Article 7.⁵⁶

Consequently, textual interpretation is used to identify the role assigned by Article 7 to the concept of good faith linked with the other terms that form that Article. The major concern about using the textual interpretation of Article 7 is that the CISG has been produced in six official languages (Arabic, Chinese, English, French, Russian and Spanish), which are treated equally and with no language prevailing over another.⁵⁷ The question that may be raised here is: Does the language used for the terms of Article 7 need to be similar in all these languages?

The textual uniformity of Article 7 is not meant to be based on the similarities between the terms used to form Article 7 in its official language, but, more importantly, in gaining similar results by applying the different texts of all six of the CISG's official languages. The results should reveal similar meanings of the role of good faith in

⁵⁵ Hussam, A., *The Interpretation of United Nations Convention for Contracts on International Sale of Goods* (Arabic Revival Publication, 2001), at 16–18. Available at <http://cisgw3.law.pace.edu/cisgarabic/middleeast/interpretation.htm> (accessed 12/09/07); Magnus, U., 'Tracing the Methodology in the CISG: Dogmatic Foundations', in Janssen, A. & Meyer, O., *CISG Methodology* (Sellier European Law Publishers, 2009), at 46. In addition Magnus referred to these works in the German language: Basedow, 'Das Konventionsprivatrecht und das Völkerrecht der Staatsverträge', in Leible/Ruffert (eds), *Volkerrecht und IPR* (Munich, 2006), at 153, 168 et seq; Ferrari, F., in Schlechtriem/Schwenzer (eds), *Kommentar zum Einheitlichen UN-Kaufrecht-CISG* (4th edn, Munich, 2004), at Art. 7, no. 33; Magnus, U., *Staudinger Kommentar zum Bürgerlichen Gesetzbuch mit Einföhrungsgesetz und Nebengesetzen. Wiener UN-Kaufrecht(CISG)* (Berlin, 2005), at Art. 7, no. 16.

⁵⁶ Honnold, J., note no:2 above, at: 112.

⁵⁷ Diedrich, F., note no: 36 above.

Article 7.⁵⁸ Nevertheless, it remains important to examine textual interpretation, because achieving a uniform result will rely heavily on achieving a high standard of similarity between different texts of Article 7, thereby giving a similar impression of what the role of good faith should be.

The English version of Article 7 could be read literally from two different angles. Each reading gives a different interpretation to the application of good faith in the CISG. The first, narrower, reading⁵⁹ suggests that the Article should be read as follows: “In the interpretation of this Convention, regard is to be had to [...] good faith with emphasis on [this Convention].” According to this reading, the principle of good faith is merely a tool for the interpretation of the Convention’s provisions that can be relied on by the courts and tribunals to “neutralise the danger of reaching inequitable results”.⁶⁰

The concern about adopting this interpretation of good faith in Article 7 is that it will create more complex situations in identifying a uniform definition for the concept of good faith, which the courts and tribunals could use to interpret the Convention’s provisions, particularly since the definition of good faith must not be derived from the domestic law.⁶¹ The complexity of adopting a narrow interpretation of the role of good faith in Article 7 will further manifest itself further if we consider the fact that the CISG already applies, with different legal backgrounds, in three-quarters of the countries in the world; and we acknowledge the vast gap between their courts’ understanding of the

⁵⁸ Andersen, C., note no: 14 above, at 59. This point enhances the requirement of case law study, which this thesis is going to examine in the fourth chapter when trying to identify the judicial application of good faith in Article 7.

⁵⁹ This reading has been adopted by a number of academics such as Farnsworth and Winship. See Farnsworth, E., ‘Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws’ (1995) 3 *Tul. J. Int’l & Comp. L.* 47, at 56. Farnsworth stated: “Article 7.1 falls short of imposing a duty of good faith on the parties”, at 56. See also Winship, P., ‘Commentary on Professor Kastely’s Rhetorical Analysis’ (1988) 8 *Northwestern J. Int’l. L. & Bus.* 623, at 631 (arguing that the drafting history of Article. 7 clearly supports a limited reading of the role of good faith).

⁶⁰ Felemegas, J., note no: 18 above.

⁶¹ *Ibid.*

concept of good faith.⁶² The other problem of this interpretation is that it ignores certain terms such as ‘promote’ and ‘observance’ in Article 7, which might give different interpretations if these terms are considered and read as one sentence.⁶³

The second interpretation of Article 7 gives wider scope to the application of good faith, where the principle of good faith should be read as follows: “In the interpretation of this Convention, regard is to be paid to [...] the need to promote [...] the observance of good faith in international trade”, with the emphasis on “to promote [...] the observance of good faith in international trade”.⁶⁴ This interpretation, based on the English use of the verb “promote”, is said to cover the principles of both uniformity and observance in international trade.⁶⁵

The meaning of terms like “promote” and “observance” may not be easily understood. Therefore, it is important to find the simplest definitions of these terms that could be interchangeable with the original terms used by the draftsmen of Article 7. In the dictionary,⁶⁶ the term “promote” means “to encourage” or “to raise”, while the verb “to observe” means “to obey”, and the noun “observance” refers to “someone who obeys”. Based on the dictionary meanings, we can reconstruct Article 7 as follows: “In the

⁶² Kilian, M., ‘CISG and the Problem with Common Law Jurisdictions’ (2001) 10 J. Transnat’l. L. & Pol’y 217, at 229. Available at: <http://www.law.fsu.edu/journals/transnational/vol1102/kilian.pdf>.

⁶³ Powers, P., ‘Defining the Indefinable: Good Faith and the United Nations Convention on the Contracts for International Sales of Goods’ (1999) 18 J.L. & Com. 333, at 344.

⁶⁴ For the supporters of wide interpretation, see: Kastely, A., note no: 3 above; Povrzenic, N., note no: 50 above; Magnus, U., ‘Remarks on Good Faith’ (2000). Available at:

http://www.cisg.law.pace.edu/cisg/principles/uni7.html#um*;

Zaccaria, E., ‘The Dilemma of Good Faith in International Commercial Trade’ (2004) Macquarie J. Bus. L. 5, at 2/B. Available at: <http://www.austlii.edu.au/au/journals/MqBLJ/2004/5.html#fn36>;

Bianca, C. & Bonell, M., note no: 38 above, at 85: Professor Bonell states that good faith “may even impose on the parties additional obligations of a positive character”); see also Honnold, J., note no: 7 above, at 94; Eörsi, G., note no: 26 above. (Eörsi hoped that “the good faith clause may play an active role in spite of its location in the Convention”).

⁶⁵ Salama, S., ‘Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, An Inter-American Application’ (2006) 28 U. Miami Inter-Am. L. Rev 225, at 235.

⁶⁶ See the Cambridge Online Dictionary at <http://dictionary.cambridge.org/>.

interpretation of this Convention, regard is to be paid to [...] the need to encourage [...] obedience of good faith in international trade.”

As can be seen from the revised wording of Article 7, the courts and tribunals are required to interpret the Convention such that good faith would be encouraged and obeyed in international trade. Similar understanding of Article 7 is shared by Flechtner who argued: “Article 7 itself recognizes that complete uniformity in interpreting the Convention is an aspiration toward which decision makers are to work rather than an absolute that can be achieved in every case. Article 7 seems to contemplate a process – leading eventually toward a universally recognized interpretation of the concept of good faith. However, this process does not sacrifice other (and perhaps competing) considerations. Thus, Article 7 not only advocates for having ‘regard’ for ‘the need to promote uniformity’ in the application of CISG, but also the need to promote ‘the observance of good faith’.”⁶⁷

Consequently, obedience of good faith in international trade cannot be achieved without requiring the contracted parties to act in good faith. In my opinion promoting good faith is not exclusively linked to uniformity in applying the Convention but also to the observance of good faith in international trade. In addition, the textual interpretation of Article 7 might suggest that good faith is an interpretive tool which could be used by judges and arbitrators to interpret the provisions of the CISG. However, using the same method of interpretation does not exclude the usage of good faith from being a general duty on parties with the aim of promoting good faith in international trade. Zeller explains that:

There is no controversy in stating that article 7(1) urges the judiciary and the

⁶⁷ Flechtner, H., ‘Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations’ (1995) 15 J.L. & Com. 127, at 136.

parties to the contract to observe good faith in international trade. The purpose of article 7(1) is to ensure that the Convention is interpreted in good faith. It therefore refers to the state of mind of those interpreting the Convention. The natural or normal state of mind when interpreting the Convention is with good faith. Article 8 of the CISG assists in this regard by prescribing that the subjective as well as objective standard is to be taken into consideration.⁶⁸

To summarise, textual interpretation of Article 7 revealed the possibility of extending the role of good faith to a general duty of the Convention. Consequently, recourse to the CISG's legislative history and the circumstances that led to the draftsmen's conclusions is crucial in understanding the role of good faith in the Convention.⁶⁹ Felemegas shared similar opinion that: 'the legislative history of the CISG is of great importance; not merely as the starting point of reference to the law it promotes, but also as a crucial tool of understanding the meaning of that law'.⁷⁰ In addition, Honnold explained that 'when important and difficult issues of interpretation are at stake, diligent counsel and courts will need to consult the CISG's legislative history. In some cases this can be decisive'.⁷¹

⁶⁸ Zeller, B., 'Good Faith - Is it a Contractual Obligation?' (2003) 15(2) B. L. Rev. 215, at; 222

⁶⁹ Lookofsky, J., 'The 1980 United Nation Convention on Contracts for the International Sale of Goods', in Herbots, J. & Blanpain, R., *International Encyclopaedia of Laws: Contracts* (Kluwer Law & Taxation, 2000).

⁷⁰ Felemegas, J., 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation'(2000) Kluwer Law International.115. available at: <http://www.cisg.law.pace.edu/cisg/biblio/felemegas.html>

⁷¹ Honnold, J., 'Uniform Laws for International Trade', 1995 Int'l Trade & Bus. L. J.1. at ; 4.

2.3.2 The Role of Good Faith according to the Preparatory Work of the Convention

2.3.2.1 The Recourse to the Travaux Préparatoires

The CISG's *Travaux Préparatoires* cannot be overlooked when attempting to clarify the ambiguity and vagueness of the role of good faith in the Convention. This is because it provides an insight into the drafters' intended and agreed role of the concept.⁷² The 1969 Vienna Convention (VCLT) refers to the Convention's legislative history as a supplementary means of interpreting it.⁷³ However, two main reservations should be considered before using the preparatory work to explore the intended meaning of Article 7.

The first reservation is the limited ability of the language to reflect the draftsmen's intention for the Convention.⁷⁴ Various legal academics share the view that,

[The] materials, even when accessible...have a habit of not providing the expected insight into the minds of those drafting conventions... Another reason why preparatory materials have so far had little influence on the interpretation of

⁷² Research on the interpretation of the CISG suggests that a sound methodology for understanding how the "good faith" provisions of the CISG are being interpreted and should be interpreted should take into account text of the Convention, the travaux préparatoires and case law. See; Jennings, R. & Watts, A., *Oppenheim's International Law* (9th edn, Longman, 1992), at 545. Lookofsky, J. (2005). Walking the Article 7 (2) Tightrope Between CISG and Domestic Law. *JL & Com.*, 25, 87. Komarov, A., note no: 26 above

⁷³ Article 32 VCLT reads: "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 obscure; or (b) leads to a result which is manifestly absurd or unreasonable." In addition, it was mentioned earlier that Honnold relied on the mutual obligations embodied in the Convention to conclude that VCLT could be applied to the CISG. In contrast, Zeller is objecting to Honnold's idea in this regard. See Zeller, B., 'The UN Convention on Contracts for the International Sale of Goods (CISG): A Leap Forward towards Unified International Sales Laws' (2000) 12 *Pace Int'l L. Rev.* 79. Available at: <http://cisgw3.law.pace.edu/cisg/biblio/zeller3.html>.

⁷⁴ It makes no difference whether the scholar is native to the language in which the Convention history documents are written. See: Posner, R., 'Statutory Interpretation: In the Classroom and in the Courtroom' (1983) 50 *U. Chi. L. Rev.* 800; Radin, M., 'Statutory Interpretation' (1930) 43 *Harv. L. Rev.* 863.

convention law is that their contents, just as those of statutes, can be understood in different ways by different courts.⁷⁵

Consequently, even scholars with great linguistic abilities found it difficult to reach clear conclusions from the material in the legislative history, which could be vague and complex. The notion of “intent” remains ambiguous and is not revealed fully by the language used.⁷⁶ Radin generalised: “[That] the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition.”⁷⁷

The second reservation that needs to be taken into account is the influence of powerful groups and the conflicts of interest that arose in drafting the Convention. This is not only because the draftsmen’s intentions, which the researcher will be looking for in the documents, were not their real intentions at the time of drafting the Convention,⁷⁸ but also because “many of the adopted solutions will not reflect the individual preferences delegates”.⁷⁹

An example of the influence of the interest groups in forming the legislation is the influence of the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL). These groups are private law making organisations in the USA and their members are judges, lawyers and academics.

⁷⁵ Bianca, C. & Bonell, M., note no: 38 above. A similar idea has been shared by Professor Zeller, in that words cannot be precise and there are always twisted meanings that can be derived from any literature term; see: Zeller, B., note no: 37 above.

⁷⁶ Judge Easterbrook expressed his opinion about searching for the intention of the drafters to identify the meaning of the legislation by saying that “[i]ntent is elusive for a natural person, fictive for a collective body” and, in another place, that “intent is empty”. See Easterbrook, F., ‘Statutes’ Domains’ (1983) 50 U. Chi. L. Rev. 533, at 547–8; also Easterbrook, F., ‘Text, History, and Structure in Statutory Interpretation’ (1994) 17 Harv. J.L. & Pub. Pol’y 61, at 68.

⁷⁷ Radin, M., note no: 71, at 870–71.

⁷⁸ Judge Breyer contended: “[L]egislation simply reflects the conflicting interactions of interest groups; the resulting law sometimes reflects their private, selfish interests, and sometimes serves no purpose at all.” See Breyer, S., ‘The Uses of Legislative History in Interpreting Statutes’ (1992) 65 S. Cal. L. Rev. 845, at 864.

⁷⁹ Bonell, M., ‘The CISG, European Contract Law and the Development of a World Contract Law’ (2008) 56 Am. J. Comp. L.1, at 2; Rosett, A., note 21 above, at 282.

These organisations produce law reviews, restatements and other contributions which aim at promoting better understanding of the existing law which should lead to better application of that law.⁸⁰ However, the product of these organisations is not as objective as it seems due to their structure and the vague and imprecise process of their work. In other words, the academic work of ALI and NCCUSL which is promoted among the legal society could be bias and reflect the interest of powerful and influential groups.⁸¹

Accordingly, the *Travaux Préparatoires* of the CISG represents one methodology but are not exclusive to disclosing the meaning of good faith in the CISG.⁸² Even when the draftsmen's intentions are ascertained it is not necessarily a decisive argument for the matter in question.⁸³ The CISG is meant to be permanent legislation that can be applied to international sale of goods transactions for a long period of time. Therefore, achieving the continued application of the Convention requires acceptance of the fact that the Convention has a "life of its own".⁸⁴ Thus, the Convention's provisions should be interpreted in a flexible way in order to adopt changes in commercial life without continuously having to change the Convention's text. Professor David noted that,

[L]aws have a life of their own, and their meaning can change with time. However, different attitudes can be adopted for uniform laws. Here (in case of international conventions) the *travaux préparatoires* have a utility they lack in the case of ordinary laws: here, they are a means of ensuring uniform interpretation of the law in all countries.⁸⁵

⁸⁰ Schwartz, A. & Scott, A., 'The Political Economy of Private Legislatures', (1995) 143 U. Pa. L. Rev. 595, at 596.

⁸¹ Ibid, at 650.

⁸² Bianca, C. & Bonell, M., note no: 38 above, at 90.

⁸³ David, R., *International Encyclopedia of Comparative Law: The Legal Systems of the World, Their Comparison and Unification* (Tübingen Mohr, 1971), at 105.

⁸⁴ Bianca, C. & Bonell, M., note no: 38 above, at: 90.

⁸⁵ David, R., note no: 80 above, at: 105.

2.3.2.2 The Legislative History of Article 7 CISG 86

Between the establishment of the Drafting Committee in 1969 by the United Nations Commission on International Trade and the drafts produced in 1977 by the Working Group on the International Sale of Goods, there was no allusion to the concept of good faith.⁸⁷ There were just two standards that the Convention asked to be considered when interpreting its provisions: the international character of the Convention and the need to promote uniformity in international trade. Article 13 of the Geneva Draft 1976 reads: “In the interpretation and the application of the provisions of this Convention regard is to be had to its international character and the need to promote uniformity.”

In fact, the principles of good faith were not added to the draft Convention until 1978, when it was suggested that it should include the need to promote uniformity, the international character of the Convention and, as a third criterion, the observance of good faith. The draft Article 6 (now CISG Article 7) reads: “In the interpretation and application of the provisions 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.”⁸⁸ The progress of incorporating good faith into the CISG underwent a number of stages and drafting sessions before Article 7 took its final shape. Examining the Working Group process would give an insight into what could be the real role intended by the drafters for good faith in the CISG, and the following section follows the process of incorporating good faith into the CISG in detail.

⁸⁶ This topic is relied heavily on in Honnold, J., *Documentary History of the Uniform Law for International Sales* (Kluwer Law & Taxation, 1989).

⁸⁷ The forerunners of the recent Article 7 were Article 13 in the Geneva Draft 1976 and Article 13 in the Vienna Draft 1977. Although Eörsi mentioned in his writing that good faith was raised by the Spanish delegate in 1972, it is obvious that the principle only started to be considered seriously in 1978. See Eörsi, G., note no: 64, Ch. 2, at 2.

⁸⁸ Article 6 of the New York Draft.

2.3.2.3 The Development by the Working Group⁸⁹

At the ninth session of UNCITRAL's Working Group on International Sales, 1977 (drafters of the CISG), the Hungarian delegate submitted a proposal to incorporate good faith and fair dealing into the future Convention. This proposal stated: "In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith."⁹⁰ [Conduct violating these principles is devoid of legal protection.]. The Hungarian proposal might be prompted by the Hungarian legal system, which good faith is a part of. The Hungarian Civil Code (1959) reads: "In the course of exercising civil rights and fulfilling obligations, all parties shall act in the manner required by good faith and fairness, and they shall be obliged to cooperate with one another."⁹¹

The court ruled that in this case the buyer should pay the price of the product and the corresponding interest. The position of the court was clear that good faith is not limited to interpretation of the CISG but also a standard to be observed by the parties in performance⁹².

A number of the delegates supported the idea of incorporating the principle of good faith into the Convention for several reasons. Firstly, the concept of good faith has been incorporated into the laws of several nations. Secondly, it would be a good idea to

⁸⁹ The Working Group was established by the United Nations Commission on International Trade Law, which was composed from a number of United Nations members. Unlike the Commission that would revise the draft, it was composed from all member states.

⁹⁰ Honnold, J., note no: 88 above, at: 298. The Hungarian proposal might be prompted by the Hungarian legal system, which good faith is a part of. The Hungarian Civil Code (1959) refers to good faith in Section 4(1), which reads: "In the course of exercising civil rights and fulfilling obligations, all parties shall act in the manner required by good faith and fairness, and they shall be obliged to cooperate with one another."

⁹¹ See: Section 4(1) of the Hungarian Civil Law.

⁹² See Arbitral Award, Hungarian Chamber of Commerce and Industry, Court of Arbitration, Hungry, 17thth November 1995, in <http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=FullText> Accessed 10th-10-2014.

promote such a principle internationally by incorporating it into the Convention.⁹³ In addition, “the extension of such a provision into an instrument regulating international trade would be a valuable extension of a norm of conduct which is widely recognized as necessary in international trade”.⁹⁴

Furthermore, it was observed that the application of good faith in some nations’ laws promoted and organised commercial conduct positively. The delegates were willing to promote such a high standard of commercial conduct in international commercial conduct by using the principle in interpreting the Convention.⁹⁵

On the other hand, some delegates opposed the inclusion of the principle of good faith in the Convention. They argued that, although many national systems recognised the concept, no uniform interpretation had been agreed by the international commercial community, which might lead to legal conflict in cases arising from the concept of good faith.⁹⁶ Besides that, the concept would not have any effect until the court interpreted it, which would take a long time.⁹⁷ Another issue about the submitted proposal was its ambiguity and that it would be difficult to specify the issues that might be covered by the principle. At the end of the session the Working Group approved the incorporation of good faith in the Article, stating that: “In the course of the formation of the contract the parties must observe the principle of fair dealing and act in good faith.”⁹⁸

⁹³ Honnold, J., note no: 83 above, at: 298

⁹⁴ Bachechi, C. & Klein, J., ‘Pre-contractual Liability and the Duty of Good Faith Negotiation in International Transactions’ (1994) 17 *Hous. J. Int’l. L.*, at 20.

⁹⁵ Report of the Working Group on the International Sale of Goods on the Work of Its Ninth Session, para. 70, U.N. Doc. A/CN.1/42 (1977). Honnold, J., note no:83 above, at 298. Winship, P., ‘Commentary on Professor Kastely’s Rhetorical Analysis’ (1988) 8 *Northwestern J. Int’l. L. & Bus.* 623. Koneru, P., ‘The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach based on General Principles’ (1997) 6 *Minn. J. Global Trade* 105, at 139.

⁹⁶ Honnold, J., note no:83 above, at 298.

⁹⁷ *Ibid.*, at 299, para74.

⁹⁸ *Ibid.*, para 87.

At the tenth session some suggestions were put forward to find a solution that would create a consensus between the opposing parties regarding the concept of good faith and fair dealing. The first proposal was to add a provision before the existing one stating that “in interpretation of the contract regard is to be had to the purpose of the contract and the interdependence of its various provisions”. It was considered that incorporating the concept of good faith and fair dealing would make the court aware of the high standard of behaviour required in international commercial conduct when examining the parties’ performance of the disputed contract. Despite this, the suggestion failed to be adopted due to lack of sufficient support and failed to be adopted.⁹⁹

In 1978 the Working Group decided to merge the Formation of Contracts for the International Sale of Goods into the CISG’s draft Convention on the International Sale of Goods.¹⁰⁰ The result of merging both Conventions created the first accepted inclusion of good faith in the CISG. Article 5 of the Draft Convention on the Formation of Contracts for International Sale of Goods stated that “in the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith”.

The reference to good faith provoked heated discussion among the representatives, who could not reach an agreement about the inclusion of fair dealing and good faith in the intended Convention.¹⁰¹

There were several arguments against including good faith in the Article. It was pointed out that the principle of good faith was based on natural morals and that its application would therefore be difficult to determine, particularly since the fact that the courts were going to rely “upon their own legal and social understanding of the terms would result

⁹⁹ Ibid., at 327, para 137.

¹⁰⁰ Ibid., at 358.

¹⁰¹ Ibid., at 369, paras 42–53.

in non uniform interpretation of the provision”.¹⁰² In addition, it was said that developing case law had an international nature, which would pose problems as the national courts would be influenced by their national legal system, which would contradict the international nature of the Convention.

Moreover, it was pointed out that not specifying consequences for the violation of the principle would allow the courts to determine the consequences according to their national laws, which was against achieving uniformity.¹⁰³ Furthermore, it was unnecessary to incorporate good faith into the Convention since the principle was dealt with under the national legal systems.¹⁰⁴

In contrast, the supporters of incorporating good faith into the Article argued that it would only cause minor harm and that there would be great benefit from adding the principle to an international Convention, particularly since the principle had already been incorporated into several legal systems and had helped to regulate commercial transactions. It was said, also, that the principle was recognised in other international Conventions. In addition, “the extension of such a provision into an instrument regulating international trade would be a valuable extension of a norm of conduct which is widely recognized as necessary in international trade”.¹⁰⁵

The Italian delegates considered that including the principle would promote fair international trade between developing and industrial countries, particularly when “the discrepancy between the bargaining powers of the two parties corresponds to that

¹⁰² Novoa, R., ‘Culpa in Contrahendo: A Comparative Law Study: Chilean Law and the United Nations Convention on Contracts for the International Sale of Goods (CISG)’ (2005) 22 *Ariz. J. Int’l & Comp. L.* 583, at 609.

¹⁰³ Honnold, J., note no: 83 above, at 369, para 44.

¹⁰⁴ *Ibid.*, at 369.

¹⁰⁵ Bachechi, C. & Klein, J., note no: 91 above, at: 20.

normally to be found in a consumer transaction stipulated at national level”.¹⁰⁶ Also, it was pointed out that the principle would turn the attention of the parties and the courts to the high standard of behaviour required in international trade. As a result of the divergent ideas, the Commission established a Working Group to bridge the different opinions and formulate a compromise solution that reflected all the views about the issue.¹⁰⁷ With regard to Article 13 of the Draft CISG, the Working Group stated that the following text should replace Article 5: “In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and to observe good faith in international trade.”¹⁰⁸

With regard to the interpretation of good faith in Article 5 (which was very similar to the present text of Article 7 of the CISG), the Working Group explained that the observance of good faith in international trade was intended to direct the attention of the courts and tribunals to the fact that the behaviour of the contracted parties must be interpreted taking account of the principle of good faith.¹⁰⁹ In other words, the contracting parties must conduct their contract in good faith, which the courts and tribunals would take into consideration in deciding any case or dispute. Consequently, in 1978, the Commission adopted Article 13 (from the previous draft of the CISG) before merging both Conventions and renumbering these collectively as Article 6.

¹⁰⁶ Quoted in Felemegas, J., note no: 18 above.

¹⁰⁷ Honnold, J., note no: 83 above, at 370, para 54.

¹⁰⁸ *Ibid*, para 56.

¹⁰⁹ Despite the interpretation of the Working Group, some differences remained regarding good faith among the delegates. See *ibid.*, paras 57–58. In addition, Article 5 later incorporated Article 13 of the draft CISG to produce Article 6 of the draft CISG 1978. See: Bianca, C. & Bonell, M., note no: 38 above, at 70–71.

2.3.2.4 The Secretary General Statement about Good Faith

Following the United Nations Commission on International Trade Law's unanimous approval in 1978 of the draft Convention, the Secretary General (in his comment on the draft Convention) explained the intended meaning of "the observance of good faith in international trade". He stated that the interpretation and application of the Convention's provisions should be carried out by courts and tribunals in such a manner as to promote international trade.¹¹⁰ He elaborated on his statement by detailing a number of rules in other provisions that manifest the principles of good faith,¹¹¹ such as:

- Article 14(2)(b) (now CISG Article 16(2/b)) on the non-revocability of an offer where it was reasonable for the offeree to rely upon the offer being held open and for the offeree to act in reliance on the offer. In other words, the offeree should have the opportunity to accept or decline the offer that was made when there were indications to suggest that the offer was irrevocable (such as giving a fixed time for acceptance). As a result, not giving that right could be considered as acting in bad faith and the opposite of reasonable conduct.¹¹²

Articles 35 and 44 (now CISG Articles 37 and 38) in relation to the right of a seller to remedy non-conformities in the goods. According to Article 37 the seller could cure the non-conformity of goods that have been delivered prior to the delivery date if he did not cause unreasonable inconvenience or expense to the buyer.¹¹³ It was most likely that

¹¹⁰ The recourse to the Secretariat Commentary in explaining the role of good faith in the CISG based on the fact that the Secretariat has witnessed the development of the CISG and the attitude of the delegates. Thus, it will be reasonable to consider his comment as a strong evidence of the role of good faith. In contrast, the articles mentioned in the Secretariat Commentary might be explained by a researcher using different approach than using good faith based on the researcher background and his understanding depth.

¹¹¹ See The Secretariat Commentary on the 1978 Draft of the CISG (document A/CONF.97/5). The Secretary General gave these articles as examples: 14(2)(b), 19(2), 27(2), 35, 44, 38, 45(2), 60(2), 67, 74 and 77. The author will consider explaining some of these articles in Chapter Four.

¹¹² See the comments of Professor Ziegel, J., 'Report Presented to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods' (1981). Available at: <http://www.cisg.law.pace.edu/cisg/text/ziegel60.html>. Also see the comments of Eörsi, G. on Art. 16. Bianca, C. & Bonell, M., note no: 38 above, at 150–60.

¹¹³ See Ziegel, J., *supra* note (comments on Article 37).

unreasonable inconvenience or expense would be measured by the judge against the standard of the reasonable buyer, who should act in good faith by cooperating with the seller to cure the lack of conformity and who should accept replacement of the non-conformity goods with the minimal amount of expense to the seller. The understanding of the relationship between good faith and the seller right to cure the non-conformity goods can be enhanced by understanding that interpreting and applying various remedy-related provisions of the Convention are based on reasonable and good faith behaviour of the contracting parties. For example: Article 50 CISG states that the buyer can not reduce the price of non-conformity goods if the seller cured any failure to perform his obligations. In fact, the buyer is not suppose to cure the defect of the goods himself befor giving the seller the opportunity to cure which is indicated in Article 48 CISG. therefore, the CISG supports good faith behaviour by encouraging the seller to respond properly and cure non conformity and the buyer to behave reasonably by giving the seller to cure befor invoking the remedies provisions offered to the buyer under the Convention.¹¹⁴

Article 38 (now CISG Article 40), which precludes the seller from relying on the fact that notice of non-conformity had not been given by the buyer in accordance with Articles 36 and 37 (now CISG Articles 38 and 39), if the lack of conformity related to facts of which the seller knew or could not have been unaware of and, at the same time, he did not disclose the goods' non-conformity to the buyer. According to Article 40, the non-conformity goods, which the seller ought to know or could not have been unaware of, would deprive him of his right to receive a notice from the buyer about the non-conformity goods before the buyer claimed for remedy in normal circumstances. In

¹¹⁴ Honnold, J.& Flechtner, H., *Uniform Law for International Sales* (3rd edn, Kluwer Law International, 2009) at 429

other words, the seller acting in bad faith was the basis of Article 40 to preclude him from requiring a notice of non-conformity.¹¹⁵

- Articles 74 and 77 (now CISG Articles 85 to 88), which imposed obligations on the parties to take steps to preserve the goods or sell them if there was an unreasonable delay from the other party in taking possession of the goods or in paying the price or the cost of preservation. The CISG gave another example of the application of good faith where the party had an obligation to preserve the goods from loss or damage until he was reimbursed for his expenses.¹¹⁶ The principle of good faith used in this Article was a legal basis in imposing a duty on the contracted parties to mitigate the loss where possible.

In addition to the Articles mentioned by the General Secretary, he clarified that the principle of good faith was broader than these examples and applied to all aspects of the interpretation and application of the provisions of this Convention.

There are various reasons (related to the role of the Secretary General's Commentary in shaping the current CISG) to enhance the great value of the Secretary General's Commentary in determining the meaning of the concept of good faith in the Convention. Firstly, it summarises and explains relevant conclusions derived from the legislative history of the Convention prior to the 1980 Vienna Conference. Secondly, it was used extensively by the delegates to the Vienna Conference as a guide to the meaning of the provisions of the 1978 Draft that they considered. Thirdly, based on the Secretariat Commentary and their further deliberations, in most cases the delegates approved these provisions of the 1978 Draft either verbatim or substantially as written. Fourthly, as an official document prepared pursuant to a resolution of the United Nations General Assembly, the Secretariat Commentary is the closest available

¹¹⁵ See Andersen, C., 'Exceptions to the Notification Rule: Are They Uniformly Interpreted?' (2005) 9(1) V.J. 17, at 17.

¹¹⁶ Schlechtriem, P., note no: 8 above, at 900.

equivalent of an Official Commentary on the Convention. Finally, the Secretariat Commentary is not designed to favour legal interpretations prevalent in any one legal system versus another.¹¹⁷

2.3.2.5 The Diplomatic Conference and the “Hard Won Compromise”

At their fifth meeting the delegates had divergent opinions towards the drafted Article generally and specifically towards the inclusion of good faith. This was not just because of its meaning but also due to its role within the Convention. It is important to include some of the discussions among the delegates particularly during the fifth meeting when the last amendments to Article 7 were made before the General Assembly adopted the CISG in 1980.

At that meeting the delegates with a civil law background were in favour of including a more accurate definition of good faith. For instance, the Italian delegate suggested that the Article be amended to read: “In the formation [interpretation] and performance of a contract of sale the parties shall observe the principles of good faith and international co-operation.”

According to the Italian delegate, the principles of good faith were meant to be a general duty on the contracted parties, which should be considered in the formation and performance of the contract, rather than being a principle used to interpret the Convention. Bonell justified the Italian amendment by stating that, according to the proposal, the concept of good faith “would clearly apply to the interpretation and performance of the contract of sale itself, and not to the application and interpretation of

¹¹⁷ Kritzer, A., ‘The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources’ (1996) 1 Cornell Review of CISG Convention 147, at 173. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/kritzer.html>.

the Convention”.¹¹⁸ Moreover, the Italian proposal considered the misinterpretation of good faith, which might result in different jurisdictions. Consequently, a reference to international cooperation was added to clarify that only the international principles and standards of good faith that enhance international trade cooperation would be applied in the Convention.¹¹⁹

In addition, the Norwegian proposal strongly recommended that the words “observance of good faith in international trade” should be deleted from Article 6 (became CISG Article 7) and transferred to Article 7 (became CISG Article 8) to make it clear that the principle of good faith was relevant to the interpretation of the contract of sale, but not to the interpretation of future Convention provisions. Therefore, the suggestion was to include the observance of good faith in the intent of the contracted parties within Article 7(3) (became CISG Article 8(3)).¹²⁰

The doubt over the practicality of including good faith encouraged some Working Group delegates to oppose the proposals of incorporating good faith within the Convention. The strongest opposition to linking the principles of good faith to the intention of the party and the interpretation of their sale contract (as proposed by the Norwegian delegate) or to being considered as a general duty on the contracted parties (as proposed by the Italian representative) came from the common law countries, particularly from the United Kingdom and the United States of America.¹²¹

¹¹⁸ See the 5th meeting for the Diplomatic Conference (A/CONF.97/C.1/L.5, L.15, L.16, L.22, L.28, L.49, L.52 and L.59) Mr Bonell (Italy), introducing his delegation’s amendment regarding Article 7, at note 14. Available at: <http://cisgw3.law.pace.edu/cisg/firstcommittee/Meeting5.html>.

¹¹⁹ Ibid., at note 45. This suggestion was also supported by the Korean representative who favoured connecting the observance of good faith to the contracted parties. See Mr Kim’s comments on the Italian proposal, *ibid.*, at note 43.

¹²⁰ See the reply of the Norwegian delegate to the Chairman with regard to Article 7, which was supported by the Iraqi delegate. *Ibid.*, at note 6.

¹²¹ Arguments of the United Kingdom and United States of America have special weight as both countries are among the biggest economies in the world.

The British delegate initially did not deny the desirability of incorporating a principle such as good faith within the Convention. Nonetheless, despite its desirability, she pointed out several criticisms of the proposal of good faith being a general duty on the contracted parties. She was against adding vague and ill-defined principles of good faith into the Convention, besides questioning whether these principles should define what is understood by all member states or what is understood by the contracted parties in the appropriate member states.

Furthermore, the British delegate was concerned about the consequences of a party breaching the requirements of good faith. She argued that, if it was accepted that the principles implied good faith on the part of the parties, what would be the legal consequences of non-compliance with good faith by one of the contracted parties? This was relevant particularly when there were no provisions for sanctions in case of non-compliance by the parties with the requirement of good faith.¹²² Based on the previous points, the British delegate concluded that it was a matter for the courts to interpret the Convention's provisions on good faith and not a matter for the parties to the sale contract.¹²³

The uncertainty in the application of good faith internationally was the reason for the American delegate's opposition to the idea of imposing good faith on the parties. He shared the British delegate's view about the desirability of good faith and pointed out the fact that the UNICITRAL Working Group had faced difficulties in citing examples

¹²² A similar argument has been posed before by Finland and Sweden in their comments on the draft Article 5 in the Hague Conference (now Article 7). See the report by the Secretary General, 'Analytical Compilation of Comments by Governments and International Organizations as adopted by the Working Group on CISG 1978', UNICITRAL Yearbook 1978 (A/CN.9/146 and Add.144) at 133, note 76–78.

¹²³ See the Diplomatic Conference note 112 above, at note 47. What is worth noting is that the ICC adopted a similar opinion by recommending deletion of the term 'observance of good faith' from the article text, or if it is retained then it should be rewritten to exclude a construction of the concept that would be derogatory to the terms of the contract; see Analysis of Comments and Proposals by Governments and International Organizations on Article 7 prepared by the Secretary General, Document A/CONF.97/9.

of how good faith could be applied if the Italian proposal was going to be approved by the conference. Consequently, the American delegate preferred the imperfect Article rather than the Italian proposal and regarded the former as a useful compromise.¹²⁴

Following a long process of amendments, the final Article 6, which was included in the Convention, represented a compromise of the delegates' divergent opinions.

Despite detailed examination of the CISG's legislative history on good faith, there are questions that need to be answered. These questions include the following: (i) Did the legislative history of Article 7 give a clear definition of the principles of good faith that are incorporated in the Article? (ii) Did the preparatory works of the Article show what the actual role of good faith is within the Convention? If so, what is the concept's definition? The most crucial question was: (iii) Was the compromise that was made with regard to the principle of good faith extended to the function of the principle in the Convention?

The answers to these questions are more complicated than a plain yes or no. This is because neither the delegates who suggested the incorporation of good faith in the Convention nor the delegates who opposed its inclusion (despite its desirability) defined it, and there was no cooperation among the delegates to overcome the problem. The conflict between the ideas from the common law legal system and the civil law legal system was the main reason for this divergence and differences between the delegates in drafting Article 7. The former do not believe in the general principle that gives judges discretionary power to decide the outcome of the contract, while the latter prefer the

¹²⁴ The author opinion that the American delegate objection to the Italian proposal could be due to the different application and functions of good faith in the American laws and the idea proposed by the Italian. In addition the application of good faith in the American laws has its own difficulties which might lead the American delegate to prefer more coherent article in the CISG. See: Farnsworth, E., note no: 59 above, at 56.

inclusion of some flexibility so the judge can be granted discretionary power for the sake of applying justice, which in itself has two different meanings in both legal systems.¹²⁵ Therefore, adopting the American delegate's statement that the inclusion of good faith in Article 7 was a "statesman-like compromise"¹²⁶ is not a sufficient basis for an argument that the principle should be limited to the literal meaning of the Article as a mere tool for interpretation. It should be noted that the compromise was about agreeing to incorporate the principle of good faith in Article 7(1) and not about compromising its function.

In fact, the history of Article 7 did not clearly record that the idea of imposing good faith as a general duty on the contracted parties had been abandoned, nor that the idea of replacing it with the notion that good faith should be used just as an interpreting tool for the provisions of the CISG had been adopted by the delegates.¹²⁷ Professor Eörsi rightly noted that "almost everybody thought it a strange compromise, in fact burying the principle of good faith and thus covering up the lack of compromise".¹²⁸ He added: "The result was strange but gained for the principle of good faith a foothold in an international convention for unification of law. It is hoped that this meager result represents a modest start."¹²⁹

In addition, what the legislative history showed was lengthy discussions among the drafters from civil and common law jurisdictions, which lasted until just before the

¹²⁵ See Salama, S., note no: 68 above, at 237–8.

¹²⁶ See Ziegel, J., note no: 108 above; Farnsworth, E., note no: 59 above, at 55.

¹²⁷ The author disagrees with Keily that "[t]he drafting history of the CISG reveals quite plainly that good faith as a general requirement was rejected". See: Keily, T., 'Good Faith & the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (1999) 3 V.J. 15.

¹²⁸ Eörsi, G., 'A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' (1983) 31 Am. J. Comp. L. 333, at 349.

¹²⁹ *Ibid.*

General Assembly passed the Convention.¹³⁰ In fact, some of the delegates' comments after the inclusion of good faith gave the impression that they had accepted that it should be applied as a general rule. For example, the Netherlands delegate declared that he was pleased to "see the inclusion [...] of a rule concerning good faith", while¹³¹ Powers explained that "[t]he compromise left the common law states, in particular the United States, feeling they had won the battle. Good faith [...] was mentioned in Article 7 of the CISG, but only time would reveal its exact function."¹³²

The message conveyed is that the described compromise to the Article was limited to the inclusion of good faith without extending the idea of compromise to its role. What should be made clear is that the compromise, which was made so that the principle of good faith could be included in the Convention, is completely different to compromising the meaning of good faith. Accepting the argument that good faith was a compromise, which added to the content of Article 7, was not accepted by any legal academic as forming any legal instrument. Bailey stated: "One must conclude that the emphasis on good faith as a tenet of interpretation is either an empty pronouncement awaiting judicial decisions to give it content or an unfocused aspiration which cannot be effectively applied by any court."¹³³

In conclusion, several points regarding the drafting history of the CISG must be emphasised. First, the CISG drafters did not expressly define the concept of good faith within the Convention. This situation could justify the statements of several academics

¹³⁰ Keily, T., 'Harmonization and the United Nations Convention on Contracts for the International Sale of Goods' (2003) 1 Nordic J. Com. L. 1. Available at: http://www.njcl.fi/1_2003/article3.pdf. See also DiMatteo, L., 'The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence' (2004) 24 Nw J. Int'l L. & Bus. 299, at 320.

¹³¹ Eörsi, G., note no: 59 above, Ch. 2, at 8.

¹³² Powers, P., note no: 63 above, at 344.

¹³³ See Bailey, J., 'Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales' (1999) 32 Cornell Int'l L.J. 273, at 297.

describing good faith in the CISG as a “statesman-like compromise”,¹³⁴ a “strange compromise”¹³⁵ and an “inconvenient compromise”.¹³⁶

Consequently, this undefined concept leaves the courts with no other option than to use their discretion to interpret it. In fact, the previous view becomes unavoidable because the concept of good faith is included within the most important provision, which is related to the interpretation and application of the whole Convention. The recourse to the courts and tribunals made Professor Zeller curious that the judicial interpretation of the CISG might be influenced by the domestic law courts. He stated that “if the interpretation of the CISG is not understood recourse to domestic law is inevitable”.¹³⁷ In contrast, Bonell, who believed that the principle of good faith was not limited to the interpretation of the Convention, considered that the standards of the concept in national legal systems did not apply to the principle of good faith in the CISG. Considering its international character to promote international trade, he considered that the insight of different legal systems in applying the concept of good faith were appropriate means of interpreting good faith in the Convention.¹³⁸

Second, the legislative history was silent about the possible link between the phrases “good faith” and “in international trade” when they came together in one sentence.¹³⁹

The assumption that could be made in this regard was that good faith should be

¹³⁴ Farnsworth, E., note no: 59 above, at 55.

¹³⁵ Eörsi, G., note no: 123 above, at 349.

¹³⁶ Kritzer, A., *International Contract Manual: Guides to Practical Applications* (Kluwer Law & Taxation, 1990), at 70.

¹³⁷ Zeller, B., note no: 37 above.

¹³⁸ Bianca, C. & Bonell, M., note no: 38 above, at 85–6.

¹³⁹ Powers, P., note no: 63 above, at 344.

observed by the conductors of international trade and could be promoted to the level of behaviour that the drafters of the Convention hoped to achieve in international trade.¹⁴⁰

In addition, the Secretary General's Commentary about good faith was the most obvious explanation for the application of good faith in the Convention and its link to other provisions within the CISG. That explanation should not be discarded in favour of concentrating on the arguments of the delegates who were against the incorporation of the concept, because, as has been seen, those arguments were countered by arguments from those who supported the inclusion of the concept.¹⁴¹

The preparatory works of the CISG might not be sufficiently helpful in providing a definite answer about the precise role of good faith within the CISG, which remains elusive.¹⁴² Therefore, the next section illustrates scholars' opinions on this matter. The aim is to evaluate these views against the results found in this chapter by investigating the textual interpretation and preparatory works of Article 7.

3. The Scholarly Contribution to Interpreting Good Faith in the CISG

The function of the principle of good faith in the CISG has divided legal scholars into two groups. The first group, which is led by scholars like Farnsworth, prefers a narrow interpretation of the concept of good faith, where the function of the concept is as a mere interpretive tool to the Convention. This interpretation has been built on two

¹⁴⁰ Bailey stated: "The legislative history reveals that the Working Group ultimately included the exhortation regarding good faith to draw the attention to emphasize that high standards of behaviour were to be expected in international transactions." See: Bailey, J., note no: 128 above, at 295.

¹⁴¹ See Eörsi, G., note no: 64 above, at 2–7, 2–8; Bianca, C. & Bonell, M., note no: 38 above, at 85.

¹⁴² Professor Kritzer described the difficulties in deriving any clear answer from the legislative history by stating that "the legislative history of the Convention's companion reference to good faith is cloudy"; Kritzer, A., *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (Kluwer Law & Taxation, 1989), at 109.

bases: firstly, on the literal meaning of Article 7(1), and secondly, on the opinion found in the legal history that states that good faith was a result of compromise.¹⁴³

In contrast, the second group, led by scholars like Honnold, Bonell and Schlechtriem, does not deny the compromise status of the inclusion of the standard of good faith in the CISG. However, it has rightly observed that the concept of good faith needs to be given wider interpretation within the CISG, relying on the necessity to direct the need to promote the observance of good faith in international trade to the parties of a sale's contract, and the fact that there are provisions in the CISG implicitly based on the standard of good faith.¹⁴⁴

3.1 Good Faith as a Mere Interpretive Tool

Relying on the historical draft of Article 7, and its literal meaning, a number of scholars believe the role of the concept of good faith is solely to interpret the provision of the Convention.¹⁴⁵ The majority of the delegates approved the application to determine the Convention's provisions without imposing the concept as an obligation on the parties' behaviour or to determine their contractual provisions.¹⁴⁶ The English delegate stated that "[A]rticle 7(1) was directed towards the courts in the interpretation of the [C]onvention, and not towards the parties to a contract".¹⁴⁷ The delegates' approval of the Article after long discussions at all levels and several amendments is considered to

¹⁴³ Professor Farnsworth illustrated that "this provision does no more than instruct a court interpreting the Convention's provisions to *consider* the importance of the listed factors"; see Farnsworth, E., note no: 64 above, at 55.

¹⁴⁴ Bianca, C. & Bonell, M., note no: 38 above, at 84. See also: Koneru, P., note no: 20 above, at 139.

¹⁴⁵ For instance, Honnold, J., note no: 83 above, at 298; Felemegas, J., 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation' (PhD thesis, University of Nottingham, 2000). Available at: <http://www.cisg.law.pace.edu/>; Hillman, R., 'Cross-References and Editorial Analysis: Article 7'. Available at: <http://cisgw3.law.pace.edu/cisg/text/hillman.html>.

¹⁴⁶ Honnold, J., note no: 83 above, at: 298, 408.

¹⁴⁷ *Ibid.*, at 479; Miss O'Flynn's statement about the Italian proposal regarding good faith in the 5th Diplomatic meeting.

be a final and clear rejection of any intention to impose good faith as an obligation on the parties.¹⁴⁸

Felemegas expressed the rejection of good faith as an obligation on the contracted parties by stating: “The possibility of imposing additional obligations on the parties is clearly not supported by the legislative history of the CISG article 7(1).”¹⁴⁹ Courts should interpret the Convention according to the drafters’ intention, and refrain from claiming that the situation is not covered because the provisions of the Convention do not provide recourse to the domestic rules to tackle the situation and resolve the dispute. Nonetheless, this presumption could be easily rejected because it has not been supported by the legislative history, and non-reliance on the domestic rules is restricted since the drafters adopted the international character as a standard of interpretation.¹⁵⁰ In fact, adapting this opinion might comply with the literal meaning of Article 7, however, it will misread the drafting history of good faith in the CISG would result in a wrongful judgment.

There was more emphasis in the legislative history on adopting good faith as a general duty on the contracted parties than on limiting its role to interpreting the Convention. The emphasis was obvious from the Secretary General’s statement and the special Working Group that was established to consider the meaning of Article 6.¹⁵¹ In addition, limiting good faith to the interpretation of the Convention contradicts the core purpose

¹⁴⁸ Felemegas, J., ‘Comparative Editorial Remarks on the Concept of Good Faith in the CISG and the PECL’ (2001) 13 Pace Int’l L. Rev. 399.

¹⁴⁹ Felemegas, J., note no: 18 above.

¹⁵⁰ See: Bailey, J., note no: 127 above, at 296.

¹⁵¹ See: the illustration presented by the author in this regard in this chapter.

of the Convention to create a uniform law that governs commercial transactions around the globe.¹⁵²

3.2 Good Faith as a General Rule in the CISG

The second opinion that is adopted by this thesis is that the concept of good faith does not just operate as a mere rule for interpreting the provisions of the Convention but also as a governing rule for the entire legal relationship between the parties. Although some might argue that the legislative history supports the opinion that the concept of good faith is there to interpret the Convention, the drafting history of Article 7 should be taken as a whole and not looked at separately. One of the major points ignored by the supporters of good faith as an interpretive tool was the Secretariat Commentary on Article 7(1) regarding good faith.

The statement delivered by the Secretary General regarding good faith read “...there are numerous applications of this principle in particular provisions”,¹⁵³ which are, for instance, late acceptance of the offer, non-revocability of certain offers, and remedy for non-conformity of goods. The Secretariat Commentary also mentioned that “the 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”.¹⁵⁴ Therefore, it can be said that recognising the general role of good faith was not just adopted by some delegates but was also the understanding of the United Nations Secretariat General, as was obvious from his statement about the role of good faith within the Convention.

¹⁵² Goderre, D., ‘International Negotiations Gone Sour: Pre-Contractual Liability under the United Nations Sales Convention’ (1997) 66 U. Cin. L. Rev. 257, at 275.

¹⁵³ The Secretary mentioned examples of these Articles: 21(2), 29(2), 37, 39, 40, 48, 49(2), 64(2), 82 & 85.

¹⁵⁴ Honnold, J., note no: 83 above, at 737.

Another point that was ignored by the delegates was the fact that “the Convention, like any other law, has a life of its own, and its meaning can change with time so that the intention of the drafters is only one of the elements to be taken into account for the purpose of its interpretation”.¹⁵⁵ There is no doubt that a Convention such as the CISG is meant to serve its purpose as long as possible, because its constitution consumed huge effort and time by the international community. Consequently, a narrow interpretation is going to affect the Convention’s practicality and its permanency as an international tool that governs sale of goods.

Logically, interpreting the Convention cannot differ from interpreting the contract that applies the Convention’s rules. Obviously, if the contracted parties agreed on including the CISG in the contract, then the Convention’s provisions will have similar effect as the rest of the contract’s provisions. Consequently, applying good faith to interpret the Convention will lead indirectly to interpreting the contract and the parties’ intentions.¹⁵⁶ Maskow had a similar view that “when certain principles are applied in interpreting the Convention’s provisions, they must have an effect on agreements between the parties to which the Convention is applied”.¹⁵⁷ In addition, Zaccaria noted that “even though it may be accepted only as an interpretative tool of the Convention, the principle of good faith has a strong impact on the parties’ behavior, as it is not possible to interpret the CISG without also affecting the contract”.¹⁵⁸

¹⁵⁵ Bianca, C. & Bonell, M., note no: 38 above, at 90.

¹⁵⁶ Eörsi, G., ‘note no: 64 above, Ch. 2, at 2–8.

¹⁵⁷ Maskow, D. & Enderlein, F., *Commentary on International Sales Law* (Oceana Publications, 1992), at 54.

¹⁵⁸ Zaccaria, E., note no: 64 above, at: 107. Korenu, in support of the opinion that good faith is a general rule that goes beyond the interpretation of the Convention, stated that “good faith cannot exist in a vacuum and does not remain in practice as a rule unless the actors are required to participate”. See: Koneru, P., note no: 20 above. Another scholar observed that the good faith provision does not constitute a mere instrument of interpretation, but, rather, it “appears to be a pervasive norm analogous to the good faith obligation of the U.C.C”.

It is important for the success of the CISG to adopt a meaning for the concept of good faith that is not limited to the interpretation of the Convention. Good faith should have a role that participates in achieving the ultimate goal of the Convention, which is included in the preamble. In other words, interpretation of the Convention should not be drawn by concentrating just on the rules and provisions of the Convention but also from the broader view of the Convention's preamble. It is noted that "the spirit of the preamble should also be taken account of when agreed texts of sales contracts are to be interpreted".¹⁵⁹

In other words, the principles that have been included in the preamble should be observed when interpreting the provisions or the terms of the Convention.¹⁶⁰ Preamble phrases like "broad objectives", "development of international trade", and "adoption of uniform rules which govern contracts for the international sale of goods" indicate that the Convention's goal is to develop and unify the rules that govern international trade, which surely needs broad principles that can be adapted and that include all the differences among national legal systems.¹⁶¹

In fact, Article 7(1) should be read as "the need to promote [...] the observance of good faith in international trade", so that it complies with the preamble's provisions. Legal scholars, such as Enderlein and Maskow, believe the principles included in the preamble can be referred to when interpreting the Convention's terms or rules, such as the term of

See Dore & DeFranco., 'A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code' (1982) 23 Harv. Int'l. L. J. 49, at 61.

¹⁵⁹ Ibid, at: 19.

¹⁶⁰ Ibid.

¹⁶¹ Kastely, A., note no: 1 above, at 575, 576.

"good faith" (Article 7, paragraph 1) or the rather more frequently used and vague term "reasonable".¹⁶²

Careful consideration of the preamble's language could lead to the presumption that good faith should have a general role, which goes beyond the interpretation of the CISG. The reference to the need for "developing international trade on the basis of equality and mutual benefit" makes a valid argument that the principle of good faith is a general rule, which extends to the contracted parties. It has been mentioned that the principle of good faith imposes a duty on the party to consider the contractual benefits of the parties. In fact, Zeller referred to the preamble to argue that the principle of good faith could interpret the contractual relation between the parties without the need to refer to good faith in Article 7(1).¹⁶³

Povrzenic stated that the observance of good faith in international trade requires wide interpretation that includes parties' behaviour and their contract along with the Convention.¹⁶⁴

In addition, comparison between the CISG and the PICC could give further support to the argument that the concept of good faith is not limited to the interpretation of the provisions of the CISG.

There are several common elements between the CISG and the PICC that lead to the conclusion that the role of the concept of good faith in the CISG is similar to its role in the PICC. Firstly, the principle of good faith in both the CISG and the PICC is directed towards international trade; thus, national interpretation of the concept is

¹⁶² Maskow, D., & Enderlein, F., note no: 471 above, at 20.

¹⁶³ Zeller, B., note no: 486 above, at 143.

¹⁶⁴ Povrzenic, N., note no: 50 above

unacceptable.¹⁶⁵ Secondly, it is true that Article 7 did not direct the concept of good faith to be applied directly to the parties and their contract. Nevertheless, the object of the concept is that interpretation of the Convention should promote the observation of good faith in international trade,¹⁶⁶ which is “directed to the parties as a standard of behavior to be maintained throughout the life of the contract”.¹⁶⁷ In other words, the object of the concept of good faith in the PICC is directed towards both the parties and the contract. Article 1.7(1) states: “Each party must act in accordance with good faith and fair dealing in international trade”.¹⁶⁸ Thirdly, both the PICC and the CISG include specific provisions that the concept of good faith has a role to play in determining their meaning.¹⁶⁹ Finally, and more importantly, the adoption of the PICC by the UNIDROIT’s Governing Council after six years of adapting the CISG gave the drafter of the PICC sufficient time to avoid the misunderstandings that occurred around the role of good faith in the CISG.¹⁷⁰ Thus, anyone would assume that, if the drafters of the PICC believed that good faith in the CISG was without benefit, they would not have included it in the PICC.

Furthermore, it is believed that the precise meaning of good faith does not serve the aim of promoting the observation of good faith in international trade; neither will it help in promoting the application of good faith.¹⁷¹ The author strongly believes that trying to limit a wide concept like good faith to one definition will lead to an undesirable

¹⁶⁵ Magnus, U., note no: 64, at para 1/A.

¹⁶⁶ Ibid., at para 1/b.

¹⁶⁷ Zaccaria, E., note no: 64 above.

¹⁶⁸ Magnus, U., note no: 64, at para 1/b. See: the Principles, Articles 1.7(1) and 4.8(2)C.

¹⁶⁹ Ibid., para 1/c.

¹⁷⁰ The author’s reliance on the PICC to argue the wider interpretation of good faith came from Professor Guillemard’s opinion that the principles of the International Institute for the Unification of Private Law (UNIDROIT) can be used to interpret the CISG as both have the similar aim of promoting international trade. See: Guillemard, S., ‘A Comparative Study of the UNIDROIT Principles of European Contracts and Some Dispositions of the CISG Applicable to the Formation of International Contracts from the Perspective of Harmonisation of Law’ (Laval University, 1999). Available at: <http://cisgw3.law.pace.edu/cisg/biblio/guillemard1.html>.

¹⁷¹ Zeller, B., note no: 32 above.

outcome represented by violating the function of the concept in the Convention. To put it more simply, no matter how strong and creative a person is regarding his linguistic ability, he will not be able to give the concept of good faith a precise definition that covers all functions of the concept.¹⁷²

Moreover, what should be raised in answering the objection that the concept of good faith is too vague to apply in the CISG is that “some laws are precise when they would be better left vague [...and] would seem to be more useful and fair”.¹⁷³ This argument should not be misinterpreted as encouragement to interpret the concept of good faith in the CISG according to national laws. When interpreting good faith, the interpreter has a duty to consider the international character of the CISG and the need for uniformity in its application.¹⁷⁴

The general application of good faith in the CISG can be based on Article 7(2) with regard to the gap-filling in the Convention. According to Article 7(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.

Despite the fact that the concept of good faith is laid down in Article 7(1), there is a strong academic opinion that good faith is one of the general principles on which the

¹⁷²This thesis has proved that lack of precise definitions did not preclude legislators in many legal systems from using concepts that are usually described vaguely and non-precisely. See the discussion of this point in chapter two. Felkins, L., ‘Understanding Vagueness’ (1996). Available at: <http://perspicuity.net/paradox/vagueness.html>.

¹⁷³ Ibid.

¹⁷⁴ This issue is dealt with in Chapter Six of this thesis under ‘The Quality of Decisions and Homeward Trend Interpretation’.

CISG is based.¹⁷⁵ Thus, good faith can be used to interpret the CISG's provisions and the contractual relationship as such.

Finally, it could be asked: If good faith is merely an interpretive tool, is it serving any purpose for the CISG? It was mentioned above that the CISG has a mixed nature and, therefore, that the VLCT applies to some of its provisions, including Article 7. Accordingly, one might ask: What is the purpose of good faith in Article 7 of the CISG when the VLCT Article 31 has already dealt with the interpretation of the Convention using the same concept?

Article 31(1) of the VLCT reads: "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." It is clear that good faith in Article 31 has already served the purpose of interpreting the Convention. Consequently, good faith in Article 7 should not be linked to the interpretation of the CISG, which, as a general rule, governs contractual relations.¹⁷⁶

The next chapter, relying on the CISG's other provisions, provides more evidence that the standard of good faith has various applications within the CISG. Several CISG provisions have implicitly adopted the meaning of good faith in their application. Analysing these applications should provide a deeper understanding of the general role of good faith within the CISG.

¹⁷⁵ Magnus, U., note no: 64.

¹⁷⁶ See Zeller, B., 'The Observance of Good Faith in International Trade', in Janssen, A. & Meyer, O., *CISG Methodology* (Sellier European Law Publishers, 2009), at 137.

Chapter Four

Manifestations of the Standard of Good Faith in the CISG

Chapter three illustrated that Article 7 is one of the general provisions which governs the CISG. Consequently, the principles included in Article 7 have technical functions such as the interpretation of the Convention; filling the legal gaps; and, in relation to this research, interpreting the contractual agreement between the parties.¹ Chapter four enhances the results discussed in chapter three and demonstrates that, as one of Article 7's guidelines, good faith can be found in other provisions in the CISG. The manifestation of good faith in these particular provisions can be interpreted as a governing conduct standard which may introduce obligations on the contracting parties. The aim of this chapter is to establish where and how the standard of good faith influences the meaning and application of certain provisions. The success of this task will reveal some of the functions of good faith within the CISG. In addition, it will enhance the argument of this thesis that good faith can have a general role in the CISG.

The argument in this chapter is based on the Secretariat Commentary of the 1978 Draft of the CISG which referred to the fact that, besides Article 7, good faith was included in several Articles in the CISG. The commentary reads:

Among the manifestations of the requirement of the observance of good faith are the rules contained in [several articles was listed].²

In addition, the Secretary emphasised that good faith is

¹ See Eörsi, G., 'General Provisions', in Galston & Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Matthew Bender, 1984), at 2–8. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/eorsi1.html>, at Ch. 2, 2-1.

² Text of Secretariat Commentary on article 6 of the 1978 Draft [draft counterpart of CISG article 7(1)]. <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html>.

broader than these examples and applies to all aspects of the interpretation and application of the provisions of this Convention.³

Also, many academics from different legal backgrounds adopted a similar approach. Leading scholars in the field such as Bonell⁴ and Schlechtriem⁵ share the same opinion, that good faith is a general principle which is contained in the provisions throughout the CISG. Articles 14(2)(b), 19(2), 27(2), 35, 44, 38, 45(2), 60(2), 67, and 74 to 77 are some of the provisions which include different applications of the standard of good faith. The following is an elaboration of the manifestations of good faith in these articles and an illustration of its function in every particular provision.

1. Good Faith as a Recognizable Usage in International Trade (Article 9)

The link between good faith and trade usage can be established on several grounds. First, the trade usage is "a practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction."⁶ Therefore, the trade usage must be a reasonable practice between the contracting parties or within a specific trade community which can be called usage after regular use over a period of time. The previous result will lead to the fact that there is no reasonable practice can be established if the contracting parties did not behave in good faith in the first place. In other words, behaving in good faith can be seen as the most prominent principle in international trade which Article 7 is promoting further. Secondly, adhering to the established trade usage by the contracting parties can be seen as an example of promoting good faith in international trade indicated by Article 7. Thus, if there was a trade usage established in

³ Ibid.

⁴ Bianca, C. & Bonell, M., *Commentary on the International Sales Law* (Giuffrè, 1987), at 84.

⁵ Schlechtriem, P., *Uniform UN Sales Law. The CISG: Description and Tests*, (Mohr, Tübingen, 1981), at 25.

⁶ Legal Information Institute: https://www.law.cornell.edu/wex/usage_of_trade.

certain trade, then every contracting parties would have the assurance that such usage would be respected by other parties except if it was explicitly excluded from the contract. Thirdly, the recourse to the concept of good faith would help the court to identify if a trade usage has been established by between the contracting parties and if that usage has been breached by one of the parties behaving in contrary to good faith.

According to Article 9 of the CISG, the contracted parties are bound to any usage, which they have agreed, and to any practices that they have established between themselves. In addition, the parties are bound to a usage which they knew or ought to have known, and which, in international trade, is widely known and regularly observed by parties involved in that particular trade, in that type of contract .

Article 9 differentiates between two types of trade usages to which the contracted parties are bound. The first type under Article 9(1) is subjective usage, which the contracted parties have established between themselves during the course of the contract. Accordingly, the parties would be liable, if they acted in a manner inconsistent with established usage, and such behaviour would be considered as contrary to the standard of good faith.

The *mattress case*⁷ is a good example of standard good faith showing linking of established usage between the parties. An Italian seller produced and sold mattresses, and the buyer, a public company, traded in all kinds of goods. The parties had established a business relationship over several years. During that time, the buyer had placed several orders for the delivery of mattresses. In one transaction, the buyer informed the seller that a number of mattresses were defective and demanded that these mattresses be replaced. In addition, the buyer demanded that the seller takes back the

⁷Switzerland 24 October 2003, Commercial Court Zurich (*Mattress case*), Case no; HG 010395/U/zs. <http://cisgw3.law.pace.edu/cases/031024s1.html>.

defective mattresses. The seller accepted replacing the defective mattresses, but refused to take them back. The seller's argument was based on the contractual agreement which stated that the seller shall provide "substitute goods (that are not defective) as replacement for deficient mattresses". The seller claimed that the contractual agreement made no reference to the responsibility of taking back the defective goods. In reviewing the contractual relationship, the court found that, in previous transactions between the parties, there was an established usage whereby the seller used to replace and take back the defective goods. Furthermore, the court held that:

This adherence to established usages is derived from the principle of good faith and shall prevent a party from suddenly acting inconsistently within an established business relationship.

The court in the previous case, believed that there was a sufficient and consistent practice between the parties which establish usages based on good faith which the contracting parties supposed to have. As a result, (at least in this case) the trade usage was identified and defined through the court understanding of good faith in Article 7 being a general principle on the contracting parties. In contrast, the same case circumstances might be read by other court differently, where the breach of the established usage will not be based on the general principle of good faith but an independent breach by contracting party with no link to good faith behaviour.⁸

The second type of usage is that established in certain areas of trade to the point where it became recognised internationally by several jurisdictions (Article 9/2). Consequently, under such trade usage, the contracted parties have obligations, even if these obligations were not included in the contract.

⁸ The issue of trade usage in the CISG was a place of divided opinion between the developing countries and developed ones. For further information see: Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. (1989), at: 476.

Two questions need to be answered in order to illustrate the relationship between international trade usage and the standard of good faith in the CISG. These are: First, what are the requirements for international trade usage referred to in Article 9? Second, can the standard of good faith match these requirements?

According to Article 9, in order for the contracted parties to be implicated in trade usage, the parties are required to “know or ought to have known” the trade usage.⁹ In addition, the usage needs to be known widely by the international trade, and “regularly observed by parties to contracts of the type involved in the particular trade concerned”.¹⁰

Consequently, international trade usage can be defined as any standard or practice which is known so widely or used in the international sale of goods that it makes it legitimate for a contracted party to expect the other party to conform to the standard or practice.¹¹ Previously, by comparison, good faith was defined as “a standard code of behaviour that is so widely recognized ... which is identified through a number of elements including the contractual intention, goods in question, communication, customary usage and contractual necessities”.¹²

Comparing both terms leaves little doubt that they share the same purpose and legal foundation. Several academics including DiMatteo¹³ and Webster¹⁴ referred to the previous notice, and Summers regarded good faith as “part of a family of general legal

⁹ Secretariat Commentary on Article 8 of the 1978 Draft, (draft counterpart of CISG Article 9). Available at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-09.html>.

¹⁰ Ibid.

¹¹ Please see Goldstajn, A., ‘International Conventions and Standard Contracts as Means of Escaping from the Application of Municipal Law’, in Schmitthoff, C (ed), *The Sources of the Law of International Trade*, (London: Stevens & Sons, Ltd, 1964), at 111.

¹² Please see the working definition of good faith in chapter two.

¹³ DiMatteo, L., ‘The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings’ (1997) 22 *Yale J. Int’l. L.* 111, at 145.

¹⁴ Webster, J., ‘Comment, A Pound of Flesh: The Oregon Supreme Court. Virtually Eliminates the Duty to Perform and Enforce Contracts in Good Faith’ (1996) 75 *Or. L. Rev.* 493, at 499.

doctrines, including implied promise, custom and usage, fraud, negligence and estoppels which all serve one purpose, justice according to the law.”¹⁵ Consequently, good faith and trade usage in many circumstances and be attached and very difficult to separated which shows the link between both concepts as a general legal principles that govern legal relationships.

In addition, the standard of good faith also fulfils an important requirement of Article 9(2), namely recognition of international trade standard, regardless of the complication of the meaning of international trade usage.¹⁶ Needless to say, good faith is an established principle in a sale of goods contract which is embodied in most recognised legal systems,¹⁷ and has been successfully adopted and harmonised by international instruments.¹⁸

In fact, there are many international trade practices where the standards of good faith and trade usage can be seen as unitary or supplemented by each other. For example, the rule which states that “in order for the offeree's expression of intention to constitute an acceptance, it must assent to the terms proposed by the offerer in his offer with no variation a reply”¹⁹ is a well-known trade usage which is contained in Article 19 of the CISG. Also, the same rule may be recognised and based on the standard of good faith

¹⁵ Summers, R., ‘Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code’, (1968) 54 V.L.R 195, at 198.

¹⁶ The Article did not provide clear guidance to interpret what could be international trade usage which raised some concerns among the delegates and legal academics.

¹⁷ According to the arbitration panel in *Libyan American Oil Co. v. Libyan Arab Republic*, the recognised principles in international trade are “These general principles [which] are usually embodied in most recognized legal systems. ... They thus form a compendium of legal precepts and maxims, universally accepted in theory and practice”. Please see DiMatteo, L., note no: 11 above, at 145.

¹⁸ It has been seen that good faith part of several international instrument regarding sale’s contract such as PECL and UNIDROIT Principles.

¹⁹ Article 19 CISG by Farnsworth, E., in Bianca, C. & Bonell, M., note no: 4 above, at 178.

because good faith implies a duty on the offeree to communicate with the offerer in clear and understandable terms which show whether he accepts or rejects the offer.²⁰

The Frankfurt court of appeal recognised the relationship between international trade usage and the standard of good faith and that they supplemented each other by stating:

A trade usage cannot be constituted through the contents of terms and conditions which were not effectively included in the contract. It contradicts the principle of good faith in international trade.²¹

In contrast, some scholars believe that international trade can be improved by implying a trade usage under which the powerful trader does not dominate in perpetuity and, therefore, in international trade, does not threaten the spirit of good faith.²² Consequently, the court might rely on the standard of good faith as a basis for suspending the effect of that trade usage if the latter was conducted in bad faith or where the application of such a usage would be unreasonable.²³

DiMatteo argued that the standard of good faith was a well-known and internationally recognised trade usage. He stated that,

A strong argument may be made that good faith is a universal trade usage or custom. From the medieval *lex mercatoria* to the present, most specific rules of business can be traced to the norm of good faith and fair dealing.²⁴

²⁰ Germany, 5 July 1995, Appellate Court Frankfurt (*Chocolate products case*), case no: 9 U 81/94. <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950705g1.html>.

²¹ Germany, 21 December 2005, Appellate Court Köln (*Trade usage case*), case no: 16 U 47/05. <http://cisgw3.law.pace.edu/cases/051221g1.html>. Accessed 14/04/09

²² Kastely, A., 'Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention' (1988) 8 *Northwestern J. Int'l L. & Bus.* 574. Available at <http://cisgw3.law.pace.edu/cisg/biblio/kastely.html#1..>

²³ Switzerland, 5 November 1998, District Court Sissach (*Summer cloth collection case*), case no: P4 1991/238. The Swiss court stated that good faith is the key to determine whether a sender may assume the recipient of the confirmation letter intended to consent to the terms of the letter, regardless of the trade usage. <http://cisgw3.law.pace.edu/cases/981105s1.html>.

²⁴ DiMatteo, L., note no: 11 above, at 146.

2. The Principle of Promissory Estoppel, Articles 16 and 29

2.1 Irrevocability of the Offer, Article 16

Reviewing the preparatory works of Article 16 shows a divergence and legal conflict between civil and common law over which an approach should be adopted with regard to an offer's revocability. Exploring the legal background of Article 16 reveals that it was based on Article 5(2) of the Convention related to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) which reads:

After an offer has been communicated to the offeree it can be revoked unless the revocation is not made in good faith or in conformity with fair dealing or unless the offer states a fixed time for acceptance or otherwise indicates that it is firm or irrevocable.²⁵

Article 5(2) used the standard of good faith as an exception to the general rule of the offer's revocability. However, in forming Article 16, the UNCITRAL working group, in its eighth session (1977), replaced the previous text to read as follows:

[A]n offer cannot be revoked ... for a reasonable time if it was reasonable for the offeree to rely upon the offer being held open and the offeree has altered his position to his detriment in reliance on the offer.²⁶

The working group's efforts in reconciling the differences regarding Article 16 are obvious. It replaced the term of "good faith" with the principle of "reasonableness".

In adopting the final version of Article 16, the delegates' differences were not easily reconciled. The civil law delegates' suggestion was to adopt the civil law rule whereby

²⁵ Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, reprinted in 1 United Nations Register of Texts of Convention and Other Instrument Concerning International Trade Law, (United Nations Publication, New York, 1971), at 64- 69.

²⁶ Report of the Secretary General: Formation and Validity of Contracts for International Sale of Goods, U.N. Doc. A/CN.9/128, Annex 2 (1977) reprinted in UNCITRAL Year Book, 1977, at 90&97. See: http://www.uncitral.org/pdf/english/yearbooks/yb-1977-e/yb_1977_e.pdf.

the offer could not be revoked except if it indicated otherwise.²⁷ Accordingly, the offer is irrevocable during the reasonable time which the offerer should give the offeree to consider the offer. On the other hand, the common law system rule is that the offer has no binding force and is always revocable.²⁸ The exception to this rule is when the offeree has been given time to consider that the offer is irrevocable.

Finally, the approved text of Article 16, which is believed to constitute a consensus between divergent delegates, reads:

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) If it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) If it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

The agreed Article seems to adopt the common law view of the offer's revocability. The first paragraph of the Article indicates that the offer is revocable as long as the offeree does not dispatch his acceptance of the offer. However, the general rule of the offer's revocability is restricted by two exceptions included in the second paragraph of Article 16. The standard of good faith can be linked to the exception when it would be

²⁷In the civil law systems like the German and Swiss law, the offer is irrevocable. The same rule applies on the French law with some exceptions such as fixing a time for acceptance. Please see; Akseli, N., 'Editorial remarks on whether and the extent to which the Principles of European Contract Law (PECL) may be used to help interpret Article 16 of the CISG' (2003); <http://www.cisg.law.pace.edu/cisg/text/peclcomp16.html#er>; Malik, S., 'Offer: Revocable or Irrevocable. Will Art. 16 of the Convention on Contracts for the International Sale Ensure Uniformity?' (1985): 25 *Indian J. Int'l L.* 26. <http://www.cisg.law.pace.edu/cisg/biblio/malik.html>.

²⁸ *Ibid*

reasonable for the offeree to regard the offer as being irrevocable and to act accordingly. This link can be based on two ideas: the standard of reasonable man: and the principle of estoppel.

Firstly, the standard of reasonableness seems to have much in common with the standard of good faith.²⁹ The reasonable person is defined usually as the person who acts in good faith.³⁰

In a more detailed definition, DiMatteo suggested that a reasonable person is the one who possesses “the knowledge and sophistication of the average business person in a given trade or profession. This knowledge includes the meanings, trade usage, and practices generally known and accepted in that business or profession.”³¹ When comparing the standard of good faith and the standard of a reasonable person, as suggested by Article 16(2B), it is easy to identify the similarity between these components. Both standards are determined by elements such as trade usages and practices which are conducted in a specific trade.

In considering the working definition of good faith adopted by this paper, it can be said that the standard of reasonableness is incorporated in the standard of good faith to the extent that it is impossible to separate one standard from the other. In fact, for the purpose of creating a certain level of certainty in the international trade, good faith parties must have certain amount of reasonableness. Thus, the contracting parties must act in good faith and take a reasonable steps as a professional trader for the court to

²⁹ Schlechtriem, stated that; ‘[good faith in international trade] ... is of the general principles and should be construed in the light of the Convention’s many references to standards of reasonableness’.

Slechtriem, P., note no: 5 above, at 39.

³⁰ Ibid.

³¹ DiMatteo, L., note no: 11 above, at 142.

consider his argument. Consequently, the offeree needs to act in good faith and believe reasonably that the offer is irrevocable so he can benefit from this exception.

In Article 16, the second view of the standard of good faith can be identified through the principle of promissory estoppel represented in Article 16(2B).³² According to the rule of promissory estoppels if, through his conduct, the offerer has made the offeree an ambiguous promise and the latter has relied reasonably on the implied promise to be irrevocable, then the offerer is prohibited from upholding his offer.³³ Notably, the promissory estoppel offers a protection to the party who was acting in good faith when he relied on the conduct of the other party. In other words, Article 16(2b) assumes the offerer's bad faith which the drafters of the CISG believed was necessary to be eliminated in order to protect the offeree's good faith.³⁴

In addition, scholars such as Magnus and Bonell identified another implication of the standard of good faith in Article 16(b), which was the pre-contractual liability of good faith during the negotiation process.³⁵ Despite the fact that the CISG does not govern expressly pre-contractual liability, both scholars believed the wide interpretation of the standard of good faith in Article 7(1), and its role as a general principle in Article 7(2), made good faith an obligation on the parties during the negotiation of the contract.

³² Viscasillas, M., 'The Formation of Contracts and the Principles of European Contract Law' (2001): 13 *Pace Int'l. L. Rev* 371, at 385. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/perales3.html>.

³³ What should be noticed is that this definition of promissory estoppels is according to the American legal system, whilst the promissory estoppels in the English system can be used only as a shield and not as a sword. Please see Clarke, M., *The Common Law of the Contract in 1993: Will Be There A general Doctrine of Good Faith*, (University of Hong Kong, 1993).

³⁴ King, C., 'The CISG - Another One of Equity's Darlings?' (2004) 8 *VJ* 249, at 264-267.

³⁵ Magnus, U., 'Remarks on Good Faith' (2000). Available at: http://www.cisg.law.pace.edu/cisg/principles/uni7.html#um*; Bianca, C. & Bonell, M., note no; 4 above, at 81.

Consequently, the parties have an obligation to negotiate in good faith and liability may arise if they failed to do so.³⁶

2.2 The Oral Modification or Abrogation of the Contract (Principle of Estoppel), Article 29

The structure adopted to draft Article 29 is similar to that used in the drafting of Article 16. Both Articles incorporated a general rule with exceptions attached to it. Furthermore, the exceptions in both Articles seem to be an application of the standard of good faith. Article 29 deals with the modification and termination of contracts. The general rule included in paragraph (1) states:

A contract may be modified or terminated by the mere agreement of the parties.”
The language of the paragraph is an indication of the principle of party autonomy and freedom of contract which on the CISG is based.³⁷

As can be seen, as a general rule, the CISG does not require written evidence for any modifications to the contract.³⁸ However, Article 29 included an exception which makes the written evidence compulsory if the contract “contains a provision requiring any modification or termination by agreement to be in writing.”³⁹

It is worth noting that the written requirement included in Article 29(2) is subject to a reservation included in the second sentence of the Article. The reservation reads that:

[A] party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

³⁶ Ibid, at 700-701.

³⁷ Eisele, 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' (2002). Available at: <http://www.cisg.law.pace.edu/cisg/principles/uni29.html#ed>.

³⁸ Schlechtriem, P., note no: 5 above, at 40.

³⁹ Article 29(2).

This reservation could be interpreted as a direct application of the principle of estoppel and indirect application of the standard of good faith.⁴⁰ It was established previously that estoppel is a principle imposed to protect the party who was acting in good faith⁴¹. In fact, the second sentence of Article 29(2) could be seen as a safety valve for the application of the formal requirement included in the first sentence of the same Article.⁴² Consequently, if that exercise affects the legitimate interests of the other party, the standard of good faith manifests itself in the restriction imposed on the party exercising his right.⁴³

The Hamm Appeal Court (Germany) made a similar observation.⁴⁴ A German buyer ordered, by fax, 1,000 memory modules (computer parts) from a Chinese seller which needed to be delivered within two to three days. The seller fulfilled the buyer's request by supplying the purchased goods to the carrier after he had received confirmation from the buyer's bank that he had received payment for a previous order. It took four days to deliver the goods to the buyer. On the same day as the goods arrived, the buyer sent another fax containing details of the order with a "cancelled" note and returned the delivered memory modules to the customs warehouse.

⁴⁰ Please see, the Editorial remarks by Kritzer, A., on; Austria 15 June 1994, Vienna Arbitration proceeding, (*Rolled metal sheets case*), case no: SCH-4318. Available at: <http://cisgw3.law.pace.edu/cases/940615a4.html>.

The tribunal invoked the principle of estoppel as a bar to seller's defence of late notice. The tribunal refers to this as the prohibition of *venire contra factum proprium*: a special application of the general principle of good faith, one of the "general principles on which the Convention is based". Similarly, Germany, 15 September 2004, Appellate Court Munich, (*Furniture leather case*), case no; 7 U 2959/04. Available at: <http://cisgw3.law.pace.edu/cases/040915g2.html>.

⁴¹ Please see Article 16(2b) above.

⁴² Lookofsky, J., 'The 1980 United Nation Convention on Contracts for the International Sale of Goods', in Herbots, J. & Blanpain, R., *International Encyclopaedia of Laws: Contracts* (Kluwer Law & Taxation, 2000), at 84.

⁴³ In a case looked by the International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry (ICAC), the tribunal has come to the conclusion that on the basis of Article 7 of the Vienna Convention and requirement of "observance of good faith in international trade", international arbitration practice has come to the conclusion that Anglo-American principle of estoppel or German *Verwirkung* could be applied to contracts of international sales'. Please see Russia, 27 July 1999, Arbitration proceeding, case no: 302/1996. <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990727r1.html>.

⁴⁴ Germany, 12 November 2001, Appellate Court Hamm (*Memory module case*), case no; 13 U 102/01. <http://cisgw3.law.pace.edu/cases/011112g1.html>.

The buyer challenged the seller's claim for payment of the purchase price by arguing that the contract was void as, by delivering the goods late, the seller had breached the contract. The District Court (Landgericht) established that the delay in delivering the goods was mainly because the seller waited to receive confirmation of the buyer's payment of the previous order. Therefore, the buyer might not use any delay in the seller's performance because it was seen as contradictory to his own previous conduct which was not permissible under the standard of good faith.

The CISG did not determine what type of conduct might lead to the preclusion of asserting the formal requirement.⁴⁵ Therefore, the judge was compelled to evaluate the conduct against the standard of good faith in order to decide whether or not this exception was applicable. In other words, the court measured the conduct in question against the categories which shaped the standard of good faith in order to decide whether or not there was a place for using Article 29(2).⁴⁶

Some might argue that the principle of party autonomy, established by Article 6, should override the problem of interpreting "reliance conduct".⁴⁷ However, it should be remembered that the second sentence of Article 29(2) is dealing with a specific case of abuse which hardly affects the general meaning of party autonomy, and is rather more in harmony with Article 6.⁴⁸ Therefore, Professor Schlechtriem concluded that Article 29(2) supported a wider reading of good faith in Article 7(1) to include "the need to promote... the observance of good faith in international trade."⁴⁹

⁴⁵ Samuel, K., in Bianca, C. & Bonell, M., note no: 4 above, at 244.

⁴⁶ These categories have been discussed in the working definition mentioned in chapter two.

⁴⁷ Honnold, J., *Uniform Law for International Sales under the 1980 United Nations Convention*, (3rd ed., The Hague, 1999), at 231.

⁴⁸ *Ibid*, at 232.

⁴⁹ Please see Schlechtriem, P., note no: 5 above, at 214-216.

3. The Duty to Communicate the Acceptance of the Offer (Article 18)

Article 18 deals with the matter of accepting the offer and the issues related to accepting it. According to this Article, the offeree must communicate his acceptance to the offerer expressly or by form of conduct. In addition, the Article adopted a general rule that the acceptance would not be effective until communicated to the offerer during the time fixed or, if no time was fixed, within a reasonable time depending on the circumstances of the transaction (Article 18/2). In exception to the general rule, Article 18(3) provides that the offeree might (as a result of practices which the parties have established between themselves) indicate his assent by carrying out an act.

With regard to the application of Article 18, the reference to the standard of good faith could be raised through two hypothetical situations.

The first situation is when the offeree remains silent regarding his response to the offer. Paragraph (1) states that the silence of the offeree does not amount to accepting the offer. However, the offeree's silence could be considered to be acceptance if it was associated with circumstances which gave adequate assurance that the offeree's silence constituted acceptance⁵⁰; A case in point is when the parties had a long-term supply agreement under which the seller was required to respond to the buyer's offer within two weeks of receipt. During the first six months, the seller acknowledged all the orders. In this case, for the following three months, the seller acknowledged the orders and, at the same time, all orders were delivered to the buyer. In the following month, the seller received the buyer's orders but he did not acknowledge or deliver the merchandise to the buyer, who subsequently raised the issue with the court. The seller

⁵⁰ Sono, K., 'Formation of International Contracts under the Vienna Convention: A Shift above the Comparative Law', in Sarcevic, P. & Volken, P (eds), *International Sale of Goods: Dubrovnik Lectures*, (Oceana, 1986), at 124. <http://www.cisg.law.pace.edu/cisg/biblio/sono2.html>.

claimed that he did not accept the buyer's order and that silence did not constitute an acceptance. In this situation, the seller would be considered to be in breach of the contract because his conduct was contradictory to the standard behaviour imposed by good faith in such circumstances.⁵¹

The *Summer cloth collection*⁵² case is an example of the hypothetical situation described above. The court had to decide whether the seller's silence, regarding a letter from the buyer about modifying payment, could be considered as acceptance of that arrangement. The court found that the buyer was entitled to rely on the seller's silence as an acceptance of the payment agreement. The court reasoned its judgment by stating that the seller's conduct, in accepting the first cheque attached to the buyer's letter and not objecting to the letter, was sufficient to support a conclusion that the recipient confirmed his intention to be bound by the terms of the confirmation letter. In addition, the court referred to the standard of good faith as being "the key to determining whether a sender may assume the recipient of the confirmation letter intended to consent to the terms of the letter".⁵³

The second situation is when the standard of good faith imposes on the offeree a duty to communicate. Article 18 might not impose a duty on the offeree to inform the offerer of receiving the offer. Nonetheless, it is observed, for example, in the case of urgency when the offerer would have the legitimate right to request confirmation of acceptance. More importantly, even if the offerer did not request such confirmation, the standard of good faith imposes (in such urgent circumstances) a duty on the offeree to inform the

⁵¹ Ibid.

⁵² Switzerland 5 November 1998, District Court Sissach (*Summer cloth collection case*), case no: A 98/126. <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981105s1.html>.

⁵³ DiMatteo, L., 'The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence' (2004) 24 Nw J. Int'l L. & Bus. 299, at 345-346.

offerer about his acceptance to the offer or his carrying out the act.⁵⁴ Winship illustrated this situation with an example of a seller receiving an offer from a buyer for merchandise.⁵⁵ At the beginning, the seller rejected the buyer's offer and mailed his rejection to the buyer. Later, the seller changed his mind and decided to begin the transaction. The question here is: Can the seller's action nullify his previous mail rejecting the offer?

According to Article 17, the offer is not terminated until the letter of rejection reaches the offerer. Therefore, the seller who decided later to consider the offer must act immediately and honour the contract. Generally, the CISG does not impose a duty on the offeree to give a notice of starting the transaction. Nevertheless, if the offerer disputed the performance of the offeree by claiming that it was after the offerer rejected the offer, then recourse to the court would be more likely to lead the court to establish that the offeree was under a duty imposed by the standard of good faith to inform the offerer of the point at which the contract came into effect.⁵⁶

In summary, the standard of good faith in Article 18 could be used to fill a legal gap as in the case of interpreting the offeree's silence to the offer. In addition, good faith could be seen as a duty which could be imposed on the offeree to inform the offerer of starting the transaction.

⁵⁴ Carrara, C., & Kuckenburg, J., Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 18 of the CISG, 2003, <http://www.cisg.law.pace.edu/cisg/text/peclcomp18.html>.

⁵⁵ Winship, P., 'Formation of International Sales Contracts under the 1980 Vienna Convention' (1983) 17 Int'l. L. 1, at 9-10. <http://www.cisg.law.pace.edu/cisg/biblio/winship3.html>.

⁵⁶ Ibid.

4. Good Faith and Purported Acceptance with Non-material Modifications, Article 19(2)

The general rule regarding a reply to an offer which claims to be an acceptance of the offer, but contains different or additional modifications, is a rejection of the offer and it constitutes a counter offer.⁵⁷ However, Article 19(2) includes an exception regarding non-material modification which states:

[R]eply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

Therefore, non-material terms' modification by the offeree amounts to a rejection of the offer, except in the case that the offerer objects according to the rules stated in Article 19(2).

The exception seems to have a mitigating effect on the application of the general rule, introduced by Article 19(1), which can be used by the offerer in bad faith to escape the contract.⁵⁸ The previous situation is illustrated by the following Secretary-General's comments on an early draft of the Convention:

[I]f the offeror objects to a reply which adds 'ship immediately' on the grounds that, where no delivery date is specified, the seller must deliver the goods 'within a reasonable time after the conclusion of the contract', the reply is a rejection of the offer. . . . In the normal course of events in which the offeror objects to [such] a non-material addition or limitation, the two parties will agree on mutually satisfactory terms without difficulty. However, since the offer was

⁵⁷ Article 19(1).

⁵⁸ Even if the modifications do not affect the offer, such if the price of the merchandise raised after the acceptance arrival. Please see Murray, J., 'An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods' (1988) 8 J. L & Com 11, at 40. Available at: <http://www.cisg.law.pace.edu/cisg/text/murray21.html>.

rejected by the addition of the non-material alteration to which the offeror objected, the offeree may no longer accept the original offer.⁵⁹

There is no doubt that Article 19(2) is an example of promoting the observance of good faith in international trade whereby the standard of good faith is used as a safeguard to prevent the offeror from abusing the right of revocability.⁶⁰ Nonetheless, Article 19(2) did not require the offeror to reason his objections to the purported acceptance with non-material modifications. In other words, even if it was irrevocable, the offeror would have the ultimate authority to terminate the offer simply by objecting, without undue delay, to the purported acceptance.⁶¹

5. Late Acceptance due to Unforeseen Circumstances (Article 21)

The general rule of acceptance time is detailed in Article 18(2) and the CISG indicates that “an acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time.” Nevertheless, Article 21 deals with exceptional situations where the offeree’s late acceptance could be considered effective. Through Article 21(1), the CISG provides a solution for a situation when the acceptance arrives late due to the offeree’s late dispatch.⁶² In such a situation the offeror would have the choice of considering or rejecting the offeree’s late acceptance. If the offeror decided to consider the offeree’s

⁵⁹ UNCITRAL, Secretary-General's Commentary on the Draft Convention on the Formation of Contracts for the International Sale of Goods, U.N. Doc. A/CN.9/144, 8-9 (1977). Quoted in Kelso, J., ‘The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of Forms’ (1982) 21 Colum. J. Transnat’ l. L 529, at 546. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/kelso.html>.

⁶⁰ In fact, still there are other gaps which can be filled using good faith; for example, if the offeree withdrew his modification to irrevocable offer after the offeror objected to the modifications without undue delay. Please see *ibid*, at 547.

⁶¹ *Ibid*.

⁶² Murray, J., note no: 56 above.

late acceptance, then he had the duty to act in good faith and inform the offeree promptly to that effect.⁶³

In addition, the need for the standard of good faith manifests itself in a more complicated situation, dealt with by Article 21(2). It is assumed that such a situation arose since, if the transmission time had been normal, it would have reached the offerer in due time. However, the acceptance was late due to unforeseen circumstances. Obviously, the circumstances which caused the late arrival of the acceptance were beyond the offeree's control. Paragraph (2) elaborated this situation by stating that:

If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

On the one hand, Article 21(2) does not bind the offerer because of the offeree's late acceptance. On the other hand, the exception considers that the offerer has no control over the cause of the delay. Moreover, it would be unjust, from the legal point of view, to punish the offerer if he was cleared of wrongdoing. Consequently, the CISG considered that late acceptance was an effective rule in this situation. Nevertheless, if the offerer wanted to reject such late acceptance, then the standard of good faith imposed a duty on him not to be silent since that would be misleading to the offeree.⁶⁴ In addition, the offerer would be required under good faith to inform the offeree orally

⁶³ Article 21(1) states, "A late acceptance is nevertheless effective as an acceptance if without delay the offerer orally so informs the offeree or dispatches a notice to that effect. Farnsworth explained that it would be contrary to the standard of good faith if the offerer after some period of delay treated the delayed communication as an acceptance". Please see Farnsworth, E., note no: 17 above, at 194.

⁶⁴ Please see; Sono, K., note no: 48 above, at 129-130.

and, without delay, that he considered his offer as having lapsed, or to have dispatched a notice to that effect.⁶⁵

6. Examination of the Goods (Articles 38-40)

Articles 38 and 39 of the CISG deal with the obligation of the buyer to examine the goods and notify the seller if he discovers non-conformity of the goods. Article 38 imposes a duty on the buyer to examine the goods within as short a period as practicable in the circumstances. In the case of non-conformity of the goods, the buyer is obliged under Article 39 to give notice, within a reasonable time, to the seller specifying the nature of the lack of conformity after he discovered it or ought to have discovered it.⁶⁶ In other words, the standard of good faith requires that the time limit to notify the seller is triggered when the buyer learned or ought to have learned about the non-conformity of the goods.

What is a reasonable time for giving notice under Article 39 would depend on the circumstances of each case. While in some cases the reasonable time might be as short as one day, the circumstances of other cases might impose a longer period as an appropriate period for giving notice of non-conformity. There are a number of factors (which can be extracted from the CISG case law and scholars writings) as to what can be taken into account when specifying the reasonable time. For example, these can be the nature of the goods;⁶⁷ the nature of the defects; the situation of the parties, and relevant trade usages.⁶⁸

⁶⁵ Honnold, J., note no: 45 above, at 107.

⁶⁶ Article 39(1).

⁶⁷ For example if the goods involved in the transaction are perishable, the "reasonable time" within which notice of lack of conformity must be given is generally shorter than the time for giving such notice if the goods are not perishable. Please see Netherlands, 5 March 1997, District Court Zwolle, *Cooperative*

If the buyer for example, was aware that the seller had a history of problems in manufacturing goods, then he would be under an obligation to conduct a thorough examination so that he could rely on the seller bearing the risk of non-conformity. Allowing the buyer, who discovered the non-conformity, to speculate on the seller's cost is contradictory to the standard of good faith. In addition, a buyer, acting in bad faith, might be tempted to increase his own loss in anticipation of litigation. Also, the buyer might be tempted to cause non-conformity to the goods if the transaction had lost its overall profit potential after some months following the delivery. The obligation is to examine the good works to prevent these attempts and allow international sales to be finalised within a reasonable time after delivery.⁶⁹ Therefore, the buyer, who was slow to examine the goods, might be considered to be acting in bad faith and would lose his right to contest the non-conformity, if his action was inconsistent with the action of a reasonable person in similar circumstances. Honnold stated that:

[A] delay in [...] avoiding a contract after a market change [...] may well be inconsistent with the Convention's provisions governing [remedies available for the buyer for non -conformity] when they are construed in light of the principle of good faith.⁷⁰

As a result, the duty to examine the goods and notify the seller of non-conformity represents the promotion of good faith in international trade because such a duty

Maritime Etaploise v. Bos Fishproducts. Case no: HA ZA 95-640. Available at: <http://cisgw3.law.pace.edu/cases/970305n1.html>.

⁶⁸ The court found that the reasonable time can be derogated from the agreement of the parties. Germany, 5 July 1994, District Court Giessen (*Women's clothes case*). Case no: 6 O 85/93. Available at: <http://cisgw3.law.pace.edu/cases/940705g1.html>.

⁶⁹ Kuoppala, S.: *Examination of the Goods under the CISG and the Finnish Sale of Goods Act*, (Publication of University of Turku, Private law publication series, 2000). Available at <http://www.cisg.law.pace.edu/cisg/biblio/kuoppala.html#ii>.

⁷⁰ Honnold, J., note no: 45 above, at 101.

prevents a bad-faith buyer from precluding the seller from his rights to benefit from the contractual agreement without great difficulties or losses.⁷¹

In the *Lambskin coat case*,⁷² a Swiss seller concluded a contract with a Liechtenstein buyer for the delivery of several instalments of lambskin jackets - both for women and men - which were to be resold by the buyer to a final customer in Belarus. First, the buyer received two deliveries and paid for them. By the third and fourth deliveries, which were sent directly to the buyer's storage in Belarus, the buyer refused to pay the full price, alleging that all the goods received did not conform to the samples in respect of their colour and weight. Consequently, the seller commenced an action asking for payment.

The court found that the buyer had lost his right to rely on a lack of conformity because examination of the goods and notification had not been carried out in time (three weeks). In addition, the court found the fact that the seller had invoked late notification, after he had examined the goods. Thus the court observed was not contrary to the principle of good faith.

In addition, the CISG exempted the buyer from the obligation to examine the goods and give notice of non-conformity to the seller, if the non-conformity was known to the seller. According to Article 40, the seller cannot rely on the buyer's failure to examine the goods and notify defects if lack of conformity relates to facts of which he knew or could have been aware of and which he did not disclose to the buyer.⁷³ The standard of good faith is used in Articles 38 and 39 and the CISG continues to use it in Article 40 to

⁷¹ Interpreting the obligation to examine the goods through the standard of good faith would also prevent bad faith attempts by the buyer who, upon discovering the non-conformity, might be attempted to wait in order to speculate on the seller's cost., Kuoppala, S., note no: 67 above.

⁷² Switzerland, 30 November 1998, Commercial Court Zürich (*Lambskin coat case*); case no: HG 930634/O. <http://cisgw3.law.pace.edu/cases/981130s1.html>.

⁷³ Article 40 CISG.

strike a balance between the contracted parties. Therefore, the seller should not be advantaged over the buyer from the application of the standard of good faith if he did not comply with the same standard in the first place.⁷⁴ In fact, the standard of good faith imposes a duty on the seller to reveal all the circumstances related to the goods which would be a significant factor for the buyer to know, including the defects.⁷⁵

A different court reached a similar conclusion. In *S.r.l. R.C. v. BV BA R.T.*,⁷⁶ the Tribunal found that, in the absence of good faith, the seller could not rely on the provisions of Article 39. The Tribunal stated that Article 40 was an application of the principle of good faith and that as, in this case, the seller was a professional businessman. In addition, not only he must be considered to have known of the defect but, also he had acknowledged such defects in earlier damage cases. The Tribunal concluded that the seller knew or at least could not have been unaware of the defects, whilst he did not disclose the defects to the buyer. Consequently, the seller had violated the principle of good faith.

Another application of the standard of good faith in Article 40 could be as a gap-filler since proving the seller's knowledge of defective goods was a problematic matter. The CISG does not provide a mechanism or standard for the court to decide whether or not the seller is aware of the defect. Article 40 provides little to answer questions such as:

⁷⁴ Andersen argued that; 'At first glance Art. 40 looks like a rule of not protecting the seller in bad faith, and it reflects a principle in the CISG which has been taken to be a general one... namely that of good faith and not protecting the fraudulent or ill-faithed party'. Andersen C, note no: 428 above, at 26. See also; Kuoppala, S., note no: 67 above.

⁷⁵ Muñoz, D., 'The Rules on Communication of Defects in the CISG: Static Rules and Dynamic Environments. Different Scenarios for a Single Player' (Thesis submitted to Universidad Carlos III de Madrid, 2005). Available at: <http://www.cisg.law.pace.edu/cisg/biblio/munoz.html>; Maskow, D. & Enderlein, F., *Commentary on International Sales Law* (Oceana Publications, 1992), at 163.

⁷⁶ Belgium 27 June 2001, Appellate Court Antwerp (*S.r.l. R.C. v. BV BA R.T.*), case no; 1997/AR/1554. <http://cisgw3.law.pace.edu/cases/010627b1.html>.

To what extent should the seller know about non-conformity of the goods? Does Article 40 apply when specific facts exist which makes the goods non-conforming? Or does Article 40 apply when these facts are hidden and cannot be detected without the seller's disclosure which might establish fraud or misleading conduct?⁷⁷

What can be understood is that relying only on the textual meaning of Article 40 makes it difficult if not impossible to give a precise mechanism to identify the seller's knowledge about the goods' lack of conformity.

Consequently, the judge should be given a tool which enables him to identify the seller's knowledge through different criteria. Without doubt and without violating the exceptional nature of Article 40, the standard of good faith could provide the judge with that tool to deal with various circumstances. The standard of good faith, based on several sources including the trade usage, the duty to communicate and co-operate, and the nature of the goods among others, would ensure that the court had the necessary flexibility to decide the seller's awareness of the lack of conformity of the goods.

In other words, the inclusion of several elements by the standard of good would ensure that the court had the necessary legal criteria to apply Article 40 on a case by case basis and to take account of its exceptional nature.⁷⁸ What should be said by now is that the application of Article 40 is best interpreted according to the standard of good faith.⁷⁹

⁷⁷ For further illustration about Article 40 vagueness, see; Garro, A., 'The Buyer's "Safety Valve" Under Article 40: What is the Seller Supposed to Know and When?' (2005) 25 J. L. & Com. 235, at 257.

Available at: <http://www.cisg.law.pace.edu/cisg/biblio/garro4.html#iv>.

⁷⁸ Ibid.

⁷⁹ Please see; Muñoz, D., 'The Rules on Communication of Defects in the CISG: Static Rules and Dynamic Environments. Different Scenarios for a Single Player' (Thesis submitted to Universidad Carlos III de Madrid, 2005). Available at: <http://www.cisg.law.pace.edu/cisg/biblio/munoz.html>.

7. The Duty to Mitigate the Loss Where Possible (Articles 77 and 85 to 88)

CISG Article 77 provides that:

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

Throughout the CISG, there are provisions which encourage efforts of good faith to save the contract or mitigate damage resulting from breach of contract. Articles like 34 and 37 provide ways to cure the defects in the documents and goods to preclude the contracting party's bad faith from frustrating the contract.⁸⁰ Article 77 provides a mechanism when, regardless of fault, the contract cannot be saved. Accordingly, the aggrieved party, who suffered a loss because of the other party's breach of contract, must react promptly and take reasonable measures to mitigate his loss.⁸¹ Nevertheless, if such measures have not been taken by the aggrieved party, then he will be ineligible to claim the damages which could have been mitigated. What can be considered as a reasonable measure, to mitigate the loss, will depend on the circumstances of each case.

Equally, it would be contrary to the standard of good faith to allow the aggrieved party to claim damages for breach of contract if he was responsible for non-performance.⁸² In fact, the use of the standard of good faith to interpret Article 77 assists the wide meaning of "reasonable steps", used by the Article. It was established that good faith contains several categories which the judge could use to define the steps including the

⁸⁰ Klein, J., "Good Faith in International Transactions", (1993): 15 *Liverpool Law Review* 115, at 131. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/Klein.html>

⁸¹ Article 77 by Knapp, V., in Bianca, C. & Bonell, M., note no: 4 above, at 560.

⁸² Ziegel, J., 'Report Presented to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods' (1981). Available at: <http://www.cisg.law.pace.edu/cisg/text/ziegel60.html>.

contractual intention, goods in question, and communication, which the aggrieved party could take to mitigate his loss. In the *Propane case*⁸³, the court shared a similar view when the court found that:

A possible measure to reduce damages is reasonable, if it could have been expected as bona fides [good faith] conduct from a reasonable person in the position of the claimant under the same circumstances.

In addition, Articles 85 to 88 provide a solution for two possible situations where the buyer either delays in taking delivery of goods or fails to make payment when the goods are delivered. The solution is the imposition of a duty on the party, who is in possession or control of the goods, to take the necessary steps to preserve the goods against loss or damage until the other party collects them.

The seller would have to preserve and retain the goods until he has been reimbursed his reasonable expenses by the buyer (Article 85). Therefore, the buyer, whose goods have been preserved, should act according to good faith and pay the seller the reasonable expenses which the seller incurred when reserving the goods for the buyer.⁸⁴

In both of the described situations, Article 85 represents the buyer's failure to fulfil his obligations which can be considered and treated as a breach of contract. However, Article 85 - by imposing a duty to mitigate the loss - seems to give greater weight to striking the balance between the contracted parties rather than achieving the aim of the contract. Like the seller, the buyer too would have to reserve the goods if he intended to

⁸³ Austria, 6 February 1996, Supreme Court (*Propane case*), case no: 10 Ob 518/95.
<http://cisgw3.law.pace.edu/cases/960206a3.html>.

⁸⁴ Similarly, if the buyer was in possession or control of the goods and decided to reject them, then has the duty to reserve the goods for the seller, see Article 86.

reject them, and he would be obliged to do so until he was reimbursed for the expenses incurred.⁸⁵

It can be argued that the duty to mitigate the loss, imposed by Articles 85 and 86, is based on the standard of good faith because, acting according to the standard of good faith means that the party should consider the other party's benefit from the contract and cooperate with him to mitigate his loss. In addition, the party, who is acting in good faith, will not wait for the losses resulting from the breach of the contract to pile up and then claim for damages for these avoidable losses.

To put it more simply, the application of the standard of good faith, in Articles 85 to 88, is to avoid the other party's unnecessary losses which might occur if the party who possesses the goods did not preserve them.⁸⁶ Therefore, in the *Machine case*, the tribunal ruled that "a liability for the preservation of the goods could have been derived from either Article 86(1) of the CISG or from the principle of good faith."⁸⁷

Moreover, if the party who is preserving the goods in accordance with Article 85 or Article 86 decides to sell them, then, he must act in good faith before and after selling the goods. For instance, the contracted party who wants to sell the goods must give the other party a reasonable time to possess the goods, known as a notice of intention,⁸⁸ and adhere to the commercial standards in selling the goods.⁸⁹

⁸⁵ Article 86(1).

⁸⁶ It is also can be said that good faith is to restrict the power of one party if the exercise of that power would increase the loss of other party. See; Kunz, C., 'Frontispiece on Good Faith: A Functional Approach within the UCC' (1990) 16 Wm. Mitchell L. Rev. 1105, at 1116.

⁸⁷ Germany 19 December 2002, Appellate Court Karlsruhe (*Machine case*), case no: 19 U 8/02. <http://cisgw3.law.pace.edu/cases/021219g1.html>.

⁸⁸ Article 85(1).

⁸⁹ Kunz, C., note no: 84 above, at 1116.

For example, if the goods have a venerable market, then they should be sold without delay before the value declines.⁹⁰ These behavioural requirements can also be established or defined by the standard of good faith. It can be said that all the conditions required to sell the goods are based on principles like reasonableness and trade usage which constitute the meaning of the standard of good faith. Consequently, the standard of good faith constitutes a cornerstone for the meaning of Articles 85 to 88 regarding the duty imposed on the contracted parties to take the necessary steps to mitigate unnecessary loss. Some might ask whether good faith can be distinguished from the duty to mitigate the loss? The main different is that good faith is a general principle which includes number of duties (which includes mitigating the loss) on the contracting parties according to the time, place and subject of the contract. The same thing can not be said about the duty to mitigate the loss which is more precise concept. In addition the application of good faith can cover all stages of the contract (negotiation to conclusion), while the duty to mitigate the loss is only applicable on the last stage of the contract performance.

It is important to conclude this section by emphasising two facts. Firstly, the provisions, which have been discussed in this chapter, are not the only provisions in the CISG which incorporate an application of the standard of good faith. Good faith embraces other ideas in the CISG such as measuring the behaviour of the parties against the standard of reasonableness,⁹¹ always favouring the solution which preserves the contract over another which terminates it,⁹² and co-operation with the other party so he can fulfil his obligations.⁹³

⁹⁰ Ibid.

⁹¹ Such as; Articles 34, 35(2)(b) and 37.

⁹² Such as; Articles 25, 26 and 34, in these articles the CISG was clear in its intention to preserve the contract over what terminates it. For example if the breach of the contract can be cured, then the contract

Secondly, the analysis of the above provisions proved that, in the CISG, good faith should be applied widely to include the contracted parties. In fact, the application of the aforementioned provisions would be extremely difficult without the CISG recognising a general role of good faith. It has been observed, rightly, that “any of the provisions directed at the parties to CISG contracts would be rendered meaningless without recognizing a general “good faith obligation”.”⁹⁴

The previous provisions are answers to the question as to where or how does the standard of good faith function in the CISG. Surely, good faith does not operate only in the aforementioned provisions.⁹⁵ Moreover, there are many other situations, in the CISG, where the interpretation of good faith needs to be applied widely.⁹⁶

8. Can the Principle of good faith be excluded from the CISG?

As shown, the principle of good faith influences many provisions in the CISG. Therefore, some might ask whether or not the contracting parties can exclude the standard of good faith from the contract. CISG Article 6 granted the contracting parties

should not be terminated (Article 34)nor if the party in breach did not for seen the result of his action (Article 25). All these exceptions can be based on the CISG promoting good faith in the international trade.

⁹³ Such as Articles; 32(3), 48(2) and 60(a). Generally, please see : Sim, D., ‘The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods’ (LLM thesis, Harvard Law School, 2000), available at <http://www.cisg.law.pace.edu/cisg/biblio/sim1.html#ii..>

⁹⁴ Kuoppala, S., note no: 67 above.

⁹⁵ Eörsi, gave the following example;

Under Article 24, a declaration of acceptance "reaches" the addressee when "it is . . . delivered . . . to his place of business or mailing address." If a party knows that the other party who has a place of business is away from his home for a considerable period of time, and he nevertheless sends the declaration to the mailing address, he may violate the requirement of good faith.

Eörsi, G., note no: 1 above, at 2-8.

⁹⁶ Winship gave the following hypothetical situation;

Assume that a sales contract requires the seller to deliver by handing over documents but does not specify the place where the documents are to be presented. Article 34 of the Convention merely says that the seller is bound to hand over the documents at the place required by the contract. Both the contract and Convention are, therefore, silent on this point. The general obligation of good faith requires the seller to present the documents at a place that is convenient for the buyer, and the buyer must not arbitrarily refuse presentment of the documents no matter where presented.

Please see Winship, P., ‘Commentary on Professor Kastely’s Rhetorical Analysis’ (1988) 8 Northwestern J. Int’l. L. & Bus. 623.

the freedom to derogate from or vary the effect of any of its provisions. The literal interpretation of Article 6 indicates clearly that the contracting parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions. The literal interpretation is also supported by the history of Article 6. The 1980 conference rejected the Canadian proposal to exclude the standard of good faith from the domain of party autonomy.⁹⁷

Some scholars, however, believed that permitting the contracting parties to exclude the standard of good faith might be inconsistent with the requirements of interpreting other provisions in the CISG. This chapter has demonstrated that good faith is an essential element in the interpretation of a number of provisions which are based on the application of good faith.⁹⁸ Therefore, if the contracted parties opt out of the application of good faith, then, the interpretation of other provisions are jeopardised.

In addition, permitting the exclusion of good faith sacrifices one of the Convention's main objectives; to promote the observance of good faith in international trade.⁹⁹ Bridge noted that "Article 7 should not be open to variation by the parties. Article 6 cannot be read literally. The parties are hardly at liberty, for example, to derogate from the Secretary –General's role as "deposit for the purpose of the CISG."¹⁰⁰

Permitting the contracting parties to exclude good faith from the CISG contract might go beyond the concept itself to affect the CISG's objectives including the meaning of a

⁹⁷ Winship, P., 'The Scope of the Vienna Convention on International Sales Contracts', in Galston, M. & Smit, H (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, (Matthew Bender, 1984), at 1-33.

⁹⁸ Keily, T., 'Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (1999) 1 VJ 15.

⁹⁹ Bianca, C. & Bonell, M., note no: 4 above, at 96.

¹⁰⁰ Bridge, M., *The international sale of goods , law and practice* (2nd Ed, oxford university press ,2007) at 535.

number of provisions and “the rules of interpretation laid down for courts”.¹⁰¹ In other words, excluding good faith means excluding substantial parts of the CISG which the contracting parties might not want to exclude. Unlike the CISG, the PECL stated clearly that good faith was exempted from the rule of freedom of contract. Article 1:102 (1) PECL reads:

Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles. However, in the current form of the CISG, the freedom of contract, which Article 6 includes expressly, cannot be hindered in favour of good faith, the existence of which in the CISG seems doubtful. Consequently, if the contracting parties expressly excluded the application of good faith from their contract, then the court should comply with their agreement and exclude the use of the concept from any dispute arising from the contract, despite the great difficulty, which the court might face in interpreting their contract due to this concept being excluded.

¹⁰¹ Ibid.

Chapter Five

The Interpretation of Good Faith in the CISG Case Law

Chapters three and four have demonstrated good faith in the CISG as a multifunctional instrument. However, the conclusion reached by these chapters cannot be accepted without first being tested. In other words, in CISG cases, the question of whether or not good faith is a general rule with several functions must be determined through courts and tribunal judgments.

Consequently, this chapter analyses good faith through transnational CISG cases where the concept was an important element in determining the judgment of the case. However, several important issues need to be discussed before studying foreign CISG cases. Therefore, this chapter focuses mainly on these issues. The first issue is the value of case law in interpreting the CISG. Can we rely on the tribunals' and courts' interpretations in deciding the meaning of good faith in the CISG? If so, the remaining question concerns how such interpretations fit within the aim, text and content of the CISG. Moreover, what are the difficulties which an interpreter might face when considering foreign CISG cases? Finally, how far is the judge willing to consider other foreign CISG cases in deciding the meaning of good faith in cases with similar facts?

The second issue is the homeward trend interpretation. Theoretically, any judgment which concerns the interpretation of the role of good faith in the CISG must be autonomous from the national understanding of the same concept.¹ Consequently, in a specific legal system, the court or tribunal must neither interpret good faith in the CISG according to the national understanding nor should it interpret good faith according to

¹ The autonomous interpretation is part of the international character requirement which is included in Article (7).

the national literature which is based on the understanding of the national legal system.

Some of the important questions which may arise in relation to this issue are:

- Can the concept of good faith be interpreted without the influence of national understanding?
- Is there any other understanding of homeward trend interpretation which allows national understanding to infiltrate the interpretation of the CISG?
- Is a homeward trend interpretation of good faith able to affect the meaning of good faith in Article 7?
- Can a uniform interpretation of good faith be achieved in the CISG?

The third issue constitutes the core of this chapter which is the interpretation of good faith in transnational CISG cases. A number of cases, which dealt with the interpretation of good faith, are analysed and classified according to the trend of interpretation and according to the understood particular function concerning the standard of good faith. The cases, discussed in this chapter, represent the main civil and common law legal systems adopted worldwide. Consequently, references are made to the understanding of the specific court or national tribunal of good faith in order to explore the homeward trend effect in deciding of the case.²

In addition, judgments of these cases would be discussed in the light of the common law legal system so that any misunderstanding, with regard to the meaning of good faith in the CISG, can be approached accurately. Therefore, with regard to the interpretation of good faith, it might become possible to create a viable meeting point between civil and common law legal systems. In other words, the researcher hopes that an analysis of

² The author expresses a reservation that not all the national legal systems' understandings of good faith are considered because of the author's limited ability with regard to the language of some of these legal systems and the accessibility of information.

these cases will reveal what can be referred to as the common legal understanding of the role of good faith in the CISG.³

The last issue that this chapter explores is the applicability of a dynamic interpretation of good faith. Consequently, the dynamic interpretation is first defined and then reviewed to examine whether or not the cases, discussed in this chapter, support such an interpretation.

1. The Role of Transnational Case Law in Interpreting CISG

In the common law legal system, the doctrine of ‘stare decisis’ is followed that obligates the judges to adhere to the previous rulings or in other words ‘case law’ established in the similar legal cases. These rulings or decisions are then collected to constitute a precedent, which may be referred to, subsequently by other courts. However, can a similar methodology be applied to the interpretation of an international instrument like the CISG? In other words, what is the value of foreign cases in interpreting the CISG?

A reader of Article 7 will arrive at one conclusion; which is that the CISG does not expressly recognise case law as a source in interpreting the Convention. Therefore, if case law does not constitute a method for interpreting the CISG, then the judicial decisions do not constitute a persuasive authority which other courts or tribunals must consider whilst reasoning similar cases. However, it seems inevitable that the interpreter of the CISG will resort to foreign cases in interpreting good faith in the CISG. A number of reasons can be illustrated to justify such a conclusion. Firstly, there is the need to dismiss self-explanatory interpretation and create a uniform application of the

³ The achievement of such understanding would participate in/would contribute to the success of the CISG as a uniform law that governs the international sale of goods transactions worldwide.

CISG.⁴ Neither the text of Article 7 nor its documented history is clear enough to unify the understanding of good faith in the CISG. The only reference in Article 7 to the authority of case law is indirectly through the need to promote uniformity in its application, which means that precedents must be collected and considered when interpreting the CISG.⁵

Secondly, recourse to the case law interpretation of good faith would be helpful in finding the uniformity, required in Article 7, which concerns “an admonition to follow precedents on the international plane”.⁶ In other words, studying the decisions of foreign CISG cases assists in indicating the trend, which has been adopted worldwide, to determine the scope and application of the standard of good faith in the convention.

Keily observed that:

“Whilst the case law does not establish a binding transnational precedent, it is only by looking at judicial and arbitral decisions that we can gauge whether the CISG is successfully promoting international trade in the manner intended by its authors.”⁷

In fact, achieving uniformity in understanding good faith becomes impossible without imposing a duty on the interpreter of the CISG to look into transnational CISG case law.⁸

⁴ For more in this regard, please see; Andersen, C., ‘The Uniform International Sales Law and the Global Jurisconsultorium’ (2005) 24 J. L. & Com. 159.at 165. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/andersen3.html#v>.

⁵ Zeller, B., ‘Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods’ (2003); <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>.

⁶ See Eörsi, G., ‘General Provisions’, in Galston & Smit (eds), *International Sales: The United Nations Convention for the International Sale of Goods* (Matthew Bender, 1984), at 2–8. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/eorsi1.html>, at 2-1,2-4.

⁷ Keily, T., ‘Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)’ (1999) 1 VJ 15, at 20.

⁸ Dr Andersen illustrated that we could achieve uniformity only through the creation of uniform terminology and interpretation. Within the need to establish a uniform autonomous terminology lies the inherent requirement that practitioners look to international case law for contributions to interpretations. Otherwise, the autonomy becomes illusory and, with it, the uniformity also ... Even assuming that international uniform standards of good faith and fair dealing and the general principles of the CISG

Veneziano shared a similar idea with Keily when he stated that:

The most effective way to ensure a truly common understanding of uniform rules is that judges and arbitrators (as well as practising lawyers) have an awareness of how the same provisions have already been interpreted and applied in previous case law from different countries.⁹

Another reason for considering transnational CISG cases, in interpreting the CISG in general and specifically for good faith, comes from the fact that the CISG lacks an amendment mechanism which allows changes to the Convention's text even if that change would be more suitable in the application and interpretation of the text. Moreover, there is no international tribunal to consider disputes regarding the interpretation of the CISG.¹⁰ Therefore, any dispute regarding the meaning of good faith or any other text in the CISG cannot be solved in a uniform manner if the interpreter has not considered similar CISG cases.

In support of considering case law whilst interpreting the CISG, Felemegas stated:

... interpretation of an international convention by sister signatories should be taken into account in a comparative manner ...[and] a judge ought to be obliged to search for and to take into consideration foreign judgments ... at least the judgments from other contracting states when he is faced with a problem of interpretation.¹¹

could be evolved, autonomy of these principles cannot be reached without some indicative recourse to the international body of case law which is the CISG case law. Andersen, C., note no: 605 above, at 166.

⁹ Veneziano, A., 'Implementing the UNILEX database and applying the CISG and UNIDROIT principles', (2009), at: 2. Available at: <http://www.ebrd.com/downloads/research/news/lit092e.pdf>.

¹⁰ Please see Felemegas, J., *International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, (Cambridge University Press, 2007), at 15.

¹¹ Ibid at 17; please see, also, Hackney stating :

"Therefore, a reasonable reading of this Convention directive would be that it requires a principle similar to jurisprudence constant, a principle from Civil- Law legal systems. This principle holds that case law is not a binding source of law, but a persuasive source of law. This would mean that when interpreting the Convention, a court should look to other court's interpretations of the Convention, including the interpretations of courts from other countries. These interpretations, however, would not be binding, but only persuasive". Hackney, P., 'Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?' (2001) 61 La. L. Rev.473.

2. The Quality of Decisions and Homeward Trend Interpretation

Considering transnational case law in understanding the meaning of good faith might present several obstacles. Two of the main obstacles, which are more likely to occur, concern the need for autonomous and uniform interpretation of good faith in the CISG.

Article 7 stresses that the true international character of the CISG must be kept in consideration while interpreting the Convention. Thus, it is imperative that domestic courts shall not overshadow the international nature of the Convention while following the precedents in the national legal system. Often, this is referred to as an autonomous interpretation of the CISG. Honnold stated:

The reading of a legal text in the light of the concepts of our domestic legal system is an approach that would violate the requirement that the convention [to] be interpreted with regard to its international character.¹²

Obviously, the drafters of the CISG hoped that autonomous interpretation would eliminate the risk of diverging interpretations from different jurisdictions.¹³ In other words, avoiding the divergence of the national systems' interpretations would contribute greatly in achieving the objectives of the CISG. In reality, the literal meaning of uniformity in CISG is impossible to achieve. This is mainly because the CISG does not provide a legal mechanism which can be used by the interpreter.¹⁴

It might be true that, with regard to its interpretation and application, judges and arbitrators are aware already of the CISG's aim to promote uniformity; this means the production of uniform results. However, the difficulties facing the interpretation of the

¹² Honnold, J., *Uniform Law for International Sales under the 1980 United Nations Convention*, (3rd ed., The Hague, 1999), at 89.

¹³ Ferrari, F., 'CISG Case Law: A New Challenge for Interpreters?' (1999): 17 J. L. & Com. 245, at 254. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/ferrari3.html#iii>.

¹⁴ See the list drawn by Professor Rosset on the weaknesses of the CISG which prevent the success of the CISG as a uniform law code. Rosset, A., note no: 335 above.

CISG could tempt courts and tribunals to “read the Convention through the lenses of domestic law”,¹⁵ which would result in a failure to achieve the Convention’s objectives.

When describing the possibility of a uniform interpretation in international trade,

Bergsten’s comments could be the most appropriate in relation to this issue. He stated:

[E]ven the most passionate supporters of the CISG would have to admit that it would be unrealizable. It is difficult enough to secure uniform interpretation of the law in national legal systems. It is unthinkable in a world where the text exists in multiple languages, where it has not always been transposed into the domestic legal systems with faithful adherence to the official text, where the practitioners have some time radically different education in the law and approach legal questions with different preconceptions and, most importantly, where is no court of final appeal that can give a uniform interpretation.¹⁶

The author’s opinion is that the Convention’s reference to the need to promote uniformity does not only mean only the need for identical interpretations to the CISG.

In fact, it is less likely to find identical interpretations for a convention, similar to the CISG, with various vague concepts which are applied in different jurisdictions and with different languages. Andersen suggested that uniformity of the CISG should be measured through uniform results rather than identical interpretation.¹⁷

When interpreting the CISG, Magnus rightly referred to the responsibility of the courts and tribunals to “make efforts to adopt solutions which are tenable on an international level, *i.e.* solutions which can be taken into consideration in other Contracting States as well.”¹⁸ As a result “[T]he more the various concepts are interpreted “autonomously” the more this result is able to be achieved”.¹⁹

¹⁵ Gopalan, S., *Transnational commercial law*, (Oxford University Press, 2004), at 37.

¹⁶ Bergsten, E., ‘*Methodological Problems in the Drafting of the CISG*’, in Janssen, A. & Meyer, O., *CISG Methodology*, (European Law Publishers, 2009), at 30.

¹⁷ Andersen, C., *Uniform Application of the International Sales Law. Understanding Uniformity: the Global Jurisconsultorium and Examination and Notification Provisions*, (Kluwer Law International, 2007), at 13.

¹⁸ Magnus, U., *Wiener UN-Kaufrecht (CISG)*, (Sellier, 2005), at 155, cited in See Ferrari, F., ‘Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With’ (2001) 20 J.L. & Com. 225. In fact, other scholars including; Kritzer, Felemegas and Hackney believe as Magnus that uniformity can only be

This thesis is not suggesting that case law is a binding source of interpreting the CISG which the court must consider. However, courts and tribunals need to adopt transnational CISG cases as a persuasive authority which may guide a judge in making the decision on the case at hand.²⁰ In addition, courts and tribunals need to elaborate on the reasoning of the judgment so that other courts can make an assessment about the correctness of the application.²¹

In cases with similar facts, the question is how far judges and arbitrators are willing to consider transnational case law judgments in deciding the meaning of good faith. There are many factors which could direct a judge to consider CISG transnational cases. On the one side, there are subjective factors such as the judge's multilingual ability, his legal understanding of other legal systems, and his courage in making an effort to search for similar cases. On the other side, there is one significant factor which could encourage the judge to disregard the consideration of transnational CISG cases; that is the availability and accessibility of these cases. It is more likely that applying the CISG in more than 70 states would create serious difficulties with regard to the collection and the language of the CISG cases.²²

achieved by considering foreign case law. In addition, the consideration of case law for a persuasive reasoning has been adopted by a Spanish court which observed that; "The spirit of the Convention is to achieve uniform law not only in regard to its text; courts should also apply it in a uniform manner... [And] The only way to assure the uniformity of the Convention is to take into account decisions from tribunals of other countries when applying the Convention and to consult expert opinions of scholars in the subject, in order to achieve uniformity".

Spain 7 June 2003 Appellate Court Valencia (*Cherubino Valsangiacomo, S.A. v. American Juice Import, Inc.* Case no; 142/2003. Available at:

<http://cisgw3.law.pace.edu/cases/030607s4.html>. accessed on 1/7/09.

Also, see; Ferrari, F., note no: 18 above at 230; Ferrari, F., note no: 13 above at 254.

¹⁹ Ferrari, F., *ibid* at 228.

²⁰ See; Andersen, C., note no: 17 above, at 13.

²¹ See; Zeller, B., note no: 5 above.

²² The essence of the problem that many member states in the CISG do not have a mechanism for reporting the cases and decisions and there is no minimum requirement for details of the fact nor the reasoning of the decision. See Ziegel, J., 'The Future of the International Sales Convention from a Common Law Perspective' (2000) 6 NZ. B. L. Q. 336. Available at: <http://www.osgoode.yorku.ca/cisg/writings/ziegelsix.htm#22>.

Moreover, if the cases were available in a language which the interpreter could understand, then another problem, which would be the details of the judgment, might occur. Many arbitration decisions do not elaborate on their reasoning. Therefore, with regard to other similar cases, consideration of the reasoning of such decisions in the case at hand might affect the correctness of the interpretation and application of the Convention. However, by any measure, several private institutions made enormous efforts to ease the accessibility of transnational CISG cases. An example would be the Pace Institute of International Commercial Law's database on CISG and International Commercial Law. The Pace databank has a collection of over 3115 CISG cases and an online collection of scholarly writings about the CISG which contains more than 1659 texts.²³ Similar databases include the UNCITRAL Digest of CISG cases (CLOUT),²⁴ UNILEX,²⁵ and the CISG-Advisory Council.²⁶

There is no doubt that the availability and the accessibility of transnational CISG cases ensures better understanding and application of the CISG. However, at present, the courts and tribunals' consideration of these databases whilst dealing with similar cases is unproven.²⁷

²³ The statistics were obtained from Pace database, <http://cisgw3.law.pace.edu/cisg/search-cases.html>, <http://www.cisg.law.pace.edu/cisg/biblio/bib2.html>, on the 31/05/15.

²⁴ See; http://www.uncitral.org/uncitral/en/case_law.html.

²⁵ Database of international case law and bibliography on the United Nations Convention on Contracts for the International Sale of Goods (CISG) and on the UNIDROIT Principles of International Commercial Contracts. Available at: <http://www.unilex.info/>.

²⁶ The primary purpose of the CISG-AC is to issue opinions relating to the interpretation and application of the CISG on request or on its own initiative. Requests may be submitted to the CISG-AC, in particular, by international organisations, professional associations and adjudication bodies. Available at: <http://www.cisgac.com/>.

²⁷ In reference to this point, it is worth mentioning that there is a project for CISG Case Coding supervised by Professor Larry DiMatteo and Dr. Camilla Andersen. According to the initial plan, one of the coding categories is the reference to other courts' judgment.

3. The Domination of Civil Law Cases and the Possible Influences on the Interpretation of CISG

According to one legal school, the unbalanced contribution of CISG member states towards building the body of CISG case law might lead eventually to understanding the Convention. In other words, the domination of one legal system in building the CISG body of cases might lead to interpreting many concepts of the CISG according to the understanding of that one particular legal system.

With the current situation and despite the 74 member states representing different legal systems, it seems that only civil law countries participate in reporting CISG cases. Consequently, there is a shortage of cases reported from common law jurisdiction courts. As of October 2014, the participation of the main member states which adopted common law systems, represented less than 10 per cent of the Pace database's total number of reported cases on the CISG.²⁸

Looking through statistics, the United States seems to have the largest number of reported cases (147) followed by Canada and Australia with (20) and (26) cases respectively, New Zealand with (12) and the United Kingdom with only (5) cases.²⁹ From all of these available cases, only one case alluded to the concept of good faith, which will be discussed later in this chapter.

In comparison, the contributions of civil law member states represent the majority of the decisions found on the CISG database. For example, in Germany, courts and tribunals decided on (523) CISG cases which are, by far, the highest number of CISG cases from

²⁸ As of May 2015 the Pace database on CISG contains links to 3115 case presentations. See: note no: 24 above

²⁹ Ibid.

a single member state. In fact, the number of German CISG cases outweighs all the cases reported by all common law member states. Furthermore, Chinese courts and tribunals contributed (433) decisions, followed by the Russian Federation Courts and tribunals with (305) decisions.³⁰ Consequently, the three aforementioned civil law jurisdictions shared over a third of the total number of CISG cases.

Despite the fact that the previous numbers did not come from any official empirical research the observation which can be made that if case law was adopted as a persuasive authority, the influence of civil law academics on the understanding of some of the highly disputable provisions and concepts in the CISG would be unavoidable. The high demands of the member states courts and tribunals to interpret the Convention means that more civil law commentaries and points of view are taken into account regarding the issue in question.

The question, which may arise here, is whether or not the current case law's contribution might affect the understanding of the role of good faith in the CISG. There is no doubt that, in its current distribution, the consideration of CISG case law would affect the results of the role of good faith towards civil law understanding of the concept's role. However, CISG case law is not considered to be the only element in this matter. Through the drafting history of the CISG and through other CISG provisions, this thesis has already discussed the role of good faith. As a result, the outcomes of the discussed cases either support the previous chapters' findings on the meaning of good faith or bring new findings into the debate.

The author believes that there is an urgent need for common law jurists to participate effectively in elaborating and expanding on the meaning of good faith in the CISG. The

³⁰ Ibid.

aim would be to close the gap between common and civil law understanding regarding good faith in the CISG. Moreover, it would contribute greatly towards promoting the uniformity of applying the CISG.³¹

4. Trends of Interpretations in CISG Case Law

Transnational CISG case law shows frequent divergent interpretations when dealing with the standard of good faith in the CISG. These interpretations can be classified into two main categories. The first is the strict literal approach whereby the court considers the interpretation of good faith through the literal meaning of Article 7(1). The second is the wider approach whereby the court considers good faith through the purpose and context of the CISG.

As a result, this section reviews selective cases from different jurisdictions in different years to find out the scope of the adoption of good faith by courts and tribunals in their decisions. In addition, some of the cases are reviewed against the effect of homeward trend interpretation in order to evaluate the possibility of achieving uniformity and autonomy in interpreting the concept of good faith. Moreover, the section provides a comprehensive view of the application of good faith in the Convention which clarifies the views of the courts and tribunals regarding the appropriate role of good faith.

4.1 Good Faith as an Instrument of Mere Interpretation

In CISG case law, the first trend in interpreting good faith is based on the drafting history of the Convention. Therefore, the compromised position of the standard of good faith in Article 7 is used as a legal tool to interpret the provisions of the Convention.

³¹ See; Bell, G (ed), 'How the Fact of Accepting Good Faith as a General Principle of the CISG Will Bring More Uniformity' , in *Review of the Convention on Contracts for International Sale of Goods 2003-2004*, (Sellier, European Law Publishers), 2005.

However, this legal view does not recognise that, in the CISG, good faith has a wider role which can be extended to the contracted parties. As a result, the CISG does not impose a duty on the contracted parties to perform their contractual obligations in good faith.

This approach was adopted in the *Industrial Equipment case*.³² A Spanish Buyer had a contract of representation (governed by the CISG) with a German machinery producer. The agreement stated that the Buyer had an exclusive right of distribution in Spain for industrial products produced by the German Seller. Later, the Seller informed the Buyer about his concern that the distribution of the products in the Spanish market was unsatisfactory. Furthermore, particularly since the Buyer's sales fell dramatically, the Seller expressed his concern that the market could be taken over by other suppliers. Consequently, the Seller decided to sell his products to another company and promised to continue supplying all the Spanish Buyer's orders, but without an exclusive right of distribution.

The Buyer sued the German Seller for damages claiming that the Seller had breached the exclusive contract, had failed to supply ordered goods, and did not supply the required replacement parts for sold machinery which, under the principle of good faith, the Buyer had always believed the Seller was obliged to continue delivering.

In principle, the tribunal supported the Buyer's argument that, under good faith, the Seller was obliged to supply the spare parts. However, the tribunal refrained from imposing such a duty because it was based on the good faith mentioned in Section 242 of the German Civil Law. The arbitrator illustrated that the good faith, mentioned in Article 7(1), was applicable only to interpretation by the CISG and was not to be

³²ICC Arbitration Case No. 8611 of 23 January 1997 (*Industrial equipment case*). Available at: <http://cisgw3.law.pace.edu/cases/978611i1.html>.

referred to as a source for the parties' rights and duties. The arbitrator concluded that the case was not to be settled by the CISG and needed to be judged under Section 433 of the German Civil Code (BGB).

Obviously, the arbitrator's statement eliminated the role of good faith in the CISG and portrayed it to be a tool to interpret the Convention itself, without any reference to the standard function on interpreting the contract or as an obligation which resulted from their contractual agreement. However, in this case, the ICC's judgment failed to answer the question of how the standard of good faith in this interpretation promoted international trade without imposing a duty on the contracted parties to perform in good faith.³³ More importantly, the tribunal neither elaborated on how good faith functioned in interpreting the Convention nor explained the legal foundation for such an opinion.

The author therefore posits that similar cases could be judged by relying on the standard of good faith included in the Convention. It is agreed that the Seller would be acting unreasonably if he failed to provide replacements for damaged products. This principle is based on the principle of good faith illustrated earlier in this thesis.³⁴ Therefore, in settling this case, good faith could have been applied implicitly as a duty on the seller to supply a replacement for the damaged goods. Good faith in this context had dual roles. The first was to interpret the meaning of reasonableness and the second was to presume, in his contractual behaviour the party's failure to consider the standard. Hence, in deciding similar cases, strong argument can be made in favor of the application of Article 7(1) in conjunction with other relevant articles of the CISG that will preclude

³³ Please see Keily, T., 'Good Faith & the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (1999) 3 V.J. 15, at 24.

³⁴ "The general principles underlying many provisions of the Convention collectively impose an obligation of good faith on the parties." Please see Koneru, P., 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach based on General Principles' (1997) 6 Minn. J. Global Trade 105, at 107.

the parties acting against the essence of good faith, which should be the core of every commercial transaction. Although, it is not disputed that in the *Industrial Equipment* case the Seller would be acting unreasonably if he failed to provide replacement for damaged products. Nevertheless, even if contention of the arbitrator is considered i.e. ‘applicability of good faith only to interpretation by the CISG but not as a source for the parties’ rights and obligations’, still there are other provisions within CISG that corroborate the intrinsic value of the good faith. Primarily, these articles include, inter alia, Article 60(a) and 71(3), which emphasize the need for maintaining reasonableness by the contractual parties. Based on this argument, the author is of the view that in deciding the said case, standard of good faith could have been applied implicitly as an obligatory duty on the Seller to supply a replacement for the damaged goods, which is duly supported by various provisions of the CISG.

Another important observation about this case, pertaining to the interpretation of good faith, was that it was exceptional. The *Industrial Equipment case* could be the only case reported on the PACE database whereby the decision indicated clearly that the role of good faith was limited to the interpretation of the Convention.

4.2 Good Faith as a General Rule

In CISG case law, a more common approach to good faith is the consideration that it has a general role in the Convention with different applications and expanded usages. This wider approach to the role of good faith was referred to in the judgment of the *Mushrooms case*.³⁵ The Hungarian arbitration court ruled that “the observance of good

³⁵ Hungary, 17 November 1995, Budapest Arbitration proceeding, case no; Vb 94124. Available at: <http://cisgw3.law.pace.edu/cases/951117h1.html>.

faith is not only a criterion to be used in the interpretation of the CISG but also a standard to be observed by the parties in the performance of the contract.”

.The following cases are examples of applications of good faith in different commercial disputes which were governed by the CISG. Each example is analyzed to reveal one or more applications of good faith in the CISG.

5. Good Faith as a Substantive Tool to Resolve Matters Not Governed Expressly by the Convention (Gap-filler)

Article 7(2) authorised the interpreter to use the general principles, on which the CISG is based, to settle any dispute governed by the Convention, although not settled expressly by the Convention. Thus, any gap found in the CISG must be filled by the convention itself using the general principles on which it based. Good faith is one of the general principles in the CISG which could be used whenever a gap is deemed to exist in the provisions of the CISG.. In other words, good faith, as a gap-filler, can be used as a foundation to imply an obligation on one of the contracted parties if that obligation was necessary to conclude the contract, and both the CISG and the contract had no reference to it.

In the *Chemical Products case*,³⁶ a dispute was raised when the Swiss Seller learned about an Italian business offering a certain product for sale. Before buying the product from Italy, the Seller sent an offer about the same product to his German client, the Buyer. The German Buyer showed interest in the product and sent the Seller written confirmation of a purchase along with the price, quality of the product and the delivery details. In addition, the Buyer asked whether or not the product conformed to European

³⁶ Switzerland 5 April 2005, Bundesgericht [Supreme Court] (*Chemical products case*), case no: 4C.474/2004. Available at: <http://cisgw3.law.pace.edu/cases/050405s1.html>.

Commission (EC) safety regulations. In response to the Buyer's enquiry, the Seller sent the Buyer a data analysis which indicated conformity with the EC safety regulations. On the letter's cover, it quoted, in the reference line, the confirmation number of the purchased order.

Before the delivery day, the German Buyer had already contracted with a third party to sell the same product. Nonetheless, the first transaction was delayed and the Swiss Seller could not deliver the product at the agreed time. Consequently, the German Buyer could not deliver the product to the second Buyer and the latter claimed for the price difference after he found a substitute. The German Buyer claimed damages because the Swiss Seller failed to perform his obligation. Nevertheless, the Seller asserted that no contract was concluded with the German Buyer. After stating that the case was governed by the CISG, the Swiss Court expressed that the correspondence between the Buyer and the Seller about purchasing the product would make any reasonable person, in the Buyer's position, understand the Seller's letter as a confirmation of purchase. The court continued that, under the principle of good faith, the Seller was obliged to inform the Buyer if he was willing to reject the contract.

In this case, the court went further by adapting the concept of good faith as a tool to impose obligations on the parties. This was an aspect which neither exists in CISG provisions nor in the parties' agreement. However, the court believed rightly that creating healthy commercial transactions could not be done without proper and clear communications between the contracted parties. Consequently, in this case, the court used the standard of good faith to ensure that the contracted parties communicated important matters in order to achieve the goal of the contract. What is understandable is that the court employed the standard of good faith as one of the general principles, on

which the CISG is based, in order to resolve matters which were not settled expressly by the provisions of the Convention.

Similarly, in the *Fashion Products case*,³⁷ a Buyer concluded an exclusive distributorship agreement to distribute a brand of a Seller's fashion products. According to the agreement, the Seller would deliver the products in instalments for the Fall/Winter and Spring/Summer seasons respectively. Payment was by means of a letter of credit. A dispute arose when the Seller sent the Buyer a product list with higher prices than the agreed prices and asked for a letter of credit to be opened as soon as possible. The Buyer had asked for the prices to be changed, which the Seller refused to do. Moreover, the Seller demanded the opening of the letter of credit within twenty days of receipt otherwise the agreement would be terminated. Later, the Buyer informed the Seller of his intention to pay and requested the necessary information. However, the Seller did not respond until the twenty days elapsed and then terminated the agreement.

In the tribunal's view, the Seller was not entitled to terminate the agreement. The Seller took advantage of the elapsing of the additional time which was granted to the Buyer, when the latter was prevented from performing his obligations by the Seller's late response. More importantly, the tribunal held that:

[A] general principle of good faith prevents a party from taking undue advantage of the remedies provided in case of breach of the other parties' obligations. It appeared that the Seller pretended not to be aware that the Buyer had opened the letter of credit and that the Seller had already decided to terminate the Agreement before the expiration of the additional time period.

The court relied on the standard of good faith³⁷ to declare that the Seller had breached an obligation to act according to the standard of good faith. In disregarding the agreement, the Seller had misused his right by preventing the Buyer from performing his

³⁷ Court of Arbitration of the International Chamber of Commerce: Case No. 11849 of 2003 (*Fashion products case*). Available at: <http://cisgw3.law.pace.edu/cases/031849i1.html>.

contractual obligations. Consequently, the Seller's action of terminating the agreement should be prevented since he did not act in good faith.

6. Good Faith as an Obligation to Communicate Relevant Information

One of the obligations, which the standard of good faith in the CISG imposes on the contract parties, is the exchange of relevant information. According to this obligation, the party is under a duty to disclose the information necessary for the other party to perform his contractual obligations. In the CISG and under the standard of good faith, the obligation to communicate includes information related to the one's intention;³⁸ acceptance of the offer;³⁹ and relevant information about the contracted goods which makes the performance of the contract obstacle-free.⁴⁰

In the *Machinery case*,⁴¹ the German Supreme Court concluded that, under the principle of good faith in the CISG, the parties were obliged to make available to the other party the terms and conditions of the contract. In the above-mentioned case, a German Seller confirmed an order with a Spanish Buyer for a used gear-cutting machine and included a reference to its standard conditions of sale which exempted the Seller from any liability for defective used equipment. However, the standard conditions of sale were not attached to the confirmation. Therefore, the Buyer could not operate the machine without expert assistance and sought reimbursement from the Seller for the cost.

³⁸ For example, Article 8(3) referred to the correspondence during the negotiation stage to determine the intention of the parties.

³⁹ For example, Article 21 demands the offeror to promptly notify the offeree in case of late acceptance of the offer.

⁴⁰ For example, Article 32 obliges the Seller to give the Buyer specific notice of the consignment of goods if the goods are not clearly identified to the contract.

⁴¹ Germany 31 October 2001, Supreme Court (*Machinery case*), case no: VIII ZR 60/01[2001]. Available at: <http://cisgw3.law.pace.edu/cases/011031g1.html>.

Firstly, the German Supreme Court observed that the incorporation of standard terms into a contract was regulated by Article 8. Secondly, the court observed that there was a requirement to interpret Article 8 through the principles in Article 7.

Relying on the standard of good faith, the court ruled that the party who wanted to include standard terms in the contract should act in good faith and dispatch those terms to the other party in his language and notify the Buyer if the term was at the back of the contract since, otherwise, the court would exclude those terms from the contract. The court observed that "Requiring one party to make general terms and conditions available to the other party, would, according to the court, promote the CISG's goals of good faith and uniformity."

On the one hand, the *Machinery case* is a perfect example of where the court's usage of the standard of good faith combined both strict and wide approaches of good faith interpretations. The court applied good faith as an interpretive tool by referring to the need to interpret Article 8 in accordance with good faith in Article 7. However, the court used the standard of good faith to give a wider meaning to Article 8, which resulted in imposing a duty on one party to communicate the standard terms which he wanted to incorporate in the agreement with the other party.⁴²

On the other hand, the decision in the *Machinery case* might be seen as a homeward trend interpretation to good faith in the CISG. There are a number of legal duties derived from the standard of good faith included in Article 242 of the German Civil Code. These duties are listed under the label of ancillary contract duties which include

⁴² Please see Magnus, U.: 'Tracing Methodology in the CISG: Dogmatic Foundations', in: Janssen, A. and Meyer, O. (Eds.), *CISG Methodology*; (Sellier, 2009), at 43.

the duty to inform, the duty to protect, and the duty of precise performance.⁴³ Despite the similarity between the understandings of the German law to the duties derived from good faith and the decision in the *Machinery case*, homeward trend cannot be established in this case's decision. In the process of deciding the case, the Supreme Court made a link between the governing provision in the CISG (Article 8) and good faith in Article 7. The court in this case did not improve the contract as much as it included what supposed to be there in the first place. The added obligation made by the court using good faith was necessary to conclude the contract in a fair and reasonable manner which is a meaning of promoting good faith in the international trade. As a result, the court concluded that, derived from understanding the CISG provisions as a whole and without referring to outside resources for interpretation, there was a duty on the contracting parties to communicate. In other words, there is no objective evidence that the Supreme Court relied on the domestic understanding to interpret Article 8 of the CISG.

Equally, in *Rynpoort v. Meneba*,⁴⁴ a dispute arose over the quality of the wheat flour which the Buyer claimed did not match the required European Union (EU) standard. From communications between the parties, the court found that, for the Buyer, the quality of the wheat was a very important aspect. Furthermore, the Seller's reactions and statements could mean only that the wheat flour would conform, at least, to the international standard applicable at that time.

Therefore, the court concluded that, if the Seller did not have the intention to use an international standard and - based on the concept of good faith present in international

⁴³ Musy, A., 'The Good Faith Principle in Contract Law and pre-contractual Duty to Disclose; Comparative Analyses of New Differences in Legal Culture' (2000) 1 G. J. Advances. 1, at 5.

⁴⁴ Netherlands 23 April 2003: Appellate Court's-Gravenhage (*Rynpoort Trading v. Meneba Meel*): case no; 99/474. <http://cisgw3.law.pace.edu/cases/030423n1.html>.

trade - the Seller would have been obligated to point out explicitly to the Buyer that the quality of the wheat flour was not according to the EU standard. In addition, the court stated that it was not convinced by the Seller's plea that the addition of potassium bromate was a company secret. A company secret should not be protected *in jure* if good faith demanded that there was a duty to inform the other party.

In the case of a lack of conformity, the Buyer should give notice under Article 39 and inform the Seller about it within a reasonable time which should not exceed a maximum period of two years from the goods being under his control. However, in the (2001) *BVBART* case⁴⁵ before the Belgian court, it was stated that applying Article 39 should be done in accordance with good faith and that the Seller would be in breach of good faith if he was aware of or should have been aware of a defect in the sold product and did not inform the Buyer about it. Consequently, the court stated that the reasonable time for informing the Seller about the defected goods could be extended as a result of the Seller acting in bad faith.

These cases used the standard of good faith to impose a duty on the contracted parties to communicate any information necessary to achieve the aim of the contract as expected by the parties. In fact, the duty to communicate could be assigned to the wider category of the duty to co-operate which the standard of good faith⁴⁶ expected from the contracted parties. Therefore, in the *Broadcasters case*, the court highlighted that,

CISG requires the user of standard terms to transmit the text of such standard terms or to make them available to the other party in another way. In fact, there would be a violation of the principle of good faith in international trade (Article

⁴⁵ Belgium 27 June 2001 Appellate Court Antwerp (*S.r.l. R.C. v. BV BA R.T.*), case no: 1997/AR/1554. Available at: <http://cisgw3.law.pace.edu/cases/010627b1.html>

⁴⁶ Please see: Germany 3 August 2005 District Court Neubrandenburg (*Pitted sour cherries case*), case no; 10 O 74/04. Available at: <http://cisgw3.law.pace.edu/cases/050803g1.html>. Also; France 22 February 1995 Appellate Court Grenoble (*BRI Production "Bonaventure" v. Pan African Export*), case no: 93/3275. Available at: <http://cisgw3.law.pace.edu/cases/950222f1.html>.

7 CISG) and the parties' general duty of cooperation and information if the recipient of standard terms and conditions was obliged to make enquires about their content and to bear the risk and disadvantage of unknown standard terms introduced by the other party.⁴⁷

In contrast, if the Seller remained silent regarding an issue about the goods despite the Buyer's communications, then the Seller would be in breach of the standard of good faith if these goods did not meet the Buyer's requirements.⁴⁸

7. Good Faith as a Prerequisite to Exercise The Rights

It was observed that, in several cases, the court considered that, to exercise their rights, acting in good faith was a prerequisite for the contracted parties. Consequently, the demand for the effect of right had to be based on prior conduct which complied with the standard of good faith. For example, in the case of *Agricultural products case*,⁴⁹ the Austrian Seller, *GmbH*, brought a claim before the court asking the Buyer, *SO*, for payment for agricultural products which the latter bought, after having to wait for six months. Consequently, *SO* did not perform its obligation to pay. *SO* challenged the *GmbH* claim by arguing that he could not know about the exact time of payment since the Seller did not inform him that the payment was due and there were no specified terms of payment of the purchase.

The court rejected the claim and challenged the injunction for payment on the basis that "the applicability of CISG does not require that the Seller asks for payment in writing before applying to the court."⁵⁰

⁴⁷ Germany, 24 July 2009, Appellate Court Celle (*Broadcasters case*): case no; 13 W 48/09. Available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/090724g1.html>.

⁴⁸ Spain 20 February 2007 Appellate Court Madrid (*Sunprojuice DK, Als v. San Sebastian, S.c.A.*); case no:683/2006. Available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/070220s4.html>.

⁴⁹Italy, 25 February 2004, District Court Padova, (*Agricultural products case*), case no; 40552. Available at: <http://cisgw3.law.pace.edu/cases/040225i3.html>.

⁵⁰ Ibid.

The court explained that, it would be contrary to the principle of good faith to file a claim in court [just] a few days after the expiration of the deadline seeking the payment of the price, without having demanded of the Buyer adequate explanations for the delay.⁵¹

However, the Seller in this case did not bring his claim after six month period when the payment had elapsed. The court observed that acting in good faith was a prerequisite for claiming that other parties should perform their obligations, and, thus,

[T]he Buyer or the Seller must act in good faith before he can exercise any of the rights or remedies that have been expressly provided for by the CISG.⁵²

The *Used Car case*,⁵³ is another example when the Seller sold a car "with [a] rolled back odometer" to a Buyer without informing the latter. The Buyer claimed compensation. However, the Seller objected to the Buyer's claim and stated "that the contract contained a clause excluding its liability for lack of conformity." Despite there being a clause of exemption from liability, the court stated that the Seller could not avoid his responsibility because the Seller did not act in good faith towards the Buyer. As a result, the Seller should be precluded from relying on the exemption from liability clause.

Likewise, in a Swiss case,⁵⁴ the Swiss Seller sold lambskin coats to a Liechtenstein Buyer who did not examine the goods and resold them to his customer in Belarus. The latter complained about the lack of conformity to the Seller (Liechtenstein Buyer) who

⁵¹ Ibid.

⁵² Sim, D., 'The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods' (LLM thesis, Harvard Law School, 2000), at chap 3/B/C. available at <http://www.cisg.law.pace.edu/cisg/biblio/sim1.html#ii>.

⁵³ Germany 21 May 1996 Appellate Court Köln (*Used car case*), case no: 22 U 4/96[1996]. Available at: <http://cisgw3.law.pace.edu/cases/960521g1.html>.

⁵⁴ Switzerland, 30 November 1998, Commercial Court Zürich (*Lambskin coat case*), case no: HG 930634/O. Available at: <http://cisgw3.law.pace.edu/cases/981130s1.html>.; similarly; Netherlands, 5 March 1997, District Court Zwolle, (*Cooperative Maritime Etaploise v. Bos Fishproducts*), case no; HA ZA 95-640. Available at: <http://www.unilex.info/case.cfm?pid=1&do=case&id=332&step=Abstract>.

declared that the contract was null and void and stopped paying the Swiss Seller the remainder of the contract price. The court stated the defect was noticed easily and the Buyer's late notice was contrary to the principle of good faith.

8. Good Faith Role in the Pre-contractual Stage

One of the CISG's unresolved questions is the party's liability during the negotiation of the contract. Unlike civil law, common law does not impose a liability on the contracted party for failing to arrive at an agreement. The common law view is that good faith exists only when an enforceable contract exists. Consequently, before the contract, there is no liability.⁵⁵ In the CISG, pre-contractual liability is a controversial issue and opinion is divided between those who support the inclusion of pre-contract liability and those who are against it.⁵⁶ The *Design of radio phone case*⁵⁷ was one of the rare cases which addressed the issue of good faith and pre-contractual liability in the CISG.

The Belgian court decision revealed that good faith, as a general principle in the CISG, could be applied in the pre-contractual stage. The dispute started when a Belgian Seller negotiated with a French Buyer to produce a plastic holder which could fit a type of pager. The results of the negotiations were set out in writing, signed by the parties, and entitled as a 'letter of intent'. However, after subsequent market changes, the Buyer denied the existence of a binding contract and refused to make any payment. Consequently, the Seller sued the Buyer for breach of contract and demanded payment.

⁵⁵ Palmieri, N., 'Good Faith Disclosures Required During Precontractual Negotiations' (1993) 24 Seton Hall. L. Rev. 70, at 101.

⁵⁶ For comprehensive view over good faith and pre-contractual liability in the CISG see; Spagnolo, L., 'Opening Pandora's Box: Good Faith and Pre-contractual Liability in the CISG' (2007) 21 Temp. Int'l & Comp. L.J. 261.

⁵⁷ Belgium 15 May 2002 Appellate Court Gent (*NV A.R. v. NV I.*) (*Design of radio phone case*). Case no; [2001/AR/0180]. Available at: <http://cisgw3.law.pace.edu/cases/020515b1.html>.

In this case, the court made two observations. Firstly, the CISG did not draw a definable line between offer and acceptance, particularly when both parties reached an advanced point in negotiations. In this particular case, the court found that the parties had already discussed, and in very specific detail, matters relating to the production and integration of electronic components. Moreover, the parties had agreed on several other matters such as quantity, price of the order, time of payment, and the penalties for delay. Under these circumstances, the court concluded that a sale agreement existed between the parties and therefore, according to Articles 11 and 29 of the CISG, such an agreement could not be modified or terminated without some consensus between the parties.

The court's second observation was that acting in good faith imposed an obligation on the contracted parties not to "come back on certain points for which mutual agreement was already reached". In contrast, the respondent's behaviour in this case was described as "incompatible with the rule of good faith in Article 7(1) CISG, which is increasingly respected in the interpretation and application of the CISG".

In fact, in this case, the court's interpretation of good faith was similar to the Concept's meaning in Article 2.15(3) PICC.⁵⁸ Whilst it might be true that the party was not liable for the failure in reaching an agreement, this rule did have an exemption when the party's conduct resulted in not reaching the agreement. Moreover, such conduct could be interpreted as a breach of a legitimate expectation on the part of the other party of the contract.

⁵⁸ According to the article; (1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

Please see; Magnus, U., note no: 45 above, at 92.

Surely this judgment reinforced the argument raised previously in the manifestation of good faith in Article 16 that the application of good faith could be extended to cover the parties' negotiations in some circumstances such as in this case. The author contends that, particularly when the negotiation had reached an advanced point, this conclusion extracted from case law and the provisions of the Convention should be sufficient to refute the opinion that the CISG does not govern the pre-contractual stage.⁵⁹

A Mexican court shared a similar understanding. The decision was that a contracting party would not be considered to be in violation of the standard of good faith if he entered into the negotiation with another party and yet did not negotiate significant terms of the agreement. Examples of these terms are price of the merchandise and the date and place of delivery.⁶⁰

9. The Role of Good Faith in Establishing a Party's Fundamental Breach

In a number of cases, courts and tribunals referred to the standard of good faith as a measurement tool to establish whether or not a party was in fundamental breach of his contractual obligations. The standard of good faith could be used objectively by considering the circumstances of the contract to establish whether or not the party was in breach of contractual duties.

⁵⁹ This decision could be always a subject of criticism on the ground of historical refusal to the German Democratic Republic during drafting, yet the provisions of the CISG gives more room to include the pre-contractual liability than not including it.

⁶⁰ See; Mexico 10 March 2005 , Appeal Court, *Kolmar Petrochemicals Americas, Inc. v. Idesa Petroquímica S.A. de C.V.*, case no; 127/2005. Available at: <http://cisgw3.law.pace.edu/cases/050310m1.html#cd>.

The following are examples of contractual conduct which represent violations of the requirement of good faith and resulted in breaches of contract:

- Terminating a long-term contractual relation between the parties without firm grounds, particularly if the non-terminating party was put in a worse position because he was ready to continue under the contract notwithstanding the contractual violation by the terminating party.⁶¹
- Failing to deliver goods which conform to the quality required by the Buyer and thus which are not fit for the purpose; this is contrary to the standard of good faith and constitutes a fundamental breach of contract.⁶²
- Depriving the party of the possibility to gain expected profit by means from which the Buyer would have covered expenses on the fulfilment of the contract.⁶³
- Continuing to retain, unlawfully, a party's prepayment sum.⁶⁴
- Declaring a contract void because of non-delivery of goods after a long time (two and half years).⁶⁵
- Issuing a bank guarantee which has already expired; therefore failing to secure payment.⁶⁶

The above-mentioned examples refer to different types of conduct which, in deciding whether or not they constitute a contractual breach, are examined against the standard of good faith. Obviously, these examples of breaching conducts are neither inclusive nor, in all circumstances, have they represented a contractual breach. Consequently, considering the standard of good faith as an examination tool for different forms of conduct in different circumstances proves the flexibility of the standard of good faith.

⁶¹ Germany, 21 March 1996, Hamburg Arbitration proceeding (*Chinese goods case*), case no; not available. Available at: <http://cisgw3.law.pace.edu/cases/960321g1.html>.

⁶² Spain, 20 February 2007, Appellate Court Madrid (*Sunprojuice DK, Als v. San Sebastian, S.c.A.*), case no; 683/2006. Available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/070220s4.html>.

⁶³ Russia, 27 May 2005, Arbitration proceeding 95/2004. Available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050527r1.html>.

⁶⁴ Ibid.

⁶⁵ Germany, 8 February 1995, Appellate Court München (*Automobiles case*).case no; 7 U 1720/94. Available at: <http://cisgw3.law.pace.edu/cases/950208g1.html>.

⁶⁶ *Mushrooms* case, note on 638 above.

10.CISG Case Law and the Adoption of the Dynamic Interpretation in Interpreting Good Faith

The above-mentioned applications of good faith identified by case law provoke a question with regard to the dynamic interpretation of the CISG. Whilst the traditional method of interpretation pays a great deal of attention to the intentions of the drafters of the law and the text presented in the law, the dynamic interpretation suggests that the legislation should be interpreted through reference to the current needs, changes in circumstances, and the goals of the legislation.⁶⁷ In addition courts are concerned about the facts and equities of the case and the consequences of choosing one interpretation rather than the other. Therefore, courts are required to be responsive to the new facts, needs, and legal ideas more than the historical circumstances surrounded the creation of the legislation. The dynamic interpretation suggests a flexible reading of the legislation which helps the interpreter in achieving the law's goals as intended by the drafters. "Interpretation is not static, but dynamic. Interpretation is not an archaeological discovery, but a dialectical creation. Interpretation is not mere exegesis to pinpoint historical meaning, but hermeneutics to apply that meaning to current problems and circumstances".⁶⁸

When considering the CISG, there are a number of reasons to favour such a method of interpretation over the textual interpretation. It should be noted that Article 7 of the CISG is presented more as guidelines than specific rules for the interpreter.⁶⁹

⁶⁷Graham, R., *Statutory interpretation: theory and practice*, (E. Montgomery Publications, 2001), at 31.

⁶⁸ Eskridge, W., 'Dynamic Statutory Interpretation', (1987) 135 U. Pa. L. Rev. 1479, at; 1842.

⁶⁹ Audit, B., 'The Vienna Sales Convention and the Lex Mercatoria', in Carbonneau, T. (ed.), *Lex Mercatoria and Arbitration* (Juris Publishing, 1998), at; 187.

With the need to promote uniformity and good faith, the international character of the Convention could consist of more than one meaning of Article 7's present text. Obviously, these concepts were not defined explicitly by the Convention. Consequently, as illustrated in the chapter three of this thesis, the textual interpretation will provide little help to the interpreter of the Convention.

Some might argue that the history of the legislation would reveal any misrepresented concepts due to the language of the legislation. However, in some cases (like in the case of good faith), the legislative history shows more conflicts of legal cultures than an obvious definition of good faith or its application. Consequently, in the domestic legal system, the applicability of the textual interpretation does not mean that similar methods of interpretation will give similar result(s) when applied to international conventions like the CISG.

Lack of a higher authority at the international level makes drafting a convention, which will be accepted by all nations, a difficult task. Consequently, the language of international conventions tends to have reconciling and general concepts whenever reaching an agreement on specific issue becomes impossible.⁷⁰ Such imprecise concepts defy the most important element in applying the textual interpretation of good faith in the CISG.⁷¹

⁷⁰ Another important reason for using general language to draft legislation is the fact that the language of the legislation must apply over a long period of time due to the practical difficulties which any future amendments will face.

Similarly, Eskridge's view that "the law must bend and stretch in ways that the drafter could not expect...[and] the law bends is inescapably influenced by the views of the interpreter, views that will be coloured more by the current legal context than by any historical beliefs held by the legislative body that was responsible for the legislation's enactment". Please see; Eskridge, W., *Dynamic Statutory Interpretation*, (Harvard University Press, 1994), at 57.

⁷¹ In fact the principle in the "new textualism" approach of interpretation is to strictly adhere to the text of the legislation only, regardless of the legislative intent or purpose. See: Van Alstine, M., 'Dynamic Treaty Interpretation' (1998) 146 U. Pa. L. Rev. 687, at 719. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/alstine2.html>.

In fact, the language used in Article 7 to describe the interpretation mechanism of the Convention suggests the need for progressive and constructive interpretation. Accordingly, when interpreting the CISG, the interpreter is required to strike a balance between several elements; these are called the text of the provisions, the legislative history, and the factors set by Article 7(1).⁷²

More importantly, Article 7(2) refers the interpreter to the general principles on which the CISG is based and to the rules of private international law to solve matters which are not settled expressly by the Convention. Surely, the gap-filling mechanism provided by Article 7(2) is not only recognition by the CISG drafters of the imperfections in the construction of the Convention but also permission to seek an interpretation which achieves the goals of the Convention. In other words, the text of Article 7(2) complements that contained in Article 7(1) by recognising the need of the texts of the Convention to enable discussion and future developments to match the dynamicity of international trade.⁷³

Audit referred to the need for recognising the ability of the CISG to generate new rules by illustrating that:

The Convention is meant to adapt to changing circumstances. Amending it is practically impossible. A conference of the magnitude of the one held in Vienna is difficult to organize. Achieving the unanimity of the participating states on proposed changes also would present substantial obstacles. The provisions of the Convention must be flexible enough to be workable without formal amendment for a long period of time. The Convention, therefore, must be regarded as an autonomous system, capable of generating new rules.⁷⁴

The interpretation of good faith in the above-mentioned cases is a clear indication of courts and tribunals adopting a dynamic approach in interpreting the CISG. This does

⁷² These factors consider its international character and the need to promote uniformity in its application and the observance of good faith in international trade.

⁷³ Please see Felemegas, J., note no: 10 above, at 9.

⁷⁴ Audit, B., note no: 72 above, at 187.

not mean, though, abandoning the textual interpretation which tends to be the first recourse for interpretation. However, in the case of interpreting good faith in the CISG, there were several participatory elements in the failure of textual interpretation. Firstly, there is the imprecise language, used to construct Article 7, which resulted in different meanings of the same concept in different official languages of the CISG.⁷⁵

Secondly, with regard to the drafters' purpose of including good faith in the CISG, there is the unclear result arising from the legislative history of Article 7. Thirdly, there is lack of definition of the concept which determines the role of good faith in the CISG. Fourthly, there is the close connection between the meaning of the standard of good faith and the meaning of a number of provisions in the Convention.⁷⁶

Finally, the wider objective interpretation of good faith seems to have the best outcome since it accommodates the textual reading of the provisions, the legislative history and the adoption of the current values, and achieves the aim of the CISG in promoting the international sale of goods. Consequently, there is a need to adopt the CISG as a living convention and interpret it in the light of international commerce developments.

Some might ask whether there is a precedent in international law whereby a court had interpreted a convention dynamically by moving away from its original text so that the demand for a dynamic interpretation for the CISG was supported legally.

The answer lies (in addition to the previous cases)in number of leading cases such as the *Tyrrer* and the *Golder*.⁷⁷ In both cases the European Court of Human Rights considered the social and political developments in adopting a dynamic interpretation of

⁷⁵ Please see the textual interpretation of Article 7 discussed by this thesis in chapter three.

⁷⁶ These provisions had been discussed in chapter four of this thesis.

⁷⁷ *Tyrrer v. The United Kingdom*, (App No. 5856/72) (1976) 2 ECHR 1, at; 15. *Golder v. United Kingdom* [1975] 18 ECHR. (ser. A).; see also, Loukaidēs, L., *The European Convention on Human Rights: collected essays*, (Martinus Nijhoff Publishers, 2007).

the European Convention on Human Rights. The court indicated in the Tyrer case the importance of considering international treaties as a living instrument which should match the development of the society. Thus it was held that:

[T]he Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it, the Court cannot but be influenced by the developments and commonly accepted standards.⁷⁸

A similar approach was adopted in the *Golder* case. The Commission stated that,

the overriding function of the Commission is to protect the rights of individuals and not to lay down as between States mutual obligations which are to be restrictively interpreted having regard to the sovereignty of those States. On the contrary the role of the Convention and the function of its interpretation is to make the protection of the individual effective.⁷⁹

The judicial practice of International Criminal Law is one of the areas where the dynamic interpretation used as a tool to prevail the wider approach of the legislation. The criminal tribunals had to adopt a evolutive approach of interpretation to settle the conflict between the original meaning of the law and the case circumstances at the time of interpretation. The international criminal law academics quoted number of legal notions where courts adopted a new definition that comply with the purpose of the legislation and suits the circumstances of the case. For example, courts developed new definition to notions such as: “rape”, “torture”, “deportation” and “enslavement”.⁸⁰

The Trial Chamber, which reviewed the Celebici Case under the The International Criminal Tribunal for the former Yugoslavia, observed that:

“The kinds of grave violations of international humanitarian law which were the motivating factors for the establishment of the Tribunal continue to occur in

⁷⁸ Ibid .

⁷⁹ Ibid .

⁸⁰ Alexander Grabert., *Dynamic Interpretation in International Criminal Law: Striking a Balance between Stability and Change* (Herbert Utz Verlag, 2015), at: 88.

many other parts of the world, and continue to exhibit new forms and permutations. The international community can only come to grips with the hydra-headed elusiveness of human conduct through a reasonable as well as a purposive interpretation of the existing provisions of international customary law.”⁸¹

In another case (*Stkic*), the tribunal found that:

“ It is accepted that in interpreting the law chamber may ‘clarify’ the law... The power to clarify the law may be used so long as the ‘essence’ of what is done can be found in the existing law. In appreciating the ‘essence’ of a clarification, the question to be attended to is not whether a particular set of circumstances was ever concretely recognised by the existing law, but whether those circumstances reasonably fall within the scope of the existing law.”⁸²

Consequently, the call for a dynamic interpretation of the CISG is not based in a vacuum, since the previous precedents and decisions constitute a valid foundation for this approach. Surely, the dynamic interpretation of the CISG must consider not implying obligations which the contracting parties did not assume.

In other words, the dynamic interpretation, required by the CISG, creates a balance between achieving the objects of the Convention and the sanctity of the contract.⁸³

⁸¹ Čelebići Camp, *Prosecutor v Delalić (Zejnil) and ors*[ICTY 1998], Case No IT-96-21-T, ICL 95. At para; 170.

⁸² *Prosecutor v. Milomir Stakic* [ICTY 2006], case no: IT-97-24-A. at para : 35-39.

⁸³ See; Loukaidēs, L., note no: 80, at 13-19; Fitzmaurice, M., ‘New Haven School, Textuality and Dynamic Interpretation (2009) . Available at: <http://opiniojuris.org/2009/03/02/new-haven-school-textuality-and-dynamic-interpretation/> ; Fitzmaurice. G, ‘*Vae Victis* or Woe to the Negotiator? Your Treaty of Our Interpretation of It’ (review essay), [1971], 65 *AJIL*358; Larouer, C., ‘*In the Name of Sovereignty? The Battle over In Dubio Mitius Inside and Outside the Courts*’, (*Conference paper*, Cornell Law School, 2009)..

Chapter Six

Conclusion

This thesis examined the role of good faith in the CISG and argued that there are good reasons to for broader interpretation or broader application of good faith. Issues related to the legal concept of good faith as an independent legal principle or in its position in the CISG have been explored. Therefore several findings can be stated to support the general role of good faith in the CISG.

Firstly; The legal principle of good faith is one of the most important legal principles which is deeply rooted in the history of societies. The principle was based on the society moral ethics and what society would recognise as legitimate expectations of the contracting parties.

The historical development of good faith linked the principle with other legal principles and doctrines including *pacta sunt servanda*, co-operation, equity, fairness, and many others. In fact, good faith would share similar elements to the previous principles and often used to justify the application of one or more of these legal principles in certain circumstances

Nonetheless, the meaning of good faith is elusive and can not be defined precisely. The concept can be looked at from different angles depending on the interpreter as well as the context of the legal instrument. This thesis highlighted that the complex establishment of good faith in legal systems led to the legal interpreters being divided over its meaning and function.

Some interpreters viewed good faith from a moral point of view, whilst others saw the need to create a balance between the sanctity of the contract and fixable solutions when rigged contract rules led to unjust results. The use of a broad concept such as good faith as an implied duty on the contracted parties might contain the risk of overly broad usage by courts and, inevitably, would sacrifice the certainty of the contract. Nonetheless, this thesis proved that the vagueness of good faith (as criticised by common law lawyers) is not absolute. In fact, good faith, with regard to the broad definition, is similar to other legal concepts recognised by common law systems.

Aside from the disagreement between legal academics on the definition of good faith, the principle has been included in most legal systems and international instruments. In fact, some of these legal instruments, which include the standard of good faith, have defined good faith in order to stop future arguments pertaining to legal instruments regarding its meaning. However, others, like the CISG, did not, due to the difficulties among the drafters in reaching an agreement with regard to its definition.

Secondly: the definition of good faith adopted in this thesis is aimed at providing a reasonable degree of certainty when dealing with international sale of goods contracts which require the implication of good faith at one stage or another. This thesis does not suggest that good faith should be applied as a moral standard whereby the judge can embrace the broader view of good faith which imposes obligations either contrary to the expressed terms of the parties' agreement or to achieve what can be described as fairness and equality.

Thirdly; the imprecise language used to draft Article 7 CISG leaves the door open for wide interpretation and application of good faith. As a result, the draft history of Article 7 CISG is an important source to identify the role of good faith in the CISG. Despite

many academics argument that good faith inclusion in the CISG was a result of a compromise, however, this thesis found that the draft history did not show that idea of general application of good faith in the convention was clearly abandoned by the drafters.

Fourth: the principle of good faith is implicitly included in several articles in the CISG along with Article 7. The functions of the principle varied from using it an interpretive to the convention, as a gap filler for matters not covered by the convention and a duty on the contracted parties to act or to abstain from certain behaviour depending on the circumstances of the case. This thesis clarified that the principle of freedom of contract entitle the contracted parties to exclude the principle of good faith from their agreement, however this exclusion might create a major difficulties for the judge looking into the contract dispute.

Fifth: while debate about good faith continues to remain fragmented, the pattern of the interpretations of case laws in different countries shows a tendency towards a need for a unifying thread. Thus, this finding is indicative of the need for a reform of some Articles in the CISG to minimise further fragmentation of adoption and understanding of good faith internationally. The thesis revealed that the majority of the reported CISG cases stemmed from civil law jurisdiction. The increasing number of decisions regarding good faith in the CISG, from civil law jurisdictions compared to common law jurisdictions, leaves little future opportunity to discuss the wider application of good faith in the CISG. Accordingly, the nature of good faith, the draft history of Article 7, the manifestation of good faith in the CISG, and the understanding of CISG case law have proved that good faith in the CISG is, and must be read as, a general rule.

There is no doubt that the CISG can only flourish in an atmosphere of trust and good faith between the parties. Therefore, if the sale of goods contract is the ‘body’ of the agreement, then good faith is the ‘soul’ within which the agreement survives.

1. Possible Reforms in the CISG

Despite the suggestion in this thesis that good faith is general principle in the CISG, the international commercial communities need more than just an academic view. In other words, understanding good faith, as a general obligation in the CISG, should be assured through legal mechanisms, which are recognised by domestic jurisdictions. Success in finding this legal mechanism by keeping pace with evolving needs will add to the value of the CISG and make steps toward perfection.¹ Consequently, the reform of the CISG becomes necessary in order to solve the interpretation and application of good faith within the Convention. Theoretically, the following suggestions are possible. However, realising the endless obstacles surrounding the revision and amendment of an international agreement makes the achievement of the following suggestions almost impossible.²

1.1 Amending Article 7, CISG

The first method, in which good faith can be interpreted as a general standard, is by amending Article 7. The current form of Article 7 has created, and will continue to create, legal and academic debates with regard to its meaning. Accordingly, both academic and legal interpreters will welcome a more accurate formulation of Article 7 which will save not only valuable time in trying to interpret its meaning but will also

¹ Noting that there are a number of CISG provisions which cause difficulties with regard to their interpretation and application.

² Please see: Potter, B., ‘Obstacles and Alternatives to International Law’ (1959) 53(3). *Am. J. Intl. L.* 647.

ensure the correct application of the provision. Consequently, the CISG should explicitly refer to good faith as a general principle with a general role. Legal history has many examples of international conventions which have been amended. For example, the 1960 International Convention for the Safety of Life at Sea (SOLAS) was amended six times after it came into force in 1965.³ In addition, the European Convention on Human Rights (ECHR), which came into force in 1953, has had, up to January 2010, fifteen protocols opened for signature⁴.

The problem facing this approach is that the CISG does not contain any provisions which explicitly permit future amendments. However, by studying Articles 40(4) and 41(1)(b), VCLT might provide a possible solution that allows amendments to be made to the CISG. According to these Articles, modifying a multilateral treaty is possible if the amendment is not prohibited by the treaty. Moreover, the amendment will be effective to all parties who agreed to it and will not bind any State which does not become a party to the amending agreement.

The only provision that could be a basis for future amendments in the CISG is in Article 90 which states:

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

³These amendments took place in 1966, 1967, 1968, 1969, 1971 and 1973. In 1974 a completely new convention was adopted incorporating all these amendments (and other minor changes) and has itself been modified on numerous occasions. Please see http://www.imo.org/conventions/mainframe.asp?topic_id=148#amend.

⁴ Other conventions include; The "Madrid Agreement concerning the International Registration of Marks" was adopted in 1892 and amended in 1979; The "Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks" 1961 and amended 1979 and The "Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks" was adopted in 1973 and amended in 1985.

Consequently, it is possible for CISG member states to enter into an agreement which contains provisions concerning the matters governed by this Convention.⁵

Assuming that the suggestion to amend the CISG has been accepted by the member states, the amendment of Article 7 should then give good faith a clear definition that will recognise the broad function of this standard in the Convention. Consequently, acting in good faith should be a mandatory requirement for the contracting parties dealing in international sales of goods and should not give the parties the ability to limit or exclude such a standard. Moreover, the functions of good faith should be categorised so that a maximum contractual predictability can be achieved without sacrificing the benefits of applying the standard of good faith. The suggestion of amending the CISG is more realistic and practical than replacing it with a new regime. The lengthy and costly process that international conventions take to be formed and ratified is one of the main reasons. Therefore, one can assume that amending the current convention would be more time efficient without denying that even amending it might take years.

1.2 Establishing an independent Body of Interpretation

The second mechanism is by creating an independent body of interpretation (advisory council). The advisory council would be responsible for a more profound understanding of the issues relating to the CISG. The role for such a council would be consultative by giving opinions related to the interpretation of the Convention. However these opinions may not necessarily result from commercial disputes but could be as a result of requests

⁵ Honnold commented on the possibility of amending the CISG by saying that "It should also be reassuring to note that the 1974 Convention on the Limitation Period in the International Sale of Goods, containing a provision substantially the same as CISG 90 and no other provision relating to amendment, was amended without objection or mishap by a Protocol approved at the 1980 Conference that finalized the Sales Convention". Honnold, J., *Uniform Law for International Sales* (3rd edn, Kluwer Law International, 1999), at 531.

for clarification by international organisations, professional associations and adjudication bodies.⁶

The UNCITRAL could consider forming an advisory council based on two foundations. Firstly, there are the precedents in forming similar advisory boards for international instruments similar to the CISG: for example, the International Labour Office; the International Monetary Fund; the Council of the International Civil Aviation Organisation; Commission on Banking Technique; the Central Office for International Road Transport; and the Practice of the International Chamber of Commerce (ICC).⁷ Secondly, there is the current existence of private institutions like the International Sales Convention Advisory Council (CISG-AC) which works on the CISG.⁸ The (CISG-AC) framework and mechanism could act as a foundation for the proposed advisory council and hence shorten the time taken to organise these matters.

Forming an advisory board for the CISG has its own obstacles, nonetheless The author believes that the first difficulty is getting the CISG member states to agree to establish such a board. The second difficulty could be the limitations on the advisory council functions. Despite its consultative foundation, there is little evidence of the CISG member states' compliance with this board's opinions. Thirdly, and more importantly, is the mechanism to appoint the board's members. Therefore, Bonell asked, "would it be appropriate to entrust such an important and politically controversial task to an organ composed of representatives of States?"⁹

⁶ Ibid.

⁷ Ibid ; see also: Sim, D., 'The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods' (LLM thesis, Harvard Law School, 2000), available at <http://www.cisg.law.pace.edu/cisg/biblio/sim1.html#ii>.

⁸ For further information, please see <http://www.cisgac.com/default.php?sid=124>.

⁹ Bianca, C. & Bonell, M., *Commentary on the International Sales Law* (Giuffrè, 1987), at 89.

This study view that The UNCITRAL should consider adopting the CISG advisory council to give the institution's opinion an influential effect with regard to the interpretation of the CISG. The current (CISG-AC) is a private initiative that its member does not represent countries or legal cultures. Opinions issued by the (CISG-AC) do not has authoritative power (not binding) over and CISG member, therefore can not change the wrong interpretation of the CISG if existed. It would be important for the creation of uniform interpretation to have and official body that would be responsible of giving an authoritative opinion and a follow up mechanism to ensure uniform interpretation of the convention.

1.3 Facilitating the Accessibility of the Transnational CISG Cases and Academic Writings

One of the main obstacles encountered in understanding good faith in the CISG is the diverging interpretations by courts of different jurisdictions. Munday stated:

Even when outward uniformity is achieved...uniform application of the agreed rules is by no means guaranteed, as in practice different countries almost inevitably come to put different interpretations upon the same enacted words.¹⁰

Consequently, there is a need for two steps to minimise the effect of different courts' interpretations. The first is to collect CISG cases which have tackled the issue of the meaning of good faith.¹¹ This step aims to spread awareness between courts in different jurisdictions of the developments in interpreting and applying good faith.¹²

¹⁰ Munday R.J.C, The Uniform Interpretation of International Conventions,[1978] 27 Int'l & Comp. L.Q. 450, at 450.

¹¹ Sim, after realising that the more ambitious reforms were unrealistic, illustrated that "the next best alternative is to implement procedures to ensure the systematic collection and dissemination of cases involving the CISG. Uniformity in application can only be achieved if decision-makers are fully aware of developments in other States and use these to build a common understanding of the CISG". Please see Sim, D., note no: 7 above.

¹² In fact the dissemination of cases would benefit not only interpreting good faith but any other complex issue in the CISG.

Consequently, the interpreter of the CISG would be able to consider decisions rendered by foreign courts' judicial bodies, which might address similar situations to the case in question. The second step is to overcome the language barrier by translating the reported CISG cases and the academic literature on the CISG. Surely, the availability of translated materials on the CISG would enhance the dialogue between the academics from different jurisdictions. Moreover, if they were translated into a language that they could understand, courts and tribunals would find it easier to understand transnational CISG cases.

The achievement of collecting and translating academic literature and cases might seem a difficult task. However, several private and international institutions have already started to make efforts to collect CISG cases. For example, the UNICITRAL Secretariat has established a system called 'Case Law on UNCITRAL Texts' (CLOUT) for collecting and disseminating information on court decisions and arbitral awards.¹³

The UNILEX is another database of international case law and a bibliography on the CISG. The database is based on the Centre for Comparative and Foreign Law Studies' research project which started in 1992.¹⁴ In addition, the Pace Institute of International Commercial Law (IICL) established one of the richest databases on the CISG (CISG Database). The database content includes the text and the legislative history of the CISG, cases, scholarly materials, and guidance on how to apply the CISG. Statistically speaking, the CISG Database has 3,042 reported cases,¹⁵ and contains more than 1634 academic writings.¹⁶ In addition, since the beginning of 2010, the database has been

¹³ Please see: http://www.uncitral.org/uncitral/en/case_law.html?lf=899&lng=en

¹⁴ Please see <http://www.unilex.info/dynasite.cfm?dssid=2375&dsmid=14276>.

¹⁵ As of October 2014. <http://www.cisg.law.pace.edu/cisg/text/casecit.html>

¹⁶ As of October 2014. <http://www.cisg.law.pace.edu/cisg/biblio/bib2.html>.

What should be mentioned that this number of literature includes writing on the PICC and the PECL.

visited more than 40 million times by internet users.¹⁷ Consequently, the Pace database on the CISG has been referred to as "a promising source" for "persuasive authority from courts of other States party to the CISG".¹⁸

Through the availability of academic writings about good faith in the CISG, the author hopes that this literature will assist in closing the gap between the courts and academics from different jurisdictions in understanding good faith in the CISG.

¹⁷ The figure is based on the statistics obtained from web information company (ALEXA), <http://www.alexa.com/>.

¹⁸ United States, 29 June 1998, Federal Appellate Court [11th Circuit] (MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino), cases no: 97-4250. Available at: <http://cisgw3.law.pace.edu/cases/980629u1.html>.

Bibliography

1. Primary sources

1.1 International Conventions

1. Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods 1964.
2. Madrid Agreement concerning the International Registration of Marks 1979.
3. Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks 1979.
4. United Nations Convention on Contracts For International Sale of Goods (CISG) 1980.
5. Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks 1985.
6. *Vienna Convention on the Law of Treaties (VCLT)* 1969.

1.2 National Laws

1. French Civil Code 1804.
2. *German Civil Code (BGB)* 1896.
3. Italian Civil Code 1865.
4. Marine Insurance Act 1906.
5. Sales of goods act 1979.
6. Swiss Civil Code 1925.
7. Uniform Commercial Code (UCC) 1952.

1.3 International legal instruments

1. The Principles of European Contract Law (PECL) 1998.
2. The (UNIDROIT) Principles of International Commercial Contracts 2004.
3. The Draft Common Frame of Reference.

2. Secondary sources

2.1 Books

1. A.D.M. Forte (ed), *Good Faith in Contract and Property Law*,(Hart Publishing, Oxford, 1999).
2. Al Sauooti, J ., *Al ashbah wa Al nzaer*, (knewoldge publications, Beirut, 1993).
3. Alahwani, H., *The voluntary sources of obligation*, (Cairo University Press, Cairo, 1990).
4. Alexander Grabert., *Dynamic Interpretation in International Criminal Law: Striking a Balance between Stability and Change* (Herbert Utz Verlag, 2015)
5. Alnisabouri, M., *Sahih Musilm* ,(Dar Alkutob Alalmiah, Beirut, 2008).
6. Alqooni, A., *The influence of good faith in the Islamic jurisprudence and civil law*. (University Publications, Cairo, 2004).
7. Alrazi, M., *Mukhtar al-sihah* , (Dar al-Hadith, Riyadh, 1995).
8. Alsanhoori, *the intermediary; documentary on the egyption civil law*, (Alhalabi publications, Syria, 1998).
9. Andersen, C., *Uniform Application of the International Sales Law. Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions*, (Kluwer Law International, 2007).

10. Aristotle (trs), *The Nocomatnean Ethics*, (Harvard University Press, 1926).
11. Audit, B., 'The Vienna Sales Convention and the Lex Mercatoria', in Carbonneau, T., (ed), *Lex Mercatoria and Arbitration*, (Juris Publishing, 1998).
12. Badawi, H. , *Esoul Alaltzamat*, (Dar Almaraf publications , Alexandria, 1948).
13. Bar, V., & Clive, E., (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DFCR)* (Oxford University Press, 2009).
14. Bergsten, E., 'Methodological Problems in the Drafting of the CISG', in Janssen, A. & Meyer, O., *CISG Methodology*, (European Law Publishers, 2009).
15. Berman, H., *Law and Revolution :The Formation of the Western Legal Tradition*, (Harvard University Press, 1983).
16. Bouvier, J., *Bouvier's Law Dictionary and Concise Encyclopedia*, (8th ed., Vernon Law Book Co, 1914).
17. Bridge, M., 'good faith in commercial contracts', in Brownsword R., *Good faith in contract: concept and context*, (Ashgate/Dartmouth, 1999).
18. Bridge, M., *The international sale of goods , law and practice*, (2nd edn, oxford university press ,2007).
19. Brownsword, R, Hird, N J and Howells, G (eds), *Good faith in contract: concept and context*, (Ashgate/Dartmouth, 1999).
20. Bryan, A. Garner (ed), *Black's law Dictionary*, (8th ed., Thomson West, 2004).
21. Cicero (eds), *On Duties*, (Cambridge University Press, 1991).
22. Clarke, M., *The Common Law of the Contract in 1993: Will Be There A general Doctrine of Good Faith*, (University of Hong Kong, 1993).
23. David, R., *International encyclopedia of comparative law , The legal systems of the world, their comparison and unification*, (Tübingen Mohr, 1971).

24. Eörsi, 'General Provisions', in Galston & Smit (eds)., *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Matthew Bender 1984).
25. Eskridge, W., *Dynamic Statutory Interpretation*, (Harvard University Press, 1994).
26. Felemegas, J., *International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, (Cambridge University Press, 2007).
27. Goldstajn, A., 'International Conventions and Standard Contracts as Means of Escaping from the Application of Municipal Law', in Schmitthoff, C (ed), *The Sources of the Law of International Trade*, (London: Stevens & Sons, Ltd, 1964).
28. Goldstajn, A., 'Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention', in Sarcevic, P., & Volken, P (eds), *International Sale of Goods*, (Dubrovnik Lectures, Oceana, 1986).
29. Gopalan , S., *Transnational commercial law* , (Oxford University Press, 2004).
30. Gordley, J., 'Good Faith in the Medieval *IUS COMMUNE*' ,in Zimmerman R & Whittaker S (eds), *Good Faith in European Contract law*,(Cambridge University Press, 2000).
31. Graham, R., *Statutory interpretation: theory and practice*, (E. Montgomery Publications, 2001).
32. Harrison, R., *Good Faith in Sales*, (Sweet and Maxwell,London, 1997).
33. Hart, H., *Concept of law*, (Clarendon Press, 1994).
34. Holdsworth, W., *History of English law*, (2nd edn, Methuen & Co Ltd, London, 1937).
35. Holland E., *The Elements of Jurisprudence*, (13th edn, Oxford Clarendon Press, 1924).

36. Honnold, J., *Documentay History of the Uniform law for International Sales*, (Kluwer and Taxation, 1989).
37. Honnold, J., *Uniform Law for International Sales under the 1980 United Nations Convention*, (3rd edn , Kluwer Law International, 1999).
38. Hussam, A., *The Interpretation of United Nations Convention for Contracts on International Sale of Goods*, (Arabic Revival Publication, 2001).
39. Jennings, R., & Watts, A., *Oppenheim's International Law* .(9th edn, Longman, 1992).
40. Kallaf, A., *Asol Al feqh Al islami* , (victory publication, Cairo, 1942).
41. Kant, I., *Idea for a Universal History with Cosmopolitan Intent*, in *The Philosophy of Kant*, Friedrich, C., (trs), (New York, Modern Library, 1949).
42. Khoo, W., in Bianca-Bonell., *Commentary on the International Sales Law*, Giuffrè: Milan ,1987.
43. Kipnis, K & Meyers, D., *Economic Justice: Private Rights and Public Responsibilities*, (Rowman & Littlefield, 1985).
44. Kritzer, A., *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods*, (Kluwer Law and Taxation, 1989).
45. Kritzer, A., *International Contract Manual: Guides to Practical Applications*, (Kluwer Law and Taxation, 1990).
46. Kuoppala, S., *Examination of the Goods under the CISG and the Finnish Sale of Goods Act*, (Publication of University of Turku, Private law publication series, 2000).
47. Lando, O. & Beale, H., *Principles of European contract law*, (Kluwer Law International, 2000).

48. Lawson, F., *A common lawyer looks at the civil law*, (University of Michigan Law School, 1955).
49. Ledlie, J.,(trs) *The Institutes: A Textbook of the History and System of Roman Private Law* , (3rd edn, Oxford: Clarendon Press,1970).
50. Leyden, V., *Aristotle on Equality and Justice :His Political Argument*, (Macmillan, 1985).
51. Lookofsky, J., ‘The 1980 United Nation Convention on Contracts for the International Sale of Goods’ in Herbots, J. & Blanpain, R., *International Encyclopaedia of Laws - Contracts*, (Kluwer Law & Taxation, 2000).
52. MacQueen, H., *Good Faith in the Scots Law of contract; An Undisclosed Principle?*, (Hart Publishing Oxford, 1999).
53. Magnus, U., *Wiener UN-Kaufrecht (CISG)*, (sellier, 2005).
54. Magnus, U., ‘Tracing the methodology in the CISG; Dogmatic Foundations’ , in Janssen, A. & Meyer, O., *CISG Methodology*, (Sellier European Law Publishers, 2009).
55. Maine, H., *Ancient Law, its connection with the early history of society and its relation to modern ideas*, (10th edn, London : Murray, 1906).
56. Maskow,D., & Enderlein, F., *Commentary on International Sales Law* , (Oceana Publications, 1992).
57. Miller, W.,(trs) *Marcus Tullius Cicero. De Officiis*, (Harvard University Press,1913).
58. Muhmsani, S., *the theory of obligations and contracts in the Shariah*, (knowledge publication, Beirut,1983).
59. Nagla, N., *Sanctity of Contracts Revisited*, (Dordrecht, Boston, London, 1995).

60. Nehf, J., 'Bad faith breach of contract in consumer transactions', in Brownsword R. ,
Good faith in contract: concept and context, (Ashgate/Dartmouth, 1999).
61. O'Connor, J., *Good Faith in International Law*, (Dartmouth Publishing Company
Limited, Brookfield USA, 1991).
62. Pound. R, *An Introduction to the Philosophy of Law*, (Yale University Press, 1922).
63. Schlechtriem, P., *Commentary on the UN Convention on the Contracts for the
International Sale of Goods*, (2nd edn, Oxford University Press, 2005).
64. Schlechtriem, P., *Commentary on the UN Convention on the International Sale of
Goods (CISG)* , (1st edn, Oxford University Press, 1998).
65. Schlechtriem, P., *Uniform Sales Law - The UN-Convention on Contracts for the
International Sale of Goods*,(Manz, Vienna, 1986).
66. Schlechtriem, P., *Uniform UN Sales Law. The CISG: Description and Tests*, (Mohr,
Tubingen, 1981).
67. Shalabi, M., *Reasoning the Islamic rules*, (Arabic revolution publication ,1985).
68. Sodhi, S., *The Canadian law dictionary*, (law and business publications, 1980).
69. Solomon, R., *Ethics and Excellence: Cooperation and Integrity in Business*,
(Oxford University Press, USA, 1992).
70. Sono, K., 'Formation of International Contracts under the Vienna Convention: A
Shift above the Comparative Law', in Sarcevic, P. & Volken, P (eds).,
International Sale of Goods: Dubrovnik Lectures, (Oceana , 1986).
71. Summers, R., & Hillman, R., *Contract and Related Obligation: Theory, Doctrine,
and Practice*, (West Publication, 1992).
72. Summers, R., & White, J., *Principles of Sales Law*, (Thomson/West, 2009).
73. Summers, R., & White, J., *Uniform commercial code*, (5th edn, West Publishing
Co., 2007).

74. Summers, R., *Essay in legal theory*, (1st ed, Kluwer Academic Publishers, 2000).
75. Summers, R., *Essays on the nature of law and legal reasoning*, (Berlin : Duncker & Humblot, 1992).
76. Trakman, L, *The Law Merchant: The Evolution of Commercial Law*, (Fred Rothman, 1983).
77. Treitel, G., *Remedies for Breach of Contract: A Comparative Account*, (Clarendon Press, 1988).
78. Treitel, G., *Frustration and Force Majeure*, (2nd edn, Sweet & Maxwell, 2004).
79. Van Alstine, M., *The international sale contract including the United Nations Convention on the International Sale of Goods*, (The Maryland Institute for Continuing Professional Education of Lawyers, 2005).
80. Vattel, E (trs), *Le Droit De Gens*, (Edward D. Ingraham, translation., AMS Press 1982).
81. Winship, P., ‘The Scope of the Vienna Convention on International Sales Contracts’ , in Galston, M. & Smit, H (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, (Matthew Bender, 1984).
82. Zeller, B., ‘The Observance of Good Faith in International Trade’, in Janssen, A. & Meyer, O., *CISG Methodology*, (Sellier, European Law Publishers, 2009).
83. Zimmermann, R & Whittaker, S., *Good Faith in European Contract Law*, Cambridge University Press, 2000.

2.2 Articles

1. Akaddaf, F.' Application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) to Arab Islamic Countries: Is the CISG Compatible with Islamic Law Principles?' (2001) 13 Pace. Int'l. L. Rev.1.

2. Amato, P., 'U.N. Convention on Contracts for International Sale of Goods –The open Price term and uniform application: An Early Interpretation by the Hungarian Courts' (1993) 13 J.L. & Com. 1.
3. Andersen, C., 'Exceptions to the Notification Rule -- Are They Uniformly Interpreted' (2005) 9(1). V. J. 17.
4. Andersen, C., 'The Uniform International Sales Law and the Global Jurisconsultorium' (2005) 24 J. L. & Com. 159.
5. Anderson, J P., 'Lender Liability for Breach of the Obligation of Good Faith Performance' (1987) 36 Emory. L. J. 917.
6. *Ansaldi, M.*, 'The German *Llewellyn*' (1992) 58 Brooklyn. L. Rev. 705.
7. Bachechi, C. & Klein, J., 'Pre-contractual Liability and the Duty of Good Faith Negotiation in International Transactions' (1994) 17 Hous. J. Int'l. 1.
8. Bailey, J., 'Facing the Truth: Seeing the Convention on Contracts for the International Sale of Goods as an Obstacle to a Uniform Law of International Sales' (1999) 32 Cornell Int'l L.J. 273.
9. Banani, D., 'International Arbitration and Project Finance in Developing Countries: Blurring the Public/Private Distinction' (2003) 26 B.C. Int'l & Comp. L. Rev. 355.
10. Bianca, C., & Bonell, M., *Commentary on the International Sales Law* (Giuffrè: Milan 1987).
11. Bonell, M., 'The UNIDROIT Principles of International Commercial Contracts and CISG: Alternatives or Complementary Instruments?' (1996) Unif. L. Rev. 26.
12. Bonell, M., 'The UNIDROIT Principles of International Commercial Contracts and CISG: Alternatives or Complementary Instruments?' (1996) Unif. L. Rev. 26.
13. Bonell, M., 'The CISG, European Contract Law and the Development of a World Contract Law' (2008) 56 Am. J. Comp. L.1.

14. Brand, R., & Flechtner, M., 'Arbitration and Contract Formation in International Trade: First Interpretations of the U.N. Sales Convention' (1993) 12 J.L. & COM. 239.
15. Brennan, G., 'Commercial law and morality' (1989) 17 Melb.U.L.Rev 100.
16. Brennan, G., 'Commercial law and morality' (1989) 17 Melb.U.L.Rev. 100.
17. Breyer, S., 'the Uses of Legislative History in Interpreting Statutes' (1992) 65 S. Cal. L. Rev. 845.
18. Bridge, M., 'Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?' (1984) 9 Can. Bus. L.J. 385.
19. Burton, S., '*Breach of Contract and the Common Law Duty to Perform in Good Faith*' (1980) 94 Harv. L. Rev. 369.
20. Davis, T., 'The Illusive Warranty of Workmanlike Performance: Constructing a Conceptual Framework' (1993) 72 Neb. L. Rev. 981.
21. Diamond, T & Foss, H., '*Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing has Been Violated: A Framework for Resolving the Mystery*' (1996) 47 Hastings L.J. 585.
22. Diedrich, F., 'Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG' (1996) 8 Pace Int'l. L. Rev. 303.
23. DiMatteo, L., '*The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings*' (1997) 22 Yale J. Int'l. L. 111.
24. Dimatteo, L., 'The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law' (1999) 60 U. Pitt. L. Rev. 839.

25. DiMatteo, L., 'The Interpretive Turn In International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence' (2004) 24 Nw. J. Int'l L. & Bus. 299
26. DiMatteo, L., 'The norms of contracts: The fairness inquiry and the 'Law of Satisfaction' -- A Nonunified theory' (1996) 24(2) Hofstra. L. Rev.349.
27. Distelhorst, M., 'A Business Ethics Approach to Contractual Good Faith and Fair Dealing: Briefly Modeled in Selected Managed Healthcare Contexts' (2000) 26 Ohio N.U. L. Rev. 57.
28. Dore & Defranco., 'A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code' (1982) 23 Harv. Int'l. L. J. 49.
29. Easterbrook, F., 'Statutes' Domains' (1983) 50 U. Chi. L. Rev. 533.
30. Easterbrook, F., 'Text, History, and Structure in Statutory Interpretation' (1994) 17 Harv. J. L. & Pub. Pol'y 61.
31. Eisenberg, A R., 'Good Faith Under The Uniform Commercial Code--A New Look At An Old Problem' (1971) 54 Marq. L. Rev 1.
32. Ellinghaus, C., '*In Defense of Unconscionability*' (1969) 78 Yale. L. J. 757.
33. Eörsi, G., 'A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods' (1983) 31 Am. J. Comp. L. 333.
34. Eskridge, W., 'Dynamic Statutory Interpretation', (1987) 135 U. Pa. L. Rev. 1482.
35. Farnsworth A., 'Good Faith Performance & Commercial Reasonableness Under the Uniform Commercial Code' (1963) 30 U. Chi. L. Rev. 666.
36. Farnsworth, E., 'Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Conventions, and National Laws' (1995) 3 Tul. J. Int'l & Comp. L. 47 .

37. Farnsworth, E., 'The Eason-Weinmann Colloquium on International and Comparative Law: Duties of good faith and fair dealing under the UNIDROIT Principles, relevant international conventions, and national laws' (1994) 3 Tul. J. Int'l & Comp. L. 47.
38. Felemegas, J., 'Comparative Editorial Remarks on the Concept of Good Faith in the CISG and the PECL' (2001) 13 Pace Int'l L. Rev. 399.
39. Ferrari, F., 'Tribunale di Vigevano: Specific Aspects of the CISG Uniformly Dealt With', (2001) 20 J. L. & Com. 225.
40. Ferrari, F., 'CISG Case Law: A New Challenge for Interpreters?' (1999) 17 J. L. & Com. 245.
41. Ferrari, F., 'Homeward Trend and Lex Forism Despite Uniform Sales Law' (2009) 13(1). V. J. 15.
42. Ferrari, F., 'Uniform Interpretation of The 1980 Uniform Sales Law' (1994) 24 Ga. J. Int'l & Comp. L. 183.
43. Finns P., 'Commerce, the common law and morality' (1989) 17 Melb. U. L. Rev. 87.
44. Finns, P., 'Commerce, the common law and morality' (1989) 17 Melb. U. L. Rev. 87.
45. Fitzmaurice, G., '*Vae Victis* or Woe to the Negotiator? Your Treaty of Our Interpretation of It' (review essay), [1971], 65 *AJIL* 358.
46. Flechtner, H., 'Another CISG Case in the U.S. Courts: Pitfalls For the Practitioner and the Potential For Regionalized Interpretations' (1995) 15 J.L. & Com. 127.
47. Flechtner, H., 'The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)' (1998) 17 J. L & Com 187.

48. Forte, A., 'The United Nations Convention on Contracts for the International Sale of Goods: Reason or Unreason in the United Kingdom' (1997) 26 U. Balt. L. Rev. 51.
49. Freyermuth, W., 'Enforcement of Acceleration Provisions and the Rhetoric of Good Faith' (1998) Byu. L. Rev. 1035.
50. Garro, A., 'The Buyer's "Safety Valve" Under Article 40: What is the Seller Supposed to Know and When?' (2005) 25 J. L. & Com. 235.
51. Goderre, D., 'International Negotiations Gone Sour: Pre-Contractual Liability Under the United Nations Sales Convention' (1997) 66 U. Cin. L. Rev. 257.
52. Goderre, D., 'International Negotiations Gone Sour: Pre-Contractual Liability Under the United Nations Sales Convention' (1997) 66 U. Cin. L. Rev. 257.
53. Hackney, P., 'Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?' (2001) 61 La. L. Rev. 473.
54. Harjani, S., 'The Convention on Contracts for International Sale of Goods in United States Courts' (2000) 23 Hous. J. Int'l L. 49.
55. Helmholz, R H., 'The Bible in the Service of the Canon Law' (1995) 70 Chicago-Kent L. Rev.1557.
56. Herran, R., 'The Principle of Good Faith in the Law of the World Trade Organization' (1964) 18(2) Y.B. I. L. C. 7.
57. Hoch, M., 'Is fair dealing a workable concept for European contract law?' (2005) 5 G. L. Advances. 1.
58. Hoffman, W., '*On the Use and Abuse of Custom and Usage in Reinsurance Contracts*' (1997) 33 Tort & Ins. L.J. 283.
59. Hofmann, N., ' Interpretation Rules and Good Faith as Obstacles to the UK's Ratification

- of the CISG and to the Harmonization of Contract Law in Europe' (2010) 22 Pace Int'l. L. Rev. 145.
60. Holmes, E., 'A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation' (1978) 39 U. PITT. L. REV. 381.
 61. Honnold, J., 'The Sales Convention: Background, Status, Application' (1988) 8 J.L. & Com. 1.
 62. Houh, E., 'The *Doctrine of Good Faith in Contract Law: A (Nearly Empty Vessel?)*' (2005) Utah L. Rev. 1.
 63. Jeffery, S., 'Measuring Damages under the United Nations Convention on the International Sale of Goods' (1989) 50 Ohio St. L.J. 737.
 64. Jerry, R H., 'The Wrong Side of the Mountain: A Comment on Bad Faith's Unnatural History' (1994) 72 Tex. L. Rev. 1317.
 65. Kastely, A., 'The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention' (1988) 63 Wash. L. Rev. 607.
 66. Kastely, A., 'Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention', (1988) 8 Northwestern. J. Int'l. L. & Bus. 574.
 67. Keily, T., 'Good Faith & the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (1999) 3 VJ. 15.
 68. Keily, T., 'Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (1999) 3(1) V.J. 15.
 69. Keily, T., 'Harmonization and the United Nations Convention on Contracts for the International Sale of Goods' (2003) 1 Nordic. J. Com. L 1.
 70. Kelso, J., 'The United Nations Convention on Contracts for the International Sale of Goods: Contract Formation and the Battle of Forms' (1982) 21 Colum. J.

- Transnat'l. L. 529.
71. Kilian, M., 'CISG and the Problem with Common Law Jurisdictions' (2001) 10 J. Transnat'l. L. & Pol'y. 217.
72. King, C., 'The CISG - Another One of Equity's Darlings?' (2004) 8 VJ 249.
73. Klein, J., 'Good Faith in International Transactions' (1993) 15 Liv. L. Rev. 115.
74. Komarov, A., 'Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)' (2005) 25 J. L. & Com 75.
75. Koneru, P., 'The International Interpretation of the UN Convention on the Contracts for the International Sale of Goods: An Approach based on General Principles' (1997) 6 Minn. J. Global Trade. 105.
76. Koneru, P., 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles', [1997] 6 Minn. J. Global Trade 105.
77. Kramer, A., 'Common sense principals of contract interpretation (and how we've been using them all along)' (2003) 23(2) Oxford J. Legal Stud. 173.
78. Kritzer, A., 'The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources' (1996) 1 Cornell Review of CISG Convention 147.
79. Kunz, C., '*Frontispiece on Good Faith: A Functional Approach within the UCC*' (1990) 16 Wm. Mitchell L. Rev. 1105.
80. Litvinoff, S., 'Good Faith' (1997) 71 Tul. L. Rev. 1645.
81. Loukaidēs, L., *The European Convention on Human Rights: collected essays*, Martinus Nijhoff Publishers, 2007.

82. Majeed, N ., 'Good Faith and Due Process: Lessons from the Shariah' (2004) 20 Arb. Int'l. 97.
83. Malik. S,' Offer: Revocable or Irrevocable. Will Art. 16 of the Convention on Contracts for the International Sale Ensure Uniformity?' (1985) 25 Indian J. Int'l L. 26.
84. Mather, H., '*Medieval Revival of Roman Law: Implications for Contemporary Legal Education*' (2002) 41 Cath. Law. 323.
85. Michael, K .'Law Reform in Changing Times' (1980) 96 L. Q. Rev. 515.
86. Miller. A., & Perry. R., 'Good Faith Performance' (2012) 98 IOWA Law Review 689
87. Moss, S., 'Why the United Kingdom Has Not Ratified the CISG' (2005) 25 J. L. & Com. 483.
88. Munday, R., '*The Uniform Interpretation of International Conventions*' (1978) 27 Int'l & Comp. L.Q. 450.
89. Murray, J., 'An Essay on the Formation of Contracts and Related Matters Under the United Nations Convention on Contracts for the International Sale of Goods' (1988) 8 J. L & Com 11.
90. Musy, A., 'The Good Faith Principle in Contract Law and pre- contractual Duty to Disclose ; Comparative Analyses of New Differences in Legal Culture', (2000) 1 G. J. Advances 1.
91. Nedzel, N., 'A comparative study of good faith, fair dealing, and pre contractual liability' (1997) 12 Tul. Eur. & Civ. L.F 97.
92. Nesteruk J., 'The Moral Dynamics of Law in Business', [1996] 34 Am. Bus. L.J. 133.

93. Novoa, R., 'Culpa in Contrahendo: A comparative Law Study: Chilean Law and the United Nations Convention on Contracts for the International Sale of Goods (CISG)' (2005) 22 Ariz. J. Int'l & Comp. L. 583.
94. On the Contracts for International Sales of Goods' (1999) 18 J.L. & Com. 333.
95. Palmieri, N W., 'Good Faith Disclosures Required During Precontractual Negotiations' (1993) 24 Seton Hall L. Rev. 70.
96. Palmieri, N., '*Good Faith Disclosures Required During Precontractual Negotiations*' (1993) 24 Seton Hall L. Rev. 70.
97. Posner, R., 'Statutory Interpretation – in the Classroom and in the Courtroom' (1983) 50 U. Chi. L. Rev. 800.
98. Potter, B., 'Obstacles and Alternatives to International Law' (1959) 53(3). Am. J. Intl. L. 647.
99. Powers , P., 'Defining the Indefinable: Good Faith and the United Nations Convention
100. Pryor, C. Scott, 'Consideration in the Common Law of Contracts: A Biblical? Theological Critique' (2005) 18 Regent U. L. Rev. 1.
101. Putnam, R A., 'Reciprocity and Virtue Ethics' (1988) 98 Ethics 379 .
102. Radin, M., 'Statutory Interpretation' (1930) 43 Harv. L. Rev. 863.
103. Reiter, B., '*Good Faith in Contracts*' (1983) 17 Val U.L. Rev. 705.
104. Rosett. A, 'Critical Reflections on the United Nations on Contracts for the International Sale of Goods' (1984) 45 Ohio st. L.J. 265.
105. Rosset, A., 'Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods' (1984) 45 Ohio St. L.J. 265.
106. Salama , S ., 'Pragmatic Responses to Interpretive Impediments: Article 7 of the CISG, An Inter-American Application' (2006) 28 U. Miami Inter-Am. L. Rev 225.

107. Shelton, D., 'Reconcilable Differences? The Interpretation of Multilingual Treaties' , (1997) 20 Hastings. Int'l. & Comp. L. Rev. 611.
108. Sims, V., 'Good Faith In Contract Law: Of Triggers and Concentric Circles' (2005) 16 KC. L. J. 293.
109. Smith, J.,' *The Draft-common Frame of reference for a European Private Law: Fit for Purpose?*, (2008) 15 MJ. 2.
110. Snyder D., 'Possession: A Brief for Louisiana's Rights of Succession to the Legacy of Roman Law' (1992) 66 Tul. L. Rev. 1853.
111. Spagnolo, L., '*Opening Pandora's Box: Good Faith and Precontractual Liability in the CISG*' (2007) 21 Temp. Int'l & Comp. L.J. 261.
112. Steven. D. Walt. 'The Modest Role of Good Faith in Uniform Sales Law' (2014) Virginia Public Law and Legal Theory Research Paper.
113. Steyn, J., '*The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy*' (1991) Denning. L. J. 131.
114. Storme, M., 'Good Faith and The Contents of Contracts in European Private Law' (2003) 7 EJCL.1.
115. Summers, R., 'Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54 Va. L. Rev 195.
116. Summers, R., 'Good Faith Revisited: Some Brief Remarks Dedicated to the Late Richard E. Speidel-- Friend, Co-Author, and U.C.C. Specialist' (2009) 46 San Diego L. Rev. 723.
117. Summers, R., 'The General Duty of Good Faith: Its Recognition and Conceptualization' (1982) 67 Cornell L. Rev. 810.
118. Tetley, W., 'Good Faith in Contract Particularly in the Contracts of Arbitration and Chartering' (2004) 35 JMLC 561.

119. Thomas, J., 'The Doctrine of Utmost Good Faith' (1990) 555 *Pli. Comm* 129.
120. Vachon, C J, 'Sovereignty versus globalization: the International Court of Justice's Advisory Opinion on the Threat or Use of Nuclear Weapons' (1998) 26 *Denv. J. Int'l L. & Pol'y* 69.
121. Van Alstine, M., 'Of *Textualism, Party Autonomy, and Good Faith*' (1999) 40 *Wm. & Mary. L. Rev.* 1223.
122. Van Alstine, M., 'Dynamic Treaty Interpretation' (1998) 146 *U. Pa. L. Rev.* 687.
123. Van Alstine, M., 'The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection' (2005) 93 *Geo. L.J.* 1885.
124. Viscasillas, M., 'The Formation of Contracts and the Principles of European Contract Law' (2001) 13 *Pace Int'l. L. Rev* 371.
125. Webster, J., 'Comment, *A Pound of Flesh: The Oregon Supreme Court. Virtually Eliminates the Duty to Perform and Enforce Contracts in Good Faith*' (1996) 75 *Or. L. Rev.* 493.
126. Winship, P., 'Commentary on Professor Kastely's Rhetorical Analysis' (1988) 8 *Northwestern. J. Int'l. L. & Bus* 623.
127. Winship, P., 'Formation of International Sales Contracts under the 1980 Vienna Convention' (1983) 17 *Int'l. L.* 1.
128. Zaccaria, E., 'The Dilemma of Good Faith in International Commercial Trade' (2004) *Macquarie J. Buiss. L.* 5.
129. Zeller, B., 'Good Faith - Is it a Contractual Obligation?' (2003) 15(2) *B. L. Rev.* 215.
130. Zeller, B., 'The CISG - Getting off the Fence' (2000) 74(9) *L. I. J.* 73.

131. Ziegel, J., 'The Future of the International Sales Convention from a Common Law Perspective' (2000) 6 NZ. B. L. Q. 336.
132. Zimmermann, R., 'Roman-Dutch Jurisprudence and its Contribution to European Private Law' (1992) 66 Tut. L. Rev 1685.

2.3 Electronic articles

1. Akseli, N., 'Editorial remarks on whether and the extent to which the Principles of European Contract Law (PECL) may be used to help interpret Article 16 of the CISG' (2003); <http://www.cisg.law.pace.edu/cisg/text/peclcomp16.html#er>.
2. Carrara, C., & Kuckenburg, J., 'Remarks on the manner in which the Principles of European Contract Law may be used to interpret or supplement Article 18 of the CISG' (2003); <http://www.cisg.law.pace.edu/cisg/text/peclcomp18.html>.
3. Eisele, 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' (2002);
<http://www.cisg.law.pace.edu/cisg/principles/uni29.html#ed>.
4. Felkins, L., 'Understanding Vagueness' (1996);
<http://perspicuity.net/paradox/vagueness.html>.
5. Fitzmaurice, M., 'New Haven School, Textuality and Dynamic Interpretation' (2009); <http://opiniojuris.org/2009/03/02/new-haven-school-textuality-and-dynamic-interpretation/> .
6. Hillman, R., 'Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity' (1995) Cornell Review of the Convention on Contracts for the International Sale of Goods 21;
7. Hillman, R., 'Cross-References and Editorial Analysis; Article 7';
<http://cisgw3.law.pace.edu/cisg/text/hillman.html>.

http://www.cisg.law.pace.edu/cisg/biblio/hillman1.html#*

8. Karollus, M., 'Judicial Interpretation and Application of the CISG in Germany 1988-1994', Cornell Review of the Convention on Contracts for the International Sale of Goods, (1995); <http://www.cisg.law.pace.edu/cisg/text/karollus1.html>.
9. Magnus, U., 'Remarks on good faith'(2000);
http://www.cisg.law.pace.edu/cisg/principles/uni7.html#um*.
10. Mistelis, L., 'CISG-AC Publishes First Opinions', London ;
<http://cisgw3.law.pace.edu/cisg/CISG-AC.html> .
11. New Jersey Law Revision Commission, 'Draft Final Report and Recommendations relating to Uniform Commercial Code Article 1', (2001);
www.lawrev.state.nj.us/ucc1/ucc1DFR101105.doc.
12. Povrzenic, N., 'Interpretation and Gap-Filling Under the United Nations Convention on Contracts for the International Sale of Goods';
<http://cisgw3.law.pace.edu/cisg/biblio/gap-fill.html>.
13. Schlechtriem, P., 'Interpretation, gap-filling and further development of the UN Sales Convention'; <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem6.html> .
14. Zeller, B., 'Four-Corners - The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods'(2003);
<http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>.

2.4 Thesis

1. Andersen, B. C., 'The uniformity of the CISG and its Jurisconsultorium ; An analysis of the terms and a closer look at examination and notification' (PhD thesis, Aarhus School of Business,2006).

2. Felemegas, J.' The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation' (PhD Thesis, University of Nottingham, 2000).
3. Muñoz, D., ' The Rules on Communication of Defects in the CISG: Static Rules and Dynamic Environments. Different Scenarios for a Single Player' (thesis submitted to Universidad Carlos III de Madrid, 2005).
4. Sim, D., 'The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods ' (LLM thesis, Harvard Law School, 2000).

2.5 Conference and other papers

1. Bazinas, S 'Uniformity in the Interpretation and the Application of the CISG: The Role of CLOUT and the Digest', (a research Presented in "Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods" , 2005); <http://cisgw3.law.pace.edu/cisg/biblio/bazinas.html>.
2. Farnsworth, A., 'The Concept of Good Faith in English Law' (Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Centre for Comparative and Foreign Law Studies] , 1997) <http://w3.uniroma1.it/idc/centro/publications/10farnsworth.pdf>.
3. Goode, R., 'The Concept of Good Faith in English Law' (Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Centre for Comparative and Foreign Law Studies] , 1997) <http://w3.uniroma1.it/idc/centro/publications/02goode.pdf> .
4. Guillemard, S., 'A Comparative Study of the UNIDROIT Principles of European Contracts and Some Dispositions of the CISG Applicable to the Formation of

- International Contracts from the Perspective of Harmonisation of Law (Laval University, 1999). <http://cisgw3.law.pace.edu/cisg/biblio/guillemard1.html> .
- <http://www.cisg.law.pace.edu/cisg/text/ziegel60.html> .
5. Larouer, C., *'In the Name of Sovereignty? The Battle over In Dubio Mitius Inside and Outside the Courts'* (Conference paper, Cornell Law School , 2009);
http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1050&context=lps_clacp .
 6. Mackaay E & Leblanc V., 'The Law and Economics of Good Faith in The Civil Law of Contract', prepared for the 2003 Conference of the European Association of Law and Economics.
 7. Munir, L., 'Sharia and Justice for Women' (Paper presented at the symposium on "Gender and Islam in Southeast Asia" at Passau University, Germany, 2005).
<http://www.lfip.org/laws718/docs/lilypdf/Sharia%20and%20Justice%20for%20Women.pdf>.
 8. Report of the Secretary General: Formation and Validity of Contracts for International Sale of Goods; U.N. Doc. A/CN.9/128, Annex 2 (1977) reprinted in UNCITRAL Year Book, 1977.
 9. Schlechtriem, P., 'Good Faith in German Law and in International Uniform Laws' (Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Centre for Comparative and Foreign Law Studies] , 1997).
<http://servizi.iit.cnr.it/~crdcs/crdcs/frames24.htm>.
 10. UNCITRAL, Secretary-General's Commentary on the Draft Convention on the Formation of Contracts for the International Sale of Goods, U.N. Doc. A/CN.9/144 8-9 (1977).

11. Ziegel, J., (Report presented to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods' , 1981).

2.6 Cases

1. Austria 15 June 1994, Vienna Arbitration proceeding, (*Rolled metal sheets case*) , case no; SCH-4318 . <http://cisgw3.law.pace.edu/cases/940615a3.html>.
2. Austria 6 February 1996, Supreme Court (*Propane case*), case no; 10 Ob 518/95. <http://cisgw3.law.pace.edu/cases/960206a3.html>.
3. *Banque Financiere de la Cite SA v Westgate Insurance Co Ltd* [1989] 2 All ER 952.
4. Belgium 15 May 2002 Appellate Court Gent (*NV A.R. v. NV I.*) (*Design of radio phone case*), case no; [2001/AR/0180] . <http://cisgw3.law.pace.edu/cases/020515b1.html>.
5. Belgium 27 June 2001, Appellate Court Antwerp (*S.r.l. R.C. v. BV BA R.T.*), case no; 1997/AR/1554. <http://cisgw3.law.pace.edu/cases/010627b1.html>.
6. Belgium 27 June 2001, Appellate Court Antwerp (*S.r.l. R.C. v. BV BA R.T.*), case no : 1997/AR/1554. <http://cisgw3.law.pace.edu/cases/010627b1.html>.
7. Bell, G (ed), 'How the Fact of Accepting Good Faith as a General Principle of the CISG Will Bring More Uniformity' , in *Review of the Convention on Contracts for International Sale of Goods 2003-2004*, sellier (European Law Publishers), 2005.
8. Cour de cassation - Chambre commercial, Arrêt n° 966 du 10 juillet [2007] 06-14.768.; http://www.lexinter.net/JF/sanction_de_la_mauvaise_foi_contractuelle.htm.
9. Court of Arbitration of the International Chamber of Commerce, (*Fashion products case*), Case No. 11849 of 2003; <http://cisgw3.law.pace.edu/cases/031849i1.html>.

10. France 22 February 1995 Appellate Court Grenoble (*BRI Production "Bonaventure" v. Pan African Export*), case no; 93/3275.
<http://cisgw3.law.pace.edu/cases/950222f1.html>.
11. Germany 12 November 2001, Appellate Court Hamm (*Memory module case*), case no; 13 U 102/01. <http://cisgw3.law.pace.edu/cases/011112g1.html>.
12. Germany 15 September 2004, Appellate Court Munich, (*Furniture leather case*), case no; 7 U 2959/04. <http://cisgw3.law.pace.edu/cases/040915g2.html>.
13. Germany 19 December 2002, Appellate Court Karlsruhe (*Machine case*), case no; 19 U 8/02. <http://cisgw3.law.pace.edu/cases/021219g1.html>.
14. Germany 21 December 2005, Appellate Court Köln (*Trade usage case*), case no; 16 U 47/05. <http://cisgw3.law.pace.edu/cases/051221g1.html>.
15. Germany 21 March 1996, Hamburg Arbitration proceeding (*Chinese goods case*), case no; not available. <http://cisgw3.law.pace.edu/cases/960321g1.html>.
16. Germany 21 May 1996 Appellate Court Köln (Used car case), case no: 22 U 4/96[1996]. <http://cisgw3.law.pace.edu/cases/960521g1.html>.
17. Germany 24 July 2009 Appellate Court Celle (Broadcasters case), case no; 13 W 48/09. <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/090724g1.html>.
18. Germany 3 August 2005 District Court Neubrandenburg (*Pitted sour cherries case*), case no; 10 O 74/04. <http://cisgw3.law.pace.edu/cases/050803g1.html>.
19. Germany 31 October 2001, Supreme Court (*Machinery case*), case no : VIII ZR 60/01[2001]. <http://cisgw3.law.pace.edu/cases/011031g1.html>.
20. Germany 5 July 1995, Appellate Court Frankfurt (*Chocolate products case*), case no; 9 U 81/94. <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950705g1.html>.
21. Germany 8 February 1995, Appellate Court München (*Automobiles case*). case no; 7 U 1720/94. <http://cisgw3.law.pace.edu/cases/950208g1.html>.

22. *Golder v. United Kingdom* [1975] 18 ECHR. (ser. A).
23. Hungary, 17 November 1995, Budapest Arbitration proceeding, case no; Vb 94124.
<http://cisgw3.law.pace.edu/cases/951117h1.html>.
24. ICC Arbitration Case No. 8611 of 23 January 1997 (*Industrial equipment case*).
<http://cisgw3.law.pace.edu/cases/978611i1.html>.
25. *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 2 W.L.R. 615.
26. *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd* [1989] Q.B. 433.
27. Italy 25 February 2004, District Court Padova, (*Agricultural products case*), case no; 40552 . <http://cisgw3.law.pace.edu/cases/040225i3.html>.
28. *Manifest Shipping Co Ltd v. Uni-Polaris Insurance Co Ltd " Star Sea"* [2003] 1 A.C. 469.
29. Mexico 10 March 2005 , Appeal Court, *Kolmar Petrochemicals Americas, Inc. v. Idesa Petroquímica S.A. de C.V.*, case no; 127/2005.
<http://cisgw3.law.pace.edu/cases/050310m1.html#cd>.
30. Netherlands 23 April 2003, Appellate Court 's-Gravenhage (*Rynpoort Trading v. Meneba Meel*), case no; 99/474. <http://cisgw3.law.pace.edu/cases/030423n1.html>.
31. Netherlands 5 March 1997 District Court Zwolle, (*Cooperative Maritime Etaploise v. Bos Fishproducts*), case no; HA ZA 95-640.
<http://www.unilex.info/case.cfm?pid=1&do=case&id=332&step=Abstract>.
32. *Prosecutor v Delalić (Zejnil) and ors*[ICTY 1998], Case No IT-96-21-T, ICL 95.
33. *Prosecutor v. Milomir Stakic* [ICTY 2006], case no: IT-97-24-A.
34. *R v Instan* [1893] 1 QB.
35. *Renard Constructions v. Minister for Public Works* [1992] 26 NSWLR 234.

36. Russia 27 July 1999, Arbitration proceeding, case no; 302/1996.
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/990727r1.html>.
37. Russia 27 May 2005 Arbitration proceeding, case no; 95/2004.
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050527r1.html>.
38. *Schaller v. Marine Nat. Bank of Neenah* [1986] 131 Wis.2d 389, 388 N.W.2d 645, 1 UCC Rep.Serv.2d 1283.
39. Spain 20 February 2007 Appellate Court Madrid (*Sunprojuice DK, Als v. San Sebastian, S.c.A.*), case no; 683/2006 .
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/070220s4.html>.
40. Spain 20 February 2007, Appellate Court Madrid (*Sunprojuice DK, Als v. San Sebastian, S.c.A.*), case no; 683/2006.
<http://cisgw3.law.pace.edu/cases/070220s4.html>.
41. Spain 7 June 2003 Appellate Court Valencia (*Cherubino Valsangiacomo, S.A v American Juice Import, Inc*, Case no; 142/2003.
<http://cisgw3.law.pace.edu/cases/030607s4.html>.
42. Switzerland 24 October 2003, Commercial Court Zurich (*Mattress case*), Case no; HG 010395/U/zs. <http://cisgw3.law.pace.edu/cases/031024s1.html>.
43. Switzerland 30 November 1998, Commercial Court Zürich (*Lambskin coat case*),case no; HG 930634/O. <http://cisgw3.law.pace.edu/cases/981130s1.html>.
44. Switzerland 30 November 1998, Commercial Court Zürich (*Lambskin coat case*), case no : HG 930634/O. <http://cisgw3.law.pace.edu/cases/981130s1.html>.
45. Switzerland 5 April 2005, Bundesgericht [Supreme Court] (*Chemical products case*).case no; 4C.474/2004. <http://cisgw3.law.pace.edu/cases/050405s1.html>.
46. Switzerland 5 November 1998, District Court Sissach (*Summer cloth collection case*), case no; P4 1991/238. <http://cisgw3.law.pace.edu/cases/981105s1.html>.

47. Switzerland 5 November 1998, District Court Sissach (*Summer cloth collection case*), case no; A 98/126.
<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/981105s1.html>.
48. *Taylor & Anor v. Caldwell & Anor* [1863] EWHC QB J1 .
49. *Tyrer v. The United Kingdom*, (App No. 5856/72) (1976) 2 ECHR 1.
50. United States 29 June 1998 Federal Appellate Court [11th Circuit] (*MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*) , cases no; 97-4250.
<http://cisgw3.law.pace.edu/cases/980629u1.html>.
51. *Walford and Others Appellants v. Miles and Another Respondents* [1992] 2 A.C. 128.

2.7 Websites

1. Bar, V., & others (eds), Outline Edition of the Draft Common Frame of Reference (DCFR); http://webh01.ua.ac.be/storme/2009_02_DCFR_OutlineEdition.pdf .
2. Cambridge Advanced Learner's Dictionary; <http://dictionary.cambridge.org/>.
3. Compact Oxford English Dictionary; <http://oxforddictionaries.com/>.
4. Encyclopaedia Britannica; <http://www.britannica.com>
5. International Maritime Organisation ;
http://www.imo.org/conventions/mainframe.asp?topic_id=148#amend.
6. Pace database on the CISG and International Commercial Law;
<http://www.cisg.law.pace.edu/>.
7. The English translation of the German Civil Law (BGB): http://www.gesetze-im-internet.de/englisch_bgb/index.html
8. The UNCITRAL Model Law on International Commercial Arbitration:
http://www.uncitral.org/uncitral/en/case_law.html.
9. UNILEX ; <http://www.unilex.info/dynasite.cfm?dsmid=13085>.

