
Author: Tiberiu Scutaru
Student ID Nr: 272402
Academic Adviser: Rene Franz Henschel, Department of Law

Aarhus School of Business

April 2005
CONTENTS:

Introduction ................................................................................................................. 3

Chapter 1: The Principle of Good Faith .................................................................... 6

1.1 What is Good Faith? ............................................................................................ 6
1.2 A Look at the History .......................................................................................... 9
1.3 Common Law vs. Civil Law ................................................................................ 12
1.4 Various national provisions on good faith ......................................................... 14
   a) American Law .................................................................................................. 14
   b) English Law ..................................................................................................... 15
   c) Australia, New Zealand and Canada ............................................................... 16
   d) French Law ..................................................................................................... 17
   e) German Law .................................................................................................... 19
   f) Italian Law ...................................................................................................... 20
   g) Chinese Law .................................................................................................... 21

1.5 Conclusions ........................................................................................................ 22

Chapter 2: The Principle of Good Faith in the CISG .......................................... 23

2.1 Introduction to the CISG ................................................................................... 23
2.2 Article 7 - A General Look ............................................................................... 24
2.3 Approaches to Good Faith in the CISG ............................................................. 26
2.4 The CISG vs. Other Legal Instruments ............................................................... 35
   a) The PECL ....................................................................................................... 35
   b) The UNIDROIT Principles ............................................................................. 37

2.5 Conclusions ........................................................................................................ 39
Chapter 3: The Case Law

3.1 Significance of Good Faith and International Trade

3.2 Good Faith and the Interpretation of the CISG

3.3 Good Faith as General Principle in CISG
   a) Good Faith during Negotiations
   b) Good Faith in Interpretation of Contract
   c) Good Faith in Performance of Contract

3.4 Conclusions

Chapter 4: Battle of Forms and Good Faith

4.1 Introduction to battle of forms
   a) The Last Shot Doctrine
   b) The Knock out Rule

4.2 Article 19 of the CISG

4.3 The Case law

4.4 Conclusions

Conclusions

The List of References
Introduction

The thing that makes the international trade law a rather difficult subject to work with is that, with all the concrete steps taken to make the rules somewhat uniform, it appears that there are still differences in opinions on how certain issues should be resolved or approached. This can be easily verified if looking at the various ongoing debates, the multitude of comments from different authors (often with very opposite positions) that have altogether produces an extremely large amount of literature on this topic. The case law from the same area is also quiet rich in multiple precedents that do not always seem to fall under any position advocated by any of the opposing parts.

The United Nations Convention on Contracts for the International Sale of Goods (also known as the 1980 Vienna Convention or the CISG) is a good example in this sense. Aiming to make the various domestic rules on the sales of goods from the different countries uniform, the provisions of the CISG have always generated many comments on what do they actually mean, as the texts of the articles are often criticized as being too general and therefore rather unclear. However this unclearness can be both understood and “excused” as it would be fair to say that it is quiet impossible “to please” all the sides, taking into account the differences in the legal systems and the legal traditions in various parts of the world as one of the scopes of the CISG is to be universal, bringing the national differences under one umbrella. This universal feature of the CISG represents both its strength and also its weakness because the diverse representation multiplied the number of potential fault lines and increased the scope for disagreement. 1 According to the same source, the final draft is an interesting mix of hard-won compromises since the delegates were often split according to the legal backgrounds (civil or common law), economic system and stage of socio-economic development etc.

Similarly to other codes, the CISG represents recognition of generalized principles of law, among which, as it is going to be further argued, the principle of good faith. The present paper proposes to observe the role of this principle in the CISG and also observe its link to the problem of battle of forms under the CISG.

This constitutes an interesting issue to analyze if considering the fact that there is a great amount of literature on both topics if taken separately, while few sources focus on the connection between them. The topic becomes even more tempting as both the principle of good faith and the battle of forms, are highly debated issues as the opinions are split among the scholars. Also, if comparing how these topics are approached under the CISG, other codes or the domestic law of some countries, there are often different solutions to the same cases. In order to support the arguments of the present paper, several literature sources have been consulted, while the main source is represented by the available case law related to both, the principle of good faith and to the battle of forms.

Thus, the scope of the present paper will be to point out the role the principle of good faith has in CISG, by making references to several proposed positions of approaching this issue together with the relevant case law. After the basis being laid down in the first part of the paper, the second part will attempt to briefly compare the process of battle of forms under CISG to some other conventions and domestic codes. Further, the link between these two issues will be looked into.

The text of the paper has a step by step structure as each chapter will be preparing the ground for the following chapter. The relevant conclusions will be drawn from each of these chapters, building up to one general conclusion towards the concluding part of the paper.

Chapter 1 adopts a more descriptive approach as its purpose is to lay down the basis for further discussion on the principle of good faith in the CISG from the following chapter. The chapter is split into five subchapters and it starts with a general introduction to the principle of good faith, together with an attempt to define the term. Several possible definitions are pointed out together with the author’s own point of view regarding this matter. The following subchapter looks into the history of good faith, going as far as the Roman law, following its evolution during the Middle Ages. The next subchapter introduces the reader to the differences in Civil law in comparison to the Common law. The fourth subchapter, the largest one, goes further into the differences between the two systems with examples from the national provisions in countries belonging to each system of law. Several preliminary conclusions are presented towards the end of this chapter.
Chapter 2 starts by a brief introduction to the CISG and its international character. A short history of Article 7 is presented, focusing on way the compromise among all the competing views over the issue of good faith was achieved and what are the results of it. Further, Article 7 of the CISG is analyzed more in details, in particular the definition of the principle of good faith according to the CISG, its role etc. The paper looks at the general wording of this article and at the debate over the way it should be interpreted. Author’s own comments and position on this issue are also presented. Secondly, the paper analyzes the text of the CISG and its formulation of the obligation of good faith on the parties and also compares it to the wording of other legal instruments, mainly the PECL and the UNIDROIT Principles. Finally, a part with conclusions comes to end the second chapter.

Chapter 3 presents the relevant case law. The structure of the chapter follows the structure of the UNILEX database.\(^2\) The cases are grouped according to the issue that is covered by them. In order to create better understanding, each case is presented through an abstract with the mentioned articles of the CISG being quoted in the footnotes. In order not to alter the general content of the cases and to better understand the whole problem of each specific case, only minor changes were performed on the texts of the abstracts. Each case is followed by author’s own brief comments and remarks, final conclusions being pointed out in the last section of the chapter.

Chapter 4 approaches the problem of the battle of forms. It starts by introducing the reader to the problem in general, pointing out the basis for the debate over this problem and different solutions to it. Further, Article 19 of the CISG is looked into details, being compared with other similar legal texts. Several relevant cases are presented in order to support the findings of the first sections of this chapter, the cases being presented in the exact similar way as the ones from the third chapter, each being followed by brief comments from the author.

The last part of the paper has the purpose of pointing out all the main ideas and findings of these four chapters, bringing them all under the umbrella of one final conclusion that has been built up throughout this paper.

---

\(^2\) www.unilex.info
Chapter 1: The Principle of Good Faith

1.1 What is Good Faith?

Let us start by trying to do a somewhat impossible thing right from the beginning: define the good faith. At first glance, everybody seems to know what good faith is in general and there are several terms that are often associated (but not equaled) with good faith. Among them, terms like fairness, equity or reasonableness are mentioned. Still, when it comes to a more detailed explanation, the literature sources point out that it is virtually impossible to give a definition. This fact generates some uncertainty and since uncertainty is not allowed in law because of obvious reasons, this is where the debate among scholars on this matter begins.

First, it is important to point out that there is a distinction between the ethical or moral principle of good faith to which all the legal systems aspire and the legal doctrine that already on its own is able to generate concrete legal rights and obligations. The same source mentions that in general, a coherent and well developed doctrine of good faith has safeguarding effects on the expectations of the contracting parties by representing and promoting the spirit of their agreement (and not the literal observance of the wording of their contract) and it can also regulate self-interested dealings. Another simple reason for defining and requiring good faith is purely economic: a pre-existing duty of good faith replaces the task of building trust between parties who may be separated by large distances and economics and efficiency concerns require a reliable definition of good faith. Thus, the doctrine of good faith can reduce the costs and promote economic efficiency as the parties would not need to contract all the contingencies if relying upon this doctrine, being able to fill the eventual gaps and representing a far better solution than the piecemeal approach. Uncertainty in defining this doctrine naturally leaves room for speculations and unpredictability and therefore is not reliable and cannot be admitted in law.

In general, there are two ways of defining good faith: the positive and negative definitions. The positive definitions are rather many and they all tend to offer substitutes for the term of good faith (synonyms) rather than explain it. Thus, good faith has been defined as fairness,

---

2 Ibid
Chapter 1: The Principle of Good Faith

fair conduct, reasonableness, reasonable standards of fair conduct, honesty in fact etc. The present paper supports D. Sim’s position that the mentioned term do not highlight the meaning of the term good faith and also the interchangeable use of the mentioned terms should not be encouraged as the terms actually refer to related but in the same time different things.

The negative definitions are somewhat easier to explain because they define good faith in relation to what is not considered good faith. This approach also has certain disadvantages as a ruling in the spirit of this definition would not be able to create a precedent for further references, as it does not has the objective of defining or clarifying the concept of good faith.

The remaining solution would be to leave to a judge’s discretion (to his/her intuitive sense of justice) but, here the danger of uncertainty and uncleanness appears, therefore, it is natural that, since the meaning is so general, there simply cannot exist a “global” doctrine of good faith in an international sales convention.

Various dictionaries of law offer quiet simple definitions that are related to the ones offered upper in the text. For example, one definition of good faith is honesty, with the specification (following the negative approach) that “a claim is not made honestly if made with the intention of committing a criminal offence or facilitating the commission of a future offence.” Another dictionary also suggests honesty when defining good faith stating: “An act carried out in good faith is one carried out honestly. Good faith is implied by law into certain contracts, such as those relating to commercial agency.” Finally, a quiet comprehensive definition is offered by the Wikipedia encyclopedia according to which:

Good faith (in Latin, bona fides) is the mental and moral state of honest, even if objectively unfounded, conviction as to the truth or falsehood of a proposition or body of opinion, or as to the rectitude or depravity of a line of conduct.

One who acts in good faith, so far as the violation of positive law (or even in certain junctures of natural law) is concerned, is said to labor under an invincible error, and hence to be guiltless. This consideration is frequently applied to determine the degree of right or obligation prevailing in the various forms of human engagements, such as contracts and the law of obligations.

---

6 For more details see D. Sim, “The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sales of Goods”.
7 Ibid
Chapter 1: The Principle of Good Faith

In the matter of prescription, good faith is held to be an indispensable requirement whether there be question of acquiring dominion or freeing oneself from a burden. Also, in deciding the duty incumbent upon one who finds himself in possession of another's property, cognizance is taken of the good faith with which perchance the holding began and was accompanied.

Some legal codes also offer a definition of the term good faith. A classic example is the definition of good faith found in the American *Uniform Commercial Code (UCC)* that has article 1-201. *General Definitions* stating:

(19) "Good faith" means honesty in fact in the conduct or transaction concerned

This is a rather short, simple and in the same time general definition. With several additional specifications, the position of this paper is that in fact it could be used as a “working” definition. This is why the present paper agrees with P. J. Powers’s definition that states that good faith is “an elusive term best left to lawyers and judges to define over a period of time as circumstances require”.11 This position is supported because, as seen from above, it is rather difficult to define good faith in a precise mode applicable to various situations, and the simple logical way out would seem to be assessing in a case by case situation whether a party has acted in bad faith.

In addition, it must not be forgotten that, in the majority of cases, regardless of the legal family (Civil law or Common law), a reasonable person would have more or less the same expectations when thinking about good faith, as there are other terms (as the one mentioned above) that are used to describe the principle and have mainly the same meaning at a “global” scale (i.e. it is believed that the words fairness, equity, honesty etc. define the same or at least similar things in all the countries). The same is applicable to the courts when they are called to fairly interpret, in the spirit of good faith.

W. Tetley’s definition also reflects very well the position of the present paper. According to him, good faith in contract represents “a just and honest conduct which should be expected of both parties in their dealings, one with another and even with third parties, who may be implicated or subsequently involved” and this “requires each party be fair and honest in negotiations and, once the agreement has been reached, that the parties also perform their obligations and enforce their rights honestly and fairly”.12 As it results from this definition, good faith should be observed both in the formation/negotiations and performance of a

12 Idem, p. 4
Chapter 1: The Principle of Good Faith

contract and in the enforcement of the contract. This is the main reason why the mentioned definition is supported by the present paper.

Another good explanation of the principle of good faith is presented by Bing Ling who states that the principle of good faith recognizes the legal effect of moral, social and commercial norms in appropriate cases, norms that apply to the conduct of the parties in all the phases of the relationship between the parties from the initial negotiation to the winding up of the contract.\(^\text{13}\) The same author states that the principle of good faith gives “protection to the reasonable expectations of the parties and serves to eliminate surprises and abuses in the transaction and to stabilize and harmonize the relationship between the parties”.\(^\text{14}\)

So far, the conclusion is that the principle of good faith cannot be properly formulated or defined as it is a rather versatile concept that can be associated with fairness, honesty, spirit of solidarity etc and it can be regarded as a phrase with no general meaning that operates to exclude various forms of bad faith and as a discretionary standard preventing parties opportunities foregone on contracting.\(^\text{15}\) It is important to note that good faith does not impose an obligation to act altruistically nor it requires the abandoning of self-interest as a governing motive in contractual relations; however it is able to prevent the parties from abusing the legal right.\(^\text{16}\) As it will be seen, the two legal systems (Common law and Civil law) impose the duty of good faith at different stages in a relationship between parties, but the difficult issue is determining what a good faith obligation requires, not when it applies.\(^\text{17}\)

1.2 A Look at the History

Before engaging into the discussion about the role of the principle of good faith in the contracts of sales in present times, it is a good idea to take a brief look at some history, focusing mainly on the evolution of this principle throughout time. This is advisable if approaching the issue both on rational grounds and as a source of possible explanations since, as it was said before, the principle of good faith has generated many discussions around it.

\(^\text{13}\) Bing Ling, *Contract Law in China*, Sweet & Maxwell Asia, 2002, p. 50
\(^\text{14}\) Ibid
\(^\text{16}\) Ibid
The principle of good faith has a long history, being already promoted to the status of legal principle by the creators of one of the most advanced Ancient legal systems – the Romans. The orator Cicero is considered to be the one who set forth the minimum requirements of good faith in commercial sales while the basic tenet of good faith used in Roman times was similar to the formulation of the general good faith obligation in the American UCC’s today. As J. Klein notes, the first who have fixed the principle of good faith (bona fide) as a legal principle were the Romans in the Twelve Tables legislation around 450 B.C. The Roman magistrates had the discretion to go beyond the strict statutory formalism and were able to adjudicate claims according to the requirement of contractual good faith. The obligation of good faith was later extended to various agreements including sales, land leases, tutelage etc. The same source continues by noting that at the core the Roman good obligation was the rule pacta sunt servanda, considered to be the basic rule of good faith. R. Zimmermann and S. Whittaker also point out the role of bona fide in Roman law. They note that it gained influence due to a specific standard clause (exceptio doli worded as following: if in this matter nothing has been done, or is being done, by the plaintiff) that was inserted at the request of the defendant into the procedural formula which defined the issue to be tried by the judges who gained the power to decide according to what appeared to be fair and reasonable. The authors point out that bona fide was an important principle in Roman law that has influenced the development of the Roman contract law, specifically the contracts of sale where the principle of caveat emptor was abandoned. Another author that stresses out the origins of the bona fide principle is W. Tetley who says that it is possible that this principle has existed at least since the development of the Roman law, with the possibility that its origins might have even preceded the natural law. He continues by saying that bona fide contracts were different from formal contracts that could be enforced only if satisfied certain legal requirements, but with the development of the notion of contracts, good faith started to be seen as a source that could generate new rules. It can be said, according to the same source that bona fide was not only to be used in interpretation,
Chapter 1: The Principle of Good Faith

but it also represented a standard to create obligations that were already binding the parties, thus giving the judges discretion to deal with informal contracts.25

After the fall of the Roman Empire, the notion of good conscience emerged as a part of the “Christianization” of Roman law and was used by the Church in determining the obligations of its members.26 As the same source notes, it should not be considered that good faith was linked only to religious matters as its influence spread to virtually all the other human interactions. With the Council of Nicea in 325, the Church already started to have jurisdiction over civil matters such as the contractual disputes on the theory that good faith was a test of the sanctity of contractual obligations.27

The development of the Scholasticism in the 13th century has contributed to the refinement of the concept of good faith with St. Thomas Aquinas bringing this concept under the natural law paradigm while regarding this principle as a precept of natural law, thus a precept of all laws, both Canon and Secular; the position was that contracts made against the principle of good faith should be invalid.28 Francisco Suarez tried to define the scope of good faith obligation as applied to secular matters in a more precise way. Such a development has led to the decline of the caveat emptor doctrine and the appearance of criminal penalties for fraud in business practices.29

The principle of good faith in contract performance came into attention being influenced by the development of the merchant class in the 11th and 12th centuries.30 Thus, the reciprocity of rights has been brought into the picture, where the reciprocity meant the fair exchange between the parties within the commercial transactions with a tendency of aiming at a more equal distribution of benefits and burdens within a contract.31 According to the same source, since fairness did not always equal with complete equality taken the process of bargaining, the modern tendency of the courts to scrutinize the relative bargaining power as a factor in good faith analysis has its origins in the early mercantilist reforms. Another source also observes that, following the fall of the Roman Empire, the development of good faith as implied in the performance of contracts, has appeared again with the mercantile practices in

25 Idem, p.7
26 J. Klein, “Good Faith in International Transactions”, p. 117
27 Ibid
28 Idem, 117 - 118
29 Idem, p. 118
31 J. Klein, “Good Faith in International Transactions”, p. 118
Chapter 1: The Principle of Good Faith

11th and 12th centuries and, later, was adopted though the civil law, with the common law system developing this principle at a slower pace with Lord Mansfield declaring in the 18th century that good faith was “the governing principle ... applicable to all contracts and dealings”, this probably being the highpoint of this development. Finally, R. Zimmermann and S. Whittaker point out that after the bona fide principle has eventually absorbed the principle of aequitas, during the Middle Ages and the early modern period, the relations among the merchants have been dominated by this spirit, becoming a fundamental principle of the medieval and early modern period lex mercantoria. To sum up, the definition of the obligation of good faith in the performance of contracts has developed from the Roman law and today exists, as it will be seen further in the text, in the civil codes of many countries. Good faith managed to “survive” but only as a principle whose precise meaning has been clouded.

1.3 Common Law vs. Civil Law

After observing the evolution of the principle of good faith, it is important to look at the differences between the two families of law: Common law and Civil law.

As it was suggested above, the principle of good faith has older lineage in the civil law than in the common law probably because of the influence of the Cannon law on the civil law, in comparison to the influence of the commercial practice on the common law. However, the same source notes that civil law is more concerned with the exchange of consents and with the moral evaluation of the behavior of the parties, while the common law pays greater attention to the economic exchange between the parties. The civil law approach to good faith has evolved from the general philosophy of contract that focuses mainly on the relationship between the parties. In general, Civil law tends to adopt an expansive approach to the good

33 R. Zimmermann, S. Whittaker, “Good Faith in European Contract Law: surveying the legal landscape”, p. 16 - 17
faith obligation applying it to both contract formation and performance while Common law states use a narrower duty of good faith applicable only to contract performance.  

In the Civil law system, the principle of good faith takes the form of a general codal provision. In comparison, with the exception of USA, the common law jurisdictions in general do not include a doctrine of good faith, using the piecemeal solutions instead. The same source suggests that, although there are certain similarities between both systems, it is much harder to imply a term in the common law in comparison to the civil law only on the basis that it would be reasonable to do it.

When dealing the pre-contractual acts against good faith, Civil law is more encompassing than Common law. A Civil law contracting party owes a pre-contract duty of good faith to negotiate in a fair and open spirit with the other party. This duty extends to contract performance, requiring the parties to act reasonably as not to breach the relationship of trust with those with whom they negotiate and contract. In Civil law countries good faith takes the form of a public policy and can be relied upon by both parties to a contract. D. Sim observes that this is true even in the case of USA with its well developed doctrine of good faith, does not do so. In this sense, Civil law has a rather expansive approach to the obligation of good faith which covers both the formation of a contract and the performance while the Common law has a narrower point of view, applicable to the performance of a contract. As said before, the explanation is that Civil law regards the contracts as a relationship between parties, thus good faith applies during the whole interaction, including during the process of negotiations, while in Common law, good faith applies already after the contract has started because of the belief that cases could be decided on subjective standards of morality and fairness, therefore raising uncertainty. The consequence is that good faith has entered the Common law in a masked way as the same source notes and, since the

38 Ibid
39 Ibid
41 Ibid
43 W. Tetley, “Good Faith in Contract, Particularly in the Contracts of Arbitration and Chartering”, p. 8
44 Idem, p. 8 – 9. Also see p. 12 for comments on Walford vs. Miles and The Star Sea cases.
Common law of England for example did not recognize good faith, the English courts have use, as it will be seen further in the text, the so-called *piecemeal solutions*. 45

To conclude, the Common law approach is characterized by the emphasis on the economic consequences of a contractual relationship where the Civil law imposes the obligation to act in good faith a rather early point – the negotiations – and the refusal to go on with them without justification can be violating the principle of good faith. 46

1.4 Various national provisions on good faith

It is time now to take a closer look at the various provisions on good faith in several countries from both Common and Civil law.

*a) American Law*

One of the most famous examples is the American case which is considered an exception among the Common law as the USA has a well developed doctrine of good faith (referring to the definition and obligation). The *Uniform Commercial Code (UCC)* has article 1-203. *Obligation of Good Faith* stating that:

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

*Article 1-201. General Definitions* comes to clarify the definition of good faith stating the definitions as follows:

> (19) "Good faith" means honesty in fact in the conduct or transaction concerned

Also, the *Restatement (Second) of Contracts* in its section 205 provides that:

> Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement

The quoted articles clearly show that the USA has a very well defined doctrine of good faith. However, it is a typical doctrine for the Common law system. This is particularly observed from the *UCC* where the emphasis is put on the performance, the enforcement and the process of negations of a contract appears to remain uncovered. The *Restatement (Second) of Contracts*, where the duty of good faith is also imposed on performance and enforcement

46 J. Klein, “*Good Faith in International Transactions*”, p. 188 - 120
only follows the same path. Thus it can be said that although the USA have a well developed doctrine of good faith, it is a rather typical one for the Common law system.

A. Farnsworth points out that both provisions say nothing about the doctrine of good faith purchase as opposed to good faith performance and although he stresses that in general the Americans are familiar with the first term, it is regarded as a different problem. The same author also points out that the USA does not recognize a duty of good faith in negotiations. However the same source notes that there are actually two definitions under the UCC. The first is the one mentioned above while the second one is provided in article 2-103.

Definitions and Index of Definitions:

(1) In this Article unless the context otherwise requires
(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.

There are three approaches to good faith in the USA. The first one regards the principle of good faith as a potential source of what the common lawyers would call an implied term that can cover a wide range of terms. The second approach is somewhat similar to the negative definition of good faith as presented previously in this chapter. It argues that good faith is a term that does not have a general positive meaning on its own, but has the role of excluding various things according to a specific context. The last approach criticizes good faith on the basis that it limits the area of actions of the parties as for example it can be considered bad faith to use the discretion “to recapture opportunities forgone in contracting” as determined by the other party’s reasonable expectations to refuse “to pay the expected cost of performance”.

b) English Law

There is no general positive duty of good faith upon the parties in the English law and Ireland. However, there could appear certain legal duties between the negotiating parties in tort as seen from the Esso Petroleum v. Mardon [1976] QB 801 case. A. Musy notes that

47 A. E. Farnsworth, “The Concept of “Good Faith” in American Law”, Saggi, Conferenze e Seminari, 10 [April 1993]
48 Ibid, Also see D. Sim, “The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sales of Goods” regarding the same matter.
49 Ibid
50 Ibid
51 Cited by A. Musy, “The Good Faith Principle in Contract Law and the Precontractual Duty to Disclose: Comparative Analysis of New Differences in Legal Cultures”, Global Jurist Advances, volume 1, issue 1, article 1, 2001, p. 11. Also see http://faculty.law.ubc.ca/biukovic/supplements/Esso.htm
Chapter 1: The Principle of Good Faith

there are remedies offered to parties that have claimed that there was a breach of the good faith duties, however the English courts are doing this without a reference to a general principle, this giving a note of uncertainty and unpredictability to the outcomes of the cases. Another author states that even in the absence of a general rule on good faith, many results are reached by the means of more specific rules. D. Sim points out that in order to “replace” the absence of a general rule Great Britain has developed the piecemeal solution to solve specific problems of unfairness. The same author notes that there has been certain interest in favor of a general rule, especially with the adoption of the 1993 EC Directive on Unfair Terms in Consumer Contracts that has several references to the concept of good faith; but still, there is little judicial development in this sense.

c) Australia, New Zealand and Canada

If compared to the American law, Canada and Australia are more on an intermediary position in the sense that there are certain similarities to the English system, however the doctrine of good faith is better developed in these countries than in Great Britain.

In Australia, as B. Zeller presents it, it appears that good faith is not just implicitly used and the case law used by the author comes to support this statement. The same source explains that because there has been much dealing with the international conventions, there was an effect of spilling into the interpretation of the domestic law. This was helped also by the fact that Australia has overcome the limitations of the Common law. Another author also point out that although Australia does not have strong doctrine of good faith, the Australian contract law tends to recognize the importance of good faith duty to perform contract obligations and is likely to define the parameters of the duty in similarly to the Civil and Common law jurisdictions, following the good faith model used in the world. Another source mentions that the Australian and New Zealand courts are more open to recognize a discrete good faith principle in contracts more similar to what is prevailing in Europe and

52 A. Musy, “The Good Faith Principle in Contract Law and the Precontractual Duty to Disclose: Comparative Analysis of New Differences in Legal Cultures”, p. 11
55 Ibid
57 Ibid
USA, with some decisions even recognizing the duty to negotiate in good faith in certain situations.59

Canadian law is also more developed in this sense in comparison to the English one. There is also the debate over which standard to adopt: the one that relies upon concepts like commercial standards, fair play, fairness and reasonableness (in this case a court would look to a tort-like norm outside the agreement of the parties to rule whether bad faith occurred) or the one that relies upon the expectations and intentions of the contracting parties as manifest in their contract (in this case the courts would go into interpreting the agreement between the parties in order to arrive to the appropriate standard).60 In general, it can be said that there are certain reluctances in imposing a duty of good faith on the parties in Canada and the preference is being given to other means that are usually used in common law.61 The choice is more likely to be given to a doctrine of good faith similar to the one set in the Restatement (Second) of Contracts.62

d) French Law

The obligation of good faith is laid out very clear in article 1134 c.c. of the French Civil Code. This is also the only explicit reference to this principle in the code. Similar provision can be found in the Belgian and Luxembourg civil codes.63 Also, the Swiss Civil Code is a good example in this sense as it also has very similar provisions on good faith.64 Thus article 1134 of the French Civil Code states:65

61 W. Tetley, “Good Faith in Contract, Particularly in the Contracts of Arbitration and Chartering”, p. 31. See the cited cases for more details.
64 Article 2 of the Swiss Civil Code states:
   B. Etendue des droits civils
   1. Devoirs généraux
      1 Chacun est tenu d’exercer ses droits et d’exécuter ses obligations selon les règles de la bonne foi.
      1.2 L’abus manifeste d’un droit n’est pas protégé par la loi.
65 English version available on http://lexinter.net/ENGLISH/civil_code.htm, Original text in French states:
   Article 1134:
   Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.
   Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise.
   Elles doivent être exécutées de bonne foi.
Agreements legally formed have the force of law over those who are the makers of them. They cannot be revoked except with their mutual consent, or for causes which the law authorizes. They must be executed with good faith.

To this formulation, article 1135 adds that:

Agreements are binding not only as to what is therein expressed, but also as to all the consequences which equity, usage or statute gives to the obligation according to its nature.

It is clear from the formulation that it was intended to give an important role to the principle of good faith: once the contracts are formed, they have the force of law that must be executed with good faith. It appears to be a rather strong and somewhat rigid approach that the Common law practice would not tolerate. Thus, the French Civil Code is a good example of the Civil law approach to good faith.

There are certain comments made by scholars regarding the French formulation of the obligation of good faith. First, it is noted that the liability rests on tort principles during pre-contractual negotiations and on contract principles once the contract is formed. The Belgium Civil Code requires all contracts to be executed in good faith and the contractual interpretations will be supplemented by custom and usage. Second, the instances in which good faith applies have been expanded to several situations such as the formation of contracts where parties are obliged to act in good faith and the performance of contracts where A. Musy points out two main applications of the principle of good faith: duty of loyalty and duty of cooperation. The same author states that there is no clear distinction between the subjective and objective good faith like in the case of German law (for example in situations of réticence dolosive or erreur sur la substance and that there is a risk of too broad judicial discretion because of the introduction of the valeur d’équité). The limitations of putting into practice of the principle of good faith are also pointed out by M. G. Bridges who notes that “its practical impact can be described as shallow: it has done nothing to disallow penalty clauses, it has not expanded the narrow categories of lesion and it has not been employed to give relief in what we would now call cases of commercial

Article 1135:
Les conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que l’équité, l’usage ou la loi donnent à l'obligation d'après sa nature.

67 Ibid
68 A. M. Musy, “The Good Faith Principle in Contract Law and the Precontractual Duty to Disclose: Comparative Analysis of New Differences in Legal Cultures”, p. 3 - 4
69 Ibid
impossibility”.70 However these limitations can be explained by the fear that a too wide application of good faith can affect the certainty of the legal relations.71

e) German Law

Another good and quiet notorious example is the German Civil Code (Bürgerliches Gesetzbuch) since Germany is often regarded as a country that has enthusiastically embraced the principle of good faith in its civil code.72 Thus, paragraph 242 [Performance according to good faith] states:73

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

At first glance, the provisions appear rather general. However, it is more important to see what shape the principle of good faith has taken in Germany in general.

By both doctrine and court decisions, the principal of good faith was given the state of a general clause and it also provided as basis for other new doctrines, modifications of the old ones and other new cases.74 The same source notes that there are three situations against which the German code does not protect: culpa in contrahendo, no protection of the recipient against partial or incorrect performance and no principle of neminem laedere (general tort of negligence).75 However, there have been identified several situations in which the good faith “general principle” must be enforced.76

D. Sim points out that there are three basic functions that the good faith doctrine can have: serving as legal basis of interstitial law-making by the judiciary, forming the basis of defense in private law suits and providing a statutory basis for reallocating risks in private

---

72 Ibid
73 English version available on http://www.hull.ac.uk/php/lastcb/bgbengl.htm, Original German version: BGB § 242 Leistung nach Treu und Glauben
    Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.
74 A. M. Musy, “The Good Faith Principle in Contract Law and the Precontractual Duty to Disclose: Comparative Analysis of New Differences in Legal Cultures”, p. 5 - 6
75 Ibid
76 Idem, p. 6 - 7, for more details see p. 6 - 7
contracts. The same author comments that the scope of paragraph 242 is quiet overwhelming and that it appears that the term good faith does not fall under a single definition. Therefore, commentators are taking a piecemeal approach when explaining this paragraph referring to different categories of situations where the principle has been applied. The German courts have appealed to this principle also when created residual causes of actions for breaches not falling within the three categories in which a creditor could claim damages for “breach of contract” such as if performance is impossible for the debtor, if the debtor’s fault has caused a delay in performance or if the seller fraudulently concealed the defect in defective goods or warranted a promised performance.

**f) Italian Law**

The *Italian Civil Code* has been drafted after the *German Civil Code* therefore good faith is clearly defined and has a rather strong basis in the code. Provisions regarding this principle can be found in several articles:

- **Article 1175**
  Debtor and creditor must behave according to good faith and fair dealing rules
- **Article 1337**
  Parties must behave in good faith during the pre-contractual bargaining and contractual drafting
- **Article 1366**
  Contracts must be interpreted in good faith
- **Article 1375**
  Contracts must be executed in good faith

The articles show that the *Italian Civil Code* is a good example of the way good faith is covered under the Civil law, the duty being extended from the pre-contractual negotiations phase to the performance and interpretation. It can be said that Italy has a strongly developed doctrine of good faith in the same way as Germany or France has. In Italy good faith is

---

78 Ibid
79 Ibid
  Il debitore e il creditore devono comportarsi secondo le regole della correttezza principi della
Art. 1337 Trattative e responsabilità precontrattuale
  Le parti, nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi secondo buona fede
Art. 1366 Interpretazione di buona fede
  Il contratto deve essere interpretato secondo buona fede
Art. 1375 Esecuzione di buona fede
  Il contratto deve essere eseguito secondo buona fede
similar to an ethical obligation which is an integral part of public policy. 81 The same author points out that the principle of good faith is defined for practical purposes, as "openness, diligent fairness, and a sense of social solidarity," this definition forcing the contracting parties to recognize the importance of good faith and, at a minimum, to act reasonably. 82

In the same time, the freedom of contract seems not to be affected even if the Italian scholars have been interpreting the provisions as synonyms to the German Treu und Glaube, this fact being reflected in the development of the case law. 83 The same source comments that there have been several developments in the way good faith principle was interpreted, thus for example in the early 1970s the Court of Cassation was holding that good faith provisions were not offering autonomous grounds for legal actions, while towards the end of this decade, the position changed in favor of the fact that they did actually offer enough grounds. 84 There has also been certain debate between the judges who were influenced by the German and the French doctrines. 85

t) Chinese Law

It is both relevant and interesting to also look at the similar provisions in an Asian country. The Chinese Contract Law is a good example to look at. Articles 3 - 8 set up the fundamental principles of the contract law, where: 86

Article 5 Fairness
The parties shall abide by the principle of fairness in prescribing their respective rights and obligations.

Article 6 Good Faith
The parties shall abide by the principle of good faith in exercising their rights and performing their obligations.

It can be observed that the principle of good faith has a strong position in the Chinese contract law. It is clear that the drafters of these articles intended for it to be imposed in a strict manner at all the levels of the relationship between the parties.

82 Ibid
83 A. A. Musy, “The Good Faith Principle in Contract Law and the Precontractual Duty to Disclose: Comparative Analysis of New Differences in Legal Cultures”, p. 8
84 Idem, p. 9 - 10
85 Ibid
86 English version available on http://www.cclaw.net/download/contractlawPRC.asp
Chapter 1: The Principle of Good Faith

It appears that the Chinese scholars tend to consider good faith as a fundamental principle of civil law (even an “imperial principle” of law) where fairness from the mentioned article 5 is further derived from good faith, being therefore subsumed by the latter.\(^{87}\)

There are two interpretations of good faith in China. The first one is the literal approach according to which the meaning of the terms *honesty* and *faithfulness* is focused upon (the parties should not deceive one another and should be truthful in their representations) and the second approach defines the principle of good faith in terms of an exercise in the balancing of conflicting interests (under this approach, there is no way to define the good faith, the principle conferring rather wide powers upon a court in applying extra-legal norms to civil cases).\(^{88}\)

1.5 Conclusions

Although there are still many issues that have remained untouched by the present chapter, several general conclusions can already be formulated. As it was seen in the beginning, it is rather difficult to formulate a definition of good faith. Despite the several approached to the definition of this concept, it is clear that all these perspectives are focusing on pretty much the same things whether it is the *positive* or *negative* approach. It is clear though that the principle of good faith has had an important role throughout history as it can be traced back up to the Roman law. Also, despite the differences in the legal systems and in the formulations in various national laws, all of them are referring to more or less the same things when attempting to define good faith. It is not the “substance” of the term that they are debating on, or the utility or the necessity of this principle, but rather its formulation and further its application. The *civil law* countries have the good faith principle put in their civil codes and extend it to cover both, the pre-contractual relations and performance while the *common law* countries fear the possible uncertainty in case of an “unclear” formulation of this principle and tend to apply it more to the performance of the contracts.

\(^{87}\) Bing Ling, *Contract Law in China*, p. 50
\(^{88}\) Idem, p. 52 – 53. Also see the cited case law on p. 54 – 57. The book brings examples from other Asian countries such as the *ROC Civil Code* with article 219 and the *Japanese Civil Code* with article 1 (English version of article 1 and 2 is available on [http://www.e-law-international.com/i-civil-Eng1.htm](http://www.e-law-international.com/i-civil-Eng1.htm)):

*Article 1*

(1) Private rights shall be subject to the principle of public welfare.
(2) Rights and obligations shall be exercised or performed in a good faith and in compliance with the *bona fide* principle.
(3) Abuse of rights shall not be allowed.
Chapter 2: The Principle of Good Faith in the CISG

2.1 Introduction to the CISG

The beginning of the CISG can be traced to the suggestion made by Ernst Rabel in 1928 regarding the fact that the law on international sale of goods should be unified and that the International Institute for the Unification of Private Law (UNIDROIT) should work on that. Thus there were two draft Conventions: one related to a Uniform Law of International Sale and one related to a Uniform Law on Formation of Contracts (also known as the Hague Conventions). It was only in 1964 when the Conventions were adopted at the Diplomatic Conference at The Hague and had little success as they were implemented in only 9 states. This was due to the fact that they were regarded as reflecting only the point of view of Western Europe.\(^8^9\) Then, the United Nations Commission on International Trade Law (UNCITRAL) resumed the work in 1968 with higher diversity in the participation and representation (including Common law, Civil law, Chinese law, Hindu law, Islamic law etc.). However, the draft of the Convention was adopted in 1980 at the Diplomatic Conference in Vienna that was attended by 62 countries and 8 international organizations. The convention entered into force on January 1\(^{st}\) 1988 upon the ratification of 11 states. Today 61 states have adopted it.\(^9^0\)

The area of application of the CISG is laid out in the beginning of the Convention, in *Part I Sphere of Application and General Provisions*, specifically in *Chapter I Sphere of Application*. As Article 1 states the Convention applies to *contracts of sale of goods between parties whose places of business are in different States*.\(^9^1\) It does not cover sales of goods bought for personal, family or household use; by auction; of stocks, shares, investment securities, negotiable instruments or money etc.\(^9^2\)

It can be reasonably expected that the “diversity” mentioned in the first paragraph, would generate difficulties in reaching compromises. Thus, when the compromise was finally reached, the final text of CISG has generated much debate due to the formulations of certain articles. Naturally, the issue of good faith has not escaped this fate. As Chapter 1 of this paper has showed, there are important differences between the civil law and common law

---


90 Ibid

91 Article 1 (1) of the CISG

92 See Articles 2 and 3 of the CISG for details. Also Articles 4 -6 for other limitations in application of CISG
approaches to the principle of good faith and reaching a working compromise on this topic is a quiet difficult task. As an author puts it: “Imagine a scenario where advocates from common law England and civil law Germany, representing antithetical position with respect to good faith and contract convene to seek a compromise on a legal position on this and related issues.”93

There are several good examples in this sense. First, a proposal from a Hungarian member of the Working group that stated: "In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith" was rejected by the UNCITRAL members.94 The reasoning was that the proposal 1) was unnecessary because good faith was adequately dealt with under national laws; 2) lacked substance because it failed to provide penalties for its breach; 3) was too vague and thus was likely to generate uncertainty and non-uniformity.95 Also, a Canadian recommendation to amend what eventually became Article 6, the provision that, with certain restrictions allowed “parties to exclude the application of [the] Convention or ... derogate from the effect of any of its provisions.”96 This fact, according to the same source, would have added a North American influence to the good faith requirement in the CISG by introducing similar language to the UCC 1-102 (3) that does not allow the parties to contract out of the good faith obligation.97 The Italian delegate proposed that only internationally accepted aspects of good faith, would apply to the CISG while Norway proposed good faith to be restricted to the relationship between the parties and not in the Convention's interpretation.98 The United States objected to a good faith provision, largely on the basis of vagueness therefore the reached compromise left the Common law states, particularly the United States, feeling they had won the battle.99

2.2 Article 7 – A General Look

It is now time to take a closer look at the text of Article 7. It is placed under Chapter II General Provisions. The Article is divided into two paragraphs, where the principle of good faith is mentioned in the first paragraph. Thus Article 7 of CISG states:

94 Cited by J. Klein, “Good Faith in International Transactions”, p. 122
95 Ibid
96 Ibid, p. 123
97 Ibid
99 Ibid
Chapter 2: The Principle of Good Faith in the CISG

(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.

As a parenthesis, it is interesting to notice that the first paragraph is identical to the 1978 Draft article 6 with two exceptions in the formulation (italics added):

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.

However, many commentators regard these modifications as not bringing any substantive changes to the text.100

Returning to the text of Article 7 as it is in the CISG, there are several things that have to be mentioned. First, what is rather unclear for the reader is the way the article is formulated. The way the principle of good faith is approached seems to be somewhat vague. In the same time, it is the only time that good faith is mentioned in the CISG while the UCC for example has around fifty separate good faith requirements.101 These of course could be attributed to the drawback of the CISG. Does this mean that there is a gap regarding the principle of good faith and its duty upon the contracting parties under CISG? Surprisingly enough the answer appears to be negative: there is a duty of good faith upon the parties under the CISG despite the rather “unclear” formulation. How can this position be defended? First, as it was seen in the previous chapter of this paper, this result can be understood and explained by both, the way the Convention was made (specifically it is a compromise between different, often competing views etc.) and by the aim of the CISG (which is to unify the various national provisions regarding the contracts of sale of goods). In this sense, the apparent vagueness is understandable and can constitute both a weakness and strength of the Convention.

The first aspect will be discussed more in details later in the text when analyzing various approaches to the role of good faith in CISG. The strength is that it allowed for an apparently working compromise: to avoid “the rigidness” of the Civil law formulations and in the same time to impose good faith as one of the basic principles without creating “legal uncertainty”

100 Legislative History of CISG article 7: Match-up with the 1978 Draft to assess relevance of Secretariat Commentary
101 J. Klein, “Good Faith in International Transactions”, p. 121
around the meaning of this principle and avoiding the fears of prejudicing the freedom of contracts feared by the common law system. There are opinions that paragraph 2 of Article 7 consecrates the principle of good faith as a principle on which the Convention is based.\textsuperscript{102}

Further it should be mentioned that, at first glance, the CISG only requires considering the observance of good faith in international trade only when interpreting the Convention as stated in paragraph 1 of Article 7. There is no express requirement on the contracting parties to act in good faith. Here is where the debate among the scholars starts as there are several opinions among them on how to interpret this formulation. Then, there is also case law where, as it will be showed further in this paper, the position is slightly broader than mentioned in Article 7 and contradicts several scholars’ opinions. The next section of this paper is going to concentrate on several of these opinions, outlining towards the end the position of the present paper.

Meanwhile, several authors have pointed out that despite the fact that the CISG is so modest in mentioning the principle of good faith, this principle is still manifested in various forms throughout the Convention. Others have argued that there is no general duty of good faith in CISG and that attributing this duty basing only on such a vague formulation would equal to stretching this definition way to far in order to cover terms that are simply not fitting in.

2.3 Suggested Approaches to Good Faith in the CISG

Let us take a closer look now at several approaches to good faith. The formulation of Article 7 (1) has convinced some of the scholars to favour the position that there is no explicit duty of good faith upon the parties. For example, E. A. Farnsworth suggests that, if judging by the fact that there is no explicit provision which would require the duty of good faith on the parties to international contracts and if read literally, the Convention does no more that instruct the courts interpreting the Convention’s provisions to take into consideration the importance of the listed factors in Article 7 (2).\textsuperscript{103} The author suggests three possible interpretations of the Convention:\textsuperscript{104}


\textsuperscript{104} Idem, p. 57
a) The Convention can be read literally, thus as not expressly settling the question and a duty of good faith cannot be extracted from the general principles on which the Convention is based. According to E. A. Farnsworth, in this case the answers in eventual cases related to this matter should be sought in the rules of private international law, such as conflict laws.

b) The Convention might be read literally, thus as not expressly settling the question, but a duty of good faith might be extracted from the general principles on which the Convention is based. In this situation the author suggests the parties would be held to that duty, within whatever contours a court deems to be warranted by the Convention.

c) The Convention might not be read literally and the provision that requires the interpreting court to consider the observance of good faith therefore is seen as imposing the same duty on the parties. In this last situation the author points out that the parties would be held to that duty, whatever its contours might be.

The author prefers the first solution because, according to him, it would be a “perversion of the compromise to let the general principle of good faith in by the back door.”

This approach however appears somewhat limited or narrow since, if the Convention was to be interpreted only literally as the first approach is suggesting, there would appear several problems. First, there would be no need for a Convention like the CISG as the solutions to the matters dealing with the international sales could be found in other legal texts, as in the rules of private international law texts for example. In other words, the Convention would loose its “framework” character. Another problem would be that if interpreted only literally, each time a new (uncovered) problem arises, the answers would probably be looked in the case law. This could generate certain problems because the courts would have too much discretion in the interpretation of the Convention, their decisions could be influenced by the legal background and, although there are many similar situations, they are not the same when analyzing the details, therefore there could be opposing decisions on similar situations or similar cases and situations, thus without setting any precedents. Also, there could be the possibility of looking for answers on unclear matters in the domestic law, thus the Convention loosing its international character.

105 Ibid
Still, there are also some strong points of approaching the CISG literally as the previous author suggests. Letting other various issues in by the “back door” as it is done in the case of duty of good faith could also in a way prejudice the Convention.

R. August suggests that the requirement to use good faith means that courts must accept foreign decisions as precedents and depart from them only when they are clearly distinguishable, clearly erroneous, or no longer applicable to changed international circumstances.\(^\text{106}\) Good faith appears in the CISG as apparently a limited principle. The same source suggests that probably the drafters meant to use it only in interpreting the provisions of the Convention as it is stated in Article 7 (1) and not as a loose or general obligation imposed on the parties. This position is contrasting to the broad application in the German Civil Code (paragraph 242), the American UCC (paragraph 1-203) and other code systems as seen in the previous chapter.\(^\text{107}\) The same author assumes that the drafters of the German Civil Code might have originally also meant to use good faith in a similar limited way. Meanwhile the German judges ignored the drafters’ intention because this proved to be a convenient tool for adding flexibility and it can be anticipated that courts used to a more liberal use of the concept which will apply it in a similar liberal way when interpreting the CISG.

The next approach is favorable to the existence of a duty of good faith in the CISG, basing on the fact that this principle is very closely linked to the idea of reasonableness. Thus, T. Keily offers a series of examples which according to him are linked to this principle:\(^\text{108}\) an offer cannot be revoked where it was reasonable for the offeree to rely upon the offer being held open and the offeree acted in reliance on the offer according to Article 16 (2) (b)\(^\text{109}\); a late acceptance will be deemed to be timely where it was sent in such circumstances that it would have reached the offerror in due time if the transmission had been normal according to Article 21 (2).\(^\text{110}\)


\(^{107}\) Ibid


\(^{109}\) Article 16 (2):

However, an offer cannot be revoked:

(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

\(^{110}\) Article 21 (2):

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
Chapter 2: The Principle of Good Faith in the CISG

The following approach is contrasting with the approaches suggested by Farnsworth and August particularly because of the attribution of a broader scope to the principle of good faith. Having this as a starting point and that good faith applies to all aspects of interpretation and application of the provisions of the Convention, the Guide to CISG Article 7 offers more examples: Article 29 (2) in the relation to the preclusion of a party from relying on a provision in a contract that modification or termination of the contract must be in writing; Articles 37 and 38 on the rights of a seller to remedy non-conformities in the goods; Article 40 which precludes the seller from relying on the fact that notice of non-conformity has not been given by the buyer in accordance with articles 36 and 37 if the lack of conformity relates to facts of which the seller knew or could not have been unaware and which he did not disclose to the buyer; Articles 49 (2), 64 (2) and 82 on the loss of the right to declare the contract avoided; Articles 85 and 88 which impose on the parties obligations to take steps to preserve the goods.

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.

Guide to CISG Article 7 Secretariat Commentary (closest counterpart to an Official Commentary)

Article 29 (2):
A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, 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.

Article 37:
(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
(3) If the goods are redirected in transit or redispattered by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispartment, examination may be deferred until after the goods have arrived at the new destination.

Article 38:
(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.
(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
(3) If the goods are redirected in transit or redispattered by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispartment, examination may be deferred until after the goods have arrived at the new destination.

Article 40:
The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 49 (2):
(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:
(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
(b) in respect of any breach other than late delivery, within a reasonable time:
Chapter 2: The Principle of Good Faith in the CISG

J. Lookofsky also notes that Article 7 (1) falls short of domestic law analogues which oblige the contracting parties to act in good faith. However the author suggests that under Article 7 (2) good faith is linked to the standard of *reasonableness*, which has the status of general principle of the CISG and therefore is capable of meeting the multiple good

(i) after he knew or ought to have known of the breach;
(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or
(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

Article 64 (2):
(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:
(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
(b) in respect of any breach other than late performance by the buyer, within a reasonable time;
(i) after the seller knew or ought to have known of the breach; or
(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

Article 82:
1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.
(2) The preceding paragraph does not apply:
(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;
(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or
(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

Article 85:
If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 88:
(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.
(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.
(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

Chapter 2: The Principle of Good Faith in the CISG

faith needs. The same author remarks that the developments in the case law declare the *estoppel* as a general principle of the Convention, and for him, the requirement of the parties to act in good faith seems as the next logical step.\(^{118}\) The principle of good faith is seen as being an unwritten one together with the principles of *reasonableness* and *estoppel*, with the specification that these principles have been already discerned and accepted by many CISG courts and commentators.\(^{119}\) J. Lookofsky also underlines the importance of Article 40 considering that it is designed to guard against the possibility that the inspection and notice regime might otherwise lead to an unfair result this article therefore acting as a “safety valve” (although a rather narrow one) which echoes the general principle that CISG parties must always act in good faith.\(^{120}\)

According to R. A. Hillman, the way good faith is consecrated in CISG represents a compromise between those who feared that the definition of good faith was too vague and took on too many different meanings in different legal systems, and those who supported the use of a broad standard to police inappropriate conduct.\(^{121}\) So, according to this compromise, the parties have no general duty to act in good faith and good faith appears as an instrumental policy that courts must attempt to advance when they interpret the Convention. Further, the courts can promote good faith by interpreting the Convention to discourage bad faith. According to the same source, if a party fails to satisfy any of the CISG’s requirements such as the duty to notify or to act reasonably and taking advantage of the other party to extract gains not due under the contract would also constitute bad faith and would be considered as acting in bad faith.\(^{122}\) The same approach suggests that considering the requirement of “mere agreement” in order to modify a contract as set in Article 29 (1)\(^{123}\), it would be bad faith if one party would take advantage of the other party’s dependence on the contract to extract price or other concessions and the courts, while interpreting the Convention, should bar enforcement of modification agreements formed under such circumstances. With such reasoning, the author suggests that a duty of good faith exists upon the parties.

\(^{118}\) Ibid, p. 39 - 40
\(^{119}\) Ibid, p. 40
\(^{120}\) Ibid
\(^{121}\) Robert A. Hillman, *Editorial analysis and cross-references to other provisions of the CISG. Cross-references to provisions of other uniform laws and international instruments that contain provisions related to CISG Art 7*,
\(^{122}\) Ibid
\(^{123}\) Article 29 (1):

A contract may be modified or terminated by the mere agreement of the parties.
P. J. Powers acknowledges that the CISG fails to clearly define what good faith requires, creating the impression that the definition of good faith under the CISG should and will be supplied by each country's domestic law and this method of defining good faith should not be encouraged as it fails to secure the uniformity desired by the CISG.¹²⁴ The same author supports the idea that Article 7 of the CISG requires contracting parties to perform their contract in good faith with the specification that in this case, the requirement of good faith is a rather loose norm which is incapable of an easy definition as described above. Still, to a certain point, the term good faith can be defined as a way of acting which most people know but cannot put into words and the obligation of good faith is the duty to act reasonably and to avoid a breach of the trusting relationship that exists between contracting parties.¹²⁵ As it can be noticed again, the author is arguing for the duty of good faith under CISG linking it to the idea of reasonableness.

In general, as it can be easily observed, most of the presented perspectives arguing in favour of the duty of good faith under the CISG are heavily relying on the strong link between this principle and the idea of reasonableness. The position of this paper is that the mentioned articles are indeed related to the principle of good faith through their character of reasonableness as many provisions are constructed in a way that a normal or reasonable person would understand them and act accordingly. Interestingly enough, if following this path of arguments, it can be argued that although the duty of good faith is not expressly mentioned and imposed upon the parties, the formulation of the articles heavily relies on this principle, therefore it could be further argued that the duty of good faith thus being implied (with significant the help from Article 7 (2) which reaches as far as setting it as a general principle of the Convention). This contradicts the approaches of the scholars arguing against this fact and, to a larger extent, to the approach of the common law in general. However, until now, the answer advanced to the question in the previous subchapter regarding the duty of good faith in CISG (there is a duty of good faith upon the parties under the CISG despite its formulation) seems to be standing on rather solid grounds. This is also supported by the case law which is going to be the object of the next subchapter.

¹²⁵ Idem, p. 352
D. Sim identifies six positions when examining the meaning of good faith in the CISG. The first position states that an obligation of good faith can result from the established practices of parties or by international trade usages. This is closely related to Article 9 of the CISG: it is conceivable that the parties may establish a practice of good faith or fair dealing among themselves and a usage may also build up in the trade requiring the observance of good faith (in the absence of such, the usages may still be useful in delimiting what type of conduct would fall under the definition of bad faith). According to the second position, the doctrine of good faith has the role of an interpretative guide. This comes from the literal reading of Article 7 (1): good faith is supposed to be used only when interpreting the Convention. The third position sees the doctrine of good faith as a prerequisite exercise of the rights and remedies provided in the Convention. In this case, basing on Article 7 (2), the interpretation is that good faith is one of the general principles in the CISG and therefore, the parties have to act in good faith before they could exercise any of the rights or remedies that have been expressly provided by the Convention. The next position sees good faith as a substantive principle in the resolution of matters not expressively governed by the CISG. In this case, the argument is also based on Article 7 (2) and is going further by setting the principle of good faith with an even more pronounced role, serving as an independent general principle used to resolve questions regarding matters governed by the CISG that are not expressly settled by the Convention. Another position sees the doctrine of good faith as a source of rights and obligations which may contradict or extend those in the Convention. The author stated that this is clearly an inappropriate use of the doctrine and that it is mentioned only for the sake of completeness. According to the same source, this situation may arise when concurrent remedies are available in domestic law and the main idea is that good faith should not be used to contradict or extend what already has been provided for in the Convention. The last position identifies good faith as an interpretative guide where in cases not expressly governed by the CISG, general principles may be derived which are, at

127 Article 9:
   (1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
   (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.
129 Ibid
**Chapter 2: The Principle of Good Faith in the CISG**

*best, particular manifestations of good faith and a general doctrine of good faith, however, does not exist to serve as a fount of additional rights and obligations.* Under this position, Article 7 (2) does not consecrate the principle of good faith in a form able to give answers to matters governed by the CISG but not expressly settled by it. Still, there may be certain principles that could be described as manifestations of the general idea of good faith. The same source continues by stating that in this case the principle of good faith is interpreted in a rather broad sense as everything that may require the parties to act promoting justice, fairness etc. and good faith may have a legal role only when interpreting the CISG.

D. Sim’s paper offers probably the best summary of the approaches to good faith in the CISG together with the appropriate comments and illustrations. According to this paper there are four possible roles for the doctrine of good faith which result from this article:  

- **As a practice of the parties,** in this sense the parties may establish a duty of good faith among themselves and from this fact, a general doctrine of good faith has derived into the CISG.

- **As a trade usage,** in this situation, the obligation of good faith derives from the *lex mercatoria* (which is an autonomous system of transnational commercial law that can be applied by the judges or arbitrators as a source of legal rules when giving their decisions).

- **As a substantive general principle,** this being the situation described upper in the text with manifests of good faith being found throughout the CISG in the wording of its articles.

- **As an interpretative tool,** this resulting from the literal approach to the formulation of Article 7 (1), also discussed upper in the text.

The final conclusion of the author is that the concept of good faith should be regarded merely as a moral aspiration that drives the development of more particular principles or as a convenient catchall term for what may otherwise seem to be a series of disparate principles. There are two roles thus for the principle of good faith in the CISG: it is a compendious term for the collection of more specific *good faith* principles that can be used

---

130 Ibid, for a detailed analysis of each approach, see “Part B, 2 The Appropriate Role of Good Faith in the CISG.” Also see T. Keily, “Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)” describing the same approaches: a) Criterion for interpretation, b) General requirements pf good faith, c) General principle of CISG, d) General principles outside the CISG

131 Ibid
Chapter 2: The Principle of Good Faith in the CISG

to resolve matters governed by the Convention but not expressly resolved by it; can be used to resolve questions of textual ambiguity.\textsuperscript{132}

2.4 The CISG vs. Other Legal Instruments

a) The PECL

It would be a good idea to look now into the text of some international legal texts. Let us start by taking note of the Principles of European Contract Law (PECL) and the way the principle of good faith is approach under it. In PECL, this principle is mentioned several times. First, there is Article 1:102: Freedom of Contract stating:

\begin{enumerate}
\item 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.
\item The parties may exclude the application of any of the Principles or derogate from or vary their effects, except as otherwise provided by these Principles.
\end{enumerate}

Already from this formulation it can be concluded that the PECL requires the parties to have good faith included as a part of the contract, which the CISG does not do so evidently and it can be said that there is no equivalent to this PECL article within the CISG (of the fear of prejudicing the freedom of formation of contracts). Thus, good faith is one of the basic principles on which the PECL is based upon.

Secondly, there is also Article 1:106: Interpretation and Supplementation in the PECL which lays down the rules for the interpretation and supplementation of the Principles which includes the promotion of good faith:

\begin{enumerate}
\item 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.
\item Issues within the scope of these Principles but not expressly settled by them are so far as possible to be settled in accordance with the ideas underlying the Principles. Failing this, the legal system applicable by virtue of the rules of private international law is to be applied.
\end{enumerate}

This is a somewhat similar formulation to Article 7 (1) of the CISG with the specification that the wording in the PECL is far more straightforward in comparison to the CISG which explicitly covers only the aspect of interpretation, the other roles of good faith, as it was seen upper in the text, remaining to be presumed or implied.

\textsuperscript{132} Ibid
The next example where the duty of good faith is expressly and clearly imposed under the PECL is Article 1:201: Good Faith and Fair Dealing:

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

This article works together with the next one, Article 1:202: Duty to Co-operate according to which:

Each party owes to the other a duty to co-operate in order to give full effect to the contract.

The duty of good faith is also imposed on the stage of negotiations by Article 2:301: Negotiations Contrary to Good Faith:

(1) A party is free to negotiate and is not liable for failure to reach an agreement.
(2) However, 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.
(3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

It is also important to mention Article 1:302: Reasonableness since the obligation of good faith is closely linked to this principle:

Under these Principles reasonableness is 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.

There are many additional references to the principle of good faith that can be found throughout the PECL. Let us look at the Article 5:102: Relevant Circumstances for example:

In interpreting the contract, regard shall be had, in particular, to:
(g) good faith and fair dealing

Another good example is Article 6:102: Implied Terms that also refers to this principle:133

In addition to the express terms, a contract may contain implied terms which stem from
(a) the intention of the parties,
(b) the nature and purpose of the contract, and
(c) good faith and fair dealing.

Chapter 2: The Principle of Good Faith in the CISG

In this situation it is obvious that in the PECL the principle of good faith is one of the principles this text is based upon. PECL’s wording meets all the characteristics of the Civil law system, covering all the phases of the relationship between the parties to a contract and imposing a clear mandatory duty of good faith.\(^{134}\)

B. Zeller considers that despite a much vaguer formulation in CISG, PECL and the Convention contain in essence the same rules. Generally speaking, the only difference is that the rules are expressly stated in PECL whereas the CISG appears to have opted for a more implied statement of the full applicability of good faith. Furthermore, only through careful examination can the extent of the influence of good faith be found within the CISG.\(^{135}\) J. Felemegas also stresses out the fact that in the PECL, the principle of good faith goes further than just a rule of interpretation of the articles of the Principles.\(^{136}\) The same author points out that while this principle is used under the CISG to guide the interpretation of the unified law text itself, in the PECL the principle of good faith prescribes the behaviour of the parties in every specific contract.\(^{137}\)

Both these statements correspond to the position supported by the present paper as laid out in the previous subchapter. The vagueness in the wording in the CISG has objective reasons (reaching a compromise among the competing views), while the PECL is a European product and it is expected for it to adopt a more European character in the situation in which the majority of the European states are basing their legislation upon the Civil law system (with the exception of England and Ireland).

b) The UNIDROIT Principles

The UNIDROIT principles for International Commercial Contracts were developed on a broad comparative law basis and the final text includes features common to some of the world's legal systems.\(^{138}\) The same source points out to the fact that the Principles have various roles including acting as a guideline for interpretation and filling gaps in

---

\(^{134}\) Also see Comment and Notes: PECL Article 1:106: Interpretation and Supplementation (especially Comment D. Good Faith and Fair Dealing), Comment and Notes: PECL Article 1:201: Good Faith and Fair Dealing (Comments A. Good Faith and Fair Dealing, E. Good Faith and Fair Dealing Distinguished, F. Good Faith presumed)

\(^{135}\) Bruno Zeller, “Good Faith - The Scarlet Pimpernel of the CISG”

\(^{136}\) J. Felemegas, “Editorial Remarks on Good Faith and Fair Dealing”

\(^{137}\) Ibid

\(^{138}\) T. Kelly, Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)
Chapter 2: The Principle of Good Faith in the CISG

international conventions. Thus, it would be useful to compare the wording of CISG with the text of the UNIDROIT Principles.

It is important to mention that when referring to the interpretation of the convention, the UNIDROIT Principles have a special article, Article 1.6 (Interpretation and Supplementation of the Principles) dedicated to that:

(1) In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application.
(2) Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles.

The principle of good faith is referred to in the next article, namely Art. 1.7 (Good faith and fair dealing) which states:

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

Already at a first glance it is clear that the Principles have a very clear wording, requiring the parties directly to act in good faith, in the same way as the PECL does (the Principles generate thus a positive obligation of good faith on the parties). Some authors consider that despite the difference in wording, the substantive content of the obligation under the CISG and the UNIDROIT Principles is very similar.\(^\text{139}\) However, the position of the present paper is that, although it is based on the same general principle, the obligation of good faith under the UNIDROIT Principles seems to go further, well beyond the same obligation from the CISG. In the Principles, the approach is broader and more straightforward, resembling PECL’s way of setting out the obligation of good faith. Overall, it has great similarities with the way it is set out in the Civil law system. One good example is Article 2.1.15 (Negotiations in bad faith):

(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.

Here, the duty of good faith is addressing the stage of negotiations, which would be contrary to the Common law approach and the commentators favoring it and that can only be implied

\(^{139}\) See the same source quoting Bonell.
under the CISG. Article 4.8 (Supplying an omitted term) is another good example with paragraph 2 stating that:

(2) In determining what is an appropriate term regard shall be had, among other factors, to
(a) the intention of the parties;
(b) the nature and purpose of the contract;
(c) good faith and fair dealing;
(d) reasonableness.

This is important since, as seen above, Article 1.6 does not mention this principle when instructing on the way the Principles should be interpreted. This last example would particularly contradict to A. Farnsworth’s approach to the CISG described upper in this chapter. Worth mentioning is also Article 5.1.2 (Implied obligations) since there is no such similar provision under the CISG:

Implied obligations stem from
(a) the nature and purpose of the contract;
(b) practices established between the parties and usages;
(c) good faith and fair dealing;
(d) reasonableness.

Therefore it can be concluded therefore that good faith is one of the main principle on which the UNIDROIT Principles are based upon. Unlike the CISG, as the presented articles demonstrate, this fact can be observed throughout the whole text of the Principles in a much more obvious way, since many other articles have references to the duty of good faith (in the majority of the cases linked to the principle of reasonableness).140

Generally speaking, in can be said that the provisions of the UNIDROIT Principles are very similar to the CISG when speaking about their essence due to the fact that the Principles were modelled on the CISG and many of the individuals who participated in the creation of the CISG were also involved in the writing of the UNIDROIT Principles.141

2.5 Conclusions

The rather vague formulation of the Article 7 (1) in the CISG has generated much debate over the obligation of good faith in this Convention. There are several competing positions

140 See articles: 2.1.4 (2, b) (Revocation of offer), 2.1.16 (Duty of confidentiality), 2.1.20 (Surprising terms),
3.5 (Relevant mistake), 3.8 (Fraud), 4.1 (2) (Intention of the parties), 4.2 (2) (Interpretation of statements and
other conduct) etc.
141 T. Keily, Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG),
Also see U. Magnus, “Guide to Article 7, Comparison with UNIDROIT Principles of International Commercial
Contracts, Match-up of CISG Article 7 with UNIDROIT Principles Articles 1.6 and 1.7, Editorial Remarks,
Remarks on Good Faith”
over whether this article imposes or not a duty of good faith on the parties. These positions can be summed into four main approaches to good faith. The present chapter has briefly described these positions together with several comments of the author. The present paper supports the idea that despite the fact that the wording in CISG appears to be rather negligent when treating the obligation of good faith upon the parties, it can be implied from the text of the CISG as a whole, making it one of the fundamental principles this Convention.

However, after closely analyzing the provisions of the CISG, it can be said that, although the duty of good faith is mentioned only once in the whole Convention, it is a fundamental principle on which the CISG is based as there are many references to it (linked to reasonableness, fairness and equity) throughout the text of the Convention. A parallel look at other legal instruments such as the PECL and UNIDORIT Principles reveal that the CISG is less generous than these two texts in setting the obligation of good faith on the parties. However the difference between the CISG and them is rather in wording than in the essence. It the next chapter, the final remarks in this general debate will be made by means of case law.
Chapter 3: The Case Law

The present chapter shall clarify the results of the previous chapter by means of case law. The structure follows the sorting of the UNILEX database as this way is considered easy to work with. The cases are grouped according to the role of good faith in international trade in general, in the interpretation of the Convention and as general principle of the CISG (during negotiations, interpretation and performance of a contract). The CISG articles are quoted where relevant and each case is followed by short comments and remarks of the author.

3.1 Significance of Good Faith and International Trade


A Mexican seller and two Korean representatives of two Korean companies concluded a contract for the sale of sweets to be produced by the seller which was following two previous agreements. The payments for the first two were made through letters of credit opened by the buyers. After the third contract and before receiving the letter of credit, the seller started the production of the goods to comply with the terms. The buyers asked the seller to label the goods with the date of production and with the expiry date of the goods, which was to be two years after the date of production and the seller has complied with this request. After receiving the letter of credit the seller discovered that the indicated terms were different from the terms agreed upon (the expiry date of the goods was stated to be one year after the date of production). The buyers motivated by invoking the Korean regulations according to which this kind of goods had to have an expiration period of only one year and promised to issue and send a document stating that the buyers would accept any modification in the terms of the agreement. The goods were shipped to the buyers without any bank endorsement of the bill of lading, because of the differences between the terms in the bill of lading and the ones in the letter of credit, as the seller believed in good faith that any problem relating to the payment would be resolved by the buyers later. Upon reaching the port of destination, the goods were retained by the forwarder because the freight remained unpaid. The buyers asked the seller for a delay in payment and suggested that the price would be paid by a banking money transfer, alleging that a custom tax could be avoided this way, as the buyers could depend on a corrupt Korean custom officer. The seller then discovered that the mentioned Korean rules did not exist and that one of the Korean representatives may have made a false declaration as to his capacity to enter into the contract on behalf of one of the buyer companies and that, possibly, the other buyer company did not exist. The seller started arbitration proceedings before the COMPROMEX for payment of the purchase price invoking fraudulent behavior on buyers’ behalf. The sellers alleged that the buyer(s) had deliberately asked for the goods to be labeled in a different way and had deceived the sellers about the existence of domestic regulations in order to have the goods shipped without paying. The Korean buyer(s) refused to submit to COMPROMEX arbitration and a non-binding decision on the case (dictamen) was issued.

The Court observed that Article 7 of the CISG indicated good faith as one of the basic principles regulating the contractual relations between the parties and specified that the standard of good faith was not to be determined according to domestic law concepts, but according to the standard of good faith which is common in international trade. The Court held that the buyer had organized the whole operation with the sole intention of obtaining the goods without paying for them, first by gaining the seller's trust and respect through two significantly smaller operations which were conducted correctly, and secondly, by placing a large order without

142 As presented on http://www.unilex.info/dynasite.cfm?dbsid=2376&dsmid=13356&x=1
any intention of paying the purchase price, and deceiving the seller in order to have the goods shipped without performing its obligation to pay the price. The Court held that the buyer(s) acted in bad faith, causing damages to the seller, by grossly violating the basic principle of good faith that should be observed in international trade.

This case supports the results of the second chapter, namely that good faith is, as a starting point, part of international trade at all the stages in a relationship between parties. It underlines the importance of good faith in international trade in general, covering all the aspects, beginning with the part of negotiation and finishing with the performance. An absence of this duty could make the trade itself impossible as circumstances similar to the ones described by this case may arise quiet often. The next logical conclusion is that since the CISG has the intention to make the rules of the international trade uniform, it seems inconceivable that this Convention would not impose an obligation of good faith upon the parties in general and at all the stages of their relationships.

3.2 Good Faith and the Interpretation of the CISG

Let us get more into details by focusing now on the significance of the principle of good faith in the interpretation of the CISG. As seen from the text of Article 7 (1), this particular role is the only one expressly mentioned in the text of the Convention. What consequences arise from this fact can be seem from several cases.

Case: SCH-4318, Parties: Unknown

An Austrian seller and a German buyer had a contract for the sale of rolled metal sheets. The goods were to be delivered in installments 'FOB Rostock', specially packaged for export. After receiving the first two deliveries, the buyer sold the goods to a Belgian company which shipped them to a Portuguese manufacturer. The manufacturer found that the goods were defective and refused to accept the rest of them. After receiving notice of the non conformity by the German buyer, the Austrian seller refused to pay damages, alleging that the notice was not timely. The buyer started arbitral proceedings (there was an arbitration clause in the contract). It was further found that the buyer had not complied with the requirements of examining the goods and raising notice of non conformity as stipulated in the contract (in derogation from Article 38 and 39 of the CISG) and the buyer had sent the notice of the defects, together with an expert statement by an internationally recognized company, only six months after delivery (under the contract, it should have done it immediately after the delivery or within two months at the latest). The buyer argued that the seller had waived its right to set up the defense that notice of non conformity was not timely given.

The arbitrator held that the seller was estopped from setting up the defense that the notice given by the buyer was not timely. As this is not settled by CISG, Articles 7 (2) was applied and there were references to Articles 16 (2) (b) and 29 (2). It was decided that estoppel is a general principle underlying CISG. In this particular situation, the seller behaved in a way that the other party was led to believe the seller would not raise the defense. The outcome was that the buyer was awarded damages for non conformity.

144 Arbitral Award, Date: 15.06.1994, Number: SCH-4318, Court: Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien (Vienna), Austria, Parties: Unknown
As it has been seen from the second chapter (when commenting on Article 29 (2)) and presenting J. Lookofsky’s position, the principle of estoppel is linked to the principle of good faith through the idea of reasonableness, this being the main idea behind the decision. It was considered that the CISG has the principle of good faith (and all the other principles linked to it) set throughout the Convention despite its vague wording.

**Case: 8611/HV/JK, Parties: W. vs. R.**

A German seller and a Spanish buyer had an agreement under which the buyer was to be the exclusive distributor in Spain of industrial equipment produced in Germany. Thus, there were several individual sales contracts between the parties. After four years, the German company informed the Spanish buyer that due to the insufficiency of the latter's sales it would sell its products in Spain through another company with whose parent it had merged. Upon buyer's refusal to pay for some of the deliveries, the seller filed arbitral proceedings. The buyer counterclaimed damages arising from breach of the exclusive distributorship agreement as well as from lack of conformity of certain products and failure to deliver spare parts.

Among other things, the arbitrator observed that the principle of good faith mentioned in Article 7(1) of the CISG was applicable in the interpretation of CISG only, and was not to be referred to as a source of the parties' rights and duties as concerns the performance of the contract. While under German law the mass producer of technical equipment is generally expected to provide spare parts according to the principle of good faith, no implied secondary obligation of the parties derives from the principle of good faith when the CISG is applicable. Since delivery of spare parts was considered to be a practice established between the parties under Article 9 of the CISG, the seller was obliged to comply within a reasonable time (with reference to Article 33 (c) of the CISG in connection with Article 7 (2) of the CISG). The buyer was therefore entitled to set-off part of the seller's claim with damages, including lost profits.

Even if the paper does not support the literal approach to the wording of Article 7 (1) separately, still, the decision of this arbitrator regarding the spare parts it is based on the established practice between the parties and as it was also seen, the parties may establish an obligation of good faith according to their practice (as in this particular situation). It would be contrary to the principle of good faith to disregard this practice under Article 9 of the CISG.

**Case: 1U 167/95, Country: Germany**

A German seller and an English buyer concluded a contract for the sale of Iron-molybdenum with a molybdenum content of certain percentage. The standard terms of the seller contained a force majeure clause which exempted the seller for any responsibility following a failure and/or delay in delivery of the goods. After the conclusion of the contract, the buyer refused seller's proposal to increase the price following a rise in market price. The seller then invited the buyer to accept a reduction of the molybdenum content together with a time delay. The buyer accepted the percentage reduction but fixed a shorter period of time for delivery. The seller informed the buyer that it needed an additional period of time and offered to pay the buyer compensation. As the seller did not perform within the fixed period the buyer made a substitute purchase at a higher price having

---

145 Arbitral Award, Date: 23.01.1997, Number: 8611/HV/JK, Court: ICC Court of Arbitration - Paris, Parties: W. v. R.
146 Country: Germany, Date: 28.02.1997, Number: 1U 167/95, Court: Oberlandesgericht Hamburg, Parties: not specified
the duty to perform under a contract with a third party. The buyer commenced an action claiming damages and interest.

The Court stated that the delay in delivery was a fundamental breach as the seller knew that timely delivery was essential to the buyer. The buyer was therefore entitled to terminate the contract according to Article 49 (1) (a) or (b) of the CISG.147

The problem whether the buyer had terminated the contract before concluding the substitute transaction as required by Article 75 of the CISG was left opened by the Court. Noting the obligation to promote the observance of good faith in international trade as Article 7 (1) of the CISG requires, the Court stated that termination does not constitute a prerequisite for the application of Article 75 of the CISG when termination is in any case possible and it is undoubtedly clear before the conclusion of the substitute transaction that the other party will not perform its obligation (in the case at hand, the seller had expressly stated its impossibility to delivery within the fixed time).

The buyer's purchase of goods in replacement was considered in accordance with Article 75 of the CISG since it was made in a reasonable manner and within a reasonable time after the termination: the substitute transaction was concluded around two weeks after the buyer last knew of the seller's refusal to perform and concerned goods similar as to quality and quantity to those which the buyer originally intended to buy from the seller.

Again, it can be seen that the principle of good faith can be found throughout the text of the CISG being closely linked to the idea of reasonableness. This argumentation of the Court follows the pattern laid down in the previous chapter of the principle of good faith being visible throughout the text of the CISG and Article 75 is a good example of this.148


A French seller delivered fish to a Dutch buyer which further transformed it into fish filets and sold them inter alia to customers in England and Austria. The latter have complained over the quality of the product and the Dutch buyer refused to pay a part of the price and claimed set-off with damages. The seller started an action to obtain full payment.

The Court held that the buyer had lost the right to rely on a lack of conformity of the goods because it did not give notice to the seller within a reasonable time after it ought to have discovered the lack of conformity under Article 39 of the CISG.150 In this case, the buyer should have discovered the defects by examining all the goods

147 Article 49:
   (1) The buyer may declare the contract avoided:
   (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
   (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

148 Article 75:
   If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.


150 Article 39:
as soon as practicable Article 38 of the CISG which under the circumstances was at the time of delivery or shortly afterwards.

Apparently the Court took into account several factors. First, the standard terms of the seller, applicable to the contract and which provided for short terms for notice of defects in frozen products, thereby also abiding to a usage in the fish market under Article 9 (2) of the CISG. Second, a very short term for examination of the goods was necessary due to the fact that the goods were perishable food products and of the fact that the goods had to be transformed by the buyer, thus making it impossible for the seller to ascertain whether the goods sold were really defective.

The Court observed that the buyer had both the opportunity and the duty to examine all the fish and not only a sample of it well before selling the products on to customers, since it could do so at the latest when it started processing each single fish unit into fish filets, and it could be expected to do so having already discovered and duly notified a lack of conformity in another type of fish delivered by the seller.

Finally, in order to confirm this interpretation of Articles 38 and 39 of the CISG, the Court referred to the duty of good faith and cooperation between the parties provided by the French law (the domestic law otherwise applicable to the contract). Thus the Court observed agreeing with the scholarly writing that the French notion of good faith is generally understood in a subjective way, and that it does not (yet) go far enough as international conventions (as Article 7 (1) of the CISG or as the UNIDROIT Principles. In the Court's opinion, the objective notion of the duty of good faith in the said international instruments gives more weight to the conclusion that in the case at hand the buyer should have examined the fish and discovered the defects before selling its products to foreign customers.

The reasoning follows the same path as the previous case (that the principle of good faith can be found in throughout the CISG due to the formulation of various articles). However, it is very interesting to notice that the Court has considered that in French law the principle of good faith is subjective and not as far reaching as it is in the CISG or UNIDROIT Principles. Chapter 2 of the present paper has actually pointed out a different conclusion under which in French law the principle of good faith is better defined than in the CISG. The UNIDROIT principles, as also seen from the previous chapter, indeed have the duty of good faith clearly imposed and this principle in general has exactly a far reaching effect as it is pointed in this decision. It is important that the Court went as far as considering good faith in the CISG as being clear and far reaching despite its vague and general wording, thus being almost at the same level as the UNIDROIT Principles.

**Case: number not specified, Country: Netherlands**

A Dutch company purchased plants from a French company. After delivery of the goods buyer paid only part of the price. Seller brought an action claiming not only the payment of the outstanding amount of the price but

(1) The buyer loses the right to rely on lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless the time limit is inconsistent with a contractual period of guarantee.

151 Country: Netherlands, Date: 16.10.2002, Number: not specified, Court: Hof 'S-Hertogenbosch, Parties: not specified
also the payment of the penalty for delay as provided for in its standard terms which it asserted formed part of the contract of sale. Buyer rejected both claims. As to its obligation to pay the outstanding amount of the price, it set it off against seller’s obligation to pay damages for defects of the goods delivered, while the payment of the penalty was not due at all, since seller’s standard terms were not incorporated into the contract. The court of first instance decided in favor of seller. The Court of Appeal reversed the decision of the court of first instance.

According to the Court of Appeal the question if seller’s standard terms formed part of the contract of sale was to be decided according to CISG and since CISG does not have any special provisions concerning standard terms, the general rules on contract formation applied with the consequence that under the Convention standard terms are binding only in so far as their applicability is stipulated by seller in its offer and accepted by buyer. What remained to be resolved was whether in order for them to be validly incorporated into the contract they have to be made available to the adhering party before or at the time of the conclusion of the contract or the adhering party has otherwise the opportunity to know their content. This posed a problem of interpretation of the Convention, which according to Article 7 must be solved having regard to the international nature of the Convention and the need to promote its uniform application and the observance of good faith in international trade. According to the Court this implied that special attention had to be paid to how the interpretative question is dealt with in the laws of the contracting States and what may be considered common principles of those legal systems.

In this context the Court expressly referred to the UNIDROIT Principles, particularly to the Comments to Article 2.20. These Comments address the question as to whether the adhering party must know the content of the standard terms, but do not address the other question as to whether the adhering party should have a reasonable opportunity of becoming acquainted with the content of the standard terms, and whether the principle of good faith requires that the other party take the necessary steps to make sure that the adhering party has such an opportunity, e.g. by sending it the text of the standard terms before or at the time of concluding the contract. On its part, Article 2.104 of the Principles of European Contract Law in paragraph 1 states that “[c]ontract terms which are not individually negotiated may be invoked against a party which did not know them only if the party invoking them took reasonable steps to bring them to the other party’s attention before or when the contract was concluded”, and in paragraph 2 adds that “[t]erms are not brought appropriately to a party’s attention by a mere reference to them in a contract document, even if that party signs the document”. According to the Court this rule not only largely coincides with Dutch and French law on standard terms and hence with the law of the two countries to which the parties belong, but also promotes the observance of good faith in international trade. The Court therefore decided to apply this rule also in interpreting CISG and held that in the case at hand seller’s standard terms were not binding upon buyer since seller had not informed buyer of its standard terms in good time, i.e. before concluding the contract, so that buyer could not be said to have accepted seller’s standard terms. As to the argument initially put forward by seller that upon delivery of the goods buyer had received the invoice with seller’s standard terms printed on the back and that the invoice was also intended to be a confirmation of order to which buyer did not object at all, the Court noted that when buyer objected that it had received the original invoice with the seller’s standard terms printed on the back only about a fortnight after the delivery of the plants, whereas upon delivery of the plant it had received only a photocopy of the front page, seller did not deny these facts. Nor was seller’s further allegation that it had sent buyer already on occasion of previous transactions invoices with its standard terms reproduced on the back supported by sufficient evidence.

As to the question whether buyer was entitled to set off its obligation to pay the remaining part of the price against seller’s alleged obligation to pay damages for defects of the goods, the Court of appeal confirmed that, since CISG does not regulate set-off, the question had to be decided in accordance with the law of the country where the party rendering the most characteristic performance is situated, (in this case, the French law according to which set-off could only be asserted if both obligations are liquide (meaning ascertainable as to both their existence and amount). The Court found that since seller had rejected buyer’s claim for damages for seller’s breach of the contract, this condition was not fulfilled in the case at hand and therefore the seller was entitled to the payment of the outstanding amount of the price.

This case is a good example of how Article 7 of the CISG has served as a starting point for the decision of the Court. It is clear from the situation that it would have been both unreasonable and unfair if one of the parties was not aware of the standard forms, therefore it
would not be in good faith and Article 7 of the CISG offers good protection against such a situation.


Canadian Defendant manufactured a chemical ingredient (clathrate) for use in the production of an anticoagulant medication. In 1994 Defendant supplied Plaintiff, a U.S. company, with samples of the ingredient and confirmed that it would support Plaintiff's application for approval by the Food and Drug Administration (FDA) as the supplier of the ingredient for the manufacture of the drug. In 1995, Defendant issued a letter to the FDA confirming it would serve as a supplier of clathrate to the Plaintiff. Later in 1995, Defendant executed a confidential contract for the exclusive supply of commercial quantities of clathrate to a third company that would be violated if Defendant were to proceed with sales of commercial quantities to Plaintiff. When Plaintiff received approval for the manufacture of the drug in 1997, it submitted a purchase order to Defendant for the purchase of commercial quantities of clathrate, which was refused by Defendant.

Plaintiff claims that, under CISG, it has a contract with the Defendant for the sale of commercial quantities of clathrate and that Defendant breached that contract by refusing to supply the ingredient. Plaintiff argues that according to industry practice supplying sufficient quantities of clathrate to support an FDA application creates a contract for future supply. Plaintiff also claims that Defendant should be liable under the doctrine of promissory estoppel under the law of the State of New York. Plaintiff contends that a claim of promissory estoppel based on the otherwise applicable domestic law is not preempted by and does not conflict with CISG.

The Court held that in accordance with the general principle of good faith in international trade stated in Article 7 (1) of the CISG the existence of a contract had to be analyzed relying on the practice in the specific industry. As stated in Article 9 of the CISG, usages and practices of the industry are automatically incorporated into any agreement, unless explicitly excluded.

The Court analyzed the elements of offer, acceptance, validity, and performance relevant to the question of contract formation under the CISG and found that the contract for future supply of “commercial quantities” of goods was sufficiently definite under Article 14 of the CISG.\(^{153}\) Also, the provision of the reference letter to the FDA qualified as an act indicating assent to a contract under Article 18 (3) of the CISG.\(^{154}\) Whether Defendant's acts actually indicated assent to a contract had to be analyzed on the basis of industry custom.

The Defendant's argument that consideration was lacking as a question of validity, pursuant to Article 4 (a) is to be decided under domestic law determined by the application of traditional conflict of laws analysis. On the basis of the Court's conflict of laws doctrine, the Court found that New Jersey law should apply and it was found that consideration was sufficient on the basis of the alleged facts. The Court also rejected Defendant's


\(^{153}\) Article 14:  
(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.  
(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

\(^{154}\) Article 18 (3):  
However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, providing that the act is performed within the period of time laid down in the preceding paragraph.
argument that, in any event, Plaintiff failed to perform under the alleged contract by failing to give commercially reasonable notice for its purchase order. The Court stated that under Article 60 (a) of CISG failure to give commercially reasonable notice by Plaintiff does not entitle Defendant to terminate the contract.

As to state law contract claims, the Court held that CISG preempted such claims, as the availability of independent state contract law causes of action would frustrate the goals of uniformity and certainty embraced by the CISG. Parties would be subjected to different states’ laws and the very same ambiguities regarding international contracts that the CISG was designed to avoid. As a consequence, parties to international contracts would be unable to predict the applicable law, and the fundamental purpose of the CISG would be undermined.

Concerning the possibility of a claim based on the U.S. doctrine of promissory estoppel, the Court first of all noted that such doctrine differed from Article 16 (2) (b) of the CISG where it is not expressly required that the offeree’s reliance must have been foreseeable to the offeror and it is not expressly required that the offeree’s reliance be detrimental. Thus a claim based on the doctrine of promissory estoppel in order to deny the existence of a firm offer was preempted by the Convention.

As to tort claims, the Court held that they were in general not preempted by the CISG, but a tort claim which is actually a contract claim, or that bridges the gap between contract and tort law, may be preempted.

This decision is once again stressing out the importance of the established usage between the parties of within an industry which is mentioned in the CISG under both Article 9 and Article 18 (3). Also, as it was pointed out in the previous chapter, Article 16 (2) (b) is also intended to back up the principle of good faith, linked in this case to both the idea of reasonableness and fairness.

**Case: 02-20166, Parties: BP Oil International and BP Exploration & Oil Inc v. Empresa Estatal Petroleos de Ecuador (PetroEcuador) et al.**

A Texan company (the Seller) entered had a contract with an Ecuadorian company (the Buyer) for the sale of gasoline. The gasoline was to be delivered "CFR La Libertad, Ecuador", and contained a choice of law clause "Jurisdiction: Laws of the Republic of Ecuador". Also, the contract required that the gasoline had specified maximum gum content. Before it was loaded on the ship, an independent inspector, designated by Buyer, certified that the gum content was within contractual limits. After the arrival in Ecuador, the gasoline was tested again and found to contain excessive gum content and the Buyer rejected the goods. The Seller brought an action before the federal district court of Texas which decided that Ecuadorian law applied to the contract and granted summary judgment for Buyer. On appeal, the Court of Appeals noted that the parties had their places of business in two different States which were parties to the CISG and that the sales contract was governed this Convention according to Article 1 (1) (a), unless the parties had excluded its application according to Article 6. The Court observed that the CISG was the law of Ecuador, and that the choice of law clause was not sufficiently specific to exclude the application of the CISG. The Court stated that if the parties wanted to exclude the Convention, this should be expressly excluded by language stating that it does not apply and also mentioning the chosen governing law of the contract. The Court pointed out that in this way "an affirmative opt-out requirement promotes uniformity and the observance of good faith in international trade, two principles that guide interpretation of the CISG" under to Article 7 (1).

The Court noted that "CFR" is part of the 1990 INCOTERMS issued by the International Chamber of Commerce, which the CISG incorporates through Article 9 (2). Even if the usage of INCOTERMS is not global, the fact that they are well known in international trade means that they are incorporated through Article 9 (2). In a CFR transaction, the risk of loss passes to the buyer once the goods "pass the ship's rail" at the port of shipment. The Court stated that pursuant to Article 36 (1), the Seller fulfilled its obligations when the

---

155 Country: USA, Date: 11.06.2003, Number: 02-20166, Court: US Court of Appeals for the Fifth Circuit, Parties: BP Oil International and BP Exploration & Oil Inc v. Empresa Estatal Petroleos de Ecuador (PetroEcuador) et al.
inspector certified the goods as conforming prior to shipment. Under Article 39 (1), the Buyer ought to have discovered any lack of conformity after the inspection and prior to the shipment of the cargo. The Seller could still be found to have breached the contract under Article 40 CISG, notwithstanding the inspection of the goods prior to shipment, if it knew or could not have been unaware that the gasoline was defective prior to the passing of the risk of loss to Buyer. As a consequence the Court remanded the case to the District Court for clarification of this particular point.

This case supports the presence of a duty of good faith in interpretation of the Convention as the Court has stated it. However, it is important to notice the use of Article 40 which is a sort of a “safety valve” as J. Lookofsky calls it against the possibility that the inspection and notice regime might otherwise lead to an unfair result, this article echoing the general principle that CISG parties must always act in good faith.

3.3 Good Faith as General Principle in CISG

The UNILEX database has a great number of cases that are grouped under this category and the next section of this chapter will look more into details into this aspect, the cases being also grouped under three subcategories further in the text.

**Case: number not specified, Parties: Renard Constructions (ME) PTY LTD v. Minister for Public Works**

A domestic Australian contract was concluded in 1985 for the construction of a pumping station. It stated *inter alia* that in the case of a default by the contractor, the principal could suspend progress payments and require the contractor to justify its default. If the contractor failed to give such justification, the principal was entitled to terminate the contract.

Applying Australian law, the Court held that such a clause was to be construed as containing a term implied by law that the principal would reasonably consider whether the contractor had failed to justify its default, and where the principal concluded that it had so failed, whether the contract should be terminated.

Equating the duty to act reasonably with the duty of good faith and fair dealing in the performance of the contract, the Court made an extensive review of the role of the duty of good faith and fair dealing at international level and in this context, the Court referred to Article 7 of the CISG as a factor confirming an increasing recognition at international level of the principle of good faith and fair dealing, and as precedent in this case for domestic Australian law.

This is a special case since the parties were both Australian, so apparently there was not supposed to be any connection to the international trade as the CISG clearly does not apply in this case according to Article 1. However it is important to notice that the Court has taken

---

156 Article 36 (1):

> The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

157 Joseph Lookofsky, *Understanding the CISG in Scandinavia*, p. 40

158 Country: *Australia*, Date: 12.02.1992, Number: not specified, Court: *Court of Appeal, New South Wales*, Parties: *Renard Constructions (ME) PTY LTD v. Minister for Public Works*
the text of CISG as an example, considering therefore the way good faith is formulated in the Convention as sufficiently clear set forward. As seen from the first chapter of this paper, good faith is a still developing principle in Australian law and, although it may seem somewhat surprising (due to the already mentioned vagueness of Article 7 (1)), it is also useful for the Australian law to do so as it definitely contributes to the rules on international trade to become more uniform and helps to some extent to clear out the definition of good faith.

Case: 1 Ob 49/01i, Parties: unknown\textsuperscript{159}

A Spanish seller (plaintiff) and an Austrian buyer (defendant) concluded several contracts for the sale of fruits and vegetables. After the seller asked the buyer to pay for some invoices which have not been paid, the buyer objected that party to the contracts concluded with the seller was not itself, but its 100% controlled subsidiary. The seller objected that, although on a number of occasions it had indeed dealt with this subsidiary, it was contacted first by the parent company and had from the start made it clear that it intended to contract only with the parent company and not with its subsidiary. Also, the conduct of both the subsidiary and the parent company let it reasonable to believe that the subsidiary acted as an agent of the parent company.

The Supreme Court held that the contracts were governed by the CISG as both seller and buyer had their places of business in different contracting States (Article 1 (1) (a)). Regarding whether the seller could reasonably believe that the subsidiary company acted not on its behalf, but as an agent of the parent company, with the result that the latter and not the former was party to the sales contracts, the Court held that question of agency are not covered by the CISG and are to be decided according to the applicable domestic law, in this case, the Austrian law. The Supreme Court expressly overruled the Court of Appeal which, though deciding the merits of the case in the same way, had argued that the fact that the seller had good reasons to believe that the subsidiary company was acting as an agent on behalf of the parent company to contact with an agent could be explained in application of the Convention itself, more precisely in accordance with the principle of good faith as in Article 7 (1) of the CISG and the rules of interpretation laid down in Article 8 of the CISG.\textsuperscript{160}

Article 8 of the CISG stresses out the idea of reasonableness and the established practice between the parties which, as it was seen previously in this paper, are closely related to the principle of good faith and it can be said that Article 8 is another example of how Article 7 (1) with its principle of good faith is backed up in the CISG.

\textsuperscript{159} Country: Austria, Date: 22.10.2001, Number: 1 Ob 49/01i, Court: Oberster Gerichtshof, Parties: unknown

\textsuperscript{160} Article 8:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.
Chapter 3: The Case Law

Case: not specified, Country: Belgium

A Belgian seller negotiated with a French buyer the production of plastic holders for pagers, inserting the pagers into them. The results of the negotiations were put in writing signed by the parties and entitled letter of intent. After subsequent market changes, the buyer denied the existence of a binding contract the seller sued the buyer for breach of contract.

The Court of first instance denied its jurisdiction. The Court of appeal reversed the decision and affirmed the jurisdiction of Belgian courts. Its decision was based on Article 5 (1) of the 1968 Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. The Court also determined that the place of performance of the obligation (the payment of the price) in accordance with the CISG, which was the law governing the contract since the parties had chosen French law as the applicable law and France was a contracting State to the CISG. Under Article 57 of the CISG, payment of the price should be made at the seller's place of business, in this case, in Belgium.

The Court decided in favour of the existence of a binding contract and pointed out that it was not always possible to identify clearly in practice a sequence of an offer and an acceptance as provided in the CISG. In the case at hand it affirmed the existence of binding contract in the light of the circumstances and the principle of good faith (Article 7 (1) of the CISG), despite the fact the title letter of intent given by the parties to their writing.

In this case, it would be clearly against the obligation of good faith to state that there was no binding contract as there was sufficient ground for the seller to believe that there was a binding contract. It is a good example of the obligation of good faith being applied to the stage of negotiations and it is also important that the Court used the wording of Article 7 (1) of the Convention as basis.

Case: 7 IV 75/95, Parties: unknown

An Italian seller and a German buyer had a contract for the supply and installation of equipments for an ice-cream shop. After delivery the parties entered into an agreement in which the buyer recognised the total amount of the purchase price (the Agreement). As the buyer paid only part of the price, the seller commenced action to recover the rest of the price. The buyer alleged lack of conformity because of quality defects and incomplete delivery.

The Court held that the buyer had lost the right to rely on lack of conformity of the goods since it had not acted in accordance with the obligations set out in Articles 38 and 39 of the CISG. The Court considered that the Agreement signed by the buyer was deemed to be an implied acceptance of the goods; the buyer's notice of non-conformity given to the seller after the signature of the Agreement was in contrast with the general duty of good faith provided by Article 7 of the CISG.

Again, it would be clearly against good faith to invoke lack of conformity because of quality defects and incomplete delivery after the Agreement was signed, since the purpose of such an Agreement is to acknowledge the receipt of the goods. The Court based its decision both on Articles 7 (under which the duty of good faith was interpreted as “a general duty”) and

---

161 Country: Belgium, Date: 15.05.2002, Number: not specified, Court: Hof van Beroep (Court of Appeal), Ghent, Parties: unknown
162 Country: Germany, Date: 26.03.1996, Number: 7 IV 75/95, Court: Landgericht Saarbrücken, Parties: unknown
Articles 38 and 39 which, as showed previously in this paper, come to support the duty of good faith throughout the text of the Convention.

**Case: 22 U 4/96, Parties: unknown**

Two car dealers, an Italian (seller) and a German (buyer) had a contract for the sale of a used car. The documents indicated that the car was first licensed in 1992 and the car odometer displayed a low mileage. The buyer resold the car to a third party who later discovered that the car had been licensed in 1990 and that the actual mileage was higher than that indicated by the odometer. The German car dealer paid damages and commenced actions against the Italian seller claiming payment of the same amount as damages. The seller objected that the contract contained a clause excluding its liability for lack of conformity.

The Court held that although the parties may derogate from the CISG under Article 6, the validity of a clause excluding the seller's liability in case of non conformity fell outside the scope of the CISG and was to be determined according the governing law of the contract (in this case, the German law applied according to German rules of private international law) and therefore the clause was not valid under German law. The difference between the date of first licensing and the mileage indicated in the contract on one side and the real ones on the other constituted a non conformity pursuant to Article 35 (1) of the CISG. Since the seller was aware of this when the contract was concluded and did not inform the buyer about it, it was not entitled to rely on Article 35 (3) of the CISG. Even if the buyer could not have been unaware of the lack of conformity, the Court, referring to Articles 40 and 7 (1) of the CISG inferred a general principle underling the Convention according to which even a very negligent buyer deserves more protection than a fraudulent seller. The Court awarded damages to the buyer on the assumption that the damages paid from the buyer to its customer were a foreseeable loss according to Article 74 of the CISG as the seller was aware of the fact that the buyer was a car dealer at the time of conclusion of the contract.

This is a clear example of negotiating in bad faith as the seller was aware of the non-conformity. The clause excluding the liability for lack of conformity in this case certainly indicates towards that. The Court used once again Articles 7 (1) in order to reach a decision, the good faith being mentioned as a “general principle underling the Convention”. The mentioned Articles 40 and 74 are also echoing the principle of good faith as showed upper in Chapter 2.

---

163 Country: Germany, Date: 21.05.1996, Number: 22 U 4/96, Court: Oberlandesgericht Köln, Parties: unknown
164 Article 35:
   (1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.
   (3) The seller is not liable under sub-paragraph (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.
165 Article 74:
Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the lights of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.
Chapter 3: The Case Law

Case: 1 U 280/96, Parties: unknown

A German seller and an Austrian buyer concluded a contract for the sale of adhesive foil covers which were to be applied on steel sheets produced by the buyer and sold on to a customer for further processing. The customer complained and the buyer gave notice to the seller of lack of conformity 24 days after delivery, alleging that the steel sheets were defective since the adhesive film applied thereon could not be removed without damaging the steel sheets. The buyer asked recovery of all costs incurred by its customer in cleaning the steel sheets, plus interest.

Both the lower and the appellate Court decided that the choice of the German law as governing law did not exclude the application of the CISG as part of the domestic law under Article 6 of the Convention. The Court decided in favor of the buyer, recognizing the lack of conformity of the goods and considering the notice of the defects as timely. The Court saw the length of the "reasonable time" referred in Article 39 (1) of the CISG as depending on the facts of each case (but no longer period than the usually applied by German Courts) and therefore, in the case of durable goods, a time of approximately one month after the buyer has discovered the defects, or should have discovered them, by examining the goods was considered timely.

The appellate Court reversed this decision. It held that the buyer had lost the right to rely on the lack of conformity, since it had not examined the goods as soon as practicable under the circumstances under Article 38 (1) of the CISG and had not given notice of the defects within a reasonable time under Article 39 (1). In this case, if the buyer had processed a sample of the goods upon delivery it would have easily discovered the defects and it could have given notice within 10 to 11 days. The buyer was required to do so regardless of the fact that the parties had a longstanding business relationship. The buyer was not entitled to rely on a reasonable excuse for its failure to give timely notice under Article 44 of the CISG as this provision does not apply in the case of improper examination of the goods. The Court held that the seller had not waived its right to set up the defence that notice was not timely. It recognized that the CISG contains the principle of estoppel, deriving from the principle of good faith under Article 7 (1). Under CISG, however, the same rule applies as in German domestic law, according to which the mere availability of the seller to reach a settlement agreement does not in itself imply a loss of the right to plead that the notice of lack of conformity was not timely. The intention to waive the defence must be clearly established.

As the previous chapter has pointed out, the principle of estoppel is linked to the principle of good faith and the presence of the latter in the CISG creates proper grounds for the application of the principle of estoppel. What is important is that the appellate did recognize this fact when reaching the final decision, therefore the considering both principles as being clearly put in the text of the CISG.

Case: VIII ZR 60/01, Parties: unknown

A Spanish buyer and a German seller concluded a contract for the sale of a used milling machine, including an obligation of the seller to install the machine on the buyer’s premises. The seller's standard terms contained an exemption from liability for any defects in used machinery. Though the seller made a general reference to its standard terms in the confirmation of order, it did not include a copy of the terms. The installation of the milling machine turned out to be very difficult, taking longer than expected. The seller's fitter failed to set up the machine and an electronics specialist was needed to complete the installation at the buyer’s expense, the buyer claimed the costs of the installation. The seller refused to pay invoking the exemption clause contained in its standard terms.

166 Country: Germany, Date: 25.06.1997, Number: 1U 280/96, Court: Oberlandesgericht Karlsruhe, Parties: Unknown
167 Country: Germany, Date: 31.10.2001, Number: VIII ZR 60/01, Court: Bundesgerichtshof, Parties: unknown
The Supreme Court confirmed the lower Court’s decision finding that the seller's liability for non-conformity of the goods had not been effectively excluded, and remanded the case to the lower Court in order to ascertain the existence of a defect in the machine. The Court found that the inclusion of standard terms in the contract is governed by the general rules of the CISG on contract formation and contract interpretation according to Articles 8, 14 and 18 and not by the applicable domestic law. In Court's opinion, standard terms referred to in the offer are binding on the offeree only where the standard terms have been attached to the offer or the offeree was otherwise in a position to know of their contents. It follows from the general principle of good faith in international trade under Article 7 (1) of the CISG and the parties' duty to cooperate and to give information that in an international sales contract the user of standard terms has to make sure that the other party is in a position to know their content.

This case is another good example of the principle of good faith in international trade being given adequate importance. In this situation, it was looked into during the process of formation of the contract and it was found that it would be clearly against good faith if one of the parties is not aware of the content of the standard terms, a situation already covered by a previously presented case.

*Case: number not specified, Country: Italy*\(^{168}\)

An Ecuadorian buyer and an Italian seller concluded a contract for the sale of machinery to be used in the recycling of plastic bags. During the negotiations, the buyer sent a sample of the goods to the seller, so as the latter could be aware of the specific features of the goods to be processed; the buyer also informed the seller of the difficulties incurred by other companies previously entrusted with the recycling. The seller assured the buyer that the machinery would fit the particular purpose made known to seller and that it would reach a specific level of production. Upon installation, the machinery turned out to be defective and not capable of reaching the promised production level. The buyer notified forthwith the seller of non-conformity; however, the defects could not be repaired by the seller’s technicians even after several attempts. Since the seller, arguing that the buyer had not properly used the machinery and had used material other than that of the sample, declined any responsibility, the buyer brought an action claiming avoidance of the contract.

The Court held that the contract was governed by the CISG under Article 1 (1) (a) finding that the seller had failed to deliver conforming goods under Article 35 of the CISG. From the time it was installed, the machinery turned out to be unfit for the particular use made known to the seller before the conclusion of the contract and the machinery was also not capable of reaching the promised production volume, which was an essential condition for the conclusion of the contract. The Court rejected the seller’s argument that notice of non-conformity was untimely under Article 39 (1) as the buyer gave notice of the defects immediately after the installation of the machinery and it continued to inform the seller about the additionally encountered defect. The Court also held that the buyer’s notice was sufficiently specific under Article 39 (1) of the CISG, containing a description of the defects. The buyer was not under a duty to indicate the cause of the defective functioning of the machinery as in this case none of the parties could provide the necessary information.

The Court held that the buyer had declared the avoidance of the contract within a reasonable time under Article 49 (2) of the CISG. The “reasonable time” ex Article 49 differs from the “reasonable time” ex Article 39 with respect to both its starting point and its length. The system of the Convention on the remedy of avoidance of contract represents a last resort as compared to all the other remedies available to the buyer, it follows that the starting point of the time limit for declaring avoidance is not the same moment as that of the time limit for giving notice of non-conformity. Whereas non-conformity has to be notified as soon as it is discovered or ought to have been discovered, avoidance has to be declared only after it appears that the non-conformity amounts to a fundamental breach which cannot be otherwise remedied.

\(^{168}\) Country: Italy, Date: 13.12.2001, Number: not specified, Court: Tribunale di Busto Arsizio, Parties: unknown
Although without expressly mentioning Article 7 (1) of the CISG, the Court stated that the principle of good faith in the performance of the contract applies also "under international law" and that in the present case to avoid the contract without waiting the outcome of the attempts to cure the defects would have been contrary to such principle.

This case comes to support the very first case presented in the beginning of this chapter.

Both cases underline the importance of the obligation of good faith in the international trade.

The difference is that the first case focuses more on the negotiations side, while the present case comes to underline the same obligation on the performance side.

### Case: number not specified, Parties: SO.M.AGRI s.a.s. vs. Erzeugerorganisation Marchfeldgemuese Gmbh & Co. KG

An Austrian seller applied for an injunction before the Tribunal of Padova, Este section, against an Italian buyer for the payment of Lit. 40,690.916, expenses and interest for agricultural products. The Court granted the injunction. The buyer filed an objection on two grounds: the seller had failed to formally request it to pay before applying for the injunction; it also had a claim for payment of Lit. 245,605,200 against the seller which it intended to set off.

The Court found that the CISG was applicable and the parties had not excluded the application of the Convention (although the pleadings referred only to the domestic laws of the two countries, it was not sufficient to establish a clear intention to exclude the application of the CISG). The Court rejected the argument that the seller should have first formally requested payment of the price from the buyer before applying for an injunction according to Article 58 (1) and 59 of the CISG. There were no other provisions to the contrary in the contract and thus the buyer had the duty to pay the price at the time the goods were delivered. It could be argued that to file a request for an injunction immediately after payment becomes due is contrary to the principle of good faith which, according to the Court, constitutes a general principle underlying the Convention. However, in the case at hand the seller had filed such a request only months after the time when the buyer should have paid. The question of set-off was not covered by CISG and had therefore to be determined in accordance with the otherwise applicable domestic law which in this case was Austrian law. The Court therefore rejected the request for set-off and confirmed the injunction granted to the seller.

In applying the individual provisions of the Convention the Court stressed the need for their uniform interpretation and application in accordance with Article 7 (1) of the CISG. According to the Court to this effect reference should be made whenever possible to foreign decisions which, though not representing binding precedents, have persuasive value. In the case at hand the Court repeatedly referred to foreign case law in support of its conclusions.

The present case is an example of the principle of good faith being seen as one of the principles of international trade which is also set as such by the CISG, this easily being seen from the reasoning of the Court.

---

169 Country: Italy, Date: 25.02.2004, Number: not specified, Court: Tribunale di Padova - Sez. Este, Parties: SO.M.AGRI s.a.s. vs. Erzeugerorganisation Marchfeldgemuese Gmbh & Co. KG

170 Article 58 (1):

If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

Article 59:

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.
An Austrian seller and an Italian buyer entered into a contract for the sale of winter potatoes. As the buyer did not pay the purchase price, the seller obtained from the Tribunale di Padova an injunction for payment plus expenses and interest, which the buyer challenged before the same court. The buyer also requested set-off against the seller's claim.

The Court relied for each issue on a number of decisions on CISG that had already been rendered by foreign courts and arbitral tribunals, in order to promote uniformity in the interpretation and application of the CISG under Article 7 (1). The Court stated that the direct application of uniform law prevails over recourse to private international law: therefore it held that the contract was governed by CISG as the two parties were situated in different Contracting States, Article 1(2) of the CISG being not applicable. Further the Court held that even if the CISG did not contain an explicit definition of "sale", the concept was to be determined in an autonomous way, without referring to national law. Making reference to Articles 30 and 53 of the CISG, the Court considered that also the substantive requirements for the application of the Convention were met. The parties had not excluded the application of the Convention and the mere reference to domestic law in the parties' pleadings was not in itself sufficient to exclude the CISG.

The Court rejected the buyer's opposition holding that since the parties had concluded the contract orally, as permitted by Article 11 of the CISG and had not fixed a specific time for payment, Article 58 applied. Therefore the buyer should have paid the price when the seller placed the goods at its disposal. According to Article 59, the buyer should have paid the price without the seller having to make any request or comply with any formality. The Court held that the seller could fix an additional period of time as set out in Article 63 of the CISG, but it also considered that this is only a possibility for the performing party, not an obligation. In this case, though the seller had waited six months after delivery before asking for the injunction of payment, the Court held that it had not violated the principle of good faith and fair dealing, considered a general principle and a precious means of interpreting the Convention under Article 7 (1) of the CISG.

Regarding the set-off claim, the Court held that this matter is not covered by the CISG. Under the private international law rules set forth in the Hague Convention of 1955, the Court applied Austrian law, under which the set-off claim was denied.

The presented case is a good example where the Court used the principle of good faith as basis for its decision. More than that, the Court went beyond the wording of the CISG, considering good faith as a general principle and a means of interpreting the text of the Convention.

A Dutch individual, the seller, ordered a German auctioneer, the buyer, to sell by auction a painting attributed to the painter Henry van der Velde. According to the order, the rules applicable to contracts of sale were also applicable to the agreement between the parties as far as "material and juridical defects" of the painting destined to be auctioned were concerned. After being bought by a second German auctioneer, the painting was offered for auction to an internationally well-known auctioneer house. After an expert examination however the auctioneer house claimed that the painting could not be attributed to the mentioned painter. As a consequence the buyer was sued by its own buyer (the second German auctioneer). Therefore the buyer commenced an action against the seller asking avoidance of the contract as well as reimbursement of the payment already

---

171 Country: Italy, Date: 31.03.2004, Number: not specified, Court: Tribunale di Padova - Sez. Este, Parties: unknown
made. The seller set up as a defense that the action brought by the second German auctioneer against the buyer had been time-barred.

The Court held the contract was governed by the CISG. The Court specified that the exclusion contained in Article 2 (b) of the CISG did not apply as the present case did not concern a sale on an auction but an order to sell by auction. Regarding the claim of the second German auctioneer against the buyer, the Court found that it had been time-barred. Therefore the seller could not be sued for the non-conformity. According to the Court, this result was confirmed by the application of the principle of good faith in international trade, which is a general principle underlying CISG according to Article 7 (1) of the Convention.

The Court further held that the case would have been decided in favour of the seller even if the claim of the second German auctioneer against the buyer had not been time-barred. Article 35 of the CISG prescribes that the delivered goods have to conform to the contract. To determine whether conformity is complied with, the time of delivery of the good is decisive, since the seller does not bear the risk of a lack of conformity arising only after delivery under Articles 36 (1) and 69 (1) of the CISG. In this case, the moment of delivery there was no indication of any kind that the painting was no longer to be attributed to Henry van der Velde. Therefore the seller had made a conforming delivery.

What is important from this case is that again, the Court went beyond the wording of the CISG, considering the principle of good faith as a general principle applicable in the international trade which is also underlying the CISG according to Article 7 (1), this fact constituting on the grounds for the final decision.

a) Good faith during negotiations

This aspect was already approached by several cases presented above that also fall under this category. Among these cases the following ones have to be pointed out: the Austrian case number 1 Ob 49/01i decided by the Oberster Gerichtshof; the Belgian case decided by Hof van Beroep (Court of Appeal), Ghent; the German cases VIII ZR 60/01 decided by Bundesgerichtshof and 22 U 4/96 decided by Oberlandesgericht Köln.

Case 10 U 80/93, Parties: unknown

A Swedish company invited a German company to make an offer for the sale of screws. The German company answered by filling in the price and time of delivery for each item in the document sent by the Swedish company. An order was then sent by the Swedish company, which referred also to items not mentioned in the previous correspondence between the parties. The German company replied accepting the order but insisting on advance payment or the opening of a letter of credit. The Swedish company then requested a pro-forma invoice which the German company provided by listing all articles ordered together with the indication of prices referring to a lower quality of screws. The Swedish company replied, requesting items of the higher quality it had indicated in the order, for the lower price offered in the pro-forma invoice. After a further exchange of correspondence, the Swedish company commenced an action claiming either delivery or damages.

---

173 Article 69 (1):
In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

174 Country: Germany, Date: 04.03.1994, Number: 10 U 80/93, Court: Oberlandesgericht Frankfurt am Main
Parties: Unknown
Chapter 3: The Case Law

The Court held that the CISG was applicable under Article 1 (1) (a) and dismissed the Swedish company's claim on the ground that no contract had been validly concluded between the parties. Under both German law and the CISG with Article 19 (1), the Swedish company's order constituted a rejection of the German company's offer, since it modified it by requesting *inter alia* items not mentioned in the offer. A modified acceptance constitutes a counter-offer when it is sufficiently definite as to quality and price of the goods under Article 14 (1) of the CISG this corresponding to German law. In the present case the Court held that the counter-offer was not sufficiently definite since the price of some items was neither expressly nor implicitly indicated, and no provisions for determining it had been made. The Court also decided there was no contract since the Swedish company had clearly rejected the German company's proposal contained in the pro-forma invoice.

Without further reference to the CISG, the Court held that the buyer was not entitled to remedies for pre-contractual liability arising from the breaking off of negotiations on the part of the seller. Such a liability would only arise when the circumstances of the case showed that the non-breaching party relied on the conclusion of the contract (in particular, when there were good reasons to believe that a contract would certainly be concluded, or when the breaching party caused the other party to perform in advance, or if the agreement had already been partially executed by the parties).

This case relates more to an aspect that is going to be looked into details in the next chapter, specifically the battle of forms. However, it can be deduced from the reasoning of the Court that the principle of good faith was among the grounds on which the case was decided. The reasoning of the last paragraph is clearly echoing this principle since it would be expressly in bad faith to entitle one party to remedies in a situation similar to this one, as there were no sufficient grounds to indicate that a contract would be formed and to require such remedies is a good example of acting in bad faith.

*b) Good Faith in Interpretation of Contract*

Two presented cases have already covered this aspect, specifically the Austrian case 1 Ob 49/01i decided by Oberster Gerichtshof and the Belgian case from 15.05.2002 decided by Hof van Beroep (Court of Appeal), Ghent.

*Arbitral Award: VB/94124, Parties: unknown*

A Hungarian seller and an Austrian buyer that had a longstanding business relationship concluded a contract according to which the seller had to make several deliveries of mushrooms to the buyer. The buyer would secure payment for deliveries by a bank guarantee in favor of the seller which should be valid until a certain date. This guarantee was neither given by the buyer nor requested by the seller before that date. The seller started to deliver the goods, but as the buyer failed to make payment, stopped further deliveries and declared the contract avoided. On a later date, the parties agreed that the seller would resume delivery on condition that the buyer provides the required guarantee. The buyer finally sent a guarantee which however stated the expiry date originally agreed upon and therefore was no longer valid. The seller commenced arbitral proceedings claiming payment and interest.

---

175 Article 19 (1):
A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

176 Arbitral Award, Date: 17.11.1995, Number: VB/94124, Court: Hungarian Chamber of Commerce and Industry Court of Arbitration, Parties: Unknown

58
The Court held that the contract was governed by the CISG under Article 1 (1) (a) and also the parties agreed during the proceedings on the CISG as the applicable law. The CISG was also applicable as the parties had chosen the law of two contracting States (Hungary and Austria) as the law governing the contract under Article 1 (1) (b). The Court held that the buyer had to pay the purchase price for the delivered mushrooms under Articles 53 and 62 of the CISG.\textsuperscript{177} The Court saw the issuance of a bank guarantee with an already expired date as contrary to the principle of good faith under Article 7 (1) and to the understanding that a reasonable person would have had in the same circumstances under Article 8 (3). The Court justified its reference to Article 7 (1), 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.

Under Article 54 of the CISG, the buyer's failure to secure payment constituted a breach of its obligation to pay the price.\textsuperscript{178} The Court held that the seller was entitled to suspend performance of its obligation as the buyer had not given adequate assurance of payment of the price through a valid bank guarantee under Article 71 (1) (b).\textsuperscript{179} The Court also held that the seller was entitled to declare the contract avoided according to Article 73 (2) of the CISG since the buyer's refusal to give a bank guarantee gave the seller good reasons to conclude that the buyer would not pay with respect to future deliveries.\textsuperscript{180}

The Court found that the seller was entitled to interest on the unpaid price under Article 78 of the CISG.\textsuperscript{181} Since the CISG does not specify the interest rate, the Court held that it would be improper to determine it according to the law otherwise applicable to the contract (Hungarian law, as agreed upon by the parties), in particular taking into account the different inflation figures in the two countries involved (Hungary and Austria). Since payment was to be made in Austrian Shillings, the Court disregarded the provisions of the Hungarian Civil Code fixing the interest rate at 20\% and granted interest at 5\% in accordance with the law of the State in whose currency payment was to be made.

This case is a good example where the Court went beyond the wording of the Article 7 (1) of the CISG stating that the principle of good faith should be seen as a standard to be observed by the parties in the performance of the contract. Linking this principle to the idea of reasonableness, the Court points out once again that the principle of good faith can be found throughout the CISG.

\textsuperscript{177} Article 53:
The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Article 62:
The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

\textsuperscript{178} Article 54:
The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

\textsuperscript{179} Article 71 (1) (b):
A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(b) his conduct in preparing to perform or in performing the contract.

\textsuperscript{180} Article 73 (2):
If one party's failure to perform any of his obligations in respect of any installment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future installments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

\textsuperscript{181} Article 78:
If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.
A German seller and a Dutch buyer entered into several contracts for the sale of powdered milk. The contracts were concluded by telephone and confirmed in writing by both parties. The letters of confirmation sent by the buyer contained a standard term stating that, notwithstanding any duty of the seller to pay back the purchase price, the liability of the seller for damages suffered (or to be suffered) should be at all times limited to the invoiced amount for the delivered goods. The seller's letters of confirmation contained a term according to which the sale was to be governed exclusively pursuant to the seller's standard terms and contrary statutory conditions or standard terms of the buyer were expressly excluded. Moreover, a warranty clause contained in the seller's standard terms stated that the buyer should inspect the goods immediately upon delivery and note any complaints on the delivery note; defects that were not noticeable at the time of delivery could only be claimed before the printed expiration date.

The buyer resold the milk to an Algerian and a Dutch company. Upon delivery, and after a sample inspection by the buyer which gave no negative results, the packaged powdered milk was shipped to Algeria and to Aruba/Netherlands Antilles. After processing, part of the milk delivered to Algeria turned out to have rancid taste. The Algerian customer claimed non-conformity of the goods and the buyer's customers met twice with the buyer and the seller to achieve an amicable solution. By a letter dated August 24, 1998, the seller acknowledged that a specified quantity of the milk did not meet the contractual requirements and that the buyer had warranty claims as to that quantity; with reference to its standard terms, however, the seller denied any liability as to further claims. Meanwhile the Dutch customer also claimed non-conformity of a certain amount of milk and obtained damages from the buyer.

The buyer commenced an action for damages against the seller, alleging that the non-conformity of goods was caused by a defect that already existed at the time of the passing of risk, but that became apparent only after processing.

The First Instance Court dismissed the buyer's complaint. The Court of Appeal (Oberlandesgericht Dresden, partially granted the claim, condemning the seller to pay damages according to Articles 74 and 75 of the CISG.

The Supreme Court agreed with the lower Court in assuming that the partial conflict of the parties' standard terms (battle of the forms) could not lead to a failure of the entire contract, since the parties, in performing the contract, had shown that such a conflict was not to be considered a material modification of their agreement according to Article 19 (1) and (3) of the CISG. As to the battle of the forms, the Court confirmed that in application of the "knock out" doctrine, generally accepted in scholarly opinions, conflicting standard terms only do not become part of the contract; the evaluation of such a conflict must proceed, however, from a systematic interpretation of all the rules involved. Thus, the liability of the seller for lack of conformity was governed by the CISG, being both buyer's and seller's standard terms not applicable to the contract as far as non conformity was concerned.

The Court pointed out that in the present case the result would not change even applying the minority doctrine of the "last shot", since it would be contrary to the principle of good faith under Article 7 (1) of the CISG for the seller, whose standard terms were sent after the buyer's, to assume that only those terms of the buyer's standard conditions more favorable to the seller would apply.

As far as the burden of proof is concerned, the Court confirmed the principle according to which the burden of proof is a matter generally governed by the CISG, either expressly under Article 79 (1) or impliedly according to Article 2 (a).

\[182\] Country: Germany, Date: 09.01.2002, Number: VIII ZR 304/00 ,Court: Bundesgerichtshof, Parties: unknown

\[183\] Article 19 (3):
Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to other or the settlement of disputes are considered to alter the terms of the offer materially.

\[184\] Article 2 (a):
This Convention does not apply to sales:
of goods bought for personal, family or household use, unless the seller, at any time before
considered a matter excluded by the scope of Article 4 of the CISG,\textsuperscript{185} and therefore the resulting burden of proof issues had to be solved according to the applicable domestic German law.

This case will be looked more into details in the next chapter when discussing the problem of battle of forms. However, it can already be demonstrated that the principle of good faith was crucial when deciding in favor of the \textit{knock out} rule, therefore being seen as a general principle upon which the Convention is based as the text of the CISG appears to consecrate the \textit{last shot doctrine}. Furthermore some authors say that because of the obligation of good faith, the preference was given to the former (this aspect will be discussed in the next chapter).

\textbf{Case: HG 930634, Parties: Unknown}\textsuperscript{186}

A Swiss seller concluded a contract with a Liechtenstein buyer for the delivery of several installments of lambskin jackets which were to be resold by the buyer to a final customer in Belarus. The buyer first received two deliveries and paid for them. By the third and fourth deliveries, which were directly sent to the buyer's storage in Belarus, the buyer refused to pay the full price, alleging non conformity of all the received goods (compared the samples as to their color and weight). The parties met later in order to solve the dispute but to no avail. The seller commenced an action asking for payment.

The Court applied the CISG according to Article 1 (1) (b) and held that the parties had concluded an installment contract. Contrary to the Swiss domestic law, Article 73 of the CISG does not require that each delivery concern the same goods (in the case at hand, the seller had delivered first jacket for woman and then for man). The Court held that the question of agency is not covered by the CISG and was to be solved according to the applicable governing Swiss law of the contract.

Analyzing buyer's claim of lack of conformity of the goods, the Court addressed the question of the burden of proof. Although not expressly regulated by the CISG, this question was solved by looking at the Convention as a system. If the buyer has accepted the goods without complaints, it is up to the buyer to bring evidence of the existence of a defect, of the timely examination of the goods according to Article 38 (1) of the CISG and of the timely and sufficiently precise notice of lack of conformity given to the seller according to Article 39 (1).

Referring to the first delivery, the Court stated that the buyer should have examined the goods by samples as soon as they arrived at its storage place. Considering that the alleged defects were easily detectable, the buyer should have been able to discover them within 1 week to 10 days, thus giving notice of the lack of conformity at the latest 1 week to 14 days later. The buyer waited until receiving customer's complaints, more than 1 month

\begin{itemize}
\item or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
\end{itemize}

\textbf{Article 79 (1):}

A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

\textbf{Article 4:}

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

\textsuperscript{185} Article 4:

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

(a) the validity of the contract or of any of its provisions or of any usage;

(b) the effect which the contract may have on the property in the goods sold.

\textsuperscript{186} Country: Switzerland, Date: 30.11.1998, Number: HG 930634, Court Handelsgericht Zurich, Parties: unknown.
after. This applied also for the second installment since the defects of the first one should have induced the buyer to a more thorough examination of the delivered goods. The buyer's notice of non-conformity should have been sufficiently precise according to Article 39 (1) of the CISG, which was not the case for the third and fourth delivery. The buyer did not bring evidence that the seller waived his right to raise the claim that the notice was not timely given. Such a waiver cannot be assumed from the mere readiness of the seller to discuss the issue with the buyer. This results both from the need of certainty in commercial transactions, and from the principle of good faith, which is applicable also under the CISG in the interpretation of the parties' statements and conduct according to Article 8.

The buyer's claim that the seller had partly delivered goods of a different model than the one agreed upon, the Court observed that CISG does not distinguish between lack of conformity and delivery of totally different goods. It stated that since the seller knew of the lack of conformity, the buyer could still rely on it even if it failed to give timely notice thereof according to Article 40 of the CISG. The seller was admitted to prove either that the buyer had agreed on a modification of the contract under Article 29 of the CISG or that the delivered model had the same value for the buyer as the one contractually agreed upon.

No consensual termination of the contract under Article 29 of the CISG regarding the delivered third and fourth installments was proved by the buyer. The Court held that the modification or termination of the contract is governed by CISG rules on formation of contract with Articles 14 and seq. The correspondence between the parties showed that neither of them had accepted the other's offer as to termination, since the modifications were material and prevented conclusion of the termination agreement under Article 19 (1) of the CISG.

The seller was granted payment for all delivered installments. As to currency of payment, the Court held that it was a question not covered by the CISG and applied domestic law. The seller was awarded interest on the price according to Article 78 of the CISG, without the need of a formal request by the seller, accruing from the date the price was due under Articles 58 and 59 of the Convention and at the rate determined by the domestic law otherwise applicable in the absence on CISG.

This case underlines the role of good faith in interpretation of the CISG. However, again, this principle was linked by the Court to the idea of reasonableness when analyzing the buyer’s conduct after the receipt of non-conforming goods during the first installment and his further conduct during the last installments, this being among the grounds for the final decision.

c) Good Faith in Performance of Contract

This aspect has been previously touched upon when presenting: the Arbitral Award number SCH-4318 decided by Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien (Vienna), Austria; the Arbitral Award number VB/94124 decided by the Hungarian Chamber of Commerce and Industry Court of Arbitration; Arbitral Award number 8611/HV/JK decided by the ICC Court of Arbitration, Paris; the Italian cases from 13.12.2001 decided by Tribunale di Busto Arsizio and from 25.02.2004 decided by Tribunale di Padova - Sez. Este; the Mexican case M/115/97 decided by COMPROMEX. Comisión para la Protección del Comercio Exterior de Mexico.
Chapter 3: The Case Law


A French seller and a US buyer concluded in 1991 a contract for the sale by installments of clothes, which the buyer upon request of the seller declared it intended to resell to a distributor in South America. After the delivery of a first installment of the goods, the buyer refused to provide the required documentary evidence that the goods had actually been delivered to the distributor in South America. The seller, after being informed that the goods were sold to a distributor in Spain, refused to deliver the other installments. The buyer claimed damages for breach of contract. The seller claimed damages alleging that the sales of its own products in Spain had been seriously hampered by the parallel distribution made by the final customer of the buyer.

The Court decided that the contract was governed by the CISG according to Article 1 (1) (a). The Court held that the fact that the goods were to be delivered in South America was of essential importance for the seller, as shown by a number of statements to this effect made by the seller in the course of the negotiations. Since the buyer knew of the actual intention of the seller, the latter's statements were to be interpreted accordingly under Article 8 (1) of the CISG.

The buyer's breach of the contract in respect of the final destination of the goods was considered a fundamental breach under Article 25 of the CISG,188 entitling the seller to declare the contract avoided. According to Article 73 (2) of the CISG, in case of a contract for delivery of goods by installments, the seller may declare the contract avoided for the future provided that it does so within a reasonable time and that the buyer's failure to perform its obligations gives the seller grounds to conclude that a fundamental breach will occur with respect to future installments.

The Court held that the conduct of the buyer as a whole was contrary to the principle of good faith in the international trade as referred to in Article 7 of the CISG. This was further aggravated by commencing a lawsuit against the seller, which the Court considered an abus de procédure.

As the Court stated in the decision, the actions of the buyer were clearly contrary to the principle of good faith as its intention was from the beginning not to sale to the country indicated by him. What is also important in this case is that the Court considered that the principle of good faith as laid in the CISG goes beyond just the role of interpreting the Convention, but also applies in the international trade.

Case: 7 IV 75/95, Parties: unknown189

An Italian seller and a German buyer concluded a contract for the supply and installation of equipments for an ice-cream shop. After delivery, the parties entered into an agreement in which the buyer recognized the total amount of the purchase price (the Agreement). As the buyer paid only part of the price, the seller commenced action to recover the rest of the price. The buyer alleged lack of conformity because of quality defects and incomplete delivery.

The Court held that the buyer had lost the right to rely on lack of conformity of the goods since it had not acted in accordance with the obligations set out in Articles 38 and 39 of the CISG. In Court's opinion, as the

---


188 Article 25:
A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result

189 Country: Germany, Date: 26.03.1996, Number: 7 IV 75/1996, Court: Landgericht Saarbrucken, Parties: unknown
Agreement signed by the buyer was deemed to be an implied acceptance of the goods, the buyer's notice of non-conformity given to the seller after the signature of the Agreement was in contrast with the general duty of good faith provided by Article 7 of the CISG.

The case is a good example of how the principle of good faith as laid down by Article 7 of the CISG can be an effective shield against conduct contrary to the obligation of good faith in such situations, since, as the Court stated, the signing of the Agreement equaled to the fact that the buyer has accepted the goods and therefore lost its right to further invoke non conformity of goods.

**Case: 27 U 58/95, Parties: unknown**

A Dutch seller delivered to a German buyer equipment to be used in the manufacture of leather skins. Upon the buyer's refusal to pay the full price, the seller commenced an action before a German Court requiring full payment. In its counteraction the buyer alleged that the goods were defective and claimed compensation for damage suffered due to the seller's breach. The Court rejected the buyer's counterclaim. On appeal the first instance decision was partially reversed with respect to the buyer's counterclaim for damages.

As in the first instance decision, the appellate Court held that the seller was entitled to payment of the full price under Article 53 of the CISG. Regarding the buyer's counterclaim, the appellate Court which confirmed the lower Court's decision, found that it had jurisdiction to hear it. The Court applied Article 5 (1) of the EC Convention on Jurisdiction and the Enforcement of Decisions in Civil and Commercial Matters (Brussels 1968), pursuant to which a person domiciled in a Contracting State (in this case the seller) may be sued in the Court of the place of performance of the obligation in question (in this case delivery of the goods). The Court applied the CISG to determine the place of delivery and held that the parties had chosen the buyer's place of business, thereby derogating from Article 31 of the CISG. For one item there was an express franco domicile clause, for the others the seller was obliged to take care of transportation by its own means to the buyer's place of business. The Court therefore affirmed its jurisdiction.

The buyer's claim of non conformity of other delivered items, the appellate Court did not consider the argument put forward by the lower Court according to which second hand equipment is sold as it is, so that the buyer cannot claim it is defective merely because it does not function perfectly according to Article 35 of the CISG. The appellate Court solved the question holding that the buyer had not given notice within a reasonable time specifying the nature of the defects under Article 39 of the CISG.

Partly reversing the first instance decision, the appellate Court awarded to the buyer damages under Articles 45 and 74 of the CISG. The seller agreed to take back some of the delivered items in order to modify them.

---

190 Country: Germany, Date: 08.01.1997, Number: 27 U58/95, Court: Oberlandsgericht Kohn, Parties: Unknown

191 Article 31:

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract involves carriage of goods - in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the precedent subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew where the goods were at, or were to be manufactured or produced at, a particular place - in placing the goods at the buyer's disposal at that place;

(c) in other cases - in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

192 Article 45:

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:
Chapter 3: The Case Law

according to the buyer's specifications and to redeliver them within a short time, but failed to do so. According to the lower Court, the buyer could not claim damages for late delivery because the seller had made it conditional on payment of past debts, nor could it withhold payment of the price under Article 80 of the CISG.  

The appellate Court held, on the contrary, that the seller had no right to suspend performance and make it conditional on payment of past debts because, with respect to the redelivery of the equipment, the parties had implicitly derogated from Article 71 of the CISG. Since the parties had already discussed the question of the payment of the buyer's past debts, and the seller had not mentioned such a question in the agreement on modification and prompt redelivery of the machines, according to good faith the buyer could rely on the seller not withholding its performance on such grounds.

Obiter the Court observed that the seller's late delivery, though being in this case a breach of a secondary obligation, was nevertheless a fundamental breach.

The buyer was entitled to recover the cost incurred because of the seller's delay in redelivering the goods. This included loss of profit and all reasonable expenses incurred to mitigate or avoid loss caused by the breaching party under Article 74 of the CISG. In particular, the loss caused by having the leather skins processed by a third party was foreseeable according to Article 74 (1) of the CISG, also in view of the fact that the buyer had explicitly drawn the seller's attention to the importance of redelivering the equipment without delay.

The case is a good example of the good faith in terms of performance. The Court based its reasoning and the final decision upon articles that, as seen in the previous chapter and in the case law mentioned upper in the text are echoing the principle of good faith throughout the text of the Convention (in this case linked to the idea of reasonableness and fair conduct).

Case: 7 O 221/02, Parties: unknown

An Italian seller and a German buyer entered into a contract for the sale of goods. The buyer refused to pay the purchase price and set off its obligation against a counter-claim for lack of conformity of the goods. The seller objected to the counter-claim and commenced an action for full recovery of the purchase price.

The Court awarded the seller the purchase price, but dismissed the claim for interest. The Court found that the obligation to pay the price had not been discharged by the buyer’s attempt to set it off against the counter-claim, and this for two reasons. First, because in the case at hand set-off is contrary to the principle of good faith set out in Article 7 (1) of the CISG, as the buyer had previously asked for payment in installments and actually offered to make a partial payment without reserving the right to set-off.

Moreover, even if the buyer’s conduct were not to be considered as a violation of its duty to act in good faith, the result would not have been different: indeed the Court held that according to Article 7 (2) of the CISG set-off has to be decided on the basis of the applicable domestic law as it is not a matter governed by CISG. In the

(a) exercise the rights provided in articles 46 to 52;
(b) claim damages as provided in articles 74 to 77.
(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.
(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

193 Article 80:
A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.
194 Country: Germany, Date: 15.07.2003, Number 7 O 221/02, Court: Landgericht Mönchengladbach, Parties: unknown

65
case at hand the applicable law was Italian law and the Court found that the requirements for set-off under Italian law had not been met because the counter-claim was neither ascertained nor enforceable.

As in many previous cases, the Court expressly saw in the present case the principle of good faith as a general principle in the CISG and not just a way of interpreting. It was also at the basis of the decision to refuse set-off.

Case: number not specified, Parties: Bielloni Castello S.p.A. v. EGO S.A.\textsuperscript{195}

An Italian seller and a French buyer concluded a contract for the sale of a printing press which the buyer intended to install in its new factory. The buyer made a partial payment but it failed to pay the balance and to take delivery of the press at the agreed date. Two months after the date for taking delivery and payment had passed, the seller, relying on a provision of the Italian Civil Code, sent a notice to the buyer demanding performance within the following 15 days and declaring that, in the event of non-performance by the buyer, the contract would be considered as a terminated. The buyer failed to perform within the additional 15 day period and the seller sent another notice of the same content. The buyer failed to perform again. The seller commenced legal action alleging termination of the contract for breach by the buyer and claiming damages. The buyer argued that non-performance was excused by the circumstance that the new factory could not be open at the expected date, due to administrative reasons falling beyond his control. Pending the lawsuit, the seller resold the press to a third party at a lower price.

The Court of First Instance overlooked the CISG, applying the Italian law, holding that the buyer was entitled to restitution of the price. The seller appealed. The Court of Appeals held that the CISG governed the contract according to Article 1 (1) (a) of the CISG.

The Court of Appeals held the seller's notice was to be regarded as fixing an additional period of time for performance under Art. 63 (1) of the CISG and which the seller had further extended by means of a second notice. The total time from the original delivery date to the expiry of the additional period fixed by the seller was altogether considered by the Court of reasonable length under Article 63 (2) of the CISG.\textsuperscript{196} The seller was entitled to declare the contract avoided as the buyer had failed to perform within the additional period of time that the seller had fixed according to Article 64 (1) (b) of the CISG.\textsuperscript{197} In this connection, the Court considered the contract terminated upon expiry of the additional period of time. The Court rejected the buyer's argument that non-performance was excused, holding that the principle of good faith laid down in Article 7 (1) of the CISG precludes the possibility of taking into account any impediments to perform. According to the Court, this matter should be settled under Article 7 (2) of the CISG, in conformity with the law otherwise applicable to the contract by virtue of the rules of private international law, in this case Italian law. The Court held that the buyer's argument was relevant neither under Italian domestic law. About the seller's claim for damages the Court held that, under Article 75 of the CISG the seller was entitled to payment of a sum equal to the difference between the contract price and the lower price of the substitute transaction as damages for non-performance. No damages under Article 74 of the CISG were granted, the Court considering that there was no evidence thereof. The Court further held that interest on the above sum applies according to Article 78 of the CISG, at the Italian statutory rate under Article 7 (2) of the CISG accruing from the date of termination of the contract.


\textsuperscript{196} Article 63:

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

\textsuperscript{197} Article 64 (1):

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.
Chapter 3: The Case Law

In the present situation the seller has extended twice the period for payment and buyer’s invocation of circumstances beyond his control was considered against good faith under the CISG, but also did not qualify under the applicable domestic law as there are no evidences that the buyer has done anything to help in this sense, therefore it would be against good faith as it is unfair towards the seller not to consider the contract terminated after the buyers failure to perform. Similar reasoning applies when considering the damages as it was seen in several instances that Article 74 of the CISG is related to this principle.

3.4 Conclusions

According to the presented case law there are several conclusions that can be made. First, it is clear that in almost all the instances the courts went beyond the wording of the CISG when looking at the role of good faith in the Convention and in international trade in general. Thus, this principle is considered more of a general principle on which the CISG is based upon and the duty of good faith upon the parties is laid in all the cases and at all the stages of their relations. What differs is the way these issues are approached, the final results being the same in principle and effect. This of course can be explained in different ways, however the present paper favors the explanation that, due to Article 7 (2), the Courts not only rely on the exact wording of Article 7 (1), but also on the general rules and principles on which the CISG, the international and domestic law etc are based. As seen from the second chapter, good faith, fairness and reasonableness have significant roles under the various domestic laws and it seems logic that the effects of this spill into the texts of the international conventions such as the CISG. Second, it is also important that (if adopting only the literal approach to Article 7 (1)), because the principle of good faith is related to the idea of reasonableness and fairness, when disregarding the obligation of good faith on the parties and using good faith only in interpretation, the results of the presented case law would not differ. In many cases the Court has relied upon other articles related to Article 7 (1) of the CISG basing on the close link between these concepts.

The final conclusion that the case law supports the findings of the second chapter: although not expressly mentioned, the CISG imposes a duty of good faith upon the parties at all the stages of their relationship. This may be easily observed from both the formulation of many articles in the Convention and from the way they have been used by the Courts from different countries in their decisions.
Chapter 4: Battle of Forms and Good Faith

After the previous chapter has covered the most relevant case law supporting the results of Chapter 2, the present part is going to back up the same conclusions through the example of the battle of forms and the way it is settled under the CISG. Also, more examples from case law will be looked into.

4.1 Introduction to battle of forms

It is quite often that the parties are exchanging standardized form contracts when dealing with each other. This standardization developed because of efficiency justifications. The battle of the forms arises in the contract formation stage in the situation when a reply to an offer qualifies as an acceptance but contains provisions that are inconsistent with those in the offer.\(^\text{198}\) The same source continues by explaining that the transactions are negotiated to the fundamental elements such as the price, quantity or delivery while the details of the transaction are left to the forms exchanged in the negotiation process, such as purchase orders, sales acknowledgments, and delivery slips. Naturally, these forms are designed to meet the interests of each party and the details are usually contained in the boilerplate, minimized typeface at the bottom or on the back of the form, and often address limitations of liability, arbitration stipulations, and reservations of power to cancel upon stated contingencies.\(^\text{199}\)

Thus, battle of the forms occurs when parties use preprinted forms both to make offers and acceptances. The typed-in descriptions (or the general conditions) usually match up and it is the “fine print” on the back of the forms, however, that contains differences.\(^\text{200}\) There are two solutions on how to resolve the battle of forms: the last shot doctrine and the knock out rule.

a) The Last Shot Doctrine

Analyzing the American common law approach, Ch. Sukurs states that the common law rules are at the basis of the last shot doctrine, being closely linked to the mirror image rule which this approach consecrates (under this rule, an acceptance is valid if it exactly corresponds with


\(^{199}\) Ibid

\(^{200}\) Ray August, International Business Law; Text, Cases, and Readings, p. 559
the offer, otherwise becoming a counter-offer). According to this doctrine, each new form sent by the parties qualifies as a counter-offer until the last one is accepted by the conduct of one of the parties, the last party to send the forms before performance “wins”, the sent forms becoming the rules governing the contract.

The last shot doctrine logically derives from the mirror rule which is based on a rather simple rationale: the original offeror makes an offer according to his own terms and does not plan to be bound to terms other than his own. Further, each part of a contract contains the core elements such as price, quantity and character of the item exchanged. It also has a value to the offeror that is incorporated into his original offer. According to the same source, the common law rules do not presuppose that changes to the offer will necessarily bring the deal to an end, contemplating that the offeror will want to weigh the changes to determine the value of the contract. Under the mirror rule, additions or modifications to the offer make it void, transforming it into a counter-offer, or a “last shot.”

This doctrine has been criticized as not being in line with the reality as sometimes the parties simply do no read all the details or choose not to concentrate on the minor differences, thus disregarding the mirror image rule for the sake of getting ahead with the transactions. This rule is also criticized on grounds of good faith and unfairness as it can encourage the parties to include many additional conditions just to avoid the contracts. Also, this rule tends to put the sellers in a superior position compare to the buyers by encouraging the contracts of adhesion.

b) The Knock out Rule

This rule represents an alternative to the last shot doctrine, resulting in the dissatisfaction with the later. In this situation, a contract is considered to be formed despite the differences in the boilerplates and the terms of this contract are those on which both parties’ forms agree, with conflicting terms from the different boilerplates dropping out and the default of the applicable law supplying the remaining terms. This rule is taking away the focus from the formal rules on offer and acceptance, placing it on the fact whether the parties have formed or not a

201 Charles Sukurs, “Harmonizing the Battle of the Forms: A Comparison of the United States, Canada, and the United Nations Convention on Contracts for the International Sale of Goods”. The author also mentions the estoppel as alternative to performance: if a party performs, this represents an acceptance on a theory of estoppel where the offeror can estop the offeree from denying the existence of a contract based upon the offeree’s performance.

202 Ibid

203 Ibid
contract, thus disregarding the conflicting provisions. This is similar to the way followed in such legal systems as the American one. For example, Section 2-207. Additional Terms in Acceptance or Confirmation of the American UCC provides the following rule:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
(a) the offer expressly limits acceptance to the terms of the offer;
(b) they materially alter it; or
(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

Naturally, there are some criticisms to this rule as well. In the USA for example this formulation was considered to actually produce a “first shot” rule since the party that sent the forms first tends to become the master of the contract (therefore the approach tends to favor the buyers that usually send their forms first).204 The same source points out however that this is more of a problem which is on “paper” and in practice the American Courts have interpreted it inclining towards the knock out rule.

Similar provisions are contained in the German Civil Code (BGB) in paragraphs 154 [Clear lack of agreement; lack of authentication] and 155 [Hidden lack of agreement] which underline the principle of partiell dissens:205

§ 154. (Clear lack of agreement; lack of authentication]
(1) Until the parties have agreed upon all points of a contract upon which, according to the declaration of even only one party, agreement had to be reached, the contract is, in case of

204 Ibid
205 English version available on: http://www.hull.ac.uk/php/lastcb/bgbengl.htm. Original version:
BGB § 154 Offener Einigungsmangel; fehlende Beurkundung
(1) Solange nicht die Parteien sich über alle Punkte eines Vertrags geeinigt haben, über die nach der Erklärung auch nur einer Partei eine Vereinbarung getroffen werden soll, ist im Zweifel der Vertrag nicht geschlossen. Die Verständigung über einzelne Punkte ist auch dann nicht bindend, wenn eine Aufzeichnung stattgefunden hat.
(2) Ist eine Beurkundung des beabsichtigten Vertrags verabredet worden, so ist im Zweifel der Vertrag nicht geschlossen, bis die Beurkundung erfolgt ist.

BGB § 155 Versteckter Einigungsmangel
Haben sich die Parteien bei einem Vertrag, den sie als geschlossen ansehen, über einen Punkt, über den eine Vereinbarung getroffen werden sollte, in Wirklichkeit nicht geeinigt, so gilt das Vereinbarte, sofern anzunehmen ist, dass der Vertrag auch ohne eine Bestimmung über diesen Punkt geschlossen sein würde.
Chapter 4: Battle of Forms and Good Faith

doubt, not concluded. An agreement concerning individual points is not legally binding, even if they have been recorded.

(2) If it has been planned that the contract contemplated be authenticated, in case of doubt the contract is not concluded until the authentication has taken place.

§ 155. [Hidden lack of agreement]
If the parties to a contract which they regard as concluded have in fact not agreed upon a point upon which an agreement should have been arrived at, that which is agreed upon is valid if it may be assumed that the contract would have been concluded even without a settlement of this point.

The international legal texts that have been already mentioned in the second chapter of this paper, the PECL ad the UNIDROIT Principles, also have similar provisions. For example Article 2:209 (1) of PECL and 2.22 of UNIDROIT Principles state:

PECL: Article 2:209: Conflicting General Conditions (1)
If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substance.

UNIDROIT Principles: Article 2.1.22 (Battle of forms)
Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

As seen in chapter 2 of the paper, in all the mentioned texts, the principle of good faith is expressly mentioned in their articles, therefore such an outcome is somewhat expected.

4.2 Article 19 of the CISG

Article 19 of the CISG is responsible for the problem of battle of forms, covering such issues as acceptance, counter-offer and the battle of forms. It is laid down in Part II Formation of the Contract of the Convention.

According to R. August, the CISG rule is based on legislation originally drafted in the Scandinavian countries. Article 19 is based on Article 6 of the Swedish Conclusion of Contracts Act of 1915. The same act was adopted in Denmark in 1917, in Norway in 1918, in Finland in 1929 and Iceland in 1936.206

Thus, Article 19 of the CISG states:

A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

206 Ibid
Chapter 4: Battle of Forms and Good Faith

However, a reply 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.

Additional or different terms relating, among other things, to the price, payment, quality and additional quantity of the goods, place and time of delivery, extent of one party’s liability to other or the settlement of disputes are considered to alter the terms of the offer materially.

At first glance, the article seems to consecrate the mirror image rule which is generally considered rather a rigid one: under paragraph 1, the acceptance has to reflect the offer’s conditions in an exact way otherwise the inconsistencies, if material, would transform the acceptance into a counter-offer and the other non-material terms that constitute proposals, will become part of the contract (unless the offeror promptly objects). To avoid this rule which is followed rather rarely, paragraph 2 and 3 come to soften it introducing several additions that help avoid the possible dead end. In case that the mirror image rule is not fulfilled, the acceptance becomes a counter-offer only if it materially alters the initial offer. A non-exhaustive list of what is viewed under CISG as altering materially the initial offer is presented in the second paragraph of this article, softening provisions of the first paragraph.

It also may seem that Article 19 supports the last shot rule to resolve the problem of battle of forms. The article does not mention the acceptance by conduct and apparently leaves a gap regarding the issue of battle of forms. As in the case of good faith, it is a debatable topic and there are several suggested approaches to solve this problem.

The debate over the problem of battle of forms is focused on which method should apply: last shot or knock out rule. This issue is usually linked to the following two questions: "Has a contract been concluded?" and, if so, "What are the terms of the contract?"\textsuperscript{207}

According to P. P. Viscasillas, the answer to the first question generally turns out to be affirmative since the contracting parties go ahead with the contract although each has referred to its own general conditions, the problem being the determination of the exact content of the contract.\textsuperscript{208} The same author notes that, under the CISG, the battle of the forms should be considered a gap that must be resolved by applying the general principles upon which the Convention is based.

\textsuperscript{207} Pilar Perales Viscasillas, Remarks on the manner in which the PECL may be used to interpret or supplement article 19 CISG. Resolving the battle of forms (conflicting general conditions), January 2002

\textsuperscript{208} Ibid
Chapter 4: Battle of Forms and Good Faith

First, by following this approach, it seems that the principle of good faith should apply since it is one of the basic principles of the CISG (as seen from the previous chapters of the paper). In this case, the contradictory terms would cancel each other out (the \textit{knock out} rule), leaving the issue to be governed by the applicable law, usage or good faith as Article 7 (1) provides.\footnote{Ibid}

The second opinion however supports the application of what is known as the \textit{last shot} rule: the party that has sent its form the last is considered to control the terms of the contract and thus would win the battle of forms. As the CISG does not have a clear answer to the situations of acceptance by conduct, the possibility that in this case the option of \textit{last shot} rule remains open.

Commenting on Article 19 of the CISG, Ch. Sukurs explains that the apparent consecration of the mirror rule under the first paragraph is due to the fact that this rule is consistent with both common law and civil law systems and by having this provision the CISG is broadly in line with the many different legal traditions that it attempts to accommodate.\footnote{Ibid} Another reason according to the same author is that the mirror image rule is more predictable and much easier to apply than the UCC counterpart and the drafters of the Convention actually considered adopting the UCC approach, but explicitly rejected it with the sanction of the American delegates, who admitted the difficulties in applying § 2-207 and seemed content to revert to the pre-UCC doctrine.\footnote{Ibid}

4.3 The Case law

In general, the case law relating to the problem of battle of forms is supporting the first position, mainly the \textit{knock out} rule. There are several cases presented in the UNILEX database regarding the battle of forms:

\textit{Case: 3C 925/93, Parties: Unknown}\footnote{Country: Germany, Date: 06.10.1995, Number: 3C 925/93, Court: Amtsgericht Kehl, Parties: Unknown}

A German buyer and an Italian seller concluded a contract for the sale of fashion goods. Each of them relied on its own standard terms which contained, \textit{inter alia}, a choice of law clause respectively in favor of German law and of Italian law. The buyer ordered the goods on the basis of a sample delivered by the seller. The buyer refused to pay the purchase price alleging that the goods did not conform with the contract as they did not possess the qualities which the seller had held out to the buyer. The buyer claimed that it had given the seller notice of non conformity by telephone one week after discovery. Six weeks after discovery the buyer sent a fax to the seller and declared the contract avoided.
Chapter 4: Battle of Forms and Good Faith

The Court held that the contract was governed by the CISG under Article 1 (1) (a). The Court held that the buyer could not rely on the lack of conformity of the goods: the buyer had not proved that it had given notice of non-conformity to the seller by telephone. The Court pointed out that in case of a notice by telephone, the buyer must indicate the precise person who received the call and the contents of the conversation and give evidence thereof. The Court further held that a notice of lack of conformity given six weeks after discovery of the defects is not within a reasonable time after discovery according to Article 39 of the CISG especially since the goods are closely related to a particular season.

As a consequence, the seller was entitled to recover the unpaid contract price and interest. Absent an express provision in the CISG, the Court held that the interest rate was to be determined in accordance with the law otherwise applicable to the contract. In determining this, the Court had first to establish whether there was a valid choice of law clause in the contract.

Regarding the choice of law clause in favor of Italian law contained in the seller's standard terms, the Court held that it had not become part of the contract. According to the Court, the fact that the parties had started performance of the contract showed their intention to be bound by it and by the terms already agreed upon as well as by any standard terms which were common in substance, with the exclusion of the conflicting terms such as the choice of law clauses. This meant that the parties had impliedly derogated from Article 19 (1) of the CISG providing that a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.

The Court held that neither the choice of law clause in favor of German law contained in the buyer's standard terms was valid as the buyer failed to give evidence that it had sent its general conditions of purchase in a language other than German, which was not the language of the contract.

Accordingly, the interest rate was to be determined in compliance with German private international law rules which referred to Italian law.

In this case the Court did not object to the fact that both parties have decided to derogate from Article 19 (1) of the CISG by starting the performance of the contract (in a way, the parties acted in accordance to the knock out rule which). Therefore, the Court based its decision on this position and by not commenting against it, it can be assumed that the Court, to a certain point, was guided by the same interpretation of the CISG as for example the Bundesgerichtshof would (strongly relying on the principle of good faith), in the third case presented below.

Case: VII ZR 304/00, Parties: Unknown

This case has been already presented in the previous chapter. However, there are several points that have to be stressed when analyzing this case. Let us recapitulate the facts, this time however focusing on the battle of forms instead of the principle of good faith:

A German seller and a Dutch buyer entered into several contracts for the sale of powdered milk. The contracts were concluded by telephone and confirmed in writing by both parties. The letters of confirmation sent by the buyer contained a standard term stating that, notwithstanding any duty of the seller to pay back the purchase price, the liability of the seller for damages suffered (or to be suffered) should be at all times limited to the invoiced amount for the delivered goods. The seller's letters of confirmation contained a term according to which the sale was to be governed exclusively pursuant to the seller's standard terms and contrary statutory conditions or standard terms of the buyer were expressly excluded. Moreover, a warranty clause contained in the seller's standard terms stated that the goods were supplied in accordance with the buyer's standard terms and conditions.

213 Country: Germany, Date: 09.01.2002, Number: VII ZR 304/00, Court: Bundesgerichtshof, Parties: Unknown
standard terms stated that the buyer should inspect the goods immediately upon delivery and note any complaints on the delivery note; defects that were not noticeable at the time of delivery could only be claimed before the printed expiration date.

The buyer resold the milk to an Algerian and a Dutch company. Upon delivery, and after a sample inspection by the buyer which gave no negative results, the packaged powdered milk was shipped to Algeria and to Aruba/Netherlands Antilles. After processing, part of the milk delivered to Algeria turned out to have rancid taste. The Algerian customer claimed non-conformity of the goods and the buyer's customers met twice with the buyer and the seller to achieve an amicable solution. By a letter dated August 24, 1998, the seller acknowledged that a specified quantity of the milk did not meet the contractual requirements and that the buyer had warranty claims as to that quantity; with reference to its standard terms, however, the seller denied any liability as to further claims. Meanwhile the Dutch customer also claimed non-conformity of a certain amount of milk and obtained damages from the buyer.

The buyer commenced an action for damages against the seller, alleging that the non-conformity of goods was caused by a defect that already existed at the time of the passing of risk, but that became apparent only after processing.

The First Instance Court dismissed the buyer's complaint. The Court of Appeal (Oberlandesgericht Dresden, partially granted the claim, condemning the seller to pay damages according to Articles 74 and 75 of the CISG.

The Supreme Court agreed with the lower Court in assuming that the partial conflict of the parties' standard terms (battle of the forms) could not lead to a failure of the entire contract, since the parties, in performing the contract, had shown that such a conflict was not to be considered a material modification of their agreement according to Article 19 (1) and (3) of the CISG. As to the battle of the forms, the Court confirmed that in application of the "knock out" doctrine, generally accepted in scholarly opinions, conflicting standard terms only do not become part of the contract; the evaluation of such a conflict must proceed, however, from a systematic interpretation of all the rules involved. Thus, the liability of the seller for lack of conformity was governed by the CISG, being both buyer's and seller's standard terms not applicable to the contract as far as non-conformity was concerned.

The Court pointed out that in the present case the result would not change even applying the minority doctrine of the "last shot", since it would be contrary to the principle of good faith under Article 7 (1) of the CISG for the seller, whose standard terms were sent after the buyer's, to assume that only those terms of the buyer's standard conditions more favorable to the seller would apply.

As far as the burden of proof is concerned, the Court confirmed the principle according to which the burden of proof is a matter generally governed by the CISG, either expressly under Article 79 (1) or impliedly according to Article 2 (a). In this case the admission of liability expressly made in writing by the seller was to be considered a matter excluded by the scope of Article 4 of the CISG, and therefore the resulting burden of proof issues had to be solved according to the applicable domestic German law.

---

214 Article 19 (3): Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to other or the settlement of disputes are considered to alter the terms of the offer materially.

215 Article 2 (a): This Convention does not apply to sales: of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

Article 79 (1): A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

216 Article 4:
Chapter 4: Battle of Forms and Good Faith

What is important from this case is that although the Court has pointed out that the decision would be similar if applying the *knock out* or the *last shot* rules, the application of the latter would be in this particular case against the principle of good faith as laid down in the CISG. Thus, this case is both supporting the importance of the principle of good faith in the Convention and the predominance of the *knock out* rule over the *last shot* doctrine.

When commenting this decision, P.P. Viscasillas first points out that there could be three possible solutions under the CISG to the battle of forms. According to the first one, the conflicting general conditions fall outside the scope of the Convention by virtue of Article 4. The second solution is similar to the one the Court adopted on the case mentioned above. The third solution would lead to the application of the *last shot* method.

As far as this case is concerned, the Court considered that there was a contract and followed the second solution, being guided by the principle of good faith as set by Article 7 (1), but also considering the last solution, specifying however that it would contradict this principle. P.P. Viscasillas considers that the Court misunderstands the role played by Article 19 (1) and (3) in the solution of the battle forms when the *last shot* doctrine applies. However, as showed above, the result would have not been different.

It is still worth mentioning that this case was decided by a German court that would be more likely to interpret the CISG in a manner which is similar to the BGB, which, as showed previously in the paper, is very strong on setting good faith as a basic principle. The question is still open in case the other party would have sent its terms last. This paper supports the position of the Court in this case as it agrees with the fact that the applying the last shot doctrine would contradict with the principle of good faith.

**Case: 770/95/HE, Parties: ICT GmbH v. Princen Automatisiering Oss. BV**

A Dutch seller and a German buyer concluded an oral agreement for the sale of computer software. Three days later the buyer confirmed the content of the agreement by means of a written order; the same letter contained a forum selection clause in favor of a German Court printed as a footnote in small characters. With a later fax the

---


218 Ibid

seller in its turn confirmed the buyer's written order and declared that its own standard terms were applicable to the contract for all contractual terms not addressed to in the buyer's confirmation. A copy of the standard terms was then sent to the buyer, which received it without objection. After delivery the seller commenced an action to obtain payment in a Dutch Court on the basis of a forum selection clause contained in the seller's standard terms. The buyer claimed that its own forum selection clause was applicable.

The Court denied its jurisdiction to hear the case since it held that according to the CISG provisions on acceptance (Art. 18 CISG et seq.); the buyer's forum selection clause was applicable. In the Court's opinion by replying to the buyer's written confirmation of the agreement, the seller had expressly excluded the applicability of its own standard terms with regard to "all terms" conflicting with the ones stated in the buyer's confirmation. The result was that the seller had accepted the buyer's confirmation in its entirety, including the printed forum selection clause in favor of a German Court.

This case is a good example of the importance of the principle of good faith in both the interpretation of the CISG according to Article 7 (1) and regarding the battle of forms as the Court adopted the position closer to the one of UCC, BGB, UNIDROIT or PECL (where good faith is expressly set to be a basic principle), despite the fact that if reading the CISG strictly literally, it seems that the last shot method should have been applied. Interestingly enough, the Court has considered this case as well, however the result would have been the same. It is important to note the formulation to excuse the non-use of this method which would be contrary to the principle of good faith from Article 7 (1) which comes to support good faith as playing a very important role in CISG.

Case: VIII ZR 60/01, Parties: unknown

This case has also been covered in the previous chapter. However, from the point of view of the battle of forms, this case also presents some interest. Specifically, we must look this time at the situation with the standard terms:

A Spanish buyer and a German seller concluded a contract for the sale of a used milling machine, including an obligation of the seller to install the machine on the buyer’s premises. The seller's standard terms contained an exemption from liability for any defects in used machinery. Though the seller made a general reference to its standard terms in the confirmation of order, it did not include a copy of the terms. The installation of the milling machine turned out to be very difficult, taking longer than expected. The seller's fitter failed to set up the machine and an electronics specialist was needed to complete the installation at the buyer's expense, the buyer claimed the costs of the installation. The seller refused to pay invoking the exemption clause contained in its standard terms.

The Supreme Court confirmed the lower Court’s decision finding that the seller's liability for non-conformity of the goods had not been effectively excluded, and remanded the case to the lower Court in order to ascertain the existence of a defect in the machine. The Court found that the inclusion of standard terms in the contract is governed by the general rules of the CISG on contract formation and contract interpretation according to Articles 8, 14 and 18 and not by the applicable domestic law. In Court's opinion, standard terms referred to in the offer are binding on the offeree only where the standard terms have been attached to the offer or the offeree was otherwise in a position to know of their contents. It follows from the general principle of good faith in international trade under Article 7 (1) of the CISG and the parties' duty to cooperate and to give information that in an international sales contract the user of standard terms has to make sure that the other party is in a position to know their content.

220 Country: Germany, Date: 31.10.2001, Number: VIII ZR 60/01, Court: Bundesgerichtshof, Parties: unknown
In this case, it is not clear which party has sent its terms last, but if assuming that the seller did and if applying the last shot rule, it would mean that the buyer have accepted the seller’s terms, thus giving the possibility to argue that the seller is exempted from any liability according to his standard terms. However it would still be contrary to the principle of good faith because of the same reason the Court has presented: the terms have been only referred to, without being actually sent to the buyer, the latter being thus unaware of their content.

There are two other cases which are considered to be important, referring to the battle of forms: Filanto, S.p.A. v. Chilewich International Corp. and Magellan International Corp. v. Salzgitter Handel GmbH. Since much of the discussion in this chapter was focused on the American approach and the CISG perspective on the battle of forms, these two cases have the advantage to combine them both, as they represent the way the American Courts have used the CISG when dealing with the battle of forms.

Case: 91 Civ. 3253 (CLB), Parties: Filanto S.p.A. v. Chilewich International Corp.221

A New York buyer entered into multiple contracts with an Italian seller in order to fulfill a master agreement that the buyer had concluded with a Russian (‘the Russian master agreement’). The Russian master agreement contained a clause which required disputes to be arbitrated in Moscow. The buyer partly performed one of the contracts and the seller commenced action in New York claiming breach of contract. The buyer sought a stay of the action and arbitration in Moscow pursuant to the arbitration clause in the Russian master agreement. The issue in this case was whether the arbitration clause in the Russian master agreement had been incorporated into the contract between the buyer and the seller.

The Court, in order to grant the stay for arbitration pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958), had to establish whether the parties had concluded a written agreement to arbitrate as required by Article II (a) of that Convention.

The Court held that the contract was governed by the CISG as at the time of the conclusion of the contract the parties had their places of business in contracting states, according to Article 1 (1) (a) of the CISG). The CISG was applied to determine whether there was a written agreement to arbitrate between the parties.

The Court found that the seller was bound by the arbitration agreement. The agreement was part of the buyer's original offer which the seller was deemed to have accepted. In reaching its conclusion, the court took into account the previous practices of the parties according to Article 8 (3) of the CISG and held that due to the extensive course of prior dealing the seller was under a duty to alert the buyer in a timely fashion of its objection to incorporating the arbitration clause (an objection made only 5 months after the offer was not considered as being timely) and since the seller knew that the buyer had already commenced performance by opening the letter of credit in its favor. The fact that the seller itself later on started performance by shipping part of the goods ordered constituted a further indication of its intention to accept the buyer's original offer according to Article 18 (1) of the CISG.222 Equally, the seller's subsequent reliance on clauses in the master agreement which it had previously excluded is yet another indication of its intention to be bound by all clauses of the master agreement under Article 8 (3) of the CISG.


222 Article 18 (1):
A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.
Chapter 4: Battle of Forms and Good Faith

The Court disregarded the seller's argument that in its reply to the buyer's original offer five months later it expressly objected to the incorporation of the arbitration agreement, thereby rendering its acceptance a counter-offer according to Article 19 (3) of the CISG.

The Court noted in a footnote that Article 11 and Article 8 (3) of the CISG essentially reject both the Statute of Frauds and the parole evidence rule.\(^{223}\)

Accordingly, the Court issued final judgment and ordered a mandatory injunction to arbitrate in Moscow.

This case is interesting through the fact that while similarities between the UCC and CISG were pointed out upper in the text, this is an example in which Filanto’s acknowledgment qualifies differently under the UCC (paragraph 2-207) and the CISG (Article 19): under UCC it rather “an acceptance with a proposal for a material modification”, while according to the CISG and Article 19 (1), it is rather seen as a counter-offer.\(^{224}\) The same author notes that Chilewich did not implicitly accept this counter-offer through his non-objection under Article 19 (2) of the CISG because the Court found the arbitration clause to be a material alteration under 19 (3) of the CISG and because the Court invoked Article 19 but also considered evidence beyond the exchanged writings (by looking at the oral negotiations over the arbitration clause), the rather harsh outcome was therefore avoided.

Case: 99C 5153, Parties: Magellan International v. Saltzitter Handel GMBH\(^ {225}\)

A United States distributor entered into negotiations with a German trader with a view to reaching an agreement for the purchase of steel bars from a Ukrainian manufacturer. During the negotiations the parties agreed on several matters (seller acting as middle-man between the U.S. buyer and the Ukrainian manufacturer), quantity of the goods, amount and method of payment, instructions for manufacturing). Nevertheless, a dispute arose when the seller, in view of the buyer’s refusal to modify the letter of credit issued for payment, threatened not to perform its contractual obligations and to sell the goods elsewhere. The buyer brought an action for anticipatory breach of contract claiming damages and specific performance of the seller’s obligations.

As to the applicable law, the Court found that, according to the facts alleged by Plaintiff, the parties had agreed that either the Illinois version of the Uniform Commercial Code (UCC) or the CISG would apply. The Court held that CISG was the law governing the dispute as a result of the fact that both parties had their places of business in Contracting States and did not expressly opt out of CISG.

The first substantive issue addressed by the Court was whether and when a contract had been concluded. In its view, the buyer's order of a determined quantity of steel, with indication of price, amounted to an offer according to Article 14 (1) and Article 8 (2) of the CISG. The seller's purported acceptance, which laid down some price adjustments, was rather a counter-offer under Article 19 (1) of the CISG. The Court concluded that the contract had been concluded with the buyer's acceptance of such counter-offer, which could reasonably be inferred from its issuing of the letter of credit according to Article 18 (1) of the CISG and from the fact that, having claimed specific performance, it confirmed its willingness to pay the price as amended by the seller.

\(^{223}\) Article 11:
A contract of sale need not to be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.


\(^{225}\) Country: USA, Date: 07.12.1999, Number: 99 C 5153, Court: U.S. District Court of Illinois, Parties: Magellan International Corporation vs. Salzgitter Handel GMBH
The second substantive issue dealt with by the Court was that of the alleged anticipatory repudiation of contract by the seller. The Court pointed out that the seller's threat not to perform its contractual obligations if the letter of credit was not amended, amounted to an anticipatory breach of contract, because the seller clearly intended to breach the contract before the contractual performance date according to Article 72 of the CISG\textsuperscript{226} and the part of the letter of credit (the bill of lading requirement) that it asked to amend was an essential one, so that the seller's insistence upon amendment of that requirement would be a fundamental breach under Article 25 of the CISG. The Court therefore awarded the buyer the damages arising out of this fundamental breach made by the seller.

Finally, in dealing with the buyer's plea for specific performance, the Court stated that this remedy is generally available under CISG according to Article 46 (1)\textsuperscript{227}, with the exception that a Court is not bound to enter judgment for specific performance unless it would do so under its own law of contracts according to Article 28 of the CISG.\textsuperscript{228} After having recalled that, according to modern judicial interpretation of Paragraph 2-716 (1) of the UCC, specific performance may be granted when the buyer proves the difficulty of obtaining similar goods on the market; the Court upheld the buyer's claim.\textsuperscript{229}

In this case the Court focused on whether there was a contract depending on whether the conditions of an offer and an acceptance were properly met. Magellan’s purchase orders were seen as offer while Salzgitter’s response with price changes was viewed as a counter-offer under Article 19 (1) of the CISG (under the UCC it would constitute an acceptance).\textsuperscript{230} The subsequent exchanges by the parties were considered by the Court as offers and counter-offers that were concluded with Magellan’s performance when it issued the line of credit. This case also covers the contract by conduct (the existence of a contract was determined because of Magellan’s performance). It could be assumed that in the case of acceptance by conduct, the mirror image rule together with the last shot doctrine would apply as Ch. Sukurs points out.\textsuperscript{231}

The position of this paper is that although this is not a clearly defined situation yet, therefore the doors for another solution still remain open since, as seen from above, the last shot rule has many disadvantages.

\textsuperscript{226} Article 72:

1. If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.
2. If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.
3. The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

\textsuperscript{227} Article 46 (1):

The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

\textsuperscript{228} Article 28:

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

\textsuperscript{229} UCC: § 2-716. Buyer's Right to Specific Performance or Replevin

1. Specific performance may be decreed where the goods are unique or in other proper circumstances.


\textsuperscript{231} Ibid
4.4 Conclusions

As this chapter has showed, the battle of forms is also a rather debated issue and there are still many unclear points linked to this problem that have to be considered. The CISG is also quiet unclear as the text of Article 19 seems to set certain rules, but their practical results tend to be different: there is a clear tendency toward the knock out rule instead of the last shot doctrine. This was showed in the text when discussing the content of this article. The presented case law also comes to support this position. It is still unclear what the outcome would be in the case of the acceptance by conduct, but several comments have to be made regarding this issue.

First, the position of this paper is that because of the fact that the CISG has the principle of good faith as its basis the preference is given to the knock out rule. This was mentioned both by scholars and by the Courts in the presented case law. The last shot doctrine does not entirely work together with the principle of good faith and therefore the Courts were less opened towards this option (especially when Article 7 (1) of the CISG imposes a duty of good faith in interpretation of the Convention).

Second, it is more difficult to deal with contracts by conduct if applying the rules of the CISG, but it makes sense to consider that, by starting the performance, the other party has accepted the last sent conditions since, if following the idea of reasonableness, it can be assumed that the party has taken knowledge of these conditions before starting the performance. Therefore, certain justification under the principle of good faith can be found (all these with reasonable time limits of course).
Conclusions

The main role of this concluding part is to point out several ideas that should be taken into consideration after reading the present paper.

As the first chapter has already pointed out, there is no single definition of good faith and therefore, the most reasonable solution would be to look at the specific situations since, as seen in this paper, there is a general understanding of what can and cannot be considered good faith. In the same time, this is an important concept in law, being traceable to the Roman law and its presence and development throughout history comes to underline its importance. The understanding of good faith does not differ in substance in the two legal systems (the Common law and the Civil law) and the difference is more or less only in formulation. Some countries impose a duty of good faith in an explicit way; other countries tend to do it more implicitly. Whatever are the reasons behind these approaches, what is important is that the final goal is the same, this fact giving the possibility of reaching working compromises when dealing with international conventions and texts such as the CISG, the PECL and UNIDROIT Principles.

The second chapter has dealt with the analysis of Article 7 of the CISG (the article dealing with the principle of good faith). Four main approaches to the role and the way of interpreting this article were briefly presented. The present paper subscribed to the idea that despite a rather vague formulation, the duty of good faith is set by the CISG in an implicit way: it can be deduced not only from the wording of Article 7, but from the text of the Convention as a whole. There are many other articles in the CISG that connect with Article 7, creating a general duty of good faith upon the parties. The conclusion of this chapter was that the principle of good faith is certainly one of the main principles the CISG is based upon, being comparable to the way it is set out in such texts as the PECL or the UNIDROIT Principles.

The third chapter has presented the case law which was grouped according to the role of good faith in negotiations, in interpretation and in the performance of a contract. In all the instances, the findings of the previous two chapters were supported. More than that, the very first presented case was supporting the position that good faith is a general principle both in the CISG and in international trade. Also, what is important to observe is that the courts often went beyond following the exact wording of Article 7 regarding this issue. They interpreted the Convention and reached the decisions respecting the principle of good faith. This was not
very different if looking from the point of view of the country in which the case was decided. This supports the idea that the final goal of the legal systems is the same despite the debate over the formulations.

The final chapter used the process of battle of forms to support the findings of the first two chapters. There are two possible ways in resolving the battle of forms and the formulation of Article 19 in the CISG on which way to be used is, as in the case of the principle of good faith, somewhat unclear. Still, the knock out doctrine was given preference in all the mentioned case law as it is regarded as being more in accordance with the principle of good faith rather than the last shot rule which is criticized as not being in accordance with this principle.

Of course, there are other aspects that could be looked into in the case of Articles 7 and 19 of the CISG. Some of them have only been occasionally mentioned as the limited space did not allowed more detailed elaborations. Among them, the relation between paragraphs (1) and (2) of Article 7 and the tendency to rely on the latter in order to avoid the debate could be further looked into. Another aspect related to the battle of forms is the contracts by conduct which, as seen, remain somewhat uncovered. However, it is believed that these issues should be investigated in a separate paper.

In conclusion, considering the findings of this paper on the role and the duty of the principle of good faith in the CISG, the theoretical analysis backed by the examples from the case law and the issue of battle of forms, it is considered that the main goals of this paper as laid down in the Introduction have been achieved.
The List of References

List of References

Books:

2) Bing Ling, *Contract Law in China*, Sweet & Maxwell Asia, 2002

Articles:

4) A. E. Farnsworth, “The Concept of “Good Faith” in American Law”, Saggi, Conferenze e Seminari, 10 [April 1993]
10) Viscasillas Pilar Perales, “Remarks on the manner in which the PECL may be used to interpret or supplement article 19 CISG. Resolving the battle of forms (conflicting general conditions)”, January 2002, available on: http://cisgw3.law.pace.edu

The Case Law*:

a) Case on Good Faith (Article 7(1) of the CISG):


* Cases are presented in the order they appear in the paper
The List of References

2) Arbitral Award, Date: 15.06.1994, Number: SCH-4318, Court: Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien (Vienna), Austria, Parties: Unknown

3) Arbitral Award, Date: 23.01.1997, Number: 8611/HV/JK, Court: ICC Court of Arbitration - Paris, Parties: W. v. R.

4) Country: Germany, Date: 28.02.1997, Number: 1U 167/95, Court: Oberlandesgericht Hamburg, Parties: not specified


8) Country: USA, Date: 11.06.2003, Number: 02-20166, Court: US Court of Appeals for the Fifth Circuit, Parties: BP Oil International and BP Exploration & Oil Inc v. Empresa Estatal Petroleos de Ecuador (PetroEcuador) et al.

9) Country: Australia, Date: 12.02.1992, Number: not specified, Court: Court of Appeal, New South Wales, Parties: Renard Constructions (ME) PTY LTD v. Minister for Public Works

10) Country: Austria, Date: 22.10.2001, Number: 1 Ob 49/01i, Court: Oberster Gerichtshof, Parties: unknown

11) Country: Belgium, Date: 15.05.2002, Number: not specified, Court: Hof van Beroep (Court of Appeal), Ghent, Parties: unknown

12) Country: Germany, Date: 26.03.1996, Number: 7 IV 75/95, Court: Landgericht Saarbrucken, Parties: unknown

13) Country: Germany, Date: 21.05.1996, Number: 22 U 4/96, Court: Oberlandesgericht Köln, Parties: unknown

14) Country: Germany, Date: 25.06.1997, Number: 1U 280/96, Court: Oberlandesgericht Karlsruhe, Parties: Unknown
15) Country: Germany, Date: 31.10.2001, Number: VIII ZR 60/01, Court: Bundesgerichtshof, Parties: unknown
17) Country: Italy, Date: 25.02.2004, Number: not specified, Court: Tribunale di Padova - Sez. Este, Parties: SO.M AGRI s.a.s. vs. Erzeugerorganisation Marchfeldgemusee GmbH & Co. KG
18) Country: Italy, Date: 31.03.2004, Number: not specified, Court: Tribunale di Padova - Sez. Este, Parties: unknown
20) Country: Germany, Date: 04.03.1994, Number: 10 U 80/93, Court: Oberlandesgericht Frankfurt am Main, Parties: Unknown
21) Arbitral Award, Date: 17.11.1995, Number: VB/94124, Court: Hungarian Chamber of Commerce and Industry Court of Arbitration, Parties: Unknown
22) Country: Germany, Date: 09.01.2002, Number: VIII ZR 304/00, Court: Bundesgerichtshof, Parties: unknown
23) Country: Switzerland, Date: 30.11.1998, Number: HG 930634, Court: Handelsgericht Zurich, Parties: unknown
26) Country: Germany, Date: 08.01.1997, Number: 27 U58/95, Court: Oberlandesgericht Köln, Parties: Unknown
27) Country: Germany, Date: 15.07.2003, Number: 7 O 221/02, Court: Landgericht Mönchengladbach, Parties: unknown
b) Cases on Battle of Forms (Article 19 of the CISG):

1) Country: Germany, Date: 06.10.1995, Number: 3C 925/93, Court: Amtsgericht Kehl, Parties: Unknown

2) Country: Germany, Date: 09.01.2002, Number: VII ZR 304/00, Court: Bundesgerichtshof, Parties: Unknown


4) Country: Germany, Date: 31.10.2001, Number: VIII ZR 60/01, Court: Bundesgerichtshof, Parties: unknown


Internet pages:

1) www.cisg.dk
2) www.unilex.info
3) http://cisgw3.law.pace.edu