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# *The Status of Good Faith in the 1980 United Nations Convention on Contracts for the International Sale of Goods*

-A Study in the Light of Article 7

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# Contents


**SUMMARY** 1

**ABBREVIATIONS** 2

**1 INTRODUCTION** 3

**1.1 Purpose** 4

**1.2 Method** 4

**1.3 Limitation** 5

**1.4 Disposition** 6

**2 ARTICLE 7 CISG –INTERPRETATION AND GAP-FILLING TECHNIQUES** 7

**2.1 Article 7(1) -Interpretation** 7
2.1.1 The International Character of the Convention 7
2.1.2 Uniformity of Application 9
2.1.3 The Observance of Good Faith in International Trade 10
2.1.4 Methodology for an autonomous interpretation 11

**2.2 Article 7(2) CISG -Gap Filling** 13
2.2.1 Gap Filling Methodology 13
2.2.1.1 Analogy 15
2.2.1.2 General Principles on which the Convention is based 16
2.2.1.3 Private International Law 17

**2.3 UNIDROIT Principles and the Principles of European Contract Law as Supplementing Means in Interpretation and Gap filling** 18

**3 THE STATUS OF GOOD FAITH UNDER THE CISG** 21

**3.1 Good Faith as an Explicit Requirement of the CISG -The Wording of Article 7(1)** 21

**3.2 Good Faith -The interpretative Approach** 21
3.2.1 Travaux Préparatoires 21
3.2.2 Jurisprudence 26
3.2.3 Doctrine 28

**3.3 Good Faith -The Gap Filling Approach** 32
3.3.1 Good Faith by Analogy –Good Faith in Negotiations and the Duty to Co-operate32
3.3.2 General Principles on which the Convention is based 42
3.3.3 Private International Law 44

**4 ANALYSIS** 48

**5 CONCLUSION** 59

**BIBLIOGRAPHY** 61
Books and Articles 61
Web sources 64
Commercial Codes 64
Official Records 65

**TABLE OF CASES** 67
Arbitration proceedings 67
Austria 68
Australia 68
France 69
Germany 69
Italy 70
Netherlands 71
Switzerland 71
US 71
Other 72

# Summary

The purpose of this essay is to analyse the status of good faith under the CISG in the light of article 7 of the Convention. The first part of this article reads: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of *good faith* in international trade."[1]

The second part of the article embodies a gap filling statute and holds: "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 essay is focusing on three issues. Firstly it is analysing whether the reference to good faith in article 7(1) only is relevant with reference to the interpretation of the Convention or if it applies to the conduct of the parties as well. Secondly the thesis is investigating the possibility to derive a duty to observe good faith by applying the gap-filling statute in article 7(2). Finally, if it is concluded that there is a duty to observe good faith under the CISG, the thesis will provide some guidelines of how a practitioner should apply the principle.

It is concluded that the reference to good faith in article 7(1) only applies to the interpretation of the Convention. The adequate technique to impose a duty to observe good faith on the parties is instead to employ article 7(2). Courts shall, however, avoid general references to good faith in their judgements. Instead they should try to derive specific principles from the CISG's provisions by analogy. An example is the buyer's duty to undertake replacement purchases at the international market in order to mitigate damages. This specific principle exhibits important links to the concept of good faith. The derived rule displays, however, a closer relationship with specific provisions in the Convention. This reduces the risk of decisions contrary to the intention of the Convention. It also promotes a uniform application of the CISG and leads to a higher degree of predictability in international trade.

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[1] Emphasis added.

# Abbreviations

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| All ER | All England Law Reports |
| BGB | Bürgerliches Gesetzbuch |
| CISG | United Nations Convention on Contracts for the International Sales of Goods |
| COMPROMEX | Comisón para la Protección del Comercio Exterior de Mexico |
| EC | European Commission |
| EU | European Union |
| PECL | Principles of European Contract Law |
| ICC | International Chamber of Commerce |
| UCC | Uniform Commercial Code |
| ULIS | Uniform Law on the International Sale of Goods |
| UN | United Nations |
| UNICITRAL | United Nations Commission on International Trade Law |
| UNIDROIT | International Institute for the Unification of Private Law |

# 1 Introduction

The duty to observe good faith plays an important role in international trade. The doctrine is established within a numerous of domestic legal systems, as well as in multinational instruments and international trade practices. Good faith imposes a duty to act fair and honestly even if the contract between the parties is silent in this respect. Commentators that are favouring an extensive duty to observe good faith, hold that the principle improves security and flexibility in international trade. Opponents, on the other hand, emphasise the vague nature of the concept. Since no internationally recognised definition of good faith exists, a uniform application of the principle is hard to maintain.

The divergences in attitudes to good faith have led to different approaches to good faith on the international level. The scope and importance of the principle varies greatly between different legal traditions. In several civil law countries, as in the German Civil law, the doctrine traditionally has a strong position and is influencing a wide area of topics. In some common law countries, on the other hand, good faith is a carefully and reluctantly applied doctrine. An important example is English common law. The different attitudes to good faith on the international arena raise the question of the status of good faith under the CISG.

According to article 7(1) of the CISG, special regard is to be had to the observance of good faith in international trade when interpreting the Convention. The conferences leading up to the CISG went on for many years and one of the most challenging problems were whether to include a good faith provision or not in the Convention. The disputes occurred not only between socialist and capitalistic representatives, but also between common law and civil law delegates. The different opinions about the role of good faith ranged from the thought that it should be viewed as an obligation present at all stages of the contracting process, to the idea that good faith should not be explicitly mentioned in any provision at all. The final result, article 7(1), embodies a compromise between the delegates. This rises an important question. How should this compromise be interpreted? Is good faith, as expressed in article 7(1), only relevant with reference to the interpretation of the Convention or does it impose additional duties on the parties?

Another important question is if there are any other possibilities to derive a duty to observe good faith under the CISG. A relevant tool is found in article 7(2). When an issue is not directly governed by the Convention, but nonetheless may fall within its scope of application, this article allows a court to fill the gap. The questions is, therefore, if it is possible to derive a duty to observe good faith by applying article 7(2)?

If there exists a duty to observe good faith under the CISG a proper and uniform application of the principle is desired. Since no general recognised definition of good faith exists, there is a risk that different courts apply the principle in a non-uniform manner. Especially when the CISG is a young instrument and lacks an extensive case law. The third question in this work is how a practitioner should apply the principle. Should it be used frequently as in several civil law countries or is a more reluctant approach to the principle of good faith preferable?

## 1.1 Purpose

The purpose of this essay is to analyse the status of good faith under the CISG in the light of article 7.

## 1.2 Method

This essay is based on studies of legal statues, case law, preparatory works, books and articles. The UNILEX database[2] and the Pace University homepage[3] have been important sources when searching for this material. It should be observed that the UNILEX database must be considered as a secondary source. The cases are first published in domestic volumes. The good reputation of the database, besides the fact that several commentators also refer to the base in their work, has convinced me to use it as well.

Another problem with the UNILEX database is that it is not possible to refer to specific pages in the cases. A reader may consequently find it difficult to follow a reference in this essay back to the original case without actually reading the major part of it. Of course this is an important drawback. The reason that I still have been using the database is its excellent accessibility.

[2] The web address is http://www.unilex.info/.
[3] The web address is http://www.cisg.law.pace.edu/.

Another important issue is how this essay refers to relevant case law. Several different standards appear at the international setting. A reference to a Swedish case in a Swedish textbook differs significantly from the standard used in England. In order to obtain uniformity I have chosen to present the cases according to the following model: *Name of the Court, date and/or year of the decision, name of the parties*. Such references provide variables enough to allow a reader to find the case as it was originally published.

The references to English common law in this essay may be surprising. England has not signed the CISG. The reason why this essay still deals with English law is its influence on several other domestic statutes. Some of these countries have signed the CISG, or will perhaps do it in the future. Consequently is English common law relevant also when discussing the CISG.

## 1.3 Limitation

There are several articles in the CISG that are exhibiting links to the principle of good faith. The aim of this study is not, however, to provide a comprehensive analysis of all these provisions. The interpretative approach in this essay focuses instead on the reference to good faith in article 7(1). The effects of the gap-filling statue in article 7(2) are also heavily restricted. This part focuses merely on specific principles related to good faith in negotiations and the duty to co-operate.

Furthermore is the intention with this study not to list as many relevant principles as possible that exhibit links to pre-contractual good faith and the duty to co-operate. Its purpose is instead to analyse appropriate approaches to good faith under the Convention. The practical discussion in chapter three is therefore not exhaustive. It merely presents some examples and aims to rise the analysis from its theoretical level.

Another important limitation is found when analysing the influence of private international law. Fundamental in this respect is of course the international choice of law statues. The relevance and consequences of such legal statues have, however, been left outside the scope of this work. A further limitation in the application of private international law is the focus on western law traditions. The fact that the thesis merely discusses common and civil law practice does not mean that other legal traditions are irrelevant. The CISG is a body of rules emanating from the United Nations. Consequently e.g. socialist and Arabic legal traditions may be relevant as well.

## 1.4 Disposition

Since the CISG is an instrument for international trade, domestic approaches to interpretation and gap filling are rejected. Therefore, the next chapter is analysing different approaches to interpretation and gap filling. The aim is to establish appropriate methods for the CISG. The chapter also contains a discussion concerning the relevance of the UNIDROIT Principles and the Principles of European Contract Law as supplementing means in interpretation and gap filling.

Chapter three is the central part of this work. It investigates the status of good faith under the CISG in the light of article 7. The chapter contains three different sections. Firstly the explicit wording of article 7(1) is briefly discussed. Secondly article 7(1) is interpreted in order to find out the underlying intention with the article. Recent case law and doctrine is also discussed in order to obtain an understanding of the application of the article. The interpretation follows the method established in chapter two.

The final section of chapter three aims to fill gaps in the Convention that exhibits links to the principle of good faith. This is also done in accordance with the method set up in chapter two. Three different techniques are employed. Gap filling by analogy, general principles and international private law. The analogical approach focuses on two aspects of good faith. Good faith in negotiations and good faith as a duty to co-operate. From these two aspects are specific principles derived. Even if they apply autonomously and are restricted to specific situations they are all exhibiting important similarities with the principle of good faith.

Filling gaps by analogy, on the other hand, is dependent on whether good faith constitutes one of the general principles underlying the Contention or not. Contrary to the specific principle a general reference to good faith applies to a wide area of topics. This increases flexibility but may have a negative influence on predictability and the uniform application of the Convention. Private international law is only used as a supplementary means in this thesis. Its function is to provide an international benchmark to the conclusions made in this work. One cannot expect a principle, even if it is derived from the framework of the CISG, to be internationally recognised if it is contradicted by several other legal traditions.

In chapter four the methodical approach in chapter two is analysed together with the material discussed in chapter three. This provides not only a possibility to obtain an understanding of the status of good faith under the CISG. It also offers a possibility to present some guiding principles of how a practitioner should apply the principle.

# 2 Article 7 CISG –Interpretation and Gap-Filling Techniques

## 2.1 Article 7(1) -Interpretation

Article 7(1) of the CISG deals with the interpretation of the Convention. The article states: "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."[4] According to the wording of the article three important parts must be observed in the interpretation of the CISG:

The international character of the Convention
The need to promote uniformity in its application
The observance of good faith in international trade

The first two parts are interdependent of each other. The third point, however, is of a rather special nature. Its location in a provision dealing with the interpretation of the CISG has caused an academic discussion about its precise meaning and scope. These three parts will now be further analysed in order to establish an accurate method valid while interpreting the CISG.

### 2.1.1 The International Character of the Convention

The interpretation of a convention is no unique phenomenon. Every legislative instrument raises questions about the precise meaning of its individual provisions. Domestic institutes are no exceptions. Problems are, however, more prevalent when the instrument has been drafted on an international level. In domestic proceedings an interpreter may rely on uniform and well-established methods of interpretations. The CISG, on the other hand, constitutes an international body of rules. This makes the interpretation of a provision within the Convention a lot more difficult compared to a corresponding domestic statute. Should it be read narrowly,

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[4] Article 7(1) CISG.

as the tradition in common law countries plead, or are more extensive interpretations allowed as suggested in several civil law countries?

According to article 7(1) the courts are obliged to recognise the international character of the Convention while interpreting the CISG.[5] Case law suggests that a uniform interpretation of the CISG requires the court to observe, not only the international character of the Convention, but also the need of an autonomous interpretation.[6] An autonomous interpretation of the CISG reduces the risk of a non-uniform application of its provisions. It also supports an effective and uniform international trade law.[7] This means that courts and arbitrators must avoid the reliance on domestic rules[8] and interpreting techniques when dealing with the CISG.[9] Instead of analysing its provisions in the light of domestic law, courts are expected to look to the underlying purposes of the Convention's individual provisions as well as of the Convention as a whole.[10]

The commentary by the UN Secretariat on the 1978 Draft Convention held that "National rules on the law of sales of goods are subject to sharp divergences in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this Convention by

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[5] See also e.g. U.S. Court of Appeals, 2nd Circuit, December 6, 1995, Rotorex Corp. v. Delchi Carrier S.p.A. and U.S. District Court, E.D., Louisiana, May 17, 1999, Medical Marketing.

[6] Gerichtspräsident von Laufen, May 7, 1993, parties unknown; Tribunal Cantonal Valais, June 29, 1994, Bonaldo S.p.a. v. A.F.. See also Bianca-Bonell: *Commentary on the International Sales Law, The 1980 Vienna Convention*, Giuffrè, 1987, p 74 and Auit, Bernard: *La vente international de marchandises, Convention des Nations-Unies du 11 avril 1980*, E.J.A.-L.G.D.J. 1990, p. 47.

[7] In the preamble to the CISG it is stated that: "BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,…"

[8] Bundesgerichtshof, April 3, 1996, parties unknown; U.S. District Court, S.D., New York, March 26, 2002, St. Paul Guardian Insurance Co. et al. v. Neuromed Medical Systems & Support. See also Ferrari, Franco: *The Relationship between the UCC and the CISG and the Construction of Uniform Law,* 29 Los Angeles Law Review, 1996, pp. 1021. For similar conclusions on the ULIS see Working group session no.1 Jan. 1970, Doc. A/CN.9/35. See also U.S. Court of Appeals, 11th Circuit, June 29, 1998, MCC-Marble Ceramic Center Inc. v. Ceramica Nuova D'Agostino S.p.A..

[9] Bonell, in Bianca-Bonell, 1987, p. 72; Hellner, Jan: *Gap-Filling by Analogy: Article 7 of the UN Sales Convention in its Historical Context*, In Festkrift til Lars Hjerner, Norstedts, 1990, pp. 219-233. See also Tribunale di Pavia, December 29, 1999, parties unknown and Oberlandesgerich Frankfurt am Main, April 20, 1994. Conflicting decisions are seen in Bundesgerichtshof, March 24, 1999, parties unknown, and in ICC Court of Arbitration, Paris, 1994, parties unknown. For criticism see e.g. Koneru, P: *The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles*, 6 Minnesota Journal of Global Trade, 1997, Section I.

[10] Bonell, in Bianca-Bonell, 1987, p. 73. See also Working group session no.1 Jan. 1970, Doc. A/CN.9/35.

national courts, each dependent upon the concepts used in the legal system of the country of the forum."[11] A legal expression in domestic law may have a vague or even different meaning under the Convention. Even when a provision is directly inspired by a domestic regulation, as in the case of article 47 and the principle of Nachfrist in German law, the court should not fall back on the domestic statute.[12] This is evident when the background of the CISG is considered. The content and wording of the Convention is the result of a prolonged process of discussions and debates between delegates representing a numerous of divergent legal systems. In order to reach a consensus the provisions of the CISG had to be formulated in a rather neutral language. The choice of one wording instead of another may represent an important compromise between different legal cultures rather than the acceptance of a concept established in a specific domestic legal system.[13]

## 2.1.2 Uniformity of Application

It is impossible to fully separate issues concerning the international character of the Convention from those regarding its uniform application. This is the reason why the uniformity of the Convention to some extent already has been discussed in the former section. An autonomous interpretation of the CISG is not only a consequence of the "international character" of the Convention. It is also a necessity if to fulfil "the need to promote uniformity in its application".[14]

One of the most important purposes of the CISG is to achieve uniformity in the law for international sales.[15] To reach this goal it is important that the contracting states read, interpret and understand the CISG in a uniform way.[16] Consequently the courts are not only bound to reject domestic approaches and interpret the Convention autonomously.[17] They must also

[11] *Commentary on the Draft Convention on Contracts for the International Sale of Goods*, Prepared by the Secretariat, U.N. Document A/CONF.97/5.
[12] Audit, Bernard: *The Vienna Sales Convention and the Lex Mercatoria,* in: Carbonneau, T.E., Lex Mercatoria and Arbitration, Juris Publishing 1998, p.187.
[13] Felemegas, John: *The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation*, Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer Law International, 2001, Section 3:3.
[14] Article 7(1) CISG.
[15] See preamble CISG.
[16] See e.g. Oberlandesgericht Frankfurt am Main, April 20, 1994, parties unknown.
[17] For a case trying to obtain a balance between different domestic legal systems to promote uniformity see Obergericht Kanton Luzern, Janury 8, 1997, parties unknown. An American case held that domestic case law was applicable when interpreting analogous provisions of article 2 of the UCC to the extent the language of the relevant CISG provisions tracks that of the UCC. See U.S. Court of Appeals, 2nd Circuit, December 6, 1995, Rotorex Corp. v. Delchi Carrier S.p.A. A contrary conclusion was made in U.S. District Court, S.D., New

observe the need to promote uniformity in its application. An extensive body of case law suggests that a uniform application of the Convention oblige the courts to consider judgements and conclusions from other states.[18] Another channel that is promoting a uniform application of the Convention is the observance of preparatory works. Such means of interpretation were under discussion when an inclusion of the expressions "international character" and "the need for uniform interpretation and application" as an amendment of article 17 of the ULIS were discussed. It was suggested that such wording should encourage courts to make references to travaux préparatoires and other materials on the legislative history of the Convention.[19] In this respect it is important to observe that common law traditionally has been reluctant to use preparatory works. This contradiction is further analysed in section 2.1.4.

### 2.1.3 The Observance of Good Faith in International Trade

The third part of article 7(1) promotes the observance of good faith in international trade. The placement of a good faith provision in an article dealing with the interpretation of the Convention has caused an academic discussion concerning the scope of the article.[20] Is the reference to good faith merely a rule relevant while interpreting the Convention or does it imply further obligations? The legislative history of the article shows that the final addition of a good faith provision represents a compromise solution.[21] The final settlement is a result of the dispute between those delegates who supported an inclusion of a good faith provision in the

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York, April 6, 1998, Calzaturificio Claudia s.n.c. v. Olivieri Footwear Ltd. The court held that it is not appropriate to apply UCC case law in construing contracts governed by CISG.

[18] Tribunale di Pavia, December 29, 1999, parties unknown; Tribunale di Vigevano, July 12, 2000, parties unknown. Professor Honnold argues that the Convention's requirement of regard for uniformity in its application calls for tribunals to consider foreign interpretations of the Convention. (Honnold, 1991, pp. 142). For similar discussions concerning the ULIS see Secretary-General: *Analysis of Comments on ULIS 1-17*, Doc. A/CN.9/WG.2/WP.6.

It is a fact, however, that few court decisions have so far referred to foreign case law. An example of how to properly apply this method is seen in Tribunale Civile di Cuneo, 31 January 1996, Sport D'Hiver di Genevieve Culet v. Ets. Louys et Fils. Another example how to apply foreign case law is seen in Tribunale di Vigevano, July 12, 2000, parties unknown. The court was dealing with some of the typical issues raised by the CISG, such as party autonomy, notice of non-conformity and burden of proof. In its discussion the court refers to almost forty foreign court decisions and arbitral awards. The court has consequently, more than any other court before it, taken into account the need to have regard to foreign case law in order to promote uniformity.

[19] Working group session no. 2 Dec. 1970, Doc. A/CN.9/52. p. 62. For such references see e.g. Landgericht Aachen, July 20, 1995, parties unknown, and Oberlandesgericht Oldenburg, December 5, 2000, parties unknown.

[20] See e.g. Honnold, John O.: *Uniform Law for International Sales Under the 1980 United Nations Convention,* 2d Edition, Kluwer Law and Taxation Publisher, 1991, p.146 and Bonell, in Binca-Bonell, 1987, pp. 83.

[21] See section 3.2.1.

Convention and those delegates opposing to such a duty.[22] The scope of this reference to good faith is, however, one of the fundamental questions analysed in the next chapter of this work. This chapter merely observes good faith as a variable relevant in the interpretation of the Convention.

### 2.1.4 Methodology for an autonomous interpretation

To succeed in the uniform application of the CISG it is not enough to regard the Convention as an autonomous body of rules, free from domestic influences. When the Convention itself may give rise to different autonomous interpretations it may still be interpreted in an inconsistent way. Uniformity can only be attained if the interpreter pays attention to the practice of the other contracting states while interpreting the convention.[23] It must be noted, however, that recourse to such materials must not be overestimated in interpreting the CISG.[24] There are two important reasons to this. Firstly, the Convention constitutes a body of dynamic rules that adapt to a continuously developing case law.[25] Secondly, the CISG is still a young instrument and the case law is limited.

Therefore, is the drafting history another important tool when interpreting the Convention.[26] Consulting drafting records is a method already adopted by many of the contracting countries. In particular the civil law countries pay special attention to drafting records in resolving statutory ambiguities.[27] Courts in the United States have also frequently invoked the legislative history of domestic statues and international conventions.[28] England, on the other hand, has traditionally held that the meaning of a provision must generally be inferred solely from the words of the statute.[29] At least as far as domestic legislation is concerned.

When interpreting international conventions this English rigidity has recently been eased. An important example is the Fothergill case.[30] This

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[22] See section 3.2.1.
[23] Ferrari, Franco: *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 Georgia Journal of International and Comparative Law, 1994, section VII.
[24] Honnold, 1991, p. 141-42.
[25] Bonell, in Bianca-Bonell, 1987, pp. 16.
[26] See e.g. Landgericht Aachen, July 20, 1995, parties unknown, and Oberlandesgericht Oldenburg, December 5, 2000, parties unknown.
[27] Honnold, 1991, pp. 138.
[28] See e.g. US Supreme Court, 1985, Air France v. Saks. The Supreme Court held that treaties might be interpreted more liberally than private agreements. Furthermore the court held that one is allowed to look beyond the wording of a specific provision and consult the drafting history of the treaty. See also Honnold, 1991, p. 138.
[29] Honnold, 1991, pp. 138
[30] House of Lords, March 17, 1977, Fothergill v. Monarch Airlines Ltd. See e.g. [1977] 3 All ER 616.

House of Lords decision concerned the interpretation of an Act of Parliament that gave effect to the Warsaw Convention on the liability of air carriers. The decision may, however, also play an important role while interpreting international conventions in the future. The case deals with the meaning of the expression "damage" under the Warsaw Convention. A passenger lost parts of the contents of a bag and failed to give notice of the loss. According to the Warsaw Convention, notice must be given within seven days as to "damage", but no notice must be given in respect to loss of baggage. The airlines held that the loss constituted a "damage" and consequently was subject to the seven days notice. The Court of Appeal dismissed the airline's argument but the House of Lords reversed the decision.

A central part of this case is analysing possible means of interpretation. Lord Diplock referred to the James Buchanan case[31] and held that the expressions must not be interpreted by rules of English law or precedent. Instead "broad principles of general acceptation" must be applied.[32] He held that the language was not a result of English draftsmen and "…neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges".[33]

A majority held that consideration must be given to foreign case law. Of more significant importance, however, is that a majority also allowed travaux préparatoires and scholarly writing as possible means of interpretation. The court emphasised, however, some important drawbacks with these means of interpretation. The legislative history must be carefully chosen in order to reflect the majority opinion and not a suggestion brought up by a few delegates. Another issue was the treatment of parliamentary debates. A speech of a member of the parliament does not necessarily reflect the future outcome as expressed in the legislation. Careful attention was also given to scholarly writing that only have a persuasive value.[34]

While regarding the development in the Fothergill case it seems unlikely that even courts influenced by English judicial tradition will continue to merely regard the words of the CISG. An effective unification of the law on international trade consequently requires co-operation among the formally independent national courts.[35] Without any binding power, however, judgements from other contracting states can only have persuasive

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[31] House of Lords, December 2, 1976, James Buchanan & Co., Ltd v. Babco Forwarding & Shipping. See e.g. [1977] 1 All ER 518.
[32] House of Lords, March 17, 1977, Fothergill v. Monarch Airlines Ltd.
[33] Ibid.
[34] Ibid.
[35] Alstine, Michael P. Van: *Dynamic Treaty Interpretation*, 146 University of Pennsylvania Law Review, 1998, pp. 687-793, p. 731.

authority.[36] Furthermore calls the usage of travaux préparatoires as a means of interpretation for carefulness. Not only because the constant development of the Convention, but also because of the disparity in recent treaty interpretation. An important reason to this divergence is that taking foreign practice into account generates difficulties both because of the problems in finding foreign decisions and because of the language barrier. To obviate this problem UNCITRAL decided to gather decisions rendered in the application of the uniform law in the various contracting states.[37]

In sum, the accurate interpretation of the CISG must not resort to domestic statutes. Instead the interpreter must consult preparatory works, relevant international case law and scholarly writing in order to obtain a uniform application of the Convention.[38]

## 2.2 Article 7(2) CISG -Gap Filling

### 2.2.1 Gap Filling Methodology

Situations may appear which are not directly governed by the CISG. Even if an issue is not possible to settle by a reference to any of the provisions in the Convention, the situation may still fall within the scope of the CISG.[39] A

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[36] Diedrich, Frank: *Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CIS*G, 8 Pace International Law Review, 1996, p. 321.

[37] Ferrari, Franco, 1994, pp. 183.

[38] See e.g. Supreme Court of Queensland, November 17, 2000, Downs Investments Pty Ltd v Perjawa Steel SDN BHD; Oberlandesgericht Oldenburg, December 5, 2000, parties unknown; Tribunale Civile di Cuneo, January 31, 1996, Sport D'Hiver di Genevieve Culet v. Ets. Louys et Fils; Tribunale di Pavia, December 29, 1999, parties unknown; Tribunale di Vigevano, July 12, 2000, parties unknown; U.S. District Court, E.D., Louisiana, May 17,1999, Medical Marketing International, Inc. v. Internazionale Medico Scientifica S.r.l..

[39] The US Supreme Court has traditionally applied a restrictive approach to gaps in international conventions. An illustrative example is the court's opinion in US Supreme Court, April 18, 1989, Chan v. Korean Air Lines, Ltd. At issue in that case was the application of the Warsaw Convention on international air travel to the shooting down of an aeroplane by the Soviet Union in 1983. The specific issue was whether the liability limitation defined in that Convention should be lifted if an airline fails to give adequate notice of the limitation to its passengers. The Court did not find any express provision to that effect in the Convention and concluded that the interpretative inquiry was at an end. Although the issue of airline liability clearly fell within the scope of the Warsaw Convention, the Court found that it had no authority to craft a substantive solution to fill the gap. According to Justice Scala an alteration, amend or ad to a treaty by inserting a clause would be an usurpation of power and not an exercise of judicial functions. It would be to make and not to construe a treaty. The US Supreme Court came to similar conclusions in US Supreme Court, June 15, 1987, Société Nationale Industrielle Aérospatiale v. United States District Court; US Supreme Court, June 15, 1988, Volkswagenwerk Aktiengesellschaft v. Schlunk and Supreme Court, January 16, 1996, Zicherman v. Korean Air Lines Co. In all these cases the Supreme Court consistently refused to apply internal

gap in the Convention may be present. These situations are governed by article 7(2). The article holds:

"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."[40]

A first condition for the existence of a gap in the sense of article 7(2) is that the issue is related to "Questions concerning matters governed by (the) convention"[41]. Such gaps are often referred to as gaps "praeter legem". The scope of the Convention is defined in article 4. The article states that the CISG "governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such contract"[42]. Further limitations are listed in article 5 and 6.[43] Issues, which are not falling within the scope of the Convention, have deliberately been left to the competence of national laws.[44] These situations constitute gaps "intra legem" and can not be settled in conformity with article 7(2).[45] The borderline between legal issues subject to the CISG, and those not governed by it, is often rather uncertain. If it is impossible to identify a general principle, the respective national law is applicable, regardless of whether the legal issue is basically covered by or exempt from the CISG.[46]

A further condition for the application of article 7(2) is that the issues "are not expressly settled" in the Convention.[47] The expression has been criticised on the ground that recourse to the general principles of the CISG is acceptable only when a solution can not be found by interpreting its specific provisions. This includes possible extensions by analogy. It has, however, been insisted that the particular criterion of this paragraph should apply whenever the Convention lacks a specific provision dealing with the actual issue.[48]

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solutions for gaps in a convention. Instead the Court has resorted to other applicable domestic law, even if the issue clearly fall within the scope of an international convention.

[40] Article 7(2) CISG.

[41] Article 7(2) CISG.

[42] Article 4 CISG.

[43] Article 5 reads: "This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person." Article 6 adds: " The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." Relevant case law e.g. Tribunale di Vigevano, 12 July 2000, parties unknown.

[44] Bonell, in Bianca-Bonell,1987, p. 75.

[45] Ferrari, 1994, pp. 183.

[46] Magnus, Ulrich: *Die allegemeinen Grundsätze im UN-Kaufrecht*, 3 International Trade and Business Law Annual, Australia 1997, part 4a. (English translation.)

[47] Article 7(2) CISG.

[48] Bonell, in Bianca-Bonell, 1987, p. 76.

The last part of the article concerns the gap filling methodology. Commentators and a body of case law[49] suggest that the wording of article 7(2) allow three different methods. Firstly should applying specific provisions by analogy fill gaps in the Convention. Secondly the interpreter may resort to general principles on which the Convention is based. Finally the article allows the application of law determined by the rules of private international law.[50]

#### 2.2.1.1 Analogy

In the case of a gap in the Convention the first attempt to be made is to settle the unsolved question by applying provisions by analogy.[51] This requires a careful examination of the provisions in the CISG. The rule stated in an analogous provision may be restricted to its particular context and an extension of its application could be contrary to the purpose of the Convention.[52] Furthermore one must analyse whether a specific principle is meant to represent a general principle possible to extend by analogy or not.[53]

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[49] Oberster Gerichtshof, June 29, 1999, parties unknown, The court applied article 81 by analogy referring to article 7(2); Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Austria, 15 June 1994, SCH-4366, parties unknown, interest rate settled in conformity with the general principles on which the CISG is based; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Austria, June 15, 1994, SCH-4318, parties unknown, estoppel as a general principle underlying CISG; ICC Court of Arbitration, Basel, 1995, parties unknown,, UNIDROIT Principles and Principles of European Contract Law as general principles underlying CISG; Oberster Gerichtshof, September 7, 2000, Parties unknown, buyer's right to terminate contract fundamental principle of the Convention; Cour d'Appel de Grenoble, October 23, 1996, parties unknown, Payment at seller's place of business a general principle underlying CISG; Cour d'Appel de Paris, 1ére chambre, section D, January 14, 1998, Société Productions S.C.A.P. v. Roberto Faggioni, impossible to deduce general principle on place of payment from article 57 CISG –application of domestic law; Oberlandesgericht Düsseldorf, July 2, 1993, parties unknown, place of payment at seller's place of business a general principle; Tribunale di Pavia, December 29,1999, parties unknown, burden of proof of damages not expressly settled by the Convention –recourse to general principles underlying the CISG that claimant must prove its cause of action; Tribunale di Vigevano, July 12, 2000, parties unknown, burden of proof of damages not expressly settled by the Convention –recourse to general principles underlying the CISG that claimant must prove its cause of action; Handelsgericht Zürich, Sept 9, 1993, parties unknown, burden of proof defects and timely notice on the buyer –general principles, interest art 78 determined by domestic law; Handelsgericht Zürich, Nov 30, 1998, parties unknown, good faith in the interpretation of parties' statement and conducts a general principle underlying CISG.

[50] Ferrari, 1994, pp. 183.

[51] Bonell, in Bianca-Bonell, 1987, p. 78.

[52] Ibid, p. 79.

[53] Bergem, John Egil, and Rognlien, Stein*: Kjopsloven 1988 og FN-konvensjonen 1980 om internasjonale losorekop*, Juridisk forlag AS 1991, pp. 493.

Professor Honnold has developed a method to ensure a proper gap filling by analogy. The first step is to examine the instances regulated by specific provisions in the Convention. The second step is to determine whether the Convention has deliberately rejected the extension of these specific provisions or not. Is the lack of a specific provision resolving the issue at hand a result from a failure to anticipate this event? If this is the case, the third step is to decide whether the case governed by the specific provision and the issue at hand are so analogous that the drafters would not have deliberately chosen discordant results for similar situations. In such circumstances it is appropriate to assume that these situations are covered by article 7(2).[54]

Professor Bonell has adopted another method. He allows gap filling when the actual provision is not restricted to its particular context and the extension of its application does not contradict the purpose of the Convention.[55] If such impediments do not exist, the next step is to analyse whether the rules expressly stated by the Convention and the case at hand are so analogous that it would be "inherently unjust" not to adopt the same solution for the actual case.[56]

### 2.2.1.2 General Principles on which the Convention is based

When no analogous solutions are possible to find within the CISG, the interpreter should resort to the general principles on which the Convention is based. There is a fundamental and important difference between gap filling by analogy and gap filling by applying general principles. An analogous application attempts to find a solution by extending specific provisions in the CISG to govern also the actual situation. Using the general principles upon which the Convention is based, on the other hand, means that the interpreter apply principles and rules that because of their fundamental and general character may be applied on a wider scale.[57] According to Ferrari one must resort to general principles of the Convention when the matters expressly settled in the CISG and the issue at hand are not so closely related that it would "not be unjustified to adopt a different solution".[58]

When detecting these general principles,[59] special attention is to be had to the Convention's overall objective to promote international trade.[60] Bonell

[54] Honnold, 1991, p. 156-157.
[55] Ibid, p. 79.
[56] Bonell, in Bianca-Bonell, 1987, p. 78.
[57] Ibid, p. 80.
[58] Ferrari, 1994, pp. 183.
[59] A problem is that the Convention does not list these general principles on which it is based. During the drafting process of the ULIS, the problem of identifying these general principles was under discussion. (Working group session no.1 Jan. 1970, Doc. A/CN.9/35.)

holds that the principles must be extracted from provisions within the CISG that deal with specific issues. The particular rules established by the provisions must be analysed in order to find out whether they constitute an expression of a more general nature, possible to apply to situations different from those the provision is meant to regulate.[61] Professor Honnold holds that one should be careful while extracting these general principles. He recommends that such derivations of general principles should be limited to situations where the principles are "moored to premises that underlie specific provisions of the Convention."[62] The finding of general principles to solve a specific problem is, however, only possible when the lack of a specific provision is due to deliberate rejection by the delegates or the Convention's failure to anticipate and resolve the issue.[63]

The case law has ruled out some general principles under the Convention. Examples are interest rate,[64] the placement of payment is the seller's place of business,[65] currency of payment,[66] claimant must prove its cause of action,[67] burden of proof of defects and of timely notice on the buyer.[68]

#### 2.2.1.3 Private International Law

Recourse to domestic law as a possible means to fill gaps in the Convention is possible only if a sufficient solution is impossible to find by analogy or by

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A number of delegates stressed the difficulties with the expression "general principles" in article 17 of the ULIS. They held that it is hard to identify such general principles, particularly due to the fact that the ULIS had no domestic legal background. Several representatives also emphasised the risk that such lack of legal background might tempt the courts to fall back on the *lex fori* and consequently threat a uniform application of the provision. This reference to unidentified general principles therefore gives rise to ambiguity and uncertainty. Delegates supporting the provision held that such general principles were able to identify. (Working group session no.1 Jan. 1970, Doc. A/CN.9/35.) They could be gathered from the provisions of the Convention, from the legislative history of the 1964 Hague Convention and from commentary on the Convention.( Working group session no.1 Jan. 1970, Doc. A/CN.9/35.)

[60] Preamble CISG.

[61] Bonell, in Bianca-Bonell, 1987, p. 80.

[62] Honnold, 1991, p. 155.

[63] Ibid, p. 156.

[64] Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Austria, June 15, 1994, SCH-4366, parties unknown and Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Austria, June 15, 1994, SCH-4318, parties unknown; ICC Court of Arbitration, Basel, 1995, parties unknown.

[65] Cour d'Appel de Grenoble, October 23, 1996, SCEA GAEC Des Beauches Bernard Bruno v. Societé Teso Ten Elsen GmbH & Co. KG; Oberlandesgericht Düsseldorf, July 2, 1993, parties unknown.

[66] Landgericht Berlin, March 24, 1998, parties unknown.

[67] Tribunale di Pavia, December 29, 1999, parties unknown and Tribunale di Vigevano, July 12, 2000, parties unknown.

[68] Handelsgericht Zürich, September 9, 1993, parties unknown and Tribunale di Appello di Lugano, January 15, 1998, parties unknown.

applying general principles.[69] The domestic law to be chosen is "the law applicable by virtue of the rules of private international law"[70]. Consequently the applicable law will be either the law, which in the absence of the Convention would have governed the contract, or some other law advocated to by conflict of law rules.[71]

## 2.3 UNIDROIT Principles and the Principles of European Contract Law as Supplementing Means in Interpretation and Gap filling

The post-war debate on international trade and general principles of law raised the question about the existence and value of a lex mercatoria. Although the different theories differed widely with respect to terminology and legal nature, all approaches shared the same idea. A common standard of international trade derived from comparative studies of domestic law.[72]

The discussion culminated when the International Institute for the Unification of Private law, UNIDROIT, presented its principles of International Commercial Contracts in 1994. These principles were developed by a rigorous study of domestic laws, the CISG and widely accepted customs in international trade. Since their introduction the UNIDROIT Principles have received a wide recognition in academic research as well as in international contract practice and commercial dispute settlement.[73]

Another uniform instrument developed during this period is the Principles of European Contract Law, hereafter referred to as the PECL. Divergences in contract law within the European Union led Ole Lando to found the Commission on European Contract law in 1976. The goal was to work out common principles of contract law for the members of the EU. The working group presented the first part of PECL in 1995, shortly after the release of the UNIDROIT Principles. The PECL have been continuously developed and covers nowadays several aspects of international contract law. The PECL, as presented in 1995 and 1999, share important features with the UNIDROIT Principles. An important reason to this congruence is the fact that several experts served in both drafting groups. Particularly the two

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[69] Bonell, in Bianca-Bonell, 1987, p. 80.
[70] Article 7(2) CISG.
[71] Bonell, in Bianca-Bonell, 1987, p. 80.
[72] Blase, Friedrich: *Leaving the Shadow for the Test of Practice - On the Future of the Principles of European Contract Law*, Vindobona Journal of International Commercial Law and Arbitration, 1999, p. 2.
[73] Ibid, p. 3.

chairmen, Lando and Bonell, were also members of the other working group.[74]

There are, however, important differences between the UNIDROIT Principles and the PECL. One of the most fundamental divergences is the scope of their application. According to the Preamble of the UNIDROIT Principles they set forth the general rules for international commercial contracts. The PECL, on the other hand, apply as general rules of contract law in the European Community.[75] This means that the UNIDROIT Principles are confined to international and commercial contracts while the PECL apply to all sorts of contracts. Consequently the PECL also govern purely domestic contracts and agreement between consumers and merchants. On the other hand the application of the UNIDROIT Principles is universal while the PECL is formally restrained to the member states of the European Union.[76]

An extensive body of case law[77] and several authorities[78] imply that the UNIDROIT Principles and the PECL may serve an accompanying role when interpreting and filling gaps in the CISG. The preamble to the UNIDROIT Principles also states that the Principles' may serve an interpreting and supplementing role when dealing with international law instruments. It even mentions the CISG as an example of an international legislation that is subject to interpretation by reference to autonomous and internationally uniform principles.[79]

Both the UNIDROIT Principles and the PECL are also relevant when the parties refer to them or in other ways have subjected their contracts to general principles of law or lex mercatoria. Both instruments also apply to situations when it proves impossible to settle an issue in accordance with the

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[74] Blase, Friedrich: *Leaving the Shadow for the Test of Practice - On the Future of the Principles of European Contract Law*, Vindobona Journal of International Commercial Law and Arbitration, 1999, p. 5.
[75] Preamble to UNIDROIT Principles and article 1.101 (1) PECL.
[76] Michael Joachim Bonell "*The UNIDROIT Principles of European Contract Law: Similar Rules for the Same Purposes*?", Uniform Law Review 1996.
[77] Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Austria, 15 June 1994, SCH-4318, parties unknown; Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Austria, June 15, 1994, SCH-4366, parties unknown; ICC Court of Arbitration, Basel, 1995, parties unknown; ICC Court of Arbitration, Zurich, 1996, parties unknown; ICC Court of Arbitration, Paris, November, 1996, parties unknown; ICC Court of Arbitration, Paris, December, 1997, parties unknown; ICC Court of Arbitration, Zurich, March, 1998, parties unknown; Cour d'Appel de Grenoble, October 23, 1996, parties unknown; Arrondissementsrechtbank, Zwolle, March 5,1997, parties unknown.
[78] Bonell, Michael Joachim, *The UNIDROIT Principles of International Contracts and CISG: Alternative or Complementary Instrument?*, Uniform Law Review 1996, pp. 26.
[79] Comments to preamble UNIDROIT Principles.

law otherwise applicable.[80] The PECL does not, in contrast to the UNIDROIT Principles, contain any provisions directly dealing with supplementing and interpretation of existing international instruments.[81] This does not necessarily mean, however, that the PECL is not applicable in these situations.[82] The introduction states that they will assist both the organs of the Communities in drafting measures and the courts, arbitrators and legal advisers in applying Community measures.

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[80] Preamble to the UNIDROIT Principles and article 1.101(2), (3)(a) and (4) of the European Principles. According to article 1.101(3)(b) of the European Principles they are also applicable when the parties have not chosen any system or rules of law to govern their contract. But according to Bonell in Bonell, Michael Joachim: *The UNIDROIT Principles of International Contracts and CISG: Alternative or Complementary Instrument?*, Uniform Law Review, 1996, this should not be considered as an actual difference of policy compared to the UNIDROIT Principles.

[81] Preamble to the UNIDROIT Principles.

[82] See e.g. ICC Court of Arbitration, Basel, 1995, parties unknown, applying article 4.507 of the PECL in order to determine a proper interest rate.

# 3 The status of good faith under the CISG

## 3.1 Good Faith as an Explicit Requirement of the CISG -The Wording of Article 7(1)

The only explicit reference to good faith in the CISG is found in article 7(1). The wording of this provision clearly restricts the scope of good faith to the interpretation of the Convention. It does not impose a duty on the parties to act in a specific manner.[83] Therefore, if only paying attention to the wording of the CISG, the conclusion must be that the principle of good faith does not apply to the conduct of the parties.

However, when investigating the status of good faith in the Convention a plain reading of its provisions does not provide the full picture. One must go further in order to determine the underlying intention of the Convention. In the following section the reference to good faith in article 7(1) is interpreted. This in order to find out if the principle of good faith, as stated in the article, applies to the conduct of the parties as well. Another possibility is that good faith constitutes an unexpressed principle under the Convention. In this case article 7(2) is a relevant tool. This approach is analysed in section 4.3.

## 3.2 Good Faith -The interpretative Approach

### 3.2.1 Travaux Préparatoires

Article 7(1) has a long and complicated drafting history. The wording of the provision can be traced back to article 17 of the ULIS. This provision said: "Questions concerning matters governed by the present law which are not expressly settled therein shall be settled in conformity with the general

[83] See e.g. ICC Court of Arbitration, Paris, January 23, 1997, parties unknown. For references in scholarly writing see also Klein in Klein, John: *Good Faith in International Transactions*, 15 Liverpool Law Review, 1993, p. 121.

principles on which the present law is based".[84] There are, however, several important differences between article 17 of the ULIS and article 7(1) of the CISG. Initially there were no references to the international character of the law and the need to promote uniformity in its application in the ULIS. An inclusion of these concepts was discussed for the first time at the second Working Group meeting in December 1970.[85]

Furthermore there was no reference to good faith in the ULIS. The representative of Hungary introduced such a principle at the eight session of the Working Group.[86] The proposal said: "In the course of the formation of the contract the parties must observe the principle of fair dealing and act in good faith. (Conduct violating these principles is devoid of any legal protections)"[87] The consideration of this provision was postponed by the Working Group to its ninth session. The German Democratic Republic suggested that an additional paragraph should be added to the Hungarian proposal: "In case a party violates the duties of care customary in the preparation and formation of a contract of sale, the other party may claim compensation for the costs borne by it."[88]

The general concept that the draft Convention should contain provisions relating to good faith and fair dealing was supported by a majority of the delegates. Some representatives held that such principles are expressly stated in several domestic statues and it was appropriate that similar provisions were to be found in international conventions. It was also pointed out that provisions on good faith and fair dealing, as stated in national laws, had become useful regulators of commercial conduct. It was suggested that the same development might occur on an international level.[89] Although a majority of the delegates supported an inclusion of a good faith provision, there was considerable opposition concerning the specific formulation of the suggested paragraphs.[90]

The Hungarian suggestion was supported on the basis that it incorporated a "desirable standard of business conduct in the process of formation of contracts".[91] The representatives agreed that there might be a difficulty, in particular initially, in obtaining a uniform interpretation of this provision in all legal systems. This could, however, not be worse than the situation in national legal system allowing similar general clauses. The existence of a uniform text might even support a uniform application of good faith in the

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[84] Article 17 ULIS.
[85] Working group session No. 2 December 1970, A/CN.9/52. para. 62.
[86] Working Group: Session No. 8, 1977, A/CN9.WG.2/WP28, para. 60.
[87] Ibid.
[88] UN Document A/CN9.WG.2/WP29, annex, para. 3.
[89] Working Group: Session No. 9 September 1977, A/CN.9/142, para. 71.
[90] Ibid, para. 72.
[91] Ibid, para. 73.

future.[92] It was observed that the general wording enunciated in the first sentence would not have much effect until it had been interpreted and applied over a long period. It was also held that the sentence was too vague and imprecise. The meaning of such rules would depend upon value judgements that would vary greatly from decision to decision. This would oppose a uniform application of the law.[93] Despite the risk of an inconsistent application of the rule, the working group decided to adopt the paragraph.

In support of the German suggestion it was held that prior to the formation of the contract the parties had duties and responsibilities to each other. The general prevailing view was that the paragraph was too vague and uncertain to be efficiently included in the Draft Convention. Consequently the Working Group decided not to retain the German proposal.[94] The final provision adopted by the representatives was based on the Hungarian proposal and said: "In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith."[95] The sentence afterwards became article 5 of the Draft Convention.

Article 5 of the Draft Convention was subject to extensive discussions and revealed a difference in opinion among the delegates. The question was whether the Draft Convention should contain a provision dealing with fair dealing and good faith or not. In sum, the following arguments were held against a provision on fair dealing and good faith: Firstly such a provision merely constituted a moral exhortation. If such a moral principle elevated to the status of legal obligation it became necessary to determine how it would be applied in particular transactions. Secondly it was held that the obligation to act in good faith is an implicit requirement in all laws regulating business activity. It is therefore unnecessary to include such an explicit provision in the Convention. Finally it was held that the Draft Convention did not specify the consequences of a failure to observe the principles which were made binding on the parties. If the determination of such consequences were left to domestic courts no uniformity of sanctions would be achieved.[96]

Several arguments in favour of a provision on fair dealing and good faith were also presented during the discussion. Some delegates held that the principles of good faith were universally recognised and the inclusion of such a principle in the Convention would not cause any problems. Several national codes contain provisions similar to article 5 and they have been of significant importance in the development of rules governing commercial activity. Furthermore it was pointed out that the concept of good faith was

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[92] Working Group: Session No. 9 September 1977, A/CN.9/142, para. 71.
[93] Ibid, para. 76.
[94] Ibid, para. 84-86.
[95] Ibid, para. 87.
[96] UNICITRAL: *Review of "Formation" Draft; The 1978 Draft Convention*, A/33/17, Annex I, para. 44-45.

well recognised in international law and already existed as a reference in the Charter of the United Nations. It was held that it was not necessary to specify the consequences of a violation of the provision. National courts should apply the article in a flexible manner, having regard to the particular facts of each case. The development of jurisprudence would soon reduce the initial uncertainty concerning the effects and the scope of article 5. The adoption of the provision would also be a modest implementation of some of the principles of the new international economic order counteracting undesirable trade practices.[97]

The serious differences in opinion concerning article 5 led to a general agreement that efforts should me made to find a compromise solution. The alternative of either deleting or retaining article 5 by a slight majority was held as an unattractive solution to most delegates. A suggestion was that the requirement of good faith should be incorporated in a provision dealing with the interpretation of statements and conducts of the parties. Against this position was held that article 5 was not concerned with the intent of the parties, but with the establishment of a "standard of behaviour" to which the parties must conform.[98] An incorporation of the good faith provision in an article dealing with the interpretation of the Convention was, however, more widely supported. This suggestion was criticised on the basis that it was not appropriate to direct the requirement of good faith to the courts rather than the parties.[99]

In order to attain a suitable compromise, taking all the views expressed during the course of discussion into account, the Commission established a Working Group on article 5. The Working Group decided to base the new provision on article 13 of the Draft Convention. Their final proposal read: "In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and to observe good faith in international trade."[100]

The first part of the suggested article reproduced article 13 of the Draft, dealing with the interpretation of the Convention. The second part of the proposal was intended to direct attention to the fact that the acts and omissions of the parties must be interpreted in the light of good faith in international trade. The provision was intended to apply to both the rules of formation and the rules governing sales issues. The representatives generally supported the proposal. It was pointed out, however, that the proposal did

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[97] UNICITRAL: *Review of "Formation" Draft; The 1978 Draft Yearbook*, A/33/17, Annex I, para. 46-48.
[98] Ibid, para. 54.
[99] Ibid.
[100] Ibid, para. 56.

not specify if the requirement of good faith in international trade also applied to the parties to an international sales transaction.[101]

Consequently article 5 of the draft Convention on Formation was integrated with article 13 of the Draft CISG. This provision became article 6 of the Draft Convention on Contracts for the International Sale of Goods. [102] The Commission finally adopted the following texts of article 6: "In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade."[103]

The discussions following the merger of article 5 and 13 reveal some information whether the new provision was meant to impose a standard upon the parties or not. The Italian representative suggested that the reference to good faith should be moved from its existing position under a provision dealing with the application and interpretation of the Convention, to an article clearly applying to the interpretation and performance of the contract of sale.[104] As a possible solution he referred to a Norwegian amendment[105] holding that the reference to good faith should be transferred from article 6 to article 7. According to the Norwegian proposal the reference to good faith should not be related to the interpretation of the Convention, but rather to the contract between the parties. Subsequently the principle's proper position was under article 7(3) and not article 6.[106]

Some other delegates also supported the view that good faith should apply to the conduct of the parties. A majority held, however, that the issue had already been subject to lengthy discussions and the existing article 6 embodied a sufficient compromise.[107] One delegate pointed out that good faith was already understood to be one of the underlying principles of law and was implicit in any legal transaction. Consequently he found it unnecessary to mention the principle in article 7.[108] Both the Norwegian and the Italian proposal were, however, rejected[109] and article 6 was adopted without changes. The final wording of article 6, adopted by 45 votes to

[101] UNICITRAL: *Review of "Formation" Draft; The 1978 Draft Yearbook*, A/33/17, Annex I, para 57-58.
[102] Ibid, para. 57-58.
[103] 1978 UNCITRAL Draft Convention, Official Records of the General Assebly, Thirty-third Session, Supplement No. 17 A/33/17, chap. II, para. 28.
[104] Amendment A/CONF.97/C.1/L.59.
[105] Amendment A/CONF.97/C.1/L.28.
[106] First Committee Deliberations, Fifth Meeting 13 March 1980, A/CONF.97/C.1/SR.5, para. 40-41.
[107] Ibid, para. 45-46.
[108] Ibid, para. 53.
[109] Ibid, para 57 and 63.

none[110], was: ”In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and to observe good faith in international trade”.[111]

### 3.2.2 Jurisprudence

There are some cases directly or indirectly dealing with the application of good faith as stated in article 7(1). The outcome of this case law is, however, inconsistent and varies greatly from decision to decision. Some courts hold the doctrine of good faith as relevant merely as a tool while interpreting the Convention. Other decisions conclude the contrary and extend the provision to impose a positive obligation upon the parties to negotiate and perform their contract in accordance with good faith.

In an arbitral award decided by the ICC Court of Arbitration it was acknowledged that good faith according to article 7(1) is limited to the interpretation of the CISG.[112] The sole arbitrator held that it is not possible to derive any additional duties from article 7(1) of the CISG.[113]

In a French court decision it was held, contrary to the ICC Arbitral Award, that the CISG requires the parties to perform their contractual obligations in good faith.[114] In the case the seller, a French jeans manufacturer, concluded a contract for the sale of goods with a buyer based in the US. The buyer declared, upon request of the seller, that he intended to resell the goods to a distributor in South America. After the first delivery of the goods, the buyer refused to present the required documentary evidence that the goods had actually been delivered to the distributor in South America. When the seller was informed that the goods were actually sold to a distributor in Spain, he refused to maintain his commercial relationship.

This initiated proceedings in a French court. The buyer claimed damages for breach of contract. The seller claimed damages holding that the sale of its products in Spain had been seriously hampered by the parallel distribution made by the final customer of the buyer. The court found that the buyer had fundamentally breached the contract under article 25 of the CISG. The buyer refused to inform the seller about the destination of the goods and send them to Spain. The contract clearly stipulated that the goods were to be sent to

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[110] Decision by the Plenary Conference, 6th Plenary Meeting 8 April 1980, A/CONF.97/SR.6, para. 42.
[111] First Committee Deliberations, 35th Meeting 4 April 1980, A/CONF.97/C.1/SR.35, para. 46.
[112] ICC Court of Arbitration, Paris, January 23, 1997, parties unknown.
[113] Ibid.
[114] Cour d'Appel de Grenoble, Chambre Commerciale, February 22, 1995, SARL Bri Production “Bonaventure” v. Société Pan African Export.

South America and Africa. The court ruled that the fact that the goods were to be delivered in South America was of essential importance to the seller. This was shown by a number of statements made by the seller during the negotiations. Consequently the court ordered the buyer to pay damages for abuse of process, holding the conduct of the buyer as "contrary to the principle of good faith in international trade laid down in article 7 CISG".[115]

A Hungarian arbitration decision also argues in favour of a wide application of the reference to good faith in article 7(1). According to the decision the principle is relevant both when interpreting the CISG and as a standard for contract performance.[116] A Hungarian seller and an Austrian buyer had an established business relationship and concluded a sales contract. The buyer would secure payment for deliveries by a bank guarantee valid until a certain date. The seller began to deliver the goods, but the buyer failed to pay in accordance with the deal. The seller stopped further deliveries and declared the contract avoided. Later the parties agreed that the seller would recommence delivery on the condition that the buyer presented the required guarantee. The buyer sent a guarantee exhibiting the originally expire date and was therefore no longer valid. The seller initiated an arbitral proceeding claiming payment and interest.

The court held, among other things, that the issuance of a bank guarantee already expired is contrary to the principle of good faith in article 7(1). The Court justified its reference to article 7(1) holding that the observance of good faith is not only a criterion relevant in the interpretation of CISG, but it is also a measure to be observed during the performance of the contract.[117]

In a Mexican case article 7 was also employed to impose a standard of behaviour upon the parties.[118] A Mexican seller and representatives of two Korean companies concluded a contract for the sale of sweets. Upon reaching the port of destination the goods were retained by the forwarder due to the fact that the freight had remained unpaid. The buyer asked the seller for a postponement of payment and suggested that the price would be paid, not by a letter of credit, but with a banking money transfer. After a while the seller discovered one of the Korean representatives to have made a false declaration considering his capacity to enter into the contract on behalf of the buyer companies. At this occasion the Mexican seller also began to doubt whether the other company did really exist or not.

[115] Cour d'Appel de Grenoble, Chambre Commerciale, February 22, 1995, SARL Bri Production "Bonaventure" v. Société Pan African Export.
[116] Hungarian Chamber of Commerce and Industry Court of Arbitration, November 17, 1995, parties unknown.
[117] Ibid.
[118] Comisión para la Protección del Comercio Exterior de Mexico, November 30, 1998, Dulces Luisi S.A. de C.V. v. Seoul International Co. Ltd.

The seller commenced arbitration proceedings before the COMPROMEX demanding payment of the purchase price. The court observed that article 7 of the CISG held the principle of good faith as one of the basic principles influencing contractual relations between parties. The provision also requires the standard of good faith to not be determined according to domestic law concepts, but according to the standard of good faith in international trade. The court held that the buyer had organised the operation with the sole intention of obtaining the goods without paying for them. Therefore the court ruled that the buyers had acted in bad faith by violating the basic principle of good faith that is necessarily to observe in international trade.[119]

In a German case the court's decision may be seen as another attempt to impose a positive obligation of good faith during contractual relations.[120] An Italian seller and a German buyer concluded a contract for the supply and installation of an ice-cream shop. After delivery the parties entered into an agreement in which the buyer recognised the total amount of the purchase price. When the buyer paid only a part of the amount the seller commenced action to recover the rest of the agreed price. The buyer alleged lack of conformity because of quality defects and incomplete delivery. The court ruled that the buyer had lost the right to rely on lack of conformity of the goods since he had not acted in accordance with the obligations set out in articles 38 and 39. In addition the court held that the agreement signed by the buyer should be seen as an implied acceptance of the goods. The buyer's notice of non-conformity given to the seller after the signature of the agreement was contrary to the general duty of good faith provided by article 7.[121]

### 3.2.3 Doctrine

Despite the fact that there is a case law favouring extensive duties under 7(1), several authorities are supporting a limited reading of the article. One of the most prominent writers in this respect is Professor Honnold. He holds that the reference to good faith in the CISG merely applies to the interpretation of the Convention.[122] According to Honnold good faith exists as a principle promoted by other articles in the Convention. The concept concerns, however, more the interpretation of the CISG than during the

[119] Comisión para la Protección del Comercio Exterior de Mexico, November 30, 1998, Dulces Luisi S.A. de C.V. v. Seoul International Co. Ltd.
[120] Landgericht Saarbrücken, March 26, 1996, parties unknown.
[121] Ibid.
[122] Honnold, 1991, pp. 146.

performance of the contract. He bases his conclusion on the wording of article 7(1) and the drafting history of the provision.

Professor Winship also supports a narrow reading of article 7(1). He concludes that the reference to good faith in the article merely applies to the interpretation of the Convention. Like Professor Honnold he refers to the wording and the legislative history of the provision. He is, however, convinced by the endurance of the commentators arguing in favour of an expanded concept of good faith. It is possible that a general obligation on contracting parties to act in accordance with good faith will be accepted in the future.[123]

Professor Ramberg and Herre hold that the nature of good faith under the CISG is uncertain.[124] There is, under certain circumstances, a possibility to argue in favour of a duty to act in accordance with good faith. Such obligations emanate, though, from other international instruments and not directly from the CISG. They refer to article 1.7 of the UNIDROIT Principles and article 1.201 of the PECL as illustrating examples. According to the preparatory works, several delegates favoured an extensive reading of article 7(1). Since the majority did not recognise good faith as an overall valid principle of law, the concept was neutralised and embedded in an article governing the interpretation of the Convention. There are still, however, several indications that parties are obligated to show respect in commercial relationships Ramberg and Herre continue.[125]

Professor Bonell holds that the CISG embodies an obligation of good faith as a general requirement. Regardless of the language used in Article 7(1), the relevance of good faith is not limited to the interpretation of the Convention. The reason is the frequency of provisions constituting different applications of the principle.[126] This implies that good faith also constitutes one of the general principles underlying the Convention. According to professor Bonell this may impose additional obligations on the parties. If a question arises during negotiations or in the performance of the contract, which is not explicitly settled by the Convention, the principle of good faith may be used to solve the problem.[127]

One of the most important objections to an inclusion of a good faith provision in the CISG was, according to Bonell, the vague nature of the concept. Consequently there was a risk that the application of such an

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[123] Winship, Peter, *Commentary on Professor Kastely's Rhetorical Analysis,* Northwestern Journal of Law & Business, 1988, pp. 623-639.
[124] Ramberg and Herre, Internationella köplagen (CISG), En kommentar, Nordsteds Juridik AB, 2001, pp. 108.
[125] Ibid. They refer e.g. to articles 16(2)(b), 29(2), 34, 35 and 77.
[126] Compare with the the discussion in Ramberg and Herre.
[127] Bonell, in Bianca-Bonell, 1987, pp. 84.

undefined principle would lead to divergent interpretations by national courts. There is indeed, at least at first sight, a great variety of ways in which the principle of good faith operates within different legal traditions professor Bonell says. In some cases the relevance of the principle is limited to the performance of the contract. §1-203 of the United States Uniform Commercial code is an illustrating example. In most civil law systems, however, the principle of good faith is not limited to the performance of the contract. The rule is also applicable to the formation and interpretation of the agreement.[128]

This divergence in application is not a problem according to Bonell. Article 7(1) refers explicitly to good faith in international trade. This implies that the principle may not be applied in accordance with the standards adopted in different national legal systems. Domestic law is only relevant to the extent it is commonly accepted at a comparative level.[129] Article 7(1) must be interpreted in the light of the special conditions and requirements of international trade. Bonell emphasises that international trade custom is not a uniform body of rules. There are important differences between a contract involving two large companies and a contract between a large and a small party. Furthermore the standards of business vary greatly depending on the location of the agreement. Therefore, according to Bonell, it is hard to determine the precise meaning of good faith within international trade. More illuminating indications may therefore be found in the Convention itself.[130]

Associate Professor Dore and Chief Justice DeFranco state that although article 7(1) does not explicitly impose a good faith obligation on the parties, the drafters considered the principle as an integral component of the Convention.[131] They refer to the preparatory works and declare the principle of good faith as applicable "to all aspects of the interpretation and application of the provisions of (the) Convention."[132] The delegates also explicitly suggested that the principle of good faith should apply to several substantive provisions of the Convention. Important examples are, according to Dore and DeFranco, the non-revocability of certain offers[133], late acceptance of offers[134], and the rights of a seller to remedy non-conforming goods.[135] Accordingly, the good faith provision in the CISG

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[128] Bonell, in Bianca-Bonell, 1987, pp. 84.
[129] Ibid, pp. 85.
[130] Ibid, pp. 87-88.
[131] Dore & DeFranco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 Harvard International, 1982, p. 59.
[132] Text of Draft Convention on Contacts for the International Sale of Goods approved by the United Nations Commission on International Trade Law Together with a Commentary Prepared by the Secretariat, U.N. Doc. A/CONF./97/5 at 44, para. 2.
[133] CISG article 16(2)(b).
[134] CISG article 21(2).
[135] CISG articles 37 and 48.

appears to be a pervasive norm analogous to the good faith obligation of the UCC.[136]

Dore and De Franco point out that several commentators have noted potential problems in applying the principle of good faith because of its position in the Convention. The lack of an internationally recognised definition of good faith may contribute to divergent applications of the principle. The development of a uniform case law may also be complicated when there is a wide variety of foras interpreting the Convention.[137] According to Dore and DeFranco this criticism must be evaluated in light of domestic experience, e.g. the application of the principle of good faith in the UCC. The lack of a distinct and precise definition of good faith has not prevented the courts from applying the principle in several cases in the United States. However, because of the diversity among jurisdictions the achievement of uniformity in the international setting will be more difficult than under the UCC. According to Dore and DeFranco common and civil law jurisdictions exhibit common features to some extent. This widespread recognition of good faith should help in promoting a uniform application of the Convention's good faith provision.[138]

Professor Schlechtriem emphasises the uncertain nature of article 7(1) and problems relating to the determination of the scope of the good faith provision.[139] He concludes that the good faith principle, as embodied in the Convention, only concerns the interpretation of the CISG. It does not apply to the conduct of the parties or the interpretation of their intentions. He refers to the UNICITRAL Working Group who discussed the issue whether the principle should be generalised to include the conduct of the parties or not. The Working Group held that the principle of good faith was applied differently under domestic law. Effective sanctions were also missing. This finally led to the withdrawal of these proposals. Nevertheless, says Schlechtriem, even those who had previously opposed them indicated several times that it would be desirable to observe the principle of good faith in international trade.[140]

Professor Ferrari also supports a restrictive approach to the principle of good faith under article 7(1).[141] Like several other commentators he derives a principle of good faith under the CISG from other provisions in the Convention. An example is article 16(2)(b). He says that it is unquestionable

[136] Dore & DeFranco, 1982, p. 60.
[137] Dore & DeFranco refer to the Working Group on the International Sale of Goods on the Work of its Ninth Session, U.N. Doc. A/CN.9/142.
[138] Dore & DeFranco, 1982, p. 59.
[139] Schlechtriem, Peter: *Uniform Sales Law, The UN-Convention on Contracts for the International Sales of goods*, Manzsche Verlags- und Universitätsbuchhandlung 1986, p.39.
[140] Ibid.
[141] Franco Ferrari, 1994, pp. 195.

that this provision is based on the principle of good faith. At least to the extent it holds that a proposal is irrevocable where it was reasonable for the offeree to rely upon the offer being held open and the offeree acted in reliance on the offer.[142]

Ferrari also rejects that an underlying principle of good faith may impose duties of a positive character on the parties. But even if the principle of good faith primarily represents an instrument of interpretation this does not mean, according to Ferrari, that the parties' behaviour must not be measured on a good faith standard. On the contrary, Ferrari says, is this indeed possible, even if limited by the Convention's scope of application ratione materiae.[143]

## 3.3 Good Faith -The Gap Filling Approach

Recent case law seems to recognise good faith as a relevant principle under the CISG. Some cases discuss good faith in general terms, whereas other derives specific rules exhibiting important links to good faith. The following section, focusing on gap filling by analogy, intents to derive such specific principles from two aspects of good faith. Good faith in negotiations and good faith as a duty to co-operate. In section 3.3.2, on the other hand, good faith is discussed as a general concept. This section focuses on gap filling by identifying good faith as a general principle underlying the Convention. Finally section 3.3.3 fills gaps in the Convention by applying private international law. The intention with this section is not primary to provide a comprehensive description of domestic statues. Instead the part has a comparative approach, trying to identify important differences and similarities between common and civil law traditions. These conclusions are later used as a benchmark, either to support duties derived by the two methods or reject them.

### 3.3.1 Good Faith by Analogy –Good Faith in Negotiations and the Duty to Co-operate

Behaviour during negotiations is important. The question is, however, whether pre-contractual activity may cause any kind of liability according to the CISG or not. The issue is twofold. Firstly it must be analysed if pre-contractual activity is relevant with reference to the Convention at all. If so, the second question is if such actions have to follow the principle of good faith.

[142] Franco Ferrari, 1994, pp. 195.
[143] Ibid.

The pre-contractual issue is delicate at the international level. Contrary to several civil law countries, the principle of culpa in contrahendo does not exist in Common law. The opening of negotiations for a contract by itself does not create any sort of duty relationship according to these traditions. It is not an unlawful act if a party who is conducting negotiations suddenly and illogically is breaking them off, even if the contract just is about to be signed.[144]

There are, however, several other concepts that may serve as a substitute for good faith and apply to situations during the contractual phase. Although pre-contractual liability does not arise as a responsibility based upon a general obligation or duty of good faith during negotiations, U.S. courts have nonetheless come to recognise pre-contractual liability in certain situations. U.S. courts have, for example, recognised liability in situations where the parties have not actually accomplished a contract, but have drawn up a series of preliminary agreements in anticipation of reaching final agreement on all points.[145]

The CISG provides limited information about pre-contractual activity. Preliminary agreements may, however, also cause liability under the CISG. Article 8(3) holds: "In determining the intent of a party…, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."[146] The interpretation of agreements according to article 8(3) may pay attention to detailed written agreements.[147] Arrangements between the parties saying that any prior agreement shall be without effect is consequently opposed by the provision. Instead all evidence between the parties is relevant in this respect.[148]

Another article in the CISG that may impose pre-contractual liability is article 16. The provision concludes that an offer may be revoked if the revocation reaches the offeree before he has sent out an acceptance.[149] The second part of the article restricts the offeror's possibility to revoke on two grounds: A promise or other indications by the offeror that the offer is

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[144] Beatson, J: *Anson's Law of Contract*, 27th Edition, Oxford University Press, 1998, general pp. 125.
[145] A principle imposing pre-contractual obligations under common law is e.g. the doctrine of misrepresentation. It concerns situations when one party makes a false statement during negotiations which is one of the causes of the other party to enter the contract. See e.g. Dobson, Paul: *Charlesworth's Business Law*, 16th Edition, Sweet & Maxwell, 1997, pp. 99.

[146] Article 8(3) CISG.
[147] Honnold, 1991, p. 171.
[148] Ibid.
[149] Article 16(1) CISG.

irrevocable or acts by the offeree in reliance on the offer.[150] The second situation is intended to cover circumstances when the offer itself does not intend to be valid for a certain time. Instead there is a possibility to regard the conduct by the offeror or other special circumstances and exigencies. This indicates that pre-contractual activity is relevant under the Convention.

The relevance of parties' behaviour was also under discussion in a German lawsuit.[151] One of several questions in this case concerned the level of activity required to influence the content of the final agreement. A Spanish buyer and a German seller concluded a contract for the sale of a used milling machine. The contract obliged the seller to install the machine on the buyer's premises. The seller's standard terms contained an exemption from liability for any defects in used machinery. Though the seller made a general reference to its standard terms in the confirmation of order, it did not include a copy of the terms. The installation of the milling machine turned out to be very difficult and took far longer than expected. Since the seller failed to set up the machine and electronics specialist was needed to complete the installation at the buyer's expense, the buyer commenced an action claiming the costs of the installation. The seller refused to pay, invoking the exemption clause contained in his standard terms.

The Court held that the recipient must be allowed the possibility to obtain sufficient knowledge of an offer and all its content in a reasonable manner. According to the Court this means that a party who utilise standard terms has to enclose a copy of these terms in the contract or in other ways ensure the other party's proper knowledge of their content. When reaching this conclusion, the Court took into account that national laws on business standard terms differ considerably among the contracting states. According to the general duty of good faith in article 7(1), and the general obligation to co-operate in the performance of the contract, the recipient of an offer is not expected to seek information regarding the other party's standard business terms. On the contrary, it is the user's responsibility to provide appropriate information of its standard terms.[152]

Consequently pre-contractual activity is relevant under the CISG in some situations. The next task is therefore to examine whether the principle of good faith may be applicable or not. There are no provisions in the CISG directly dealing with good faith in negotiations. A possible solution is to employ the UNIDROIT Principles and the PECL as complementary works. The UNIDROIT Principles impose an extensive duty of good faith on contracting parties. The Principles address good faith as relevant both during

[150] Article 16(2) CISG.
[151] Bundesgerichtshof, October 31, 2001, parties unknown.
[152] Ibid.

pre-contractual situations as well as in the performance of the contract. The obligation to negotiate in good faith is also supported by several cases.[153]

Negotiations in bad faith are governed by article 2.15 of the UNIDROIT principles. According to this article a party is free to negotiate and is not liable for a failure to reach agreement.[154] According to the Principles this is necessary in order to guarantee an effective competition among business people engaged in international trade.[155] The right to freely enter into negotiations and to decide on the terms to be negotiated must not, however, conflict the principle of good faith and fair dealing laid down in Art. 1.7. An example of negotiations in bad faith is when a party enters into or continues negotiations when he does not intend to reach and agreement with the other party.[156] Negotiations in bad faith are also present when a party deliberately or by negligence misled the other party. This may be at hand if he presents misrepresenting facts[157] or does not disclose information that should have been revealed given the nature of the contract.[158]

According to the Principles the liability for negotiating in bad faith is limited to the losses caused the other party.[159] The aggravated party may recover the expenses incurred in the negotiations and may additionally be compensated for the opportunity to conclude another contract with a third person. However, the party may generally not retrieve the profit that would have been the result if the original contract had been concluded.[160]

Article 2:301 of the PECL also governs negotiations contrary to good faith. The article states that a party is free to negotiate and is not liable for failure to reach an agreement.[161] If a party has negotiated, or broken off negotiations, contrary to good faith and fair dealing is he liable for the losses caused to the other party.[162] As an example of negotiations contrary to good faith the Principles mention, like the UNIDROIT Principles, a party who enters into or continues negotiations with no real intention of reaching an agreement with the other party.[163]

There is a limited body of case law discussing the duty to observe good faith in negotiations under the CISG. In a German case pre-contractual liability

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[153] E.g. ICC International Court of Arbitration, Paris, September 4, 1996, parties unknown; Supreme Court of New South Wales, October 1, 1999, Aiton v. Transfield.
[154] Article 2.15 (1) UNIDROIT Principles
[155] Comments article 2.15 UNIDROIT Principles.
[156] Article 2.15 (3) UNIDROIT Principles.
[157] See e.g. ICC International Court of Arbitration, August 2000, parties unknown.
[158] Comments article 2.15 UNIDROIT Principles.
[159] See article 2.15 (2).
[160] Comments article 2.15 UNIDROIT Principles.
[161] Article 2:301(1) PECL.
[162] Article 2:301(2) PECL.
[163] Article 2:301(2) PECL.

from breaking off negotiations was under consideration.[164] Two companies were negotiating in order to reach an agreement for the sale of screws. After an extensive correspondence between the parties to determine the terms for delivery, the buyer claimed either delivery or damages. The court, who did not make any references directly to the CISG, held that the buyer was not entitled to rely on remedies for pre-contractual liability arising from the breaking off of negotiations. Such liability may only arise when the circumstances of the case show that the non-breaching party relied on the conclusion of the contract. This is especially relevant when the breaching party has given the other party good reason to believe in the conclusion of the contract. Examples of such good reasons are when the breaching party caused the other party to perform in advance, or if the agreement had already been partially executed by the party.[165]

The discussion now turns to principles related to good faith as a duty to co-operate. The CISG does not contain any provision explicitly imposing a duty to co-operate. This is, however, the case in the UNIDROIT Principles. Article 5.3 of the Principles concludes: "Each party shall co-operate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations". The article is related to the principle of good faith and fair dealing as ruled out in article 1.7 as well as to the obligation to mitigate harm in the event of non-performance in article 7.4.8.[166]

In an arbitral award the claimant and the defendant entered into a contract for the sale of electricity.[167] The agreement was never performed and the claimant sued the defendant for breach of contract and liability for damages. The defendant objected that the contract was void due to the lack of registration in the Public Registry. The court rejected the defendant's argument of the invalidity of the contract. It held that the registration of the contract was a joint task of both parties. It was not accomplished because of defendant's failure to perform his duties to obtain the registration. In arriving to this conclusion the court referred to the duty to co-operate laid down in article 5.3 of the UNIDROIT Principles.[168]

In another case it was concluded, referring to article 5.3, that the obligation to co-operate in good faith is a general principle applicable to all international trade. In the case the arbitrators found the principle applicable

[164] Oberlandesgericht Frankfurt am Main, March 4, 1994, parties unknown.
[165] Ibid.
[166] Comments article 5.3, UNIDROIT Principles.
[167] ICC International Court of Arbitration, Barranquilla, December, 2000, parties unknown.
[168] Ibid. See also ICC International Court of Arbitration, Geneva, July 28, 2000, Andersen Consulting Business Unit Member Firms vs. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative.

to the Ivorian Civil Code containing similar rules.[169] There is, however, a possibility to employ similar references when applying the CISG.

The PECL also contains a provision governing the duty to co-operate. Article 1:202 provides that each party owes to the other a duty to co-operate in order to give full effect to the contract. This rule includes an obligation to allow the other party to perform his duties and thereby earn the fruits of the performance stipulated in the contract. The rule applies to all contracts, but has particular importance in relational contracts.

Even if the duty to co-operate does not exist in the CISG as a specific provision, there are several articles in the Convention imposing such duties. An important example is the buyer's obligation to accept performance. This duty is governed by article 48 and includes the seller's right to cure his failure to perform. This right is relevant also after the date for delivery.[170] In an arbitral award, however, the sole arbitrator ruled that the seller's right to cure after the date for delivery was dependent on the buyer's consent.[171] In a German case it was held that the buyer must specify the nature of the goods and accept reasonable efforts made by the seller in order to cure the damages.[172]

It is difficult to decide the nature of these "reasonable efforts".[173] In a Swiss case the buyer was held responsible for not allowing the seller to remedy its non-conformity. The dispute concerned a contract for the sale of furniture. The buyer sold a set of living-room furniture on to a customer and received shortly thereafter complaints holding that the goods were defective. The buyer refused to accept the seller's offer to repair the furniture and declared the contract avoided. The court held that the buyer must accept such an offer according to article 48 of the CISG.[174] In another Swiss case the buyer was not entitled to a price reduction due to article 50 of the CISG. According to the court a buyer cannot rely on such remedy if the he refuses the seller's offer to remedies its failure to perform.[175]

The seller's right to cure is limited to situations when he can do so without unreasonable delay and without causing the buyer unreasonable

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[169] ICC International Court of Arbitration, Paris, December, 1998, parties unknown.
[170] Article 48(1) CISG.
[171] ICC Court of Arbitration, Paris, 1994, parties unknown.
[172] Landgericht Regensburg, September 24, 1998, parties unknown
[173] For a discussion on imprecise expressions see Gorton, Lars: *"Best Efforts"*, The Journal of Business Law, March 2002, pp. 148. In short, he compares legal statutes and case law using or analysing vague expressions such as "best endeavours", "best efforts" and "good faith". Professor Gorton holds, among other things, that it is in general hard to establish legal principles outof such imprecise definitions since the circumstances in each individual case rarely are the same.
[174] Pretura di Locarno-Campagna, April 27, 1992, parties unknown.
[175] Handelsgericht des Kantons Zürich, February 10, 1999, parties unknown.

inconvenience.[176] In a German case, concerning the sale of a special chemical substance, the seller's right to cure failed, as it did not reach the buyer on time. The court held that any further delay would have been unreasonable as the buyer's customer had to stop their production during the time the good was treated. This delay of delivery would lead to claims for damages from the buyer's customer.[177]

Another important part of the buyer's duty to co-operate is his obligation to take delivery. This obligation is governed by article 60. According to the article the buyer must undertake all acts which could reasonably be expected of him in order to enable the seller to deliver.[178] As an example he is obligated to take over the goods.[179] The article provides no information on the place of performance. In a German case, however, it was ruled that in situations where there are no contrary agreements the seller must make delivery at the seller's place of business.[180]

In an arbitral award an Australian seller and a Polish buyer concluded two contracts for the sale of barley. Two instalments of barley were delivered in January and February. The buyer refused to take any further deliveries holding that the goods did not correspond to the qualities set out in the contract. After fixing an additional time for performance the seller declared the contract avoided and began arbitral proceedings demanding damages and interest. After examining the evidence presented by the parties on the lack of conformity, the arbitral court rejected the buyer's argument that the goods were imperfect. Consequently the buyer could not rely on article 73(2) of the CISG. The seller was allowed to declare the two contracts avoided with reference to article 64(1b) since the buyer had breached its duty to take delivery of the goods and refused to accept any other future delivery.[181]

If the buyer fails to take delivery, the seller has a duty to preserve the goods according to article 85. Courts have concluded that the seller may request reasonable compensation for the cost of storage and other expenses related to the buyer's failure to take delivery.[182] The same obligation for the buyer is stated in article 86. If the buyer has received the goods and intends to exercise any right under the contract or the Convention to reject them, he

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[176] Article 48(1) CISG.
[177] Amtsgericht München, June 23, 1995, parties unknown. For a discussion concerning inconvenience see also Oberlandesgericht Koblenz, January 31, 1997, parties unknown.
[178] Article 60(1) CISG.
[179] Article 60(2) CISG.
[180] Landgericht Aachen, May 14, 1993, parties unknown.
[181] Schiedsgericht der Börse für Landwirtschaftliche Produkte, Wien, December 10, 1997, parties unknown. See also Bulgarian Chamber of Commerce and Industry, February 12, 1998, parties unknown.
[182] Tribunal of Internationall Commercial Arbitration at the Russian Federation Chamber of Commerce, September 9, 1994, parties unknown. See also the same court, September 25, 1995, parties unknown and Tribunal Cantonal de Vaud, May 17, 1994, parties unknown.

must take reasonable steps to preserve the goods. He is entitled to retain the commodities until the seller has compensated him for reasonable expenses.[183] This is seen in a French case. It was concluded that if the buyer has received the goods and intends to exercise the right to reject them, he is entitled to retain them until he has received a reasonable compensation for his storage. In the actual case, however, the buyer had not given evidence of any expense incurred to preserve the goods and the court rejected his pleading for compensation.[184]

The duty to preserve the goods is intimately related to the obligation to mitigate damages. This duty is governed by article 77 of the CISG and applies both to the seller and the buyer.[185] The article requires a party who is expecting a breach of the contract to "take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach."[186] The second paragraph holds that if he fails to undertake such measures, "the party in breach may claim a reduction in damages to the amount by which the loss should have been mitigated."[187]

The corresponding provision in the UNIDROIT Principles is article 7.4.8 that deals with mitigation of harm. The provision states that the "non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the "…latter party's taking reasonable steps".[188] The injured party is allowed to recover any expenses "…reasonably incurred in attempting to reduce the harm."[189] The relevant case law exhibits similar features as the one for article 77 in the CISG.[190]

According to the comments to the UNIDROIT Principles the purpose of the provision is to avoid the aggrieved party from passively sitting back and

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[183] Article 86 CISG.
[184] Cour de Cassation, January 4, 1995, Sté Fauba France FIDIS GC Electronique v. Sté Fujitsu Mikroelectronik GmbH, France.
[185] For general applications of article 77 see e.g. ICC Court of Arbitration, Paris, December, 1997, parties unknown, referring to the UNIDROIT Principles article 7.4.8; Hungarian Chamber of Commerce and Industry Court of Arbitration, May 25, 1999, parties unknown; Oberster Gerichtshof, March 9, 2000, parties unknown; Bundesgerichtshof, March 24, 1999, parties unknown, wherein the court emphasised the duty to stop the usage of the seller's product as soon as he became aware of its damaging effects; Landgericht Darmstadt, May 9, 2000, parties unknown, The buyer claimed that product-information was not delivered in French and Italian but only in German. The court held the buyer liable for failing to mitigate loss according to article 77 by not asking the seller to supply the missing product information right after delivery of the goods.
[186] Article 77(1) CISG.
[187] Article 77(2) CISG.
[188] Article 7.4.8(1).
[189] Article 7.4.8(2).
[190] ICC International Court of Arbitration, Paris, December, 1997, parties unknown, ICC International Court of Arbitration, Paris, April, 1998, parties unknown; ICC International Court of Arbitration, March, 1999, parties unknown, ICC International Court of Arbitration, Barranquilla, December, 2000, parties unknown.

waiting to be compensated for harm which he could have avoided or reduced. Any harm, which the aggrieved party could have avoided by taking reasonable steps, will not be compensated. The comments also state that a party who has already suffered the consequences of non-performance, cannot also be required to undertake time-consuming and costly measures. On the other hand, the comments continue, it would be unreasonable from an economic standpoint to permit an increase in harm that could have been reduced by taking reasonable steps.[191]

An important issue is what measures a party must undertake in order to limit the other party's loss. According to article 77 measures to mitigate loss must be reasonable in the circumstances concerned.[192] The extent of the duty to mitigate damages is consequently dependent on the meaning of the wording "reasonable in the circumstances concerned". This is a rather vague expression but some guidelines are possible to find in an Austrian case.[193] The court concluded that a "measure to reduce damages is reasonable, if it could have been expected as bona fide conduct from a reasonable person in the position of the claimant under the same circumstances."[194] The aggrieved party is not, however, obliged to undertake measures involving unreasonably high expenses and risks. An Australian court has, for example, concluded that the duty to mitigate damages did not oblige the seller to risk his commercial reputation.[195]

In practice several situations require resolute activities to mitigate damages. An important matter is the buyer's obligation to undertake replacement purchases. A court found that a buyer had failed to mitigate losses under article 77 when he had only made efforts to find possible replacement purchases in his region.[196] The German court held that the buyer should also have investigated suppliers in the whole Germany and even abroad.[197] If the buyer undertakes a substitute purchase to higher costs than the contractual price, he is allowed to obtain the difference between the replacement purchase and the contracted price from the seller.[198]

A seller has a corresponding duty to sell goods when the buyer is unable to take delivery. If he does not undertake such measures the buyer is not

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[191] Comments article 7.4.8, UNIDROIT Principles.
[192] Article 77 CISG.
[193] Oberster Gerichtshof, February 6, 1996, parties unknown.
[194] Ibid.
[195] Supreme Court of Queensland, November 17, 2000, Downs Investments Pty Ltd v Perjawa Steel SDN BHD.
[196] Oberlandesgericht Celle, September 2, 1998, parties unknown.
[197] Ibid. See also Landgericht Berlin, September 15, 1994, parties unknown, where the buyer's declaration to try to resell the defective goods had to be considered as an attempt to mitigate the damages in accordance with article 77 of the CISG and not as an implicit waiver of its right to rely on the lack of conformity.
[198] Oberlandesgericht Hamburg, February 28, 1997, parties unknown.

obligated to pay any damages.[199] In a German case the buyer ordered shoes from an Italian shoe manufacturer.[200] After the shoes were manufactured the seller demanded security for the sales price. The buyer neither provided security or payment for the goods. The seller declared the contract avoided and resold the shoes. The seller demanded compensation for damages. The buyer, who accepted responsibility, questioned damages concerning the seller's failure to resell some of the shoes.

The court held that the seller was allowed to avoid the contract according to article 72 of the CISG.[201] The seller was also authorised to obtain the difference between the contract price and the price recovered in the substitute transactions.[202] The court found that the seller had carried out the resale within a reasonable time and held that the he was not forced to resell the shoes before the date of avoidance. Consequently a resale, practically two months after avoidance, is performed within reasonable time and does not constitute a breach of the seller's obligation according to article 77.

The seller's refusal to enter into a covering transaction does not, however, constitute a breach of his obligation to mitigate loss if he can show that he would have suffered the same loss of profit even if he had resold the goods to a third person.[203] A German court has ruled that in situations where the seller only is able to recover about 25% of the contract price is he not obligated to sell the goods in order to receive compensation for damages. Such a resale is not considered to be in a reasonable manner as required by article 75 of the CISG.[204]

Avoidance of a contract is another way to limit damages. This situation is seen in a German case.[205] The court concluded that the seller had not taken the suitable legal measures to mitigate his loss. Even if the seller had fulfilled his contractual obligations and the buyer had committed a breach of

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[199] Oberlandesgericht München, February 8, 1995, R. Motor s.n.c. v. M. Auto Vertriebs GmbH.
[200] Oberlandesgericht Düsseldorf, January 14, 1994, parties unknown.
[201] The article says: " 1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided. 2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance. 3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.
[202] Article 75 CISG. See also Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, Austria, June 15, 1994, parties unknown.
[203] Oberster Gerichtshof, April 28, 2000, parties unknown.
[204] Oberlandesgericht Hamm, September 22, 1992, parties unknown. The article says: " If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74."
[205] Oberlandesgericht München, February 8, 1995, parties unknown.

contract, the seller was held responsible for never avoiding the contract. Consequently he had ignored his duty to mitigate its loss and could not claim damages.

### 3.3.2 General Principles on which the Convention is based

The second method to fill gaps in the Convention is to apply general principles on which the Convention is based. If it is possible to show that good faith constitutes a general principle under the Convention, there is also strong evidence in favour of a positive duty to observe good faith in contractual situations.

In a German case two car dealers concluded a contract for the sale of a used car.[206] When the buyer resold the car to a third party it was discovered that the car was older than the documents indicated. The actual mileage was also higher than shown by the odometer. The seller, paying damages to the third party, claimed compensation from the first seller for the same amount as the damages. The seller refused, holding that the contract contained a clause excluding its liability for lack of conformity.

The court argued that the seller was aware of the non-conformity at the time of the conclusion of the contract. The seller did not inform the buyer thereof and was consequently not entitled to rely on article 35(3) CISG. This article provides a liability exemption for the seller in cases where the buyer knew or could not have been unaware of the lack of conformity at the time of the contract's conclusion. Even if the buyer could not possibly have been unaware of the lack of conformity, the court imposed, referring to articles 40 and 7(1) of the CISG, a general principle underlying the CISG holding that even a negligent buyer deserves more protection than a fraudulent seller.[207]

Similar conclusions are seen in a Dutch case.[208] The seller asked an auctioneer to sell a painting by auction. The painting was attributed to the painter Henry van der Velde. The painting was bought by a second German auctioneer and was offered for auction to an international auctioneer house. After an expert examination the auctioneer house claimed that the painting could not be attributed to Henry van der Velde. The second German auctioneer then sued the first auctioneer. The first auctioneer commenced an action against the seller in order to avoid the contract and recover his

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[206] Oberlandesgericht Köln, May 21, 1996, parties unknown.
[207] Ibid. Article 40 says: " The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer."
[208] Arrondissementsrechtbank Arnhem, July 17, 1997, Kunsthaus Math. Lempertz OHG v. Wilhelmina van der Geld.

payment. The seller held that that the action brought by the second German auctioneer against the buyer had been time-barred. The court agreed with the seller. Therefore the seller could not be sued for non-conformity. The court referred to the principle of good faith in international trade that, according to the court, is a general principle underlying the CISG.[209]

Evidence in favour of an underlying general principle of good faith is also found in the UNIDROIT Principles. Article 1.7 of the Principles requires parties to act in accordance with good faith and fair dealing in international trade and prohibits the parties from limiting or excluding this duty in their contracts. There are several provisions in the Principles directly and indirectly imposing the duty of good faith and fair dealing.[210] Consequently the concept of good faith and fair dealing may be considered as one of the fundamental ideas underlying the Principles. This will have the result that even in the absence of specific provisions in the Principles the conduct of the parties throughout the life of the contract, including the negotiation process, must conform to the concept.[211]

Like the UNIDROIT Principles the PECL impose a great duty of good faith and fair dealing on contracting parties.[212] Article 1:201 is the most important provision within the PECL on good faith and fair dealing. The article corresponds to 1.7 in the UNIDROIT Principles and provides: "Each party must act in accordance with good faith and fair dealing. The parties may not exclude or limit this duty". Article 1.201 in the PECL is meant to constitute a basic rule under the Principles. Good faith and fair dealing must be observed throughout the life of the contract, including its negotiation phase. Particular applications of the rule appear in several specific provisions in the principles. Its purpose is to enforce community standards of decency and reasonableness in commercial transactions. It also takes priority over other provisions of the Principles when a strict adherence to them would lead to a manifestly unjust result.[213]

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[209] Arrondissementsrechtbank Arnhem, July 17, 1997, Kunsthaus Math. Lempertz OHG v. Wilhelmina van der Geld.
[210] See e.g. articles 2.15, 2.16, 3.5, 3.8, 4.6, 4.8, 5.2, 5.3, 6.1.5, 7.1.2, 7.1.6, 7.1.7, and 7.4.8.
[211] Comments article 1.7, UNIDROIT Principles.
[212] Guillemard, Sylvette: *Comparaison des Principes UNIDROIT et des Principes du droit européen des contrats dans la perspective de l'harmonisation du droit applicable à la formation des contrats internationaux*, Université Laval, 1999.
[213] Lando, Ole and Beale, Hugh (Editors): Principles of European Contract Law, Part I: Performance, Non-performance and Remedies, Martinus Nijhoff Publishers, 1995, p. 53-54.

### 3.3.3 Private International Law

A uniform law cannot provide rules covering all topics arising within its scope of application. A solution to this problem is to apply appropriate provisions under the rules of private international law.[214] The problem with this approach has already been discussed. It will threat a uniform application of the Convention. Therefore, it is more fruitful to compare major legal traditions over the world in order to find similarities in the view on good faith.

The common law of England has a concept of good faith, but it is a limited one. The reason to this reluctant approach to good faith in English courts is the legal uncertainty this principle will entail. This is illustrated by a case from 1988. The English Court of Appeal concluded that a broad concept of honesty and fair dealing in commercial contracts "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."[215]

Even if English legal tradition is reluctant when applying general concept of good faith the expression exists in the English Sale of Goods Act. According to section 61(3) behaviour is in accordance with good faith when the acting"…is in fact done honestly, whether it is done negligently or not." Despite this definition of good faith valid in the Sale of Good Act, English law does not have any equivalent to the general concept of good faith found in civil law. It is a fact, however, that several English courts arrive at the same conclusions as their continental equivalents, but by a different route. There are numerous situations in which English common law do not find it necessary to require good faith because a duty, which does not depend on good faith, but provide similar results, is imposed upon the parties.

Instead of using a general principle, as many continental legal systems, English law requires good faith in particular situations. A party who opens negotiations leading to a contract has a duty not to deceive the other party by false statements or by any concealment of facts.[216] English law also imposes a general duty of good faith in particular types of relationship. An agent owes a duty to subordinate his own interests to those of his principal and a company director owes a duty of good faith to the company that employs

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[214] An inclusion of such a provision in the CISG has been heavily debated during the drafting process. Opponents held that the recourse to rules of private international law threat the uniform application of the Convention. See e.g. Doc. A(10)(b), *Recommendation on Pending Questions*, A/CN.9/100, Annex III, p. 112.

[215] Court of Appeal of England, July 28, 1988, Banque Financiere de la Cité S.A. v. Westgate Insurance Co. Ltd. For pre-contractual issues see also Lord Ackner in House of Lords, January 23, 1992, Walford v Miles. "A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating parties."

[216] See doctrine of misrepresentation. E.g. in Dobson, 1997, pp. 99.

him.[217] It must be acknowledged, however, that there recently have been indications of a development towards the continental view of good faith. This as a result of the introduction of the 1993 EC Directive on Unfair Terms in Consumer Contracts, which makes several references to good faith.[218]

If England traditionally has been reluctant using general principles of good faith the United States is an important example of the contrary within the common law family. Both the Uniform Commercial Code and the Restatement second imposes an obligation of good faith in the performance and enforcement of contracts. Section 1-203 of the Code provides that "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." And Section 205 of the Restatement, which was inspired by the Code, declares "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."

The Uniform Commercial Code contains two definitions of good faith which apply to contracts for the sale of goods. Under the general definition in Section 1-201(19) good faith is defined as "honesty in fact in the conduct or transaction concerned." Bad faith is present when a party fails to perform or enforce a specific duty under a contract that constitutes a breach of the contract or make a remedial right unavailable.[219] Under the special definition in Section 2-103, applicable to merchants in sales transactions, good faith is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

In the Restatement good faith is defined as "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."[220] Examples of bad faith according to the Restatement are evasion of the spirit of the bargain, lack of diligence, wilful rendering of imperfect performance, and abuse of a power to specify terms and the failure to co-operate.[221]

An interesting example of a development in the view of good faith is seen in Australia. Some time ago Australia had a traditional English common law approach to good faith, merely using the concept in an implicit way. Recently have courts, however, concluded that a duty of good faith might be imposed upon parties both in the performance of obligations and in the exercising of rights.[222] According to Australian case law the concept of good

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[217] See e.g. Beatson, 1998, p. 636.
[218] Official Journal EC L 95/29 of 21 April 1993.
[219] UCC § 1-203.
[220] Second Restatement of Contracts § 205.
[221] Ibid.
[222] Zeller, Bruno: Good Faith - *The Scarlet Pimpernel of the CISG*, Pace essay 2000.

is bilateral. There is one subjective and one objective side. The subjective side requires actual state of mind of the persons concerned. The objective part of the principle, on the other hand, involves the words within a given legislative context. The meaning of "the state of mind" has been criticised as being imprecise and not capable of giving rise to an enforceable obligation.[223] Further restrictions in the application of the principle are seen in the Asia Pacific Recourses case. In this case it was held that the principle of good faith is an "incapable of abstract definition" and may only be assessed if the relevant facts are known.[224]

An Australian court has, however, recognised the importance of good faith under the CISG.[225] The judge discussed the concept of good faith as it is applied in both Europe and the United States. The judge held that good faith has not yet been accepted to the same extent in Australian law. In sum, Australia yet has a restrictive approach to good faith even if there are indications that it is approaching an explicit recognition of the concept of good faith.

In civil law the doctrine of good faith typically takes the form of an explicit provision.[226] An important and illustrative example is the German Civil Code. Section 242 of the code provides that the obligor must perform his duty in accordance with good faith and fair dealing, having regard to commercial practices.[227] The German Civil Code obligates contracting parties to observe good faith both in negotiations and in performance of the contract. The definition of good faith includes customs as well as a general requirement to act reasonably and it forms a far-reaching provision. German courts have created several obligations ensuring a loyal performance of the contract by referring to §242. Examples are the duty to co-operate, to safeguard the other party's interest, to give information and to submit accounts. As a result of this liberal approach to section 242 the provision has been applied in such a wide variety of situations that the term "good faith" is not subject to a single definition within German law.[228]

Dutch law is closely related to German law. Article 6:2 of the Civil Code from 1992 provides that good faith shall not only supplement the parties' obligations, but also modify and extinguish them. A rule that binds the parties by virtue of law, usage or legal act shall not apply if this would be

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[223] Zeller, Bruno: Good Faith - *The Scarlet Pimpernel of the CISG*, Pace essay 2000.
[224] Supreme Court of Tasmania, May 5, 1998, Asia Pacific Resources Pty Ltd v Forestry Tasmania.
[225] Court of Appeal, New South Wales, March 12, 1992, Renard Constructions (ME) PTY LTD v. Minister for Public Works.
[226] See e.g. § 242 BGB and article 1337 Codicie Civile.
[227] "Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.", § 242 BGB.
[228] Sim, 2001, section II B1.

unreasonable by the standards of good faith. Art. 6:248 contains a similar rule applying to contracts.

Further provisions laying down a principle of good faith in contractual relationships are found in Belgium, France and Luxembourg. Article 1134 of the French Code Civile provides that contracts must be performed in good faith.[229] Contrary to Germany, however, this provision has been used purely in a subsidiary manner. In France liability rests on tort principles during pre-contractual negotiations and on contract principles once the contract is formed. [230]

Similar rules are found in the Italian Codicie Civile. Article 1337 promotes a duty to act in accordance with good faith in the pre-contractual phase as well as in negotiations and in performance of the contract.[231] The duty to act in accordance with good faith includes an obligation to disclose information to the other party during negotiations.[232] In Italy good faith has been defined as "openness, diligent fairness, and a sense of social solidarity."[233] In the Nordic countries the good faith principle has been recognised by courts and legal writers. Although it has not been expressed in general terms in the statutes, several statutory provisions presuppose its existence.[234]

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[229] "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi.", article 1134 French Code Civil.
[230] Sim, 2001, Section II B2.
[231] "Le parti, nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi secondo buona fede.", article 1337 Italian Codice Civile.
[232] Article 1337 of the Italian Codice Civile.
[233] Corte di Cassazione, October 27, 1961, parties unknown.
[234] See for instance § 36 of the Uniform Nordic Contract Act which gives the courts power to set aside unfair contract clauses.

# 4 Analysis

The CISG contains no articles directly governing the parties' duty to observe good faith. This does not necessarily mean, however, that no such duties may be derived from the Convention. This essay is analysing two possibilities to impose a duty to observe good faith on the parties. The first method is trying to extend the reference to good faith in article 7(1), which normally applies to the interpretation of the Convention, to impose additional duties on the parties as well. This is done by an interpretative approach, based on the method laid down in article 7(1). The second alternative investigates the possibility to impose good faith by employing the gap-filling statue in article 7(2).

As already concluded, the primary function of article 7(1) is to provide a tool for the interpretation of the Convention. It is, however, possible to argue in favour of a more extensive reading of the provision. A small body of case law holds that the reference to good faith in the article applies to the conduct of the parties as well. The problem is, though, that there exists strong evidence opposing such an extensive reading of the article. Some court's decision and several authorities strongly reject additional duties under article 7(1). Since the ultimate goal of the Convention is to establish a uniform international trade instrument, it is unsustainable that different courts apply the article in a different manner. Such behaviour threatens predictability in international trade. Consequently an international uniform methodology must be established. Therefore, in the first part of this analysis, the nature of article 7(1) is interpreted. This in order to achieve an understanding of the initial intention with the article. Recent developments in case law and scholarly writing are also considered.

There is an important arbitral award holding that the reference to good faith in article 7(1) is limited to the interpretation of the Convention. [235] The sole arbitrator held that the wording of the article clearly restricts the scope of good faith to the interpretation of the Convention. The "Bonaventure" case, on the other hand, indicates the contrary. [236] In this case the court held that

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[235] ICC Court of Arbitration, Paris, January 23, 1997, parties unknown.

[236] Cour d'Appel de Grenoble, Chambre Commerciale, 22 February 1995, SARL Bri Production "Bonaventure" v. Société Pan African Export.

the CISG requires parties to perform their contracts in accordance with good faith. The conduct of the parties in the case was “contrary to the principle of good faith in international trade as laid down in article 7 CISG”.[237] A similar conclusion is seen in a Hungarian arbitration decision.[238] In this case the principle of good faith was held relevant both when interpreting the Convention and as a standard for performance. Further judgements in this direction are seen in a Mexican case[239] and in a German case.[240]

The case law is consequently favouring an extensive reading of article 7(1). It is important to observe, however, that four cases do not constitute a reliable trend. Especially not when there exist contradicting decisions. The preparatory works to article 7(1) also provides arguments in favour of a limited reading of the article. The drafting history is an important source since it reveals the intention with the article. It also discloses whether the issue was controversial or not. If the provision embodies a compromise between different delegates, it may call for carefulness when extending the wording of the provision.

Article 7(1) has a complex drafting history. Several ideologies and traditions were considered and it was hard to reach an efficient compromise. The drafting history reveals, however, some important evidence in favour of a limited scope of the article. A Hungarian proposal to impose a provision in the Convention directly imposing a duty to observe good faith was initially adopted by the conference. The discussions preceding the decision exposed, however, a significant difference in opinion. An important reason was probably that the delegates represented different legal traditions. In civil law the duty to observe a general good faith is often extensive. In several common law countries, on the other hand, general references to good faith are rejected when the outcome of such provisions is unpredictable. An important provision in an international instrument must, however, be supported by a majority of the delegates in order to become effective. Therefore a compromise was worked out.

The adopted compromise was only mentioning good faith as a principle relevant with reference to the interpretation of the Convention. The crucial question is, therefore, how this compromise is to be interpreted. It could be interpreted narrowly, restricting the reference to good faith to the interpretation of the Convention. It could also be interpreted extensively, imposing additional duties under the article. The discussions on the fifth

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[237] Cour d’Appel de Grenoble, Chambre Commerciale, 22 February 1995, SARL Bri Production “Bonaventure” v. Société Pan African Export.
[238] Hungarian Chamber of Commerce and Industry Court of Arbitration, November 17, 1995, parties unknown.
[239] Comisión para la Protección del Comercio Exterior de Mexico, 30 November 1998, Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd., Seoulia Confectionery Co.
[240] Landgericht Saarbrücken, 26 March 1996, parties unknown.

meeting with the first committee provide important guidelines. The Italian delegate proposed transference of the reference to good faith from its position in an article dealing with the interpretation of the Convention to a provision applying to the interpretation and performance of the sales contract. The amendment held that the reference to good faith should not be related to the interpretation of the Convention. Instead is should govern the contract between the parties. Several delegates supported this view, but the majority concluded that the issue had already been discussed without reaching a sufficient solution. The proposal was consequently rejected.

The doctrine analysing the issue is divided. Most commentators agree that the CISG does impose a duty to observe good faith in international trade.[241] There are, however, important differences between how they derive this obligation. Professor Honnold and Professor Winship hold that the reference to good faith in article 7(1) merely applies to the interpretation of the Convention. They base their conclusion on the wording and the legislative history of the article. Professor Bonell, on the other hand, holds that regardless of the language used in article 7(1) is the relevance of good faith not limited to the interpretation of the Convention. He does not, though, derive the obligation directly from the wording of the article. Instead he holds that good faith is one of the general principles underlying the Convention. Similar conclusions are seen in other scholarly writing. Several authorities recognise good faith as a principle relevant between the parties. They do not, however, derive this duty from a general principle of good faith. Instead they identify specific provisions in the CISG that are exhibiting important links to the concept. A common reference is article 16(2)(b).[242]

In sum, additional duties under article 7(1) were rejected by the Conference. The case law is contradictory and several authorities conclude that the wording of the article does not apply to the conduct of the parties. The drafting process was also complicated and the final settlement must be applied carefully. The conclusion must consequently be that the reference to good faith in article 7(1) only applies to the interpretation of the Convention. If future court's decisions will form a uniform case law allowing additional duties under the article, it may be possible to argue that the initial idea with the provision has been overruled. This probably requires judgements from a majority of the contracting states. Today the case law favouring additional duties under the article mostly originates from countries with a civil law tradition. Even if the CISG is an autonomous body of rules, it is not likely that questionable decisions from courts representing legal traditions with a liberal approach to good faith mirror the international recognised view. It is

[241] See e.g. Dore and DeFranco, 1982, p. 60; Schlechtriem, 1996, p. 39 and Ferrari, 1994, p. 183.
[242] See e.g. professor Ramberg and Herre, p. 108 pp.

another question, though, if it really is fruitful to have a discussion treating the interpretation of the Convention as an issue fully separated from the conduct of the parties. If courts consistently interpret the Convention in accordance with good faith, the parties in international trade will adopt to this standard. Such an interpretation will consequently also influence the behaviour of the parties.

Since no duty to observe good faith in international trade can be derived directly from article 7(1), other means must be analysed. This essay has discussed article 7(2) as a possible tool. If an issue is not directly governed by the Convention, but nevertheless may fall within its scope of application, the gap-filling statue in article 7(2) is relevant. Several delegates have acknowledged good faith as a principle falling within the scope of the Convention.[243] Commentators[244] and case law[245] indicate the same.

Gap filling may be performed in three different ways. By analogy, general principles or the application of international private law. Chapter two concluded that the first two methods, gap filling by analogy and by general principles, are the primary tools to be used. The usage of international private law is only relevant when no guidelines are found in the other two approaches.

To fully understand the conclusion in this essay the difference between the analogical approach and the employment of general principles of the Convention must be understood. Gap filling by analogy deduces specific principles from the provisions in the CISG. The result is typically a principle exhibiting important links to the general concept of good faith. The scope of this principle is, however, significantly more constrained. It applies only to specific situations when certain predetermined circumstances are present. Gap filling by general principles, on the other hand, fills gaps in the Convention by referring to principles and rules that because of their general character may be applied on a wider scale. This means that the principle of good faith is applied as a general concept. Contrary to specific principles deduced by analogy, this sort of good faith applies to a wide spectrum of situations.

Since the principle lacks an internationally recognised definition it is up to every individual court to decide whether the principle applies to the actual situation or not. Prior court's decisions may provide some guidance. The case law is not, however, offering a full coverage. There are always going to

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[243] See e.g UNICITRAL: *Review of "Formation" Draft*; The 1978 Draft Convention, Annex I, para.44-45.

[244] See e.g. Dore and DeFranco, 1982, p. 59; Bonell, in Bianca-Bonell, 1987, pp. 84.

[245] Arrondissementsrechtbank Arnhem, July 17, 1997, Kunsthaus Math. Lempertz OHG v. Wilhelmina van der Geld; Bundesgerichtshof, October 31, 2001, parties unknown.

be situations that are not covered by any article or case law. Despite this lack of guiding principles, a court may still apply the general concept of good faith on the new situation.

The first issue to be analysed in the light of article 7(2), is good faith in negotiations. Pre-contractual good faith is not directly covered by the Convention and the gap-filling statue may consequently be relevant. The question is, however, if pre-contractual issues are falling within the scope of the CISG at all. Common law, for example, is often reluctant when imposing pre-contractual duties. This fact does not mean, though, that such topics automatically fall outside the frames of the Convention. It merely indicates that analogous conclusions favouring pre-contractual duties under the CISG must be carefully applied. Even if common law traditionally is unenthusiastic in imposing pre-contractual liability, such obligations still exist. For example are disloyal negotiations sanctioned also in common law.[246]

It has been concluded that the CISG contains articles holding pre-contractual situations as relevant. Examples are article 8(3) and 16. Consequently may some pre-contractual issues fall within the scope of the Convention. Since the occurrence of provisions dealing with pre-contractual circumstances is limited in the CISG, the difficulty to achieve any analogous conclusions from applying and comparing related articles is always present. A possible solution is therefore to study the UNIDROIT Principles and the PECL as supplementary works.

The duty to negotiate in good faith has been supported by several cases.[247] An example is when a party negotiates without any intention to reach an agreement with the other party.[248] Other examples are when a party deliberately or by negligence mislead the other party. This might be the case when a party presents misrepresenting facts or disclose important information.[249] The duty to negotiate in good faith does not, however, prohibit a party from breaking off negotiations.[250] Liability from breaking off negotiations may only arise if the circumstances show that the non-breaching party relied on the agreement between the parties. This is the case when the breaching party has given the other party good reasons to believe

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[246] An example hereof is when a party deceives the other party by false statements and concealment of facts.
[247] See e.g. ICC International Court of Arbitration, Paris, September 4, 1996, parties unknown and Supreme Court of New South Wales, October 1, 1999, Aition v. Transfield.
[248] See e.g. article 2.15(3) UNIDROIT Principles.
[249] See e.g. Oberlandesgericht Köln, May 21, 1996, parties unknown; ICC Court of Arbitration, August, 2000, parties unknown; comments article 2.15 UNIDROIT Principles and article 2:301(2) PECL.
[250] Oberlandesgericht Frankfurt am Main, March 4, 1994, parties unknown. See also article 2.15 (1) UNIDROIT Principles and article 2:301(1) PECL.

in the conclusion of the contract. This is especially relevant when the breaching party has caused the other party to perform in advance or if the contract already has been partially executed by the parties.[251] Such actions constitute negotiations contrary to good faith and may consequently cause liability.[252]

A related issue is whether the parties' behaviour during negotiations may cause contractual obligations or not. U.S. courts have recognised liability in situations where the parties have drawn up a series of preliminary agreements without reaching final agreement on all points.[253] This conclusion is also supported by article 8(3) of the CISG. A Swiss case has also concluded that a contract has to be interpreted in good faith with regard to all relevant circumstances during the contractual process.[254]

This indicates that a party may be bound by his actions during the pre-contractual phase. A court may also find that preliminary agreements are of binding nature when the parties have either reached agreement on all issues requiring negotiation, or have agreed upon the major terms of the agreement, even if there still are terms to agree upon. If the contract does not cover a specific situation a court may consequently resort to behaviour and promises during the negotiations to interpret the terms of the agreement.[255] However, a certain level of activity is probably needed. A party will certainly not be bound by an offer made as a step in the negotiations or a simple action undertaken to exhibit his interest in continuing the negotiations in a specific direction. Some evidence is found in the German milling machine case. The court held that activity is required if a party wants to make his standard term relevant as a part of the agreement. A sole reference to the terms during negotiations is not enough. Instead the court held that the party who wants to claim his standard terms as a part of the agreement, has to enclose a copy of these terms in the contract or in other ways ensure the other party's knowledge of their content.[256]

Even if not explicitly mentioned by the Convention, a duty to co-operate is possible to derive from its provisions. In an arbitral award it was concluded, referring to article 5.3 of the UNIDROIT Principles, that the obligation to co-operate in good faith is a general principle applicable to all international

[251] Oberlandesgericht Frankfurt am Main, March 4, 1994, parties unknown. See also Teachers Ins. & Annuity Ass'n v. Tribune Co, 1987, for a domestic decision in this direction.
[252] ICC International Court of Arbitration, August, 2000, parties unknown; article 2.15(3) UNIDROIT Principles and comments to the article; Article 2:301(2) PECL.
[253] Teachers Ins. &Annuity Ass'n v. Tribune Co, 1987
[254] Handelsgericht des Kantons Aargau, June 11, 1999, parties unknown.
[255] Oberlandesgericht Frankfurt am Main, March 4, 1994, parties unknown and Handelsgericht des Kantons Aargau, June 11, 1999, parties unknown.
[256] Handelsgericht des Kantons Aargau, June 11, 1999, parties unknown.

trade.[257] The principle may consequently also be relevant under the CISG. As a general principle the concept of co-operation may be seen as a duty to observe, not only your own interest, but also the other party's. This duty may be especially important in relational contracts.[258] This essay will not, however, discuss the duty to co-operate in general terms. The analogical approach will be maintained.

The duties to accept performance and take delivery constitute fundamental parts of the principle of cooperation. An important aspect of this issue is to what extent the buyer must accept the seller's right to cure. If the seller is able to cure his non-conformity without unreasonable delay and without causing the buyer unreasonable inconvenience, the buyer must accept the cure.[259] The problem is to decide the nature of unreasonable delay and inconvenience. There is, however, some guiding case law. The seller's right to cure after the date of delivery has been concluded to be dependent on the buyer's consent.[260] How effective the cure has to be is probably dependent on the buyer's costs associated with the non-conformity. A possible method to decide the degree of effectiveness required is to consider the buyer's losses associated with the non-conformity compared to the seller's advantages from curing his breach.

The buyer's duty to take delivery obligates him to undertake such acts that could reasonably be expected of him in order to enable the seller's delivery.[261] As an example he is obligated to take over the goods when the seller delivers.[262] According to case law the goods are to be delivered at the seller's place of business if nothing else is agreed between the parties.[263] The seller has an obligation to preserve the goods if the buyer fails to take delivery.[264] The buyer, on his side, is required to preserve the goods if he has received it but intends to exercise any right under the contract or the Convention.[265] Both the buyer and the seller are allowed to demand compensation for costs associated with the other party's non-performance or breach of contract.[266]

The duty to preserve the good is closely related to the obligation to mitigate damages. This duty obligates a party to undertake such measures as are reasonable in the circumstances to mitigate the loss emanating from the

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[257] ICC International Court of Arbitration, Paris, December 1998, parties unknown.
[258] See e.g. article 1:202 PECL.
[259] Article 48(1) CISG.
[260] ICC Court of Arbitration, Paris, 1994, parties unknown.
[261] Article 60(1) CISG.
[262] Article 60(2) CISG.
[263] Landgericht Aachen, May 14, 1993, parties unknown.
[264] Article 85, CISG.
[265] Article 86 CISG.
[266] Ibid.

breach.[267] To decide how extensive this duty is, one must determine the meaning of "measures…reasonable in the circumstances".[268] An important aspect is the buyer's duty to undertake replacement purchases. According to the case law the buyer has a rather extensive duty to investigate whether other sellers may be able to deliver the goods or not. Efforts made to find a new seller in the region has been considered as insufficient.[269] A party has to consider the market of the whole county and even the international market.[270] The parties in the relevant case law are unknown, but it is possible to argue in favour of a more far-reaching duty if the company at hand is a large multinational association. A multinational company has an international established organisation and will more easily find alternatives. Therefore a replacement purchase abroad may be regarded as reasonable if the company is large and unreasonable if the actual firm is a small local one.[271] The seller has a corresponding duty to sell goods when the buyer fails to take delivery.[272] The seller is, however, not obligated to undertake such measures if he will suffer the same loss of profit even if the resold the good to another party.[273]

Above have examples of specific principles related to good faith in negotiations and the duty to co-operate been derived from the CISG's framework by analogy. The discussion will now turn to the discussion treating good faith as a general principle. If the concept of good faith constitutes one of the general principles underlying the Convention such a general duty is possible do impose on the parties by employing the gap-filling statue in article 7(2).

There is strong evidence favouring a general principle of good faith underlying the Convention. This is the case in both the UNIDROIT Principles and the PECL.[274] It is also supported by several cases.[275] If it is impossible to derive a specific principle by analogy, the courts are consequently allowed to apply a general principle. It is important to observe that this method is secondary to the analogical approach. Applying a general principle of good faith is consequently only allowed when deducing a specific principle has failed. But even in these cases the general principle of good faith should be carefully applied. If every court employs the principle

[267] Article 77 CISG.
[268] Ibid.
[269] Oberlandesgericht Celle, September 2, 1998, parties unknown.
[270] Ibid.
[271] For a similar discussion see e.g. Professor Bonell in Bianca-Bonell, 1987, p. 87.
[272] Oberlandesgericht München, February 8, 1995, R. Motor s.n.c. v. M. Auto Vertriebs GmbH.
[273] Oberster Gerichtshof, April 28, 2000, parties unknown.
[274] Comments article 1.7, UNIDROIT Principles and article 1.201 PECL.
[275] See e.g. Arrondissementsrechtbank Arnhem, July 17, 1997, Kunsthaus Math. Lempertz OHG v. Wilhelmina vand der Geld and Oberlandesgericht Köln, May 21, 1996, parties unknown.

according to its own preferences, the uniform application of the Convention may be threaten. A specific principle, deduced by analogy, is also exhibiting subjective features. The principle will, however, be more closely linked to the specific principles of the Convention. This will promote uniformity and improve predictability.

As last resort, article 7(2) allows private international law as a possible means of gap filling. This thesis has discussed different approaches to good faith in civil- and common law. This to achieve an understanding of the attitude to good faith at the international setting. These results are used to provide a standard measuring the validity of the derived principles in this essay.

With the exception of the United States, general doctrines of good faith are reluctantly used in common law countries. This does not mean, however, that the requirement of good faith is not relevant within common law. In civil law tradition the obligation to act in good faith generally takes the form of a written clause in a legal code. In common law countries, on the other hand, the principle of good faith is derived from specific cases. The approach to good faith in civil law is more flexible than the one in common law. While the common law often reach the same result as civil law countries do, it is generally much harder to imply a term in the common law than it is to find a good faith obligation under a general doctrine. A general doctrine is always ready to meet any unforeseen contingencies. A weakness of the general clause is its legal uncertainty due to low predictability. It is difficult to know how a court will apply a general clause, even if an extensive body of case law provides important guidelines.

Another major difference between common law jurisdictions and civil law countries lies in their treatment of pre-contractual acts of bad faith. The civil law generally has a well-developed doctrine of pre-contractual liability. Most common law jurisdictions, on the other hand, do not recognise pre-contractual liability of bad faith. In common law the parties generally have the freedom to break off negotiations without any risk of liability. Although the UCC and the Restatement of Contracts both impose a duty of good faith and fair dealing on parties to a contract, there is no similar duty on parties to mere negotiations.

Although the view of how to guarantee a proper business climate varies between civil law countries and common law jurisdictions, the meaning of good faith are essentially the same. Good faith requires parties to perform their obligations under the contract fairly, honestly, and in a manner acceptable in their business. Good faith may be defined more narrowly, or may be more limited in its scope in common law countries, but the message is that the contracting parties owe one another a duty to act in good faith.

Does international private law supports the conclusions in this essay? Firstly it can be held that pre-contractual liability must be carefully implied under the CISG. It has been shown, however, that some situations cause pre-contractual liability even under common law. An example is the doctrine of misrepresentation. Such situations may consequently also fall under the CISG. Other relevant pre-contractual duties under the CISG are discussed above.

The attitude to good faith in English common law is also reflected in the most important conclusion in this essay. How a practitioner shall employ the principle of good faith under the CISG. It has been shown that the principle must not be derived from the wording of article 7(1). Instead such duties are deduced from article 7(2). In English common law good faith is reluctantly used as a general concept. The author favours a similar standard under the CISG. Good faith should not primarily be used as a general concept. Instead it should be implied from specific principles derived by analogy.

If the practitioner fails to derive a specific principle by analogy, he may resort to the general principle of good faith. This must, however, be done with care. Perhaps only when the avoidance of applying the principle will lead to a result that is contrary to the intention with the Convention. Liberal approaches to good faith will not only threat a uniform application of the Convention. It will also decrease predictability in international trade.

It has been shown when comparing civil law and common law, that the final result from applying a general clause and specific principles often is the same. The difference between good fait derived by analogy and the application of a general principle is consequently more or less a matter of method. So why is this issue important at all?

Firstly a uniform application of the Convention calls for standardised methods. Without such consistency a clear and guiding case law will be difficult to establish. If an arbitrator shall base his judgement on prior cases, he must know exactly how his colleague valued certain circumstances and behaviours. This is difficult when the case law exhibits different methods.

Secondly a discrepancy in methods used, will slow down the establishment of an effective and extensive case law. If one approach is preferred, all cases concerning the duty to observe good faith will be focused around one method. This will increase the possibility to find guidance in prior cases in the future. If both approaches were used side by side the result would be two different bodies of case law instead of one. This will not only make the utilisation of case law more difficult. It also takes more time to build up two bodies of case law compared to a situation when only one method is used.

Finally it is often hard to establish clear and uniform legal principles when basing judgements on vague expressions such as "good faith". The term has not only several different definitions in various domestic laws.[276] The application of the statute will also significantly depend on the circumstances in each individual case. Since the same conditions seldom are present in two individual cases, a guiding case law allowing a uniform application of the general principle will be hard to establish.[277]

[276] See section 3.3.3.
[277] Compare Gorton, 2002, p. 162.

# 5 Conclusion

Even if the CISG does not contain any provisions directly dealing with the duty to observe good faith during contractual relations, there is a possibility to deduce such obligations from the Convention. The only explicit reference to good faith is found in article 7(1). This thesis has shown, however, that this article merely applies to the interpretation of the CISG. A clear and stringent case law in the future favouring additional duties under 7(1) may, however, change the original intention with the article. This is not the situation today. Therefore the conclusion must be that article 7(1) does not impose a duty to observe good faith in contractual relations.

An adequate way to impose a duty to observe good faith is instead to apply the gap-filling statue in article 7(2). This provision allows gap filling by analogy, general principles or international private law. This thesis has shown how a limited duty to negotiate in good faith is possible to derive from the Convention by analogy. It has also derived several obligations under the duty to co-operate. These principles are closely related to the obligation to observe good faith. There is, however, an important difference between a specific principle and a general principle. Specific principles derived by analogy apply in particular situations when certain pre-determined features are present. A general principle of good faith, on the other hand, applies to an undefined area of situations.

It is possible to argue in favour of a general principle of good faith underlying the Convention. Even if it has been concluded that no general principle of good faith is possible to derive directly from 7(1), such a principle may consequently exist as a result of article 7(2). This approach is subordinated the analogical method and must be carefully applied. The problem to find a relevant principle by analogy may be the result of a failure of the delegates to anticipate the new situation during the drafting process. In this case article 7(2) may be relevant. The actual situation could, however, also be one of several questions where the conferences did not agree. If so, the issue may fall outside the scope of the Convention and an utilisation of article 7(2) would be illegitimate.

Despite a high flexibility when applying a general principle of good faith, this thesis is favouring good faith as specific duties derived by analogy.

Specific principles improve predictability and promote a uniform application of the Convention. Since no universally accepted definition of good faith exists, it is up to individual courts to decide the scope of the principle. Such interpretations exhibit subjective elements. Applying specific principles also involves subjective rudiments, but such judgements will be based on principles more closely related to the provisions in the Convention.

As a last resort international private law is applicable. This is not a homogenous body of rules, though, and this method may consequently threat a uniform application of the Convention. A brief analysis has shown that even if the method to derive good faith is different in different legal traditions, the outcome of the method exhibits important similarities. These principles are in most cases possible to derive also from the CISG.

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