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Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)

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1. Introduction

The degree to which commercial law should reflect and uphold standards of morality is deeply contested. What does morality embrace? Whose morality should be enforced? And to what degree should standards of morality regulate commercial dealings? Sir Gerard Brennan, the former Chief Justice of the High Court of Australia, believes that in the commercial law there is a moral standard to be observed. He rejects the position represented in a literary setting by George Essex Evans: [\[1\]](#)

Six days shalt thou swindle and lie!
On the seventh - tho' it soundeth odd -
In the odour of sanctity
Thou shalt offer the Lord, thy God,
A threepenny bit, a doze, a start, and an unctuous smile,
And a hurried prayer to prosper another six days of guile.

At a domestic level, the task of reconciling morality with the law has been approached in divergent ways by different legal systems. For example, § 242 of the German Civil Code provides that the conduct of parties to a contractual relationship is to be governed by the requirements of good faith.[\[2\]](#) The converse position however, is found in the English common law. In 1988 the English Court of Appeal stated that "in the case of commercial contracts, broad concepts of honesty and fair dealing, however laudable, are a somewhat uncertain guide when determining the existence or otherwise of an obligation which may arise even in the absence of any dishonest or unfair intent."[\[3\]](#) To re-emphasize the severity of the English position, Wills J in *Allen v. Flood*[\[4\]](#) stipulated that "any right given by a contract may be exercised as against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of the right."

Now imagine a scenario where advocates from common law England and civil law Germany,[\[5\]](#) representing antithetical positions with respect to good faith and contract convene to seek a compromise on a legal position on this and related issues. This was the formidable scenario confronting delegates whose task it was to draft the Vienna Convention on Contracts for the International Sale of Goods (CISG).

If the complex web of morality and commercial law poses difficulties in a domestic context, then elevating the issues to an international stage was certain to amplify the problem such that a marriage of contract and good faith would appear illusory. However, within the CISG a marriage of sorts does exist. Article 7(1) provides 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."

Professor Farnsworth described article 7(1) as a "statesman like compromise".[\[6\]](#) And indeed, an examination into the drafting history of the CISG reveals that the final position seen in article 7(1) was a compromise between advocates and critics of 'good faith'. The purpose of this paper is to outline the meaning of good faith and examine to what degree and effect good faith is recognised by the CISG. For example, can good faith be used solely in the interpretation of the Convention, or does it extend to impose an obligation on the actions of contracting parties? Further, article 7(1) expressly refers to good faith, but are there other sources which provide for good faith within the CISG? Some commentators contend that good faith is also a general principle of

the CISG and of *lex mercatoria*, the consequences of which will be examined. In addition, what insight into this discussion can be discerned from the legislative history and commentaries on the CISG. Disputes involving the CISG have been determined by courts and tribunals, so how have the courts interpreted good faith in the CISG? Given the need for uniformity in the application of the CISG, reference to judicial trends regarding the use and scope of good faith is particularly pertinent. Finally, this paper shall consider what impact uniform and global changes in international commercial law should have on the future interpretation and evolution of the CISG. The CISG represents a consensus position amongst signatory nations on the law governing the international sale of goods. Therefore, if the domestic law of these nations is changing to now recognise good faith in contractual relations, should this change be reflected in the CISG?

2. What is Good Faith?

Good faith is not a principle which can be adequately defined, and this paper does not seek to do so. For example, good faith has been described vaguely as a rechristening of fundamental principles of contract law, as a phrase with no general meaning but which operates to exclude various forms of bad faith, and as a discretionary standard preventing parties recapturing opportunities foregone on contracting.^[7] Good faith has also been compared with unconscionability, "fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, decent behavior, a common ethical sense, a spirit of solidarity, community standards of fairness"^[8] and "honesty in fact," indicating that good faith is an extremely versatile concept. And indeed, its versatility is an essential characteristic because, as stated by Aristotle, "there are some cases for which it is impossible to lay down a law, so that a special ordinance becomes necessary. For what is itself indefinite can only be measured by an indefinite standard."^[9]

However, good faith is not an obligation to act altruistically. Regretfully, Lücke writes, "one must leave the universal adoption of such a noble motive to some far-distant and much more enlightened age."^[10] Good faith does not require the abandoning of self-interest as the governing motive in contractual relations. However, it may prevent a party from abusing a legal right, as the cases below will illustrate.

Within the context of the CISG, good faith is manifested in various forms. For example, 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.^[11] Further late acceptance will be deemed to be timely where it was sent in such circumstances that it would have reached the offeror in due time if the transmission had been normal.^[12] It should be noted that the doctrine of good faith is broader in its scope,^[13] but these examples^[14] do give an indication of the type of obligation a duty of good faith requires. Common is a sense that parties to a contract for the international sale of goods are required to do all that is reasonable, and prohibited from doing all that is not reasonable, to ensure the contract remains on foot. This is consistent with the principle of contract continuance embodied within the CISG.

3. Uniformity

The very nature of the CISG as a multilateral convention means that a uniform application of its provisions is crucial. This goal is reflected in article 7(1), which emphasizes the importance of the CISG's international character and the need to promote uniformity in its application. Essentially, this provision is designed to counteract the "homeward trend"^[15] in interpretation, that is, "the risk that judges from different cultural and legal backgrounds are apt to rely upon individual national legal heritages."^[16] Phanesh Koneru notes that "[t]he integrity of the Convention and its role as an international body of law to be respected and widely followed depends on how its various provisions are interpreted by the judiciary in a given country."^[17] For these reasons, Koneru describes article 7(1) as "arguably the single most important provision ensuring the future success of the Convention."^[18]

The need for and importance of a uniform application of the CISG gives added significance to a discussion and analysis of case law decided using the Convention. Whilst the case law does not establish a binding transnational precedent, it is only by looking at judicial and arbitral decisions that we can gauge whether the CISG is successfully promoting international trade in the manner intended by its authors.^[19] It is within this context that I will consider several cases and question whether they correctly interpret and apply the role of good faith envisaged for the CISG. Before proceeding to this examination however, it is necessary to look at the Convention debates, outline arguments both for and against a good faith provision, explain what compromise was reached, what it means and how commentators have subsequently approached this question.

4. Common Law v. Civil Law: Clash and Compromise

The inclusion of good faith within article 7(1) of the CISG represents a "hard-won compromise"^[20] between two factions divided upon common law and civil law lines. Common law delegates forcefully opposed any explicit reference in the Convention to the principle of good faith.^[21] Civil law delegates however, favoured imposing a positive obligation and duty upon contracting parties to govern their conduct according to the principle of good faith. Concessions were made from both factions with a recommendation "that as a compromise good faith could survive but should be shifted to the provisions on interpretation of the Convention, thus . . . giving it an honorable burial."^[22] A further proposal suggested that good faith should apply to the interpretation of the contract rather than the Convention, but the common law delegates again found this unacceptable.

The common law opposition to the inclusion of a good faith provision in the CISG was predicated on the argument that good faith was a moral exhortation which should not be given the status of a legal obligation binding on contracting parties.^[23] This principle of morality, whilst said to be desirable,^[24] was further rejected on the basis that it was "antithetical to the value of certainty in the commercial law developed in common-law systems".^[25] Certainty in contract is a corollary of freedom of contract and classical contract theory presupposes that there can be "no duty to contract except on terms agreed upon."^[26] Commentators have observed

with surprise the ferocity with which common law lawyers opposed the imposition of a good faith provision,^[27] Friedrich Juenger suggesting that the common law lawyers may have smelt "a civilian plot to undermine the certainties to which they are accustomed."^[28]

Good faith was also said to be too ambiguous, a "protein phrase"^[29] meaning "different things to different people in different moods at different times and in different places."^[30] Therefore, it was feared that a good faith provision in the CISG would ultimately endanger uniformity as "national courts would be influenced by their own legal and social traditions"^[31] in the application of such an obligation.

A further interesting observation made by the opponents of good faith was that it was unnecessary to include a good faith requirement in a specific provision of the CISG as good faith is implicit in all national laws regulating business activity.^[32] The converse was also correctly asserted in support of a good faith provision, that is, as "[t]he principle of good faith is universally recognized . . . there is no harm in including it in the Convention."^[33]

Additional arguments were mooted in favor of a good faith provision. Civil law advocates suggested 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 recognized as necessary in international trade."^[34] The issue of non-uniformity was also countered with the suggestion that any initial problems with non-uniform interpretation would be overcome with the promotion of a body of case law.^[35] Also, courts and tribunals would be directed to the text of article 7(1) which stresses the need for a uniform interpretation of the CISG and outlines the methodology for achieving this end. In any event, good faith did find its way into article 7(1) in some form, so the hurdle of uniform interpretation must still be addressed.^[36]

Lord Mansfield, an advocate of the principle of good faith,^[37] addressed the criticism that the imposition of good faith erodes certainty. In *Vallejo v. Wheeler*^[38] he stated that:^[39]

"[i]n all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon."

His words are of particular relevance to the debate surrounding the role and scope of good faith within article 7(1) and the CISG. Mansfield warned that it is not the principle of good faith itself that would introduce uncertainty, but rather uncertainty would arise from not knowing whether the principle is law or not. This statement is pertinent because whilst article 7(1) of the CISG would seem to make the position quite clear, that is, that the principle of good faith applies only to the interpretation of the Convention, this is not in fact the case. Rather, the role of good faith in the CISG is uncertain as commentators differ substantially in their approach to this issue.^[40]

5. Approaches to Good Faith

Commentators have outlined four possible approaches to the role and scope of good faith within the CISG. First, that the good faith provision in article 7(1) should be used only in interpreting the Convention. Second, that the conduct of contracting parties is governed by a positive obligation of good faith provided in article 7(1). Third, that good faith is a general principle of the CISG. And finally, that good faith is a general principle of *lex mercatoria* and *UNIDROIT*.

a. Criterion for interpretation

The drafting history of the CISG reveals quite plainly that good faith as a general requirement was rejected. Rather, a plain reading of the compromised position embodied in article 7(1) provides that good faith is to be used as a principle for interpreting provisions of the CISG.^[41] Good faith is a criterion adopted to help judges and arbitrators interpret the Convention. This position was acknowledged by the ICC Court of Arbitration Case No. 8611 of 1997, where the court stated that "[s]ince the provisions of Art. 7(1) CISG concerns only the interpretation of the Convention, no collateral obligation may be derived from the 'promotion of good faith'".^[42]

However, this approach to article 7(1) is not without its complications. How is a tribunal, directed by article 7(1) to interpret the Convention having regard to the need to promote the observance of good faith in international trade,^[43] best able to achieve this goal? Surely good faith in international trade can only be truly promoted by requiring parties to so act. The objective of promoting good faith would be undermined by an interpretation of article 7(1) which allowed parties to escape liability where their conduct is *mala fides*. Koneru supports this point by 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."^[44]

Even if the position is accepted that article 7(1) does not impose an obligation of good faith on contracting parties, but merely requires provisions of the CISG to be interpreted in good faith, a problem remains. The CISG outlines rights and obligations of parties to an international sale of goods. Article 7(1) provides that the principle of good faith should be used when interpreting these provisions. Surely it is not possible to interpret the CISG in good faith without also indirectly affecting the conduct of parties.^[45] This point was illustrated in Case Number 7 U 1720/94, heard before the German Provincial Court of Appeal.^[46]

This case involved an Italian buyer and a German seller. The parties had concluded a contract for the sale of eleven cars. The contract of sale provided that the buyer was to furnish a bank guarantee in favor of the seller, which it did. The time of delivery was determined after the contract was concluded. Five cars were ready in August and the other six in October. However, in October, the

buyer informed the seller that acceptance of the delivery of cars was impossible due to extreme exchange rate fluctuations between the Lira and the Deutschmark. The buyer asked the seller to defer delivery from the supplier. Rather, the seller cancelled its orders with the supplier and demanded and received payment of the bank guarantee. The court ordered the seller to repay the guarantee moneys as they had been obtained without legal grounds - the bank guarantee was to cover an obligation to pay and was not to act as a penalty for not taking delivery by the buyer. However, the buyer's claim for damages was dismissed. The court determined that there had not been a fundamental breach, as the cars were ready for delivery in October, therefore there was no right to avoid for non-delivery. In any event, the buyer failed to declare the contract avoided at the time.^[47] To allow the buyer to declare the contract void at the time of the trial, two and a half years after the event, would violate the principle of good faith in article 7(1) of the CISG.

The court did not elaborate further as to their interpretation of good faith in article 7(1) of the CISG. It appears the court may have interpreted the provisions relating to avoidance, particularly article 49 which gives the parties the power to avoid, and article 26 which provides that avoidance is only effective if notice is given, with a view to promoting good faith in international trade as directed in article 7(1). That is, giving notice of avoidance two and a half years after the right arose would not be in good faith. In this sense, the objective of the civil law advocates who preferred a general requirement of good faith has been indirectly achieved. Provisions of the Convention can not be interpreted in good faith without that interpretation having consequences for the conduct of contracting parties.

However, circumstances may arise where conduct which is mala fides will not be caught by provisions of the CISG interpreted in good faith. A general requirement of good faith would therefore be necessary to remedy an action which, although strictly within the prescribed limits of the CISG, is not in good faith. Possibly it was the precise intention of the Convention drafters in agreeing on the article 7(1) compromise that, when available, good faith interpretation of CISG provisions could remedy conduct not in good faith but a general obligation of good faith would not be available for circumstances beyond the language of the CISG. However, even if this were the case, recourse could possibly be had to good faith as a general principle of the CISG.

b. General requirements of good faith

Despite the express rejection of good faith as a general requirement during the drafting conventions, some commentators still attest that the CISG embodies an obligation of good faith as a general requirement. Nives Povrzenic writes that "[t]he provision 'the need to promote... the observance of good faith in international trade' should be given a broad interpretation in the sense that it is addressed to the parties to each individual contract of sale as well as to the Convention itself."^[48] She argues that the subjects of commercial law are parties to commercial transactions, and that good faith is a leading principle in the field of commerce which can not be ignored.^[49] Whilst Povrzenic finds support from eminent authors such as Michael Bonell^[50] and Peter Schlectriem,^[51] it remains an irrefutable fact that good faith as a general requirement was rejected during the drafting of the Convention. To subsequently allow such an interpretation, however desirable, may tend to undermine the Convention process, although some authors believe that the continued "criticism, which seeks to broaden the effect of good faith, will in the course of time lead to the recognition of a general obligation on the parties to behave accordingly."^[52] Certainly, there are cases which can be interpreted as favouring this apparently rejected position.

In *SARL BRi Production "Bonaventure" v. Society Pan African Export*,^[53] a term of a contract for the sale of jeans from a French manufacturer/seller to an American based buyer specified that the jeans purchased were to be sent to South America and Africa. When negotiating the contract and during performance, the seller repeatedly and insistently demanded proof regarding the destination of the jeans sold. During the second delivery, it became apparent that the jeans had been shipped to Spain in breach of the contract. The seller refused to continue any further deliveries to the American buyer, at which time the buyer brought proceedings in the French courts. However, the court found that the buyer had fundamentally breached the contract under article 25 of the CISG by not telling the seller the destination of the goods and by sending them to Spain when the contract stipulated that they were to be sent to South America and Africa. In addition, the court ordered the buyer to pay damages for abuse of process. This finding was based on the conduct of the buyer, "contrary to the principle of good faith in international trade laid down in article 7 CISG by the adoption of a judicial stand as plaintiff in the proceedings, constituted abuse of process".^[54]

In effect, the court relied upon article 7(1) of the CISG in finding that the buyer had breached an obligation to govern its conduct in good faith. The buyer's conduct of initiating legal proceedings in circumstances where it was clearly in breach was said to be "contrary to the principle of good faith in international trade laid down in article 7 CISG".^[55] The court appears to have suggested that contracting parties have a positive obligation to regulate their conduct in good faith, and for a party to commence court proceedings in circumstances where they are clearly at fault is not in good faith.^[56]

The decision in the German case, number 7 U 1720/94 could also be interpreted in this manner. There the court found late exercise of a right to avoid was not in good faith. Whilst this case may be explained by the court interpreting the provisions of the CISG in good faith to indirectly impose this obligation on the parties, it might also be explained by the court relying on article 7(1) as imposing a general obligation of good faith.

If nothing else, the reference to the above two judgments illustrates one of the difficulties in establishing and maintaining a uniform sales code. As tribunals around the globe are responsible for interpreting and applying the provisions of the CISG, the burden is also upon them to promote uniformity by deciding disputes in a manner consistent with the spirit of the CISG and the judgment of other tribunals. It is true that the doctrine of precedent does not apply to bind courts and tribunals to foreign judgments, but in the spirit of international cooperation which formed the CISG, foreign judgments should at least be considered to further uniformity. This position is supported by article 7(1) which directs decision makers to have regard to the 'international character' of the

Convention when interpreting its provisions. That is, the CISG should not be read through domestic lenses but projected against an international background.^[57] Consideration of foreign decisions in formulating a judgment under the CISG would be consistent with the international character of the Convention. However, frequently these judgments are not made publicly available. And even where they are available, the reasons and basis for the court's decision is often not expressed. All these factors mean that it is increasingly difficult to keep the code uniform.

c. General principle of the CISG

No uniform commercial code could hope to include provisions governing all circumstances which arise within the scope of its application. To overcome the problem of filling those 'gaps' within the CISG, article 7(2) was introduced. Article 7(2) provides that:

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

The methodology for "gap filling", according to article 7(2) follows two steps. First, reference is made to general principles on which the CISG is based and in the absence of such principles, one resorts to the rules of private international law, that is, the applicable domestic law. ^[58]

General principles can be discerned from the text of the Convention^[59] and from its legislative history. An approach based on general principles is preferred because it is the procedure that best promotes a uniform interpretation of the CISG. Interpretations based on general principles are more likely to depict the spirit underlying the Convention because general principles "represent the 'common ground' on which the international delegates understood each other and agreed to join together in formulating the Convention".^[60] Also, if there are gaps, it is only logical that a solution is sought by looking within the four corners of the CISG itself wherever possible.^[61]

Good faith is a general principle of the CISG. It is a principle that permeates the Convention, providing the policy basis for many provisions. For example, not only is it expressly provided for in article 7(1), good faith is also manifested in provisions relating to the: ^[62]

"non-revocability of an offer where it was reasonable for the offeree to rely upon the offer being held open and the offeree acted in reliance on the offer; ^[63] . . . the status of a late acceptance which was sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time;^[64] . . . the preclusion of a party from relying on a provision in a contract that modification or abrogation of the contract must be in writing;^[65] . . . the rights of a seller to remedy non-conformance of the goods;^[66] . . . [a provision] 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 38 and 39] 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;^[67] . . . the loss of the right to declare the contract avoided;^[68] . . . [and provisions] which impose on the parties obligations to take steps to preserve the goods.^[69]

In addition, provisions of the CISG reflect a foundation in good faith through its variants such as reasonableness and fair dealing.^[70] Indeed, so pervasive is the presence of good faith that the obligation on the parties must exist.^[71] This is despite Professor Farnsworth's lonely cry amidst a sea of support to the contrary, that it would be "a perversion of the compromise to let a general principle of good faith in by the back door."^[72]

Furthermore, there is a possibility that the principle of good faith is not excludable. Whilst article 6 provides that "parties may exclude the application of this Convention or . . . derogate from or vary the effect of any of its provisions",^[73] Bonell argues that the provisions of article 7(1), particularly the good faith obligation, can not be excluded by any agreement. Bonell states that^[74]

"to permit the parties to derogate . . . by agreeing on rules of interpretation used with respect to ordinary domestic legislation would be inconsistent with the international character of the Convention and would necessarily seriously jeopardize the Convention's ultimate aim, which is to achieve worldwide uniformity in the law of international contracts of sale and to promote the observance of good faith in international trade."

Should the mandatory nature of good faith be accepted, its existence as a general principle is further supported. As Bonell suggests, not only is good faith expressly provided for within the CISG, but it is of such importance to the operation and success of the Convention as a uniform law that to allow parties to exclude it by agreement should not be permitted. Farnsworth again seeks to criticise this position by pointing out that opponents to the inclusion of good faith, in compromising on article 7, would be doubly surprised as they "intended neither that a duty of good faith would nevertheless creep in as a general principle nor that the parties would be powerless to do anything about it."^[75]

The ICC Arbitration Case No. 8611^[76] of 1997 reveals how the general principle of good faith can be identified and applied to govern the conduct of contracting parties. This case involved a contract of sale for goods between a German company (the seller) and a Spanish company (the buyer). The contract stipulated that the German company would exclusively supply the Spanish company with the particular goods (a type of machinery).^[77] However, the German seller had a right to terminate the contract if the Spanish buyer did not purchase a stipulated amount of goods in any one year. In 1991, the Spanish buyer bought less than this amount, so in 1992 the seller informed the buyer that it would no longer exclusively supply the goods. The dispute then arose when the German seller sought payment from the Spanish buyer of invoices plus interest. The buyer did not dispute having received the

specified goods, but claimed a right to set-off any damages due to the seller's supply of defective goods^[78] and refusal to take the goods back or supply the buyer with the required replacement parts.

The buyer had urged the seller to deliver the replacement parts several times.^[79] The seller agreed it had an obligation to supply replacement parts for the delivered goods, and stated it would have so delivered had the buyer paid for the outstanding invoices. However, the Tribunal dismissed this claim as the failure to deliver the replacement parts appeared before the buyer was in arrears of payment. The Tribunal then made reference to article 433 of the German Civil Code which provides that the producer of machines^[80] has an obligation to supply replacement parts for a limited time, even if no special agreement exists. This obligation arises in most cases from the principle of good faith according to article 242 of the German Civil Code.^[81] Article 433 of the German Civil Code was distinguished from article 7(1) of the CISG, the Tribunal noting that as article 7(1) concerns only the interpretation of the Convention, no collateral obligation may be derived from the 'promotion of good faith'.^[82]

Despite this finding however, the Tribunal still found in favor of the buyer as if the case had been determined under article 433 of the German Civil Code. By relying on provisions of the CISG, other than article 7(1), as well as general principles of the Convention,^[83] the Tribunal held that the seller had breached its obligation to supply replacement parts. In reaching this conclusion, the Tribunal noted that:

"regarding the relationship between the parties, a prompt delivery of replacement parts had become normal practice as defined by Art. 9(1) of the CISG by which the [seller] was bound. In accordance with Art. 33(c) of the CISG, the seller has to deliver the goods within a reasonable time after the conclusion of the contract. From Art. 7(2) it can be derived that the obligation to deliver subsequent replacement parts would have to be fulfilled within a reasonable time after receiving the buyer's order."^[84]

A comparison was made between article 7(1) of the CISG which the court felt imposed no collateral obligation to act in good faith, and the German Civil Code which does. The court noted that under the German Civil Code, the seller would have an obligation to supply replacement parts to the buyer, but because of the limited nature of article 7(1) of the CISG no corresponding obligation would apply. However, the court still found that the seller had breached its obligation to supply replacement parts to the buyer. The court's decision was based on the fact that delivery of replacement parts had become normal practice between the parties^[85] and that article 33(c) of the CISG provided for delivery of goods within a reasonable time. From these provisions, the court derived the general principle that replacement parts should be delivered within a reasonable time. As noted above, reasonableness is considered a variant of good faith within the CISG. Furthermore, the decision reached using general principles of the Convention was the same as that which would have been found under the German Civil Code which expressly provides for good faith as a general requirement.

A further example is seen in Arbitral Award SCH-4318 delivered in Vienna on June 15 1994.^[86] There the court determined that the principle of estoppel^[87] "represents a special application of the general principle of good faith and without doubt is seen as one of the general principles on which the Convention is based."^[88] In that case, goods delivered by an Austrian Seller to a German buyer were defective in quality. The seller refused to pay damages on the basis that the buyer did not give timely notice of the defect as required under the CISG. However, the court determined that the seller was estopped from raising the defence of untimely notice as the seller's conduct had led the buyer to believe that the seller would not raise this defence. By pursuing negotiations so as to seemingly reach a settlement agreement and by continuing to ask the buyer for information regarding the status of its complaint, the court effectively determined that it would not be in good faith to allow a defence of untimely notice.

d. General principles outside the CISG

Article 7(2) of the CISG clearly provides that only general principles on which the CISG are based are to be considered in filling gaps. Despite this clear limitation, some authority asserts that recourse can and should be made to general principles outside the Convention. Should this argument succeed, a positive obligation to act in good faith may bind parties to the international sale of goods, as good faith is a recognised principle of *lex mercatoria* ^[89] and is also provided for in the UNIDROIT principles.^[90]

The CISG requires a connection between the CISG and any general principles sought to be used before a party may seek to rely on them. This limitation is necessary to prevent the arbitrary use of general principles which would undermine a uniform interpretation of the Convention. As the provision of a uniform law was a primary objective of the Convention drafters, this limitation would appear justified and necessary. However, this limitation also frustrates the development of the CISG. International conventions, unlike domestic legislation, lack a mechanism for change. For example, the CISG makes no provision for a legislative or editorial body with the authority to amend and add to the Convention so as to remedy deficiencies, or in response to developments in the legal systems of the world. Further, there is no authoritative judicial body which may give binding determinations as to the law. Indeed, the debate on the true position of good faith would be well served if an authoritative court or tribunal was empowered to give a judgment binding, or at least of authoritative persuasion, to all tribunals and courts around the world dealing with the CISG. This approach would certainly enhance a uniform interpretation. But these mechanisms are not available, and nor is it foreseeable that countries jealously guarding their sovereignty would acquiesce to the provision of legislative and judicial institutions to regulate the CISG.

Is the CISG therefore, confined to its historical vacuum, unable to adapt to the changing world around it? Should recourse to general principles of law found outside the CISG be allowed, this need not necessarily be the case. Ulrich Magnus argues that general principles found outside the Convention should generally be excluded, but an exception should be made for general principles "which are internationally coordinated and actually find general acceptance."^[91] Whilst the CISG may not have initially

been based on such principles, such a development should not be impeded in order to prevent petrifying this uniform law.

This issue has particular pertinence to the position of good faith within the CISG. As already indicated, the role and scope of good faith is subject to varying opinions. The foundation of this disagreement is located in the disparate approaches to good faith espoused by the common law and civil law representatives respectively, during the Conventions which formulated the final text of the CISG. Reflecting the law as it stood in their domestic jurisdictions, delegates from common law systems were opposed to incorporating good faith into the Convention. However, the law in some of these common law countries has undergone fundamental changes. For example, due to the influence of equitable doctrines such as unconscionability, Australian common law is now better prepared to accept and recognise an obligation of good faith upon parties. The question thus arises as to whether the CISG should reflect this development?

Magnus would argue that the CISG should indeed reflect this development, subject to the proviso that the general principles which develop are truly "internationally accepted". This question can be examined in light of the UNIDROIT principles and the apparent conversion in some common law countries to a position supportive of good faith in contractual relations.

(1) UNIDROIT Principles of International Commercial Contracts

Magnus is of the opinion that the UNIDROIT principles should be utilised as additional general principles of the CISG.^[92] The UNIDROIT principles were developed on a broad comparative law basis, the final text representing features common to some of the world's legal systems.^[93] The principles serve various functions, one such function being to act as a guideline for interpretation and filling gaps in international conventions. This intention alone however is insufficient reason for expanding the scope of application of the UNIDROIT principles to general principles of the CISG. Rather Magnus finds support for his position by referring to the extensive correspondence between the UNIDROIT principles, the provisions of the CISG and the general principles derived from within the CISG boundaries.^[94] In addition, the approach adopted in developing the UNIDROIT principles reflects a body of law that is internationally accepted.

A further mechanism to introduce the UNIDROIT principles and *lex mercatoria* generally, is found in article 6 of the CISG. As already noted, article 6 embodies the rule of "party autonomy", allowing parties to exclude, derogate or vary the application and effect of the Convention provisions. The recognition of party autonomy indicates that the CISG does not necessarily seek to "compete with the *lex mercatoria*, but rather that the two bodies of law are complementary".^[95] Utilising article 6 therefore, parties may supplement the CISG or fill gaps that remain by reference to usages included in the *lex mercatoria*,^[96] such as the observance of good faith.

Returning specifically to UNIDROIT, if it is accepted that these principles provide an additional source for general principles of the CISG, the question remains as to what consequence this has regarding the position of good faith. As noted, the provisions of the UNIDROIT principles and the CISG are very similar. This is in part due to the fact that the UNIDROIT principles were modelled on the CISG and many of the individuals who produced the CISG also produced the UNIDROIT principles.^[97]

Article 1.7(1) supports the imposition of a positive obligation of good faith on contracting parties. It provides that "each party must act in accordance with good faith and fair dealing in international trade."^[98] Bonell states that the only difference between article 1.7 of the UNIDROIT principles and article 7 of the CISG relates to the wording rather than the substantive content of the obligation.^[99] In so arguing, reliance on the UNIDROIT principles reaffirms support for the positive obligation of good faith. It should be remembered however, that the persuasive weight of this position is contingent on the rather flimsy suggestion that the UNIDROIT principles can provide a source of general principles to be used in interpreting the provisions of the CISG.^[100] Furthermore, despite Bonell's respected opinion to the contrary, it seems clearly evident that good faith under the UNIDROIT principles goes well beyond the CISG, to expressly impose an obligation of good faith on contracting parties.

However, the existence of the UNIDROIT principles assists in demonstrating that good faith is a principle of law located in different legal systems and that it is a shared value in international trade.^[101] This is now also increasingly true for countries with a common law tradition.

(2) Common law developments

Commentators describe the CISG as an autonomous instrument,^[102] meaning it is capable of generating new rules and adapting to changing circumstances. In this regard, Magnus argues that the development of the CISG should not be restricted to the mechanisms outlined in article 7(2). Rather, the criterion by which Magnus would regulate the evolution of the CISG is whether a principle is truly internationally accepted.

When the CISG was drafted, good faith was generally treated with contrasting respect by civil law and common law legal systems. That is, there was no truly internationally accepted approach to good faith in contractual relations. However, this position has changed. Good faith is now increasingly being recognised by common law courts and writers, suggesting a position of international acceptance is now a realistic possibility.

Lord Mansfield in 1766 referred to good faith as "the governing principle... applicable to all contracts and dealings".^[103] In terms of the approach taken by the common law to good faith, this decision represents the high watermark. However, the 19th and early 20th centuries witnessed a uniform reaction against this position.^[104] Reasons include "the rise of legal positivism with its distaste for legal principles which contain broadly conceived ethical components and its almost frantic quest for legal certainty."^[105] All these arguments were aired in the context of the debates preceding the formulation of the CISG. During this period, in which the

common law sought the "right balance between fairness and justice on the one hand, and certainty and predictability on the other, the scales tipped strongly against fairness and in favor of predictability."[\[106\]](#)

Whilst the pendulum swayed strongly against the inclusion of a good faith obligation in contractual relations for the greater part of this century, circumstances indicate that the scales are again turning. In the United States the doctrine of good faith now finds general acceptance. Section 1 - 203 of the Uniform Commercial Code (UCC) provides that "[e]very contract of duty within this Act imposes an obligation of good faith in its performance or enforcement."[\[107\]](#) Furthermore, over fifty provisions of the UCC specifically mention good faith.[\[108\]](#) Likewise, the Restatement (2nd) of Contracts includes a provision stating that "every contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement."[\[109\]](#) In addition, in Canada, good faith has been described as "a vital norm in contract law"[\[110\]](#) and two Ontario Law Reform Commission studies have advocated rules on good faith.[\[111\]](#) In England however, good faith is "specifically not recognised, although in many cases application of particular rules would achieve the same result."[\[112\]](#)

The developments in North America have been replicated in Australia. In a 1992 case, Priestley JA concluded "that people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance."[\[113\]](#)

Mr Justice Priestley drew a parallel between the recognised obligation to exercise contractual powers reasonably and honestly and "the notions of good faith which are regarded in many civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contracts"[\[114\]](#) Priestley further noted that there are various indications, including the ratification by many countries of article 7(1) of the CISG, to support the proposition that good faith is recognised in contract law or at least that the time is fast approaching when such an idea may become orthodox.

Friedrich Juenger makes the interesting observation that the common law reluctance to openly adopt good faith as a governing contractual principle may well be based on terminology rather than substance.[\[115\]](#) The courts in Australia recognise the equitable doctrine of unconscionability.[\[116\]](#) Therefore, had article 7 of the CISG been phrased to prohibit parties to contracts for the international sale of goods from engaging in conduct that is 'unconscionable'[\[117\]](#), support from common law lawyers might have been more forthcoming; even though unconscionability "is but another variant of justice, the basic ingredient of good faith."[\[118\]](#)

Good faith is finding increasing favor across the common law world. The scenario is therefore set for the common law to declare the induction of a fundamental principle[\[119\]](#) whereby good faith is recognised as an obligation governing the conduct of parties to a contract. Such a principle would bring the common law into conformity with the law in civil jurisdictions and result in a principle that is truly internationally accepted. Accordingly, it would be appropriate for the CISG to recognise that this positive obligation exists. In light of the alternative arguments supporting the recognition within the CISG of an obligation of good faith that regulates the conduct of contracting parties, the recognition of this principle by both common law and civil law systems alike would tend to consummate its position within the fabric of the CISG.

6. Conclusions

Aristotle wrote that "the law is always a general statement, yet there are cases which it is not possible to cover in a general statement."[\[120\]](#) This was the jurisdiction of equity, being "a rectification of law where law is defective because of its generality."[\[121\]](#) Aristotle was warning against the rigid universal application of principles, arguing that all justice systems need balancing equitable principles to account for different individual circumstances. In civil law systems, the requirement of good faith tempered the rigid application of contractual principles. In common law countries however, the focus until recently was placed heavily on the importance of certainty and distaste for broadly conceived ethical components. To a degree, equity was able to remedy the strict application of contract law, with doctrines similar to good faith such as unconscionability. However, the claim is being made in common law countries that equity today "has no exclusive proprietorship of 'good faith'."[\[122\]](#) Case law and commentary suggests that the common law scales are presently tilting in favor of also recognising good faith as an obligation governing the conduct of parties.

Should this occur, good faith will become a principle recognised internationally. This position is consistent with the inclusion of good faith obligations in the *lex mercatoria* and the UNIDROIT principles. The concern of this paper was the degree to which the CISG recognised good faith. Does good faith operate in the CISG as a balancing equitable principle in the manner suggested by Aristotle?

As discussed, opinions on this question vary. The recognition of good faith as a positive obligation does find support within the CISG. Eminent authors such as Bonell and Schlectriem hold that article 7(1) of the CISG embodies an obligation of good faith as a general requirement. Beyond this position, it is an irrefutable fact that good faith, in its various manifestations, permeates the body and spirit of the CISG. That is, good faith is a general principle of the CISG, and as such can be utilised by virtue of the article 7(2) procedure.

Alternatively, a narrow, literal interpretation of article 7(1) of the CISG, and consideration of its legislative history, favors the use of good faith by judges and arbitrators merely as an instrument of interpretation. Whilst the consequences of this position may indirectly regulate party conduct against a good faith standard, no general obligation of good faith would exist under a narrow approach to article 7(1). However, not only does this stance offend the wisdom of Aristotle, it poses greater questions as to how the CISG should be interpreted in the future. A literal interpretation confining good faith to a criteria for interpretation is more in line

with the traditional common law approach to statutory interpretation, an approach "geared to the concept of written law as an exception to the common law... [in which] statutes must be interpreted narrowly." [123] This approach is inappropriate when interpreting an international convention. Rather, the "provisions of the Convention must be flexible enough to be workable without formal amendment for a long period of time. The Convention, therefore, must be regarded as an autonomous system, capable of generating new rules." [124] If good faith truly is a principle recognised internationally, then the CISG should be allowed to reflect this development to its full extent. To suggest otherwise is to confine the CISG to its historical vacuum.

Bibliography

- Aristotle., *The Nocomatnean Ethics*, trans. H. Rackham, Harvard University Press, Cambridge, Mass., 1926.
- Beatson, J & Friedman, D. (eds)., *Good Faith and Fault in Contract Law*, 1995, Oxford University Press, Great Britain.
- Berger, K.P., *An International Restatement of Contract Law*, 1993, Kluwer Law and Taxation Publishers, Deventer.
- Bianca, C.M. & Bonell, M.J. (eds)., *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, 1987, Giuffr , Milan.
- Brennan, B., 'Commercial law and morality' *Melb Uni L.R.* 17 (1989) 100.
- Bridge, Michael G., 'Does Anglo-Canadian contract law need a doctrine of good faith?' (1984) *9 Canadian Business Law Journal* 385.
- Carboneau, Thomas E., (ed)., *Lex Mercatoria and Arbitration*, 1990, Transnational Juris Publications, Inc., New York.
- Enderlein, Fritz & Maskow, Dietrich., *International Sales Law*, 1992, Oceana Publications Inc., New York.
- Farnsworth, E. Allen., 'The Eason-Weinmann Colloquim on International and Comparative Law: Duties of good faith and fair dealing under the UNIDROIT Principles, relevant international conventions, and national laws', *3 Tul. J. Int'l & Comp. L.* 47.
- Ferrari, Franco., 'Uniform interpretation of the 1980 Uniform Sales Law', Pace University School of Law, <http://www.cisg.law.pace.edu/cisg/biblio/franco.html>
- Finn, Paul., 'Commerce, the common law and morality', (1989) *17 Melb Uni L.R.* 87.
- Finn, Paul (ed)., *Essays on Contract*, 1987, The Law Book Company Limited, Sefton - NSW.
- Gabriel, H., *Practitioner's Guide to the Convention on Contracts for the International Sale of Goods (CISG) and the Uniform Commercial Code (UCC)*, 1994, Oceana Publications, Inc., USA.
- Hellner, Jan., 'Gap-filling by analogy', CISG W3 database, Pace University School of Law, <http://www.cisg.law.pace.edu/cisg/text/hellner.html>
- Hillman, Robert A., 'Cross-reference and editorial analysis: Article 7', CISG W3 database, Pace University School of Law, <http://www.cisg.law.pace.edu/cisg/text/hillman.html>
- Hiscock, Mary E., 'The keeper of the flame: good faith and fair dealing in international trade', *29 Loyola of Los Angeles Law Review*, 1059.
- Honnold, John., *Uniform Law for International Sales Under the 1980 United Nations Convention*, (2nd ed), 1991, Kluwer Law and Taxation Publishers, Cambridge.
- Juenger, Friedrich K., 'Listening to law Professors talk about good faith: some afterthoughts', *69 Tulane Law Review* 1253.
- Kessler, Friedrich & Fine, Edith., 'Culpa in contrahendo, bargaining in good faith, and freedom of contract: a comparative study', (1964) *77 Harvard Law Review* 401.
- Klein, John & Bachechi, Carla., 'Precontractual liability and the duty of good faith negotiation in international transactions', *17 Houston Journal of International Law* 1.
- Koneru, Phanesh., 'The international interpretation of the UN Convention on Contracts for the International Sale of Goods: an approach based on general principles', Pace University School of Law, <http://www.cisg.lawpace.edu/cisg/biblio/koneru.html>
- Kritzer., *International Contract Manual: Guides to Practical Applications*, Kluwer.
- Marsh, P. D. V., *Comparative contract law: England, France, Germany*, 1994, Gower Publishing, Great Britain.
- Magnus, Ulrich., 'General Principle of UN-Sales Law', translated by Lisa Haberfelner, CISG W3 database, Pace University School of Law, <http://www.cisg.law.pace.edu/cisg/text/magnus.html>

Magnus, Ulrich., 'Remarks on good faith', CISG W3, Pace University School of Law, <http://www.cisg.law.pace.edu/cisg/principles/uni7.html>

Newell, Douglas K., 'Will kindness kill contract?', (1995) 24 Hofstra L. Rev. 455.

Nicholas, Barry., 'The Vienna Convention on International Sales Law', (1980) 105 The Law Quarterly Review 201.

Perillo, Joseph M., 'UNIDROIT Principles of International Commercial Contracts: The black letter text and a review', 63 Fordham Law Review 281.

Povrzenic, Nives., 'Interpretation and gap-filling under the United Nations Convention on Contracts for the International Sale of goods', CISG W3 database, Pace University School of Law, <http://www.cisg.law.pace.edu/cisg/biblio/gap-fill.html>

Priestley, L. J., 'A guide to a comparison of Australian and Unites States contract law', (1989) 12 UNSW Law Journal 4.

Redfern, Alan & Hunter, Martin., International Commercial Arbitration, (2nd ed.) 1991, Sweet & Maxwell Limited, Great Britain.

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

Satory, Beate., CISG W3 database, Pace University School of Law, <http://cisgw3.law.pace.edu/cases/978611i1.html>

Schlectriem, Peter., Einheitliches UK-Kaufrecht. Das Ubereinkommen der Vereinten Nationen uber internationale Warenkaufvertrage - Darstellung und Texte [Uniform UN Sales Law. The CISG: Description and Tests], 1981, Mohr, Tubingen.1

Secretariat Commentary on the CISG; CISG W3 database, Pace University School of Law, <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html>

Winship, P., "Commentary on Professor Kastely's rhetorical analysis", (1988) 3 Northwestern Journal of International Law and Business 623.

FOOTNOTES

1. 'Ode to the Philistines' by George Essex Evans, quoted by G. Brennan in 'Commercial law and morality' Melb Uni L.R. 17 (1989) 100 at 100-101.

2. Section 242 German Civil Code: The debtor is bound to perform according to the requirements of good faith, ordinary usage being taken into consideration. Note also s.157 which provides that: Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration.

3. Banque Financiere de la Cité S.A. v. Westgate Insurance Co. Ltd (unreported, Court of Appeal of England, 28 July 1988).

4. 1898 App. Cas. 1, at 46 (P.C. 1897).

5. In addition to delegates representing legal systems based on Islamic law and Communist doctrine.

6. E. Allan Farnsworth., 'The Eason-Weinmann Colloquim on International and Comparative Law: Duties of good faith and fair dealing under the UNIDROIT Principles, relevant international conventions, and national laws', 3 Tul. J. Int'l & Comp. L. 47 at 55.

7. Ibid., pp.59-61.

8. H. K. Lücke., "Good Faith and Contractual Performance", in P. Finn (ed)., Essays on Contract, 1987, The Law Book Company Limited, Sydney, p.160.

9. Aristotle., The Nocomatnean Ethics, trans. H. Rackham, Harvard University Press, Cambridge, Mass., 1926, p.315.

10. Lücke., op. cit., p.162.

11. Article 16(2)(b) of the CISG.

12. Article 19(2) of the CISG.

13. Secretariat Commentary on the CISG; CISG W3 database, Pace University School of Law, <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html>

14. See discussion below on general principles of the CISG for further examples.

15. Jan Hellner., 'Gap-filling by analogy', CISG W3 database, Pace University School of Law, <http://www.cisg.law.pace.edu/cisg/text/hellner.html>

16. Nives Povrzenic., 'Interpretation and gap-filling under the United Nations Convention on Contracts for the International Sale of

goods', CISG W3 database, Pace University School of Law, <http://www.cisg.law.pace.edu/cisg/biblio/gap-fill.html> : "As an example, many common law judges are more inclined to stick to a plain meaning and grammatical structure of a text, while civil law colleagues are apt to give greater recourse to preparatory materials and the legal history of a statute."

17. Phanesh Koneru., 'The international interpretation of the UN Convention on Contracts for the International Sale of Goods: an approach based on general principles', Pace University School of Law, <http://www.cisg.law.pace.edu/cisg/biblio/koneru.html>

18. Id.

19. The removal of legal barriers and the adoption of uniform rules so as to promote international trade is an express aim of the CISG contained in its the preamble.

20. Nives Povrzenic., loc. cit.

21. This is not to suggest that the approach to good faith within the common law world was completely homogenous. For example, a Canadian proposal regarding Article 6 suggested that parties be prohibited from excluding an obligation of good faith but that parties could agree to the standard by which the performance of a good faith could be measured. This proposal was ultimately rejected. See: Pace University School of Law, <http://cisg.law.pace.edu/cisg/1stcommittee/summaries6.html> & <http://joe.law.pace.edu/cisg.text.colloquy7/html>

22. Eörsi in Kritzer., *International Contract Manual: Guides to Practical Applications*, Kluwer, p.69.

23. Koneru., loc. cit.; Kritzer., *Ibid.*, p.70.

24. Povrzenic., cit.

25. Mary E. Hiscock., 'The keeper of the flame: good faith and fair dealing in international trade', 29 *Loyola of Los Angeles Law Review*, 1059 at 1061.

26. Friedrich Kessler & Edith Fine., 'Culpa in contrahendo, bargaining in good faith, and freedom of contract: a comparative study', (1964) 77 *Harvard Law Review* 401 at 409.

27. Kritzer., op. cit., p.70.

28. Friedrich K Juenger., 'Listening to law Professors talk about good faith: some afterthoughts', 69 *Tulane Law Review* 1253 at 1255.

29. Lücke., op. cit., p.160.

30. Kessler & Fine., loc. cit., quoting Michael G. Bridge, 'Does Anglo-Canadian contract law need a doctrine of good faith?' (1984) 9 *Canadian Business Law Journal* 385 at 407.

31. Povrzenic., loc. cit.

32. Kritzer., loc. cit.; Koneru., loc. loc. cit.; John Klein & Carla Bachechi., 'Precontractual liability and the duty of good faith negotiation in international transactions', 17 *Houston Journal of International Law* 1 at 20.

33. Klein & Bachechi., *Id.*, quoting the Draft Convention on Contracts for the International Sale of Goods. sic

34. *Id.* sic

35. *Id.*

36. Franco Ferrari., 'Uniform interpretation of the 1980 Uniform Sales Law', Pace University School of Law, <http://www.cisg.law.pace.edu/cisg/biblio/franco.html>

37. *Carter v. Boehm* 97 Eng. Rep. 1022, where Lord Mansfield said the principle of good faith was "applicable to all contracts and dealings", at 1164.

38. 98 Eng. Rep. 1012.

39. *Ibid.*, at 1017.

40. Lord Mansfield said it was of greater importance that the rule should be certain, one way or another. Vilus made the related observation, that "[a]fter the representatives of the civil law countries have understood that any insisting on their version was useless, they suggested that the referring to the principle of good faith should be omitted from the text. It is a pity that they did not succeed in that. Instead, an unlucky combination has been adopted, an inconvenient compromise" : Vilus., 'Common law institutions in the UN Sales Convention', *Estudios in Homenaje Joge Barrera Graf*, Vol.11 (Mexico: Universiaded Mac. Aut. de Mexico, 1989) pp.1438 - 1440 in Kritzer., op. cit., p.70. Mansfield may well have suggested that the drafters of the CISG would be better to completely omit any reference to good faith in the CISG or expressly exclude its relevance, rather than agree to an

uncertain compromise.

41. I shall discuss below whether a plain, literal reading of the CISG or any international convention is appropriate.

42. ICC Arbitration Case No. 8611 of 1997. Case text translated by Beate Satory., CISG W3 database, Pace University School of Law, <http://cisgw3.law.pace.edu/cases/978611i1.html> - Note however, that the court proceeded to find an obligation of good faith elsewhere in the CISG, see below.

43. Although the distinction is academic, there is even conjecture as to whether the emphasis is on 'observing good faith' and 'promoting the observance of good faith'. That is, should article 7(1) read: "in the interpretation of the convention... regard is to be had... to the observance of good faith in international trade", or should it read: "in the interpretation of the convention... regard is to be had to... the need to promote... the observance of good faith in international trade". See Koneru., *loc. cit.*

44. *Id.*

45. Also see Fritz Enderlein & Dietrich Maskow, *International Sales Law*, 1992, Oceana Publications Inc., New York, p.54.

46. . Oberlandesgericht (Provincial Court of Appeal) München, case number 7 U 1720/94. Decided on 8 February 1995. Case law on UNCITRAL texts (CLOUT), abstract no. 133. Reproduced at <http://cisgw3.law.pace.edu/cases950208g1.html>

47. As required under article 26 CISG: A declaration of avoidance of the contract is effective only if made by notice to the other party.

48. Povrzenic., *loc. cit.*

49. *Id.*

50.

I. M.J. Bonell in C.M Bianca & M.J. Bonell (eds.), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention*, 1987, Giuffrè, Milan, p.84.

51. Peter Schlectriem., *Einheitliches UK-Kaufrecht. Das Ubereinkommen der Vereinten Nationen uber internationale Warenkaufvertrage - Darstellung und Texte*[Uniform UN Sales Law. The CISG: Description and Tests], 1981, Mohr, Tubingen, p.25.

52. Enderlein & Maskow., *op. cit.*, p.55; P. Winship., "Commentary on Professor Kastely's rhetorical analysis", *Northwestern Journal of International Law and Business*, 3 (1988) 623 at 635.

53. Case number 93/3275. Cour d'appel (Appeal Court), Grenoble, France. Decided on 22 February 1995. Case law on UNCITRAL texts (CLOUT), abstract no. 154. Reproduced at <http://cisgw3.law.pace.edu/cases/950222f1.html>

54. *Id.*

55. *Id.*

56. Note, the court finding may also have been based upon good faith as a general principle of the CISG. As the full judgment is not available, it is difficult to say which approach the court has taken.

57. Ferrari., *loc. cit.*

58. Note that some authors support the settlement of unsolved questions by analogical application of specific provisions before proceeding to general principles or rules of private international law. See Ferrari., *loc. cit.*

59. U. Magnus argues that general principle can be derived from the text of the CISG in four ways: 1) some provision explicitly claim their applicable to the entire convention; 2) some general principles can be derived by analogy; 3) some provision include principles subject to generalisation; & 4) the overall context may show that a certain basic rule is implicitly assumed. See Ulrich Magnus., 'General Principle of UN-Sales Law', translated by Lisa Haberfelner, CISG W3 database, Pace University School of Law, <http://www.cisg.law.pace.edu/cisg/biblio/magnus.html>

60. Koneru., *loc. cit.*

61. Ferrari., *loc. cit.*; See also Robert A. Hillman., 'Cross-reference and editorial analysis: Article 7', CISG W3 database, Pace University School of Law, <http://www.cisg.law.pace.edu/cisg/text/hillman.html>

62. Secretariat Commentary on the CISG; CISG W3 database, Pace University School of Law, <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html>

63. Article 16(2)(b) of the CISG.

64. Article 21(2) of the CISG.
65. Article 29(2) of the CISG.
66. Articles 37 & 38 of the CISG.
67. Article 40 of the CISG.
68. Articles 49(2), 64(2) & 82 of the CISG.
69. Articles 85 to 88 of the CISG.
70. See articles 16(2)(b) [reasonable reliance]; 18(2), 33(c), 39(1), 43(1), 46(2), 46(3), 47(1), 48(2), 49(2), 63(1), 64(2)(b), 65(1), 65(2), 73(2), 75, 79(4) [reasonable time]; 34, 37, 86(2) [unreasonable inconvenience or expense]; 88(1) [unreasonable delay]; 76(2) [reasonable substitute]; 75 [reasonable manner]; 79(1) [reasonable expectations]; 85 [reasonable steps]; 88(2) [reasonable measures to sell]; 72 [reasonable time for notice]; 35(2)(b) [unreasonable reliance]; 38(3) [reasonable opportunity for examination]; 88(2) [unreasonable expense]; 8(2), 25 [reasonable person]; 48(1) [unreasonable delay, inconvenience or expense]; 44 [reasonable excuse]; 72(2), 88(1) [reasonable notice]; 77, 86(1) [reasonable steps in the circumstances]; 85, 86(1), 87, 88(2) 88(3) [reasonable expense]. See Koneru., loc. cit.
71. Id.
72. Farnsworth., 'Eason-Weinmann Colloquim', op. cit., p.56. The compromise he refers to being that made between those who wanted good faith as a general obligation in the CISG and those who wanted no reference to good faith at all.
73. Article 6 of the CISG.
74. Bonell in Bianca & Bonell., op. cit. p.96, sic. Note, Bonell's position found support in a Canadian proposal to prohibit the ability of parties to exclude the obligation of good faith, see footnote 21 above.
75. Farnsworth., 'Eason-Weinmann Colloquim', op. cit., p.62.
76. ICC Arbitration Case No. 8611 of 1997. Case text translated by Beate Satory., CISG W3 database, Pace University School of Law, <http://cisgw3.law.pace.edu/cases978611i1.html>
77. The translated text does not identify the type of goods, nor does it state the exact names of the parties other than their nationality.
78. The seller's claim regarding the supply of defective goods failed as the buyer neither alleged nor proved a reasonable excuse for the omission of the required notice as required under article 44 of the CISG.
79. The Tribunal made particular reference to a letter dated 16 July 1991 in which the buyer repeated its request for delivery of the parts and further explained the damage being caused to the buyer as a result of the sellers non-compliance, the buyer being unable to fulfil its own orders to customers.
80. In addition to producers of series-produced automobiles and technical equipment.
81. See fn.2. In a few cases this obligation also arises according to article 26(2) of the Law governing Competition Limitation.
82. The Tribunal did however acknowledge academic authority to the contrary.
83. Article 7(2) CISG.
84. ICC Arbitration Case No. 8611 of 1997. Case text translated by Beate Satory., CISG W3 database, Pace University School of Law, <http://cisgw3.law.pace.edu/cases/978611i1.html>
85. See article 9(1) of the CISG.
86. Austria 15 June 1994 Vienna Arbitration proceeding SCH-4318.
87. Or the prohibition of venire contra factum proprium.
88. Koneru., loc. cit.
89. K.P. Berger, An International Restatement of Contract Law, 1993, Kluwer Law and Taxation Publishers, Deventer, p.544.
90. UNIDROIT Principles of International Commercial Contracts 1994, Rome. The UNIDROIT principles provide the most accessible and accurate statement of law with regard to lex mercatoria. It should be noted, however, that they are only one interpretation and don't purport to be exhaustive.

91. Magnus, loc. cit.
92. Id.
93. Id.
94. Id.
95. Bernard Audit., "The Vienna Sales Convention and the Lex Mercatoria", in Thomas E. Carbonneau (ed.), *Lex Mercatoria and Arbitration*, 1990, Transnational Juris Publications, Inc., New York, p.141.
96. Id.
97. Joseph M. Perillo., 'UNIDROIT Principles of International Commercial Contracts: The black letter text and a review', 63 *Fordham Law Review* 281 at 282.
98. Art 1.7(1) of the UNIDROIT Principles. Note Art 1.7(2) provides that parties may not exclude or limit this duty. In addition, there are several articles which incorporate concepts of good faith, see Farnsworth., 'Eason-Weinmann Colloquim', op. cit., p.49.
99. Bonell., op. cit., p.47.
100. Note: Authority also supports the view that good faith is a general principle of the CISG itself (see above). The theory expounded by Magnus would therefore only be necessary should Farnsworth's view be accepted that good faith is not a general principle of the CISG - an unlikely outcome.
101. Hiscock., op. cit., p.1061.
102. Ferrari., loc. cit.; Audit., op. cit., p.153.
103. *Carter v. Boehm* (1766) 3 Burr. 1905; 97 E.R. 1162.
104. Although Lücke argues that the reaction against the Mansfield position was stronger in England and Australia than in the United States, see Lücke., op. cit., p.157.
105. Id.
106. Id.
107. Note, the language of s.1 - 203 leaves open the issue of good faith and pre-contractual liability.
108. Farnsworth., 'Eason-Weinmann Colloquim', op. cit., p.52. For a comparison of the UCC and CISG, see H. Gabriel., *Practitioner's Guide to the Convention on Contracts for the International Sale of Goods (CISG) and the Uniform Commercial Code (UCC)*, 1994, Oceana Publications, Inc., USA.
109. Section 205 of the Restatement (2nd) of Contracts. Note, both the UCC and Restatement only seek to collate the law on contracts, they are not binding.
110. B. J. Reiter., 'Good Faith in Contracts', (1983) 17 *Val U.L. Rev.* 705 at 707.
111. See E. Allen Farnsworth., 'Good Faith in Contract Performance', in J. Beatson & D. Friedman (eds.), *Good Faith and Fault in Contract Law*, 1995, Oxford University Press, Great Britain, p.158.
112. Hiscock., op. cit., p.1070.
113. *Renard Constructions (ME) Pty v. Minister for Public Works* (1992) 26 NSW LR 234 at 268. For a contrary position, see Gummow J in the Federal Court decision of *Service Station Ass'n v. Berg Benett & Associates* 45 F.C.R. 84 (NSW Dist. Reg. 1993). Gummow noted that: "there was no binding Australian authority which mandated that there be implied into every contract as a matter of law a term that each party to a contract will act in good faith and with fair dealings in its performance and enforcement: Hiscock., op. cit., pp.1065.
114. (1992) 26 NSW LR 234 at 263-264. Note also Justice Priestley's article in: L. J. Priestley., 'A guide to a comparison of Australian and Unites States contract law', (1989) 12 *UNSW Law Journal* 4.
115. Juenger., op. cit., p.1255.
116. *Commonwealth Bank of Australia v. Amadio* (1983) 151 CLR 447.
117. On this point, consider s.51AA of the Trade Practices Act 1974 (Cth) which prohibits corporations from engaging in unconscionable conduct in trade or commerce.

118. Juenger., op. cit., p.1255. Note however, that Farnsworth argues that it is wrong to equate the equitable doctrine of unconscionability with good faith. This appears justified to the extent that good faith may be a broader doctrine than good faith. Farnsworth fears that such an interpretation would promote the use of "the doctrine of good faith as a cloak with which to envelop other doctrines". Therefore permitting an obligation of good faith to be read into the CISG could also allow the introduction of doctrines not even considered when the CISG was formulated: Farnsworth., 'Eason-Weinmann Colloquim'op. cit., pp.60-61.

119. Juenger., op. cit., p.1070.

120. Aristotle., op. cit., p.315.

121. Id.

122. P. D. Finn., 'Equity and Contract', in Finn (ed)., op. cit., p.106.

123. Audit in Carbonneau., op. cit., p.153.

124. Id.

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