

## THE DILEMMA OF GOOD FAITH IN INTERNATIONAL COMMERCIAL TRADE

ELENA CHRISTINE ZACCARIA\*

The development of human culture ... originated with the formation of human groups ... Group-living at any level only becomes possible if there is some sort of minimal co-operation and tolerance ... From that necessity, the emergence of [the] concept of good faith would seem to be inevitable.<sup>1</sup>

This generalized concept of good faith emphasises how the attitude, considered in the light of mutual confidence, correctness, 'co-operation and tolerance' is strongly connected with social and cultural needs, being the basis of every human relationship, including business relationships.<sup>2</sup>

Indeed, commercial transactions must necessarily be based on mutual trust and the confidence that each party to a contract will act reasonably and honestly, as no businessperson desirous of further access to world markets can afford to behave in a disreputable and unfair manner, for this would destroy their credit-worthiness. Moreover, there are economic risks associated with mistrust that could make contracting more difficult and inefficient.<sup>3</sup>

Nevertheless, within the business world, as indeed in most contexts where there are different advantages at stake, parties are bound to act according to their own best interests. However, in civilized cultures this behaviour is, as described above, set within a context of trade custom and balanced by social values and it is in this

---

\* Law degree (*summa cum laude*), University of Bari, Italy (2001); LLM University of Queensland, T.C. Beirne School of Law, Australia, (2003). Currently Elena Christine Zaccaria is a PhD candidate in Comparative and European Union Law at the University of Macerata, Italy.

<sup>1</sup> J Klein, 'Good Faith in International Transactions' (1993) 15 *Liverpool Law Review* 115 cites O'Connor.

<sup>2</sup> N Nassar, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long – Term International Commercial Transactions* (1995) 141.

<sup>3</sup> P J Powers, 'Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sales of Goods' (1999) 18 *Journal of Law and Commerce* 349 cites Garvin.

precise context that the importance of promoting good faith as a standard of behaviour for contracting parties cannot be underestimated.

The main problem, however, is to offer a clear understanding of the obligation of good faith given 'the varying constructions and inherent ambiguities which surround the notion of [this concept]'.<sup>4</sup> Without aiming to formulate any specific domestic interpretation of this principle, the duty of good faith can be considered as a duty of the parties to act *reasonably* as they would expect the other party to act. This definition of good faith certainly recalls the golden rule: treat others as you wish to be treated,<sup>5</sup> confirming the existence of a strong interaction between the concept of good faith and standards of morality. The question that inevitably arises is to what extent should standards of morality regulate commercial contracts.

The task of reconciling morality and commercial law within the concept of good faith has been faced very differently in the various legal systems and this is the reason why the principle of good faith, although playing an important role in domestic laws, differs greatly in its scope and application depending on the legal tradition which governs a particular commercial transaction. These differences were inevitably destined to come to a head when delegates of different legal systems were called upon to draft the United Nations Convention on Contracts for the International Sales of Goods (CISG) and attempted to introduce into the Convention a provision touching on good faith.

The aim of this paper is to establish to what extent the CISG recognises the concept of good faith and whether the Unidroit Principles can play a part in demonstrating that good faith is a shared value in international trade.

## I THE DOCTRINE OF GOOD FAITH AND THE DIFFERENT APPROACHES OF DOMESTIC LEGAL SYSTEMS

While civil law regimens recognise a general duty to negotiate and perform contracts in good faith, generally speaking the common law approach to good faith is considered to be less encompassing.

According to German law<sup>6</sup> the duty of good faith is not only a requirement to act reasonably but 'it requires a relationship of trust based on the commercial dealing of the parties in a particular transaction'.<sup>7</sup> Furthermore, it is expected that the parties act in good faith before and after a contract is formed, i.e. during both negotiation and performance of the contract.

---

<sup>4</sup> Klein, above n 1, 115

<sup>5</sup> Powers, above n 3, 316.

<sup>6</sup> Section 242 of the German BGB (known as the *Treu und Glauben* provision) states that 'the debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage'.

<sup>7</sup> Powers, above n 3, 336

Also the Italian *Codice Civile* subjects pre-contractual negotiations, formation,<sup>8</sup> interpretation<sup>9</sup> and performance of contract<sup>10</sup> to the duty of good faith. This principle is considered by Italian law as an 'ethical obligation' which is an integral part of public policy and must be respected by the parties through out the life of the contract.<sup>11</sup> Thus, under the Italian Civil Code good faith is clearly a limitation on the parties' 'freedom' as 'private control of legal transactions is not indiscriminate freedom to act, but freedom to act in good faith'.<sup>12</sup>

Instead, there is reluctance on the part of English law to recognise a general duty to act in good faith. This stems from the fairly extreme position that 'the predictability of the legal outcome of a case is more important than absolute justice' as 'it is necessary in a commercial setting that businessmen ... know where they stand'.<sup>13</sup> According to professor Goode the advantages to be gained by rejecting the 'vague' concept of good faith outweighs the disadvantages although the outcome of disputes may sometimes be hard on one of the parties. This, he regards as 'an acceptable price to pay in the interest of the great majority of business litigants'.<sup>14</sup>

Nevertheless, the rigidity of English law in not accepting a doctrine of good faith has in reality, less negative consequences than what it would appear to have on the surface. As in many cases, where good faith would be accepted in civil law, English law arrives at similar results but only 'by a different route',<sup>15</sup> without having to refer to good faith.<sup>16</sup>

This rigidity to good faith by the English legal system is not completely shared by the United States. A significant example of a good faith requirement in a common law country can be found in the American Uniform Commercial Code where good faith is defined as meaning 'honesty in fact in the contract or transaction concerned'.<sup>17</sup> Indeed, in this code over fifty sections specifically refer to such a

---

<sup>8</sup> Article 1337 Codice Civile (Negotiations and pre-contractual liability): 'The parties in the conduct of negotiations and the formation of the contract, shall conduct themselves according to good faith'.

<sup>9</sup> Article 1366 Codice Civile (Interpretation according to good faith): 'The contract shall be interpreted according to good faith'

<sup>10</sup> Article 1375 Codice Civile (Performance according to good faith): 'The contract shall be performed according to good faith'.

<sup>11</sup> According to the Italian Court of Cassation good faith must be considered as 'openness, diligent fairness and a sense of social solidarity'. See Cass. 27 October 1961, No 2425, *Repertorio del foro italiano*, 1961, voce 'Obbligazione e contratto', n 138

<sup>12</sup> N W Palmieri, 'Good Faith Disclosures Required During Precontractual Negotiations' (1993) 24 *Seton Hall Law Review* 201-202.

<sup>13</sup> R Goode, 'The Concept of Good Faith in English Law' - Centro di studi e ricerche di diritto comparato e straniero - <http://www.cnr.it/CRDC/goode.htm>.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Section 1-201 Uniform Commercial Code (UCC).

principle and section 1-203 imposes also a general obligation of good faith in the performance and enforcement of a contract.<sup>18</sup>

Following the American approach, another common law country which has just begun to recognise the need for good faith in commercial transactions, is Australia. In *Renard Constructions (ME) Pty v Minister for Public Works*,<sup>19</sup> Justice L J Priestley of the Court of Appeal of New South Wales described the doctrine of good faith as a ‘feature ... of much United States contract law’ and put forward the proposal as to whether ‘Australian law has reached the point where terms may readily be implied into contracts, having substantially the same effect as the good faith formulation in the United States’.<sup>20</sup>

Canada also has shown an interest in the concept of good faith as two studies conducted in Ontario recommended the adoption of a good faith standard for performance in contracts of sale.<sup>21</sup>

Indeed, these developments show a gradual tendency towards the concept of good faith finding favour across the common law world, although considerable differences still continue to exist among the various legal systems.

## II THE PRINCIPLE OF GOOD FAITH AND THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS

### A *The drafting history of Article 7(1) of the United Nations Convention on Contracts for the International Sales of Goods*

The attempt to resolve the divisions existing among the civil law and common law systems on the question of the principle of good faith was certainly one of the most challenging problems faced by the drafters at the debates and conferences that lead up to the United Nations Convention on Contracts for the International Sales of Goods (CISG).

Many contrasting proposals were presented by the two ‘factions’, one was represented by the civil law delegates ‘who would have preferred a provision

<sup>18</sup> A Farnsworth, ‘The Concept of Good Faith in American Law’ – Centro di studi e ricerche di diritto comparato e straniero <http://soi.cnr.it/~crdcs/crdcs/farnswrt.htm>.

<sup>19</sup> *Renard Constructions (ME) Pty v Minister for Public Works* (1992) 26 NSWLR 234, 268.

<sup>20</sup> Ibid 239. See also Justice Priestley’s comments on good faith in ‘A Guide to Comparison of Australian and United States Contract Law’ (1989) 12 *University of New South Wales Law Journal* 4.

<sup>21</sup> E A Farnsworth, ‘The Eason – Weinmann Colloquium on International and Comparative Law: Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws’ (1995) 3 *Tulane Journal of International and Comparative Law* 54-55, citing Ontario Law Reform Commission, 1 Report on Sale of Goods (1979) 103 and Ontario Law Reform Commission, Report on Amendment of the Law of Contract (1987) 165

imposing directly on the parties the duty to act in good faith'<sup>22</sup> and the other was represented by the common law delegates 'who on the contrary were opposed to any explicit reference to the principle of good faith in the Convention'.<sup>23</sup> The Working Groups final 'hard-won compromise'<sup>24</sup> was what eventually became Article 7 of the CISG which is the provision of the Convention that refers to the principle of good faith.

However, the outcome reached by the Working Group cannot be considered satisfactory as the only provision in the CISG that mentions good faith is rather ambiguous and unclear, making it difficult to define on just which terms the CISG recognises the concept of good faith and what role this principle covers in the Convention.

An early draft submitted by the Hungarian delegate required the contracting parties to 'observe the principles of fair dealing and to act in good faith'<sup>25</sup> in the course of the formation of the contract. This proposal was strongly opposed by those delegates who believed that a concept of good faith would be much too vague and its interpretation would mean 'different things to different people in different moods at different times and in different places'.<sup>26</sup> The main fear was that such vagueness could generate uncertainty and be a threat to uniformity in international trade. Indeed, it was argued that 'national courts applying the provision would necessarily be influenced by their own legal and social traditions with the result that different interpretations would be given to the provision in different countries'.<sup>27</sup>

Another main objection to the Hungarian proposal was that a provision which imposes on the parties a general obligation to act in good faith would be unnecessary as this principle is already implied in every legal system. This argument was adamantly rejected by civil law delegates who argued that 'because of the universal recognition of the principle of good faith there would be little harm in including it in the Convention'.<sup>28</sup> Furthermore, in support of the Hungarian proposal it was also underlined that 'the extension of such a provision into an instrument regulating international trade would be a valuable extension of a norm of conduct which is widely recognised as necessary in international trade'.<sup>29</sup>

---

<sup>22</sup> M H Bonell, 'Article 7: Interpretation of the Convention' in C M Bianca and M J Bonell (eds), *Commentary on the International Sales Law – The 1980 Vienna Sales Convention* (1987) 83.

<sup>23</sup> Ibid 84.

<sup>24</sup> Farnsworth, above n 21, 55

<sup>25</sup> Bonnell, above n 22, 68 cites the Hungarian proposal.

<sup>26</sup> T Keily, 'Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (1999) 3 *Vindabona Journal of International Commercial Law and Arbitration* 21.

<sup>27</sup> Bonell, above n 22, 69.

<sup>28</sup> Ibid.

<sup>29</sup> Keily, above n 26, 21 citing the different proposals presented during the drafting of the Convention.

Eventually, this animated discussion brought the Working Group to accept what is defined as a 'strange arrangement',<sup>30</sup> 'an awkward compromise',<sup>31</sup> or 'a rather peculiar provision',<sup>32</sup> incorporating the principle of the observance of good faith in the article that deals with the interpretation and application of the provisions of the Convention, namely Article 7.

B *Good Faith under the CISG: a Mere Interpretative Tool of the Convention or a Standard of Behaviour for the Contracting Parties?*

The first sub-paragraph of Article 7 of the CISG states that:

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.

Although some sort of compromise was reached between the delegates and a provision which mentions good faith was finally included in the Convention, this did not bring a definite conclusion to the debate as considerable disagreement then commenced over the interpretation of the wording of Article 7(1) of the CISG.<sup>33</sup> Indeed, a question that necessarily arises is that of how to interpret the result of this compromise and whether the principle of good faith in Article 7 is relevant only as an interpretative tool of the Convention or if it is also relevant as a standard of behaviour for the contracting parties.<sup>34</sup>

Part of the literature supports the belief that Article 7(1) of the CISG should be narrowly construed, considering good faith only as a mere instrument for the interpretation of the Convention.<sup>35</sup> Indeed, professor Farnsworth's opinion on this issue is that 'this provision does no more than instruct a court interpreting the Convention's provisions to *consider* the importance of the listed factors,'<sup>36</sup> i.e. (i) regard to the international character of the Convention; (ii) need to promote uniformity in its application and (iii) observance of good faith.

---

<sup>30</sup> G Eorsi, 'A Proposal for the 1980 Vienna Convention on Contracts for the International Sale of Goods' (1983) 31 *American Journal of Comparative Law* 354.

<sup>31</sup> T E Carbonneau and M S Firestone, 'Transnational Law – Making: Assessing the Impact of the Vienna Convention and the Viability of National Adjudication' (1986) 1 *Emory Journal of International Dispute Resolution* 74.

<sup>32</sup> Bonell, above n 22, 84.

<sup>33</sup> H E Hartnell, 'Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods' (1993) 18 *Yale Journal of International Law* 64.

<sup>34</sup> F Ferrari, 'Uniform Interpretation of the 1980 Uniform Sales Law' (1994) 24 *The Georgia Journal of International and Comparative Law* 210.

<sup>35</sup> Farnsworth, above n 21, 56; P Winship, 'Commentary on Professor Kastely's Rhetorical Analysis' (1988) 3 *Northwestern Journal of International Law and Business* 631; A Di Majo, 'L'osservanza della buona fede nei Principi Unidroit sui contratti commerciali internazionali' in M J Bonell and F Bonelli, *Contratti commerciali internazionali e Principi Unidroit* (1997) 154

<sup>36</sup> Farnsworth, above n 21, 55.

Thus, it can be construed that Article 7(1) does not impose on the parties an obligation to act in good faith. This approach is also confirmed in the ICC Award No 8611 of 1997 where the Court stated that:

[s]ince the provision of Article 7(1) of the CISG concerns only the interpretation of the Convention, no collateral obligation may be derived from the promotion of good faith.<sup>37</sup>

However, some commentators<sup>38</sup> have rightly observed that, even though it maybe accepted only as an interpretative tool of the Convention, the principle of good faith has a strong impact on the parties' behaviour, as it is not possible to interpret the CISG without also affecting the contract. Professor Korenu strongly supports this point of view stating that 'good faith cannot exist in a vacuum and does not remain in practice as a rule unless the actors are required to participate'.<sup>39</sup>

This valuable argument has led leading scholars such as professor Bonell and professor Schlechtriem to prefer a broader reading of Article 7(1) of the CISG, pointing out that 'the need to promote ... the observance of good faith in international trade' is also necessarily directed to the parties as a standard of behaviour to be maintained throughout the life of the contract.<sup>40</sup>

Indeed, notwithstanding the language used in Article 7(1), the relevance of the principle of good faith is not limited to the interpretation of the Convention, as there are many provisions in the CISG that would be meaningless without recognizing a general duty to act in good faith.

The most significant example of these 'implicit good faith provisions'<sup>41</sup> is Article 8(3) of the CISG which provides that in determining the intent of the parties, due consideration must be given to statements made during the negotiation process. This Article prevents one party from inducing the other to sign the contract by using the so-called 'bait and switch manoeuvre',<sup>42</sup> i.e. asserting during the oral negotiations that the contract means on thing and then claiming something else, once the agreement is reached. Thus, Article 8 of the CISG is useful:

---

<sup>37</sup> ICC Arbitral Award No 8611 of 1997, URL: <http://cisgw3.law.pace.edu/cases/978611i1.html>.

<sup>38</sup> Bonell, above n 22, 84; P Schlechtriem, *Good Faith in German Law and in International Uniform Laws* – Centro di studi e ricerche di diritto comparato e straniero – <http://soi.cnr.it/~crdcs/crdcs/frames24.m>.

<sup>39</sup> P Koneru, 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles' (1997) 6 *Minnesota Journal of Global Trade* 120.

<sup>40</sup> Bonell, above n 22, 84; A Rosett, 'Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods' (1984) 45 *Ohio State Law Journal* 290. See also Oberlandesgericht Munchen: 7 U 1720/94 of 8 February 1995. URL: <http://cisgw3.law.pace.edu/cases950208g1.html>.

<sup>41</sup> Klein, above n 1, 23.

<sup>42</sup> Ibid 125.

to disable *bad faith* alterations of the agreement ... [which are] typically attempted by parties who creatively 'reinterpret' previous oral assurances, later emphasizing what remains within the 'four corners' of the written contract.<sup>43</sup>

Another requirement of good faith is implicit in the provisions which demand the parties to act in a manner consistent with the agreement, as for example Article 39 of the CISG which provides the duty of the buyer to give notice of the lack of conformity 'within a reasonable time'. This Article prevents *bad faith* attempts by the buyer who, after having discovered the defects may be tempted to wait in order to deprive the seller from exercising his/her right to cure the defects or to preserve evidence for use in any possible dispute.

Even Article 40 of the CISG carries strong good faith implications, as it prevents the seller from relying on the buyer's failure to promptly inspect the goods and give notice of the lack of conformity, in the event that the seller knew or could not have been unaware of the existence of such defects. Indeed, Article 40's limitations on the seller would be 'virtually meaningless without good faith at its foundation'<sup>44</sup> as few scenarios exist in which a seller 'knew or could not have been unaware' of the lack of conformity and not be in *bad faith*.<sup>45</sup>

All these Articles are clearly only a limited example of the many provisions in the Convention which make specific reference to good faith, proving the 'vitality of [this principle] ... as an unspoken yet omnipresent requirement of the CISG'.<sup>46</sup>

Following this line of reasoning, good faith must be considered as 'one of the *general* principles underlying the Convention as a whole'<sup>47</sup> and thus, it can be used as a means of gap-filling by applying Article 7(2) of the CISG.<sup>48</sup> Indeed, as professor Bonell argues:

this will be the case, if during the negotiation process or in the course of the performance of the contract a question arises for which the Convention does not contain any specific provision and the solution is found in applying, in accordance with Article 7(2), the principle of good faith.<sup>49</sup>

However valuable and desirable this interpretation may be, it is an irrefutable fact that during the *travaux préparatoire* common law delegates were strongly against

---

<sup>43</sup> Ibid 126.

<sup>44</sup> Klein, above n 1, 130.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid 131.

<sup>47</sup> Bonell, above n 22, 85 – of the same author see *An International Restatement of Contract Law* (2<sup>nd</sup> ed, 1997) 81.

<sup>48</sup> According to Article 7(2) of the CISG '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'.

<sup>49</sup> Bonnell, above n 22, 85.

the introduction of a general principle of good faith for the fear that it may be applied also for circumstances beyond the language of the CISG.

Indeed, these prejudices were not unfounded if one considers that there have been attempts among the literature to apply Article 7(1) of the CISG in the most unexpected circumstances. An example that immediately comes to mind is that of certain scholars who believe that a general principle of good faith may be applied to solve situations of hardship, i.e. situations where unpredicted circumstances arise which make performance of the contract excessively onerous for one of the parties. According to this part of the literature, under such circumstances it would be in contrast with the principle of good faith stated in Article 7(1) of the CISG to expect the disadvantaged party to perform the contract in its original terms.<sup>50</sup> Although a solution for situations of hardship based on the principle of good faith is typical of the German concept of *Wegfall der Geschäftsgrundlage*, it was far beyond the Convention drafters' intentions as it is very rarely, if ever applied by any other legal system.

Thus, it seems rather difficult to accept this broad interpretation of Article 7(1) of the CISG as, if accepted, it would clearly endanger the need to promote uniformity in international trade. If it was the drafters' belief that the concept of good faith should be interpreted without restoring to domestic definitions,<sup>51</sup> then they fell far short of achieving their intended aim.

This does not mean that good faith should be confined to a mere principle for interpreting the Convention, as Article 7(1) does impose on the parties a duty to act in good faith, although strictly within the prescribed limits of the CISG. Indeed, the opposition by common law delegates during the *travaux préparatoire* was not against the principle of good faith in itself but against an introduction of a *general* principle that may be applied through out the life of the contract and for circumstances beyond the language of the CISG.

However, whatever the drafter's intentions were when including good faith, they should have been aware that an ambiguous wording like that used in Article 7(1) of the CISG would have led to as much uncertainty as there would have been had a general principle of good faith been introduced.

Indeed, considerable disagreement over the interpretation of Article 7(1) exists not only among the literature but also among those judges and arbitrators who apply the

---

<sup>50</sup> H Stoll in P Schlectriem, *Commentary on the UN Convention on the International Sales of Goods (CISG)* (1998) 617-618; P Schlectriem, *Good Faith in German Law and in International Uniform Laws – Centro di studi e ricerche di diritto comparato e straniero –* <http://soi.cnr.it/~crdcs/crdcs/frames24.m>

<sup>51</sup> Schlectriem, above n 50, 65; see also Bonell, above n 22, 86 who states that 'in the context of the Convention the principle of good faith may not be applied according to the standards ordinarily adopted within the different national legal systems ... such national standards may be taken into account only to the extent that they prove to be commonly accepted at a comparative level'.

CISG's provisions. In the already mentioned ICC Award No 8611 of 1997<sup>52</sup> the tribunal conceived good faith only as a mere instrument to interpret the Convention, arguing that 'no collateral obligation may be derived from the promotion of good faith'. While part of the literature would certainly agree with this interpretation, it is in contrast with the decisions of other courts that have interpreted Article 7(1) as an international recognition of the duty to act in good faith.<sup>53</sup>

Once again, this confirms the difficulty in establishing and maintaining a 'uniform sales code' and in deciding disputes in a manner consistent with the spirit of the CISG. Thus, 'the only thing that seems clear through all these competing arguments is that the uniformity sought by the CISG is definitely lacking with respect to the existence of a good faith obligation'.<sup>54</sup>

### III THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Unlike the ambiguities of the CISG, there is no doubt that the Unidroit 'Principles of International Commercial Contracts' impose a general duty of good faith on the contracting parties.

The Principles' main provision on good faith is Article 1.7 which requires each party to 'act in accordance with good faith and fair dealing in international trade' and prevents the parties from excluding or limiting this duty in their contract. The reference to 'good faith and fair dealing in international trade' shows that these two concepts should not be applied 'according to the standards ordinarily adopted within the different national legal systems'<sup>55</sup> as such national standards may be taken into account only to the extent that they prove to be commonly accepted in all legal systems.<sup>56</sup> Indeed, the values and standards necessary to give form to the concept of 'good faith and fair dealing' must be drawn from the truth of the case, taking also into account the particular trade in which the parties operate.<sup>57</sup>

---

<sup>52</sup> ICC Arbitral Award No 8611 of 1997, URL: <http://cisgw3.law.pace.edu/cases/978611i1.html>.

<sup>53</sup> *SARL Bri Production 'Bonaventure' v Society Pan African Export*, Cour d'appel de Grenoble of 22 February 1995. URL: <http://cisgw3.law.pace.edu/cases/950222f1.html>. See also *Renard Constructions (ME) Pty v Minister for Public Works* (1992) 26 NSW LR 234, 268. Although the latter case did not deal with an international transaction it refers to Article 7(1) of the CISG to support the proposition that the principle of good faith is recognised in contract law

<sup>54</sup> Powers, above n 3, 347-348.

<sup>55</sup> Official Commentary, UNIDROIT Principles of International Commercial Contracts, Roma (1994) 17.

<sup>56</sup> H van Houtte, 'The Unidroit Principles of International Commercial Contracts' (1996) II *International Trade and Business Law Annual* 12; G Alpa, 'Prime noto di raffronto tra i Principi Unidroit e il sistema contrattuale italiano' (1996) 1 *Contatto e impresa/Europa* 318.

<sup>57</sup> P Schlechtriem, *Good Faith in German Law and in International Uniform Laws* - Centro di studi e ricerche di diritto comparato e straniero - <http://soi.cnr.it/~crdcs/crdcs/frames24.m>; G Moens and P Gillies, *International Trade and Business: Law, Policy and Ethics* (2000) 84; M J Bonell, 'I Principi UNIDROIT dei contratti commerciali internazionali: origini, natura e finalit ' (1995) *Diritto del commercio internazionale* 15.

The duty of good faith is not found only in Article 1.7 as the Official Commentary mentions a great number of Articles of the Unidroit Principles which constitute ‘a direct or indirect application of the principle of good faith and fair dealing’.<sup>58</sup> Indeed, there are many provisions throughout the different chapters of the Principles that impose a duty of good faith and fair dealing not only in the performance of the contract but also in its negotiation, its interpretation and in the event of a breach of the contract,<sup>59</sup> thus, proving that good faith ‘may be considered one of the fundamental ideas underlying the Principles’.<sup>60</sup>

However, although a general duty to act in good faith is expressly stated, the Unidroit Principles are not binding unless chosen by the parties as the ‘rules’ governing the contract.

Thus, it seems clear that these Principles do not carry the same force of law as the CISG but this was probably the main reason that led the drafters of the Unidroit rules to introduce a general principle of good faith in spite of the differences existing among civil law and common law systems on such a controversial an issue. Indeed, the Unidroit Principles were drawn up by academics, judges and lawyers, who did not act as representatives of their native countries but in a personal capacity, as experts in the field of contract law and international trade law and therefore were not subject to outside conditioning but were free to express their honest opinions.

This scenario made it easier for the drafters to establish rules that although not common to most of the existing legal systems are more suited to the specific needs of international trade.’<sup>61</sup>

#### IV CONCLUSIONS

Although the ambiguous wording used in Article 7(1) of the CISG does not make it clear to what extent the Convention recognises the principle of good faith, there is no doubt that this concept is implicit as a standard of behaviour for the contracting parties in many articles of the Convention.

The overall importance of this concept is confirmed by the fact that during the *travaux préparatoires* even common law delegates were not against the concept of good faith in itself but only against the introduction of a *general* principle of good faith due to the fear that it might be applied too broadly, i.e. even in circumstances

---

<sup>58</sup> Official Commentary, *Unidroit Principles of International Commercial Contracts* (1994) 16.

<sup>59</sup> See, for instance, Articles 2.4(2)(b), 2.15, 2.16, 2.18, 2.20, 3.5, 3.8, 3.10, 4.1 (2), 4.2(2), 4.6, 4.8, 5.2, 5.3, 6.1.3, 6.1.5, 6.1.16(2), 6.1.17(1), 6.2.3(3)(4), 7.1.2, 7.1.6, 7.1.7, 7.2.2.(b)(c), 7.4.8 and 7.4.13.

<sup>60</sup> Official Commentary, above n 58, 16-17.

<sup>61</sup> Bonell, *The Unidroit Principles and Transnational Law*, seminar on ‘The Use of Transnational Law in International Contract Practice and Arbitration’ – Center for Transnational Law – Munster, [www.unidroit.org/english/publications/review/articles/2000-2.htm](http://www.unidroit.org/english/publications/review/articles/2000-2.htm).

that would not be acceptable to common law, as for instance, in the case of pre-contractual negotiations.

Nevertheless, the final result achieved by the delegates has in some ways shown itself to be unsatisfactory, as its vagueness has given rise to both broad and narrow interpretations of Article 7 of the CISG, demonstrating that in any case, no uniform view has actually been reached on the question of good faith.

Moreover, although the CISG does incorporate a positive obligation to act in good faith this is strictly limited to those articles prescribed in the Convention. Thus, despite what certain leading scholars such as professor Bonell and professor Schlectriem have stated,<sup>62</sup> the concept of good faith cannot truly be considered as 'one of the *general* principles underlying the Convention as a whole'<sup>63</sup> as it was this very issue which one faction of the Working Group strongly opposed during the *travaux préparatoires*.

However, it is also true that reference to the drafters' intention is only one of the elements that must be taken into account when interpreting the CISG as 'once adopted, the Convention like any other law, inevitably has a life of its own, and its meaning can change with time'.<sup>64</sup>

Since the drafting of the Convention, good faith has been finding increasing favour across the common law world. This important factor, together with other international agreements such as the Unidroit Principles and the Principles of European Contract Law (PECL) and their acceptance of adoption in their provisions of a general duty to negotiate and perform in good faith, shows that there is a growing sensibility towards this issue generally.

Although it is still premature to consider good faith as a general principle recognised in international trade, these recent developments may in the future contribute to give a broader interpretation to Article 7(1) of the CISG.

---

<sup>62</sup> Bonell, above n 22, 85; H Stoll in Schlectriem, above n 50, 617-618; Schlectriem, above n 57.

<sup>63</sup> Bonnell, above n 22, 85.

<sup>64</sup> Ibid 90.