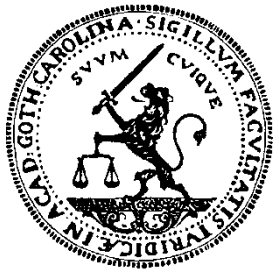

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THE ROLE OF GOOD FAITH IN INTERNATIONAL LAW
- Particularly under the United Nations Convention on Contracts for the International Sale of Goods

Master thesis
30 credits

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Contents

Summary

The principle of good faith has been described as one of the most debated concepts of the CISG and is also the main subject of this thesis. Since Article 7 is the only article of the CISG expressly mentioning good faith it has served as the base for this study.

An examination of four different countries confirms that the dilemma of good faith originates from the fact that it is a concept known and applied differently in different countries. For example the concept of good faith is well-established in Germany, but has no general recognition in English law. Therefore, it is no surprise that it was only after pro-longed negotiations that the drafters of the CISG managed to agree on the role of good faith. The critics long opposed its inclusion and argued that the concept was too vague, too uncertain and even superfluous. Finally however, good faith was included in CISG Article 7.1, but only as a tool for interpretation of the CISG itself. Said article also states that when interpreting the Convention, uniformity and the international character of the CISG shall be observed and promoted. The underlying idea of the latter element is that the interpreter at all times must refrain from applying any domestic standards. Whether courts have managed to comply with this for the purpose of good faith under the CISG, will be particularly addressed in this thesis.

Even though Article 7.1 establishes the importance of uniformity and that good faith only is to be observed in the interpretation of the Convention, at least three different understandings of good faith's role under the CISG exist. All three of these are represented in both the jurisprudence of the CISG as well as in international doctrine on the subject.

Under the first interpretation, CISG Article 7.1 is read literally and only allows the decision maker to observe good faith in the interpretation of the Convention. According to the second alternative, good faith in Article 7.1 is addressed to the parties of the contract as well, and therefore imposes positive duties upon the parties. The third understanding is that good faith is a general principle that underlies the Convention by virtue of Article 7.2. From a party perspective the existing non-coherent jurisprudence on good faith might cause problems. Will parties be held to a positive duty of good faith or not?

Clearly, there are arguments for all three understandings. However, this thesis will advocate that extending CISG Article 7.1 to include a party-oriented duty of good faith would frustrate the intention and the compromise reached by the drafters. Establishing a general principle of good faith by virtue of Article 7.2 on the other hand, will not. The final conclusion is therefore that the drafters of the CISG indeed opened up for a duty of good faith, but not as a hidden positive duty in Article 7.1, but rather as an underlying general principle for the purpose of Article 7.2.

Sammanfattning

Good faith har beskrivits som en av de mest omdebatterade principerna i CISG och är också det ämne som denna uppsats behandlar. Eftersom artikel 7 är det enda stället i CISG där *good faith* uttryckligen omnämns har uppsatsen tagit sin utgångspunkt i denna artikel.

En studie av fyra olika länder har bekräftat att det dilemma som är förknippat med *good faith* härrör från det faktum att principen tillämpas olika i olika länder. Tysk rätt har till exempel en väl etablerad princip om *good faith* medan engelsk rätt intar en skeptisk ställning till principens tillämpning. Det är därför inte överraskande att det tog lång tid innan CISG:s upphovsmän lyckades komma överens om vilken roll *good faith* skulle spela under CISG. Kritikerna menade att principen om *good faith* var för vag, för osäker och till och med överflödig. Slutligen togs dock *good faith* med, men enbart som ett rekvisit att ta hänsyn till vid tolkningen av själva konventionen. Övriga rekvisit i artikel 7.1 är att tolkningen av CISG ska ske uniformt och att CISG:s internationella karaktär måste beaktas i alla lägen. Idén bakom det sistnämnda villkoret är att den som tolkar konventionen måste distansera sig ifrån nationella standarder. Huruvida nationella domstolar har lyckats i detta avseende är något som särskilt kommer att behandlas i denna uppsats.

Även om artikel 7.1 slår fast vikten av en uniform tolkning och att *good faith* måste beaktas, återfinns åtminstone tre olika sätt att se på *good faith* i rättspraxis och i den internationella doktrinen.

Enligt den första tolkningen ska artikel 7.1 läsas bokstavligen och enbart tillåta beslutsfattaren att beakta *good faith* vid tolkningen av konventionen som sådan. Andra menar att *good faith* i artikel 7.1 även är adresserat till parterna och därmed ålägger dem att agera i enlighet med principen. Enligt det tredje alternativet är *good faith* snarare en av de allmänna principer som ligger till grund för konventionen i enlighet med artikel 7.2. Från ett partsperspektiv kan osäkerheten i praxis innebära problem. Kräver CISG att parterna ska agera i enlighet med principen om *good faith* eller inte?

Det är tydligt att det finns argument till förmån för alla dessa tre sätt att tolka *good faith* på. Denna uppsats kommer dock att förespråka att en utvidgning av artikel 7.1 till att inkludera en partsorienterad skyldighet att agera i enlighet med *good faith* inte är att föredra. En sådan tillämpning skulle stå i direkt strid med konventionens förarbeten och ordalydelsen i artikel 7.1. Att tillämpa *good faith* i enlighet med artikel 7.2 är däremot mer legitimt. Slutsatsen är därmed att *good faith* i CISG bäst förstås som en av de allmänna principer som ligger till grund för konventionen.

Preface

With regard to the chosen topic of this thesis, it was during my exchange at Suffolk Law School that I was introduced to the area of international commercial law. The idea to write about the dilemma of good faith in an international context was particularly initiated by Professor Greiman, my professor in International Business Transactions.

For the purpose of used non-English sources I am personally fully responsible for the translations made and any linguistic errors are mine alone.

Lund, March 2012

Josefin Ström

Abbreviations

BGB	Bürgerliches Gesetzbuch (The civil code of Germany)
CISG	United Nations Convention on Contracts for the International Sale of Goods
PECL	Principles of European Contract Law
UCC	Uniform Commercial Code
UNCITRAL	United Nations Commissions on International Trade Law
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
ULF	Uniform Law on the Formation of Contracts for the International Sale of Goods
ULIS	The Uniform Law on the International Sale of Goods

1 Introduction

1.1 Background

There has been a remarkable change in world trade since the end of the Second World War. Today, parties from different countries interact and depend on each other to a greater extent than ever before. With rising developing countries in both Africa and Asia, the growth in international commerce is not likely to stagnate. Thus, in a globalized world a basic understanding of other national legal systems and traditions has become a relevant, if not necessary, element in international commercial law.

It seems to be a general understanding that a principle of good faith today is recognized in most legal systems, albeit to varying extent. It is also a fact that many international legal bodies refer to the concept. The comment to Article 1.7 of the 1994 UNIDROIT Principles of International Commercial Contracts describes good faith as one of the fundamental ideas underlying the Principles.[1] The CISG, a binding international legal document with increasing influence in world trade, also refers to good faith[2]. However, neither the CISG nor the UNIDROIT Principles, define what good faith means.

Since no uniform international definition exists on good faith, and countries and practitioners all over the world have very different approaches as to the exact application and scope of good faith, contracting with other nations or foreign entities might cause problems. The issue becomes even more evident since some countries fail to provide a clear definition of how to apply the concept of good faith even within their own national legal systems. If it is not possible to agree upon at national definition, an obvious question is what the potential consequences are when an international legal body refers to the principle, and that body does not define good faith.

The CISG constitutes a perfect example of this. As a starting point, the Convention was drafted to create certainty and uniformity. Good faith has been included in Article 7.1 as an interpretation tool of the Convention itself. The same Article also establishes that while interpreting the Convention, uniformity shall be promoted and the international character of the CISG must be regarded at all times. In order to do so the idea is that judges and arbitrators must refrain from using any domestic standards when interpreting the CISG.

However, the legislative history of the Convention reveals that the article was not drafted without divergent opinions. Even though the drafters finally

[1] See The Official Comment to the UNIDROIT Principles 2004, 17 and McKendrick, 1999, 40-41.
[2] CISG Article 7.1.

managed to agree, at least three different interpretations on the role of good faith under the CISG exist. All of these are represented in international doctrine as well as in the jurisprudence of the Convention.

The first view is based on a literal reading and holds that good faith under the CISG only serves as an interpretation tool. A second interpretation of the same article imposes a positive duty of good faith upon the parties. The third alternative is that good faith is one of the general principles underlying the Convention, either by interpreting Article 7.1 or through an application of Article 7.2. Clearly, the desired certainty that the CISG aimed to accomplish has not been achieved, at least not in terms of the role of good faith.

1.2 Purpose

The objective of this thesis is to answer two main questions.

First, do national courts tend to follow domestic standards of good faith familiar to them, or have they managed to ignore such values to maintain and meet the stated goals of the CISG? Second, in order to achieve uniformity and the benefits from international uniform laws, what is the most proper way to understand and apply good faith under the CISG?

Finally, where many have tried and failed, this thesis will not render a uniform definition of good faith applicable to all possible situations. Rather, the overall purpose of this essay is to facilitate an understanding of one of the most debated concepts in international trade, namely good faith.

1.3 Method and Materials

CISG Article 7 is the only provision in the Convention that expressly mentions the concept of good faith and it will therefore serve as the base for this thesis. Its legislative history, jurisprudence on good faith and international legal doctrine on the subject will all be examined in order to fulfil the purpose of this essay.

As to specific commentary, the Pace University website[3] is a particularly important source of CISG material. Both articles as well as case law decided under the CISG are published and made available on this website. Since the issue of accessibility, especially with regard to case law decided under the CISG, always is a concern, the publication of case law on this site is critical and highly valuable for the purpose of this thesis. Even though the UNILEX database will not be as frequently used, it is another valuable source.

[3] Available at [http://www.cisg.law.pace.edu/].

Since case law decided under the CISG initially is published in a particular country, the two sources just mentioned must be considered secondary. This is of course not ideal since a writer always endeavors to consult the primary source. However, even though there is no guarantee that these sources are complete, and in the event of arbitral awards even restricted by confidentiality, their good reputations have convinced me to rely on their credibility. It is also a fact that authorities in the relevant field commonly refer to case law and articles published on these websites.

CISG Article 7.2 states that when matters are governed but not settled, gaps may be filled with general principles upon which the Convention is based. This indicates that three scenarios are possible; matters under the CISG may be governed, not governed at all or governed but not settled. Even though this paper will touch upon the differences between internal and external gaps, it will not focus on a detailed analysis of how these gaps are established. Instead, the point of origin of this thesis is when a gap is already existing and from there discuss the importance of good faith in the actual process of gap filling.

In chapter two, an overview of how good faith is applied in four different legal systems is presented**.** The chosen countries are first of all the United States and the United Kingdom since they both belong to the same legal family but still have very different approaches to the concept of good faith. Germany is the third chosen country since it is known for being the country with the most well-established good faith principle of all. The reason why Sweden is the final country is because, unlike The United States and Germany, it does not have a codified principle of good faith. Even so, in contrast to the United Kingdom, Sweden still recognizes the principle of good faith as a general principle of law.

Even though the examination just described is an overview, it is only after such review the reader will be able to fully understand the legislative history of the good faith provision in the CISG and why it has caused confusion among national courts and arbitrators when interpreting the Convention. Said overview will also serve as the essential base for the analysis in section 4.1. The latter section will discuss the nationality of judges and whether it is possible to conclude that their legal background have affected their judging and interpretation under the CISG.

With regard to legal backgrounds it must also be observed that it is possible that the nationalities of referred commentators might have affected their opinions as presented in their works. While several understandings of good faith under the CISG exist in doctrine I will present these different interpretation alternatives one by one. Both arguments for and against either alternative will be presented.

Finally, I will present my own opinions in separate sections (section 2.6 and 4-5). At times however, I may consider it appropriate to include and intertwine my personal reflections in the descriptive parts. In such

situations, I will try to make it as clear as possible what represents my personal views as opposed to other commentators' discussed in the same sections.

1.4 Delimitations

There are several aspects of good faith but this essay does not aim to consider them all. The first important dividing line to draw is the one between good faith purchases and good faith performances. This essay mainly deals with the latter. While the former generally is based on what a party knew or should have known, good faith in terms of performances tends to focus more on objective standards.[4]

As mentioned in section 1.3, this thesis will review domestic approaches of good faith, but the primary purpose of this paper is to examine the proper role of good faith under the CISG. Even though the examination of different domestic approaches is vital in terms of understanding the dilemma of good faith under the CISG, it is important to note that chapter two only is an overview. The different approaches of four countries will be presented, which obviously is a delimitation in itself.

Another important limitation is the fact that several international instruments besides the CISG refer to the principle of good faith. However, there has not been room for them all, why only The UNIDROIT Principles and its potential influence on good faith under the CISG will be further scrutinized. Good faith under for example the PECL is therefore not studied at all.

Good faith in pre-contractual negotiations is an area that deserves its own attention. The subject will only be touched upon, mainly when different domestic standards are discussed, but it will not be examined whether the CISG potentially contains such obligation.

Section 1.3 described how this thesis aims to discuss the relevance of good faith as a general principle for the purpose of filling internal gaps under the CISG. Even though the paper will mention external gaps, it will not focus on how these latter gaps are established.

One last limitation is the importance of choice of law clauses. If the parties to a contract have failed to agree on applicable law and a dispute arises, the domestic court will apply national choice of law rules in order to determine the appropriate law. Undoubtedly, a lot of uncertainty is involved in this process. The consequences could be fatal to the party not considering it. However, even though this issue often precedes the applicability of the

[4] This terminology is especially used by the American authority Allan Farnsworth. See *infra* section 2.4.2 at p. 17. Good faith purchase is also commonly known as "Bona Fides".

CISG, or a domestic law for that matter, the topic will not be covered in this thesis.

1.5 Disposition

This paper starts with a basic introduction to international trade in general and its development. Despite the fact that this description is only an overview, it still provides the reader with an essential introduction to the overall subject of this thesis.

Chapter two is the core of the first part of this paper since it examines good faith as applied in different legal systems. Two subchapters, one dealing with common law countries and the other one with civil law countries, aim to show how different the notion of good faith is understood. This will in turn facilitate the continued reading.

The next chapter is to investigate good faith as applied on an international level. After an introductory note about harmonization of international law in general, an in-depth examination of the role of good faith under the CISG is made. This part includes a review of relevant case law as well as scholarly writings.

Chapter four aims to answer the two questions asked under section 1.2. As mentioned earlier CISG Article 7.1 establishes that the international character of the CISG as well as uniformity, are two of the main elements to observe when interpreting the Convention. Therefore, it is essential that judges and arbitrators manage to set aside any domestic standards when interpreting the Convention. The first subsection in chapter 4 will analyze this dilemma. The second subsection will discuss the different interpretation alternatives presented in section 3.3 and finally present the most appropriate role of good faith.

The last chapter entails a summary of the conclusions made within this thesis.

2 Good Faith as Applied in Different Domestic Legal Systems

2.1 Introductory Note on the Role of International Trade

One of the lessons confirmed by the Second World War is that existing economic conflicts among nations are often followed by military actions. Therefore, a main concern and a highly prioritized question after the war was to create conditions for a functional world trade. This aim resulted in the creation of legal institutions like the International Monetary Fund and the World Bank. The promotion of free trade also led to negotiations of the General Agreement on Tariffs and Trade. Despite the recognized benefits from international trade, the true development was delayed. It was not until two decades ago that the real growth in international trade started.[5] Along with new trade policies in developing countries, introduction of new technology and increased consumer demands, a new era of international business transactions began.[6] Another major factor to this later surge is the establishment of new economic powers in Asia, where China is the leading example.[7]

In this new era, where national boundaries constantly are crossed, transfers of technology frequently are made and cultural differences are evident, the interest in international trade has inevitably increased. Since international business effect almost every person in today's society, understanding different components in international as well as domestic trade law has become a critical element in international commercial law.

When parties from different countries interact, a fundamental question will always be what substantive law that shall apply to the transaction. The question of applicable law is not to be underestimated as it may become critical for the outcome of many disputes.[8] In order to create certainty and efficiency, the trend towards harmonisation of international commercial law has long been significant. The result is that parties to an international contract nowadays can choose from a number of different sources of law and not only domestic ones. However, as this thesis will describe, international legislation does not always provide the desired certainty. This has particularly been the case with regard to the notion of good faith.

[5] Chow & Schoenbaum, 2005, 14-15.
[6] Carr, 1998, Introduction.
[7] Chow & Schoenbaum, 2005, 22.
[8] Chow & Schoenbaum, 2005, 27-29.

2.2 Good Faith in General

Without a doubt, the notion of good faith in contract law raises many issues and may be dealt with in different ways. Some commentators argue that the answer to the uncertainties coupled with good faith would be a workable and uniform definition.[9] Others are of the opinion that the best way to understand good faith is to study different approaches and how the notion of good faith has been applied.[10]

Those who argue that there is a need for a definition will be faced with the fact that defining the scope of good faith is not easily done. If possible at all, such work requires a review of both its roots as well as its recognition in different legal systems.[11] It is a fact that the meaning of the term has been widely debated all over the world. For example, its existence in European contract law has created a division between civil and common law countries.[12] While the civil law tradition relies on the idea of codification, the common law system leaves the law-making process almost entirely to the courts. When drafting a civil code, general and open clauses is often included in order to avoid a rigid and stiff legal system. In common law system on the other hand, the courts develop the law gradually. It is often stressed that there is simply no need for an unambiguous principle of good faith in such flexible system.[13] On a general level the same differences applies to contract drafting. While a civil law lawyer is comfortable in drafting short contracts and trusts the code to serve as the default law, the common law lawyer put their reliance in the words of the contract with detailed and long contracts as the result. Because such agreements often are seen as exhaustive in common law jurisdictions, the interpretation of them is also much narrower.[14]

However, as will be described, even within the common law tradition the acceptance of a general principle of good faith differs. The question is if, even after a comprehensive study has been conducted, a uniform definition of good faith can be given. If defining is not possible, the task of trying to understand the different applications of good faith remains. In doing so, different attempts to define as well as different applications of good faith will be analyzed in the following sections. First, a short overview of some historic aspects of good faith will be presented.

[9] See for example Powers' statement that "[---] economics and efficiency concerns require a reliable definition of good faith." in Powers, 1999, 350.
[10] See for example Zeller, 2003, 220.
[11] Powers, 1999, 333.
[12] MacQueen, 1999, 7.
[13] Styles, 1999, 158.
[14] Bell, 2007, 13.

2.3 The History of Good Faith

The concept of good faith has a long history. As early as in 44 BC, the Roman philosopher, politician and lawyer Cicero used the following words to describe the moral obligation of good faith:

> "The foundation of justice, moreover, is good faith; - that is, truth and fidelity to promise and agreements."[15]

Several commentators have pointed out the importance of distinguishing good faith as a purely moral concept from a legal doctrine capable of creating legal obligations.[16] The fact is however that good faith as a legal obligation in commercial contracts also has its roots in Roman law.[17] The roman Goddess Fides, who was the goddess of trust and protector of the weak, gave name to the Roman legal term, Bona fides.[18] In general, the obligation of Bona fides gained its influence in ancient Roman law as a way for the judge to correct injustices after a strict application of the law. Basically, the judge was given an opportunity to consider unreasonable circumstances and to only enforce contracts considered fair. Eventually, this led to a contract law based on the theory of consensus and the term "bona fides contract", or "good faith contract", was introduced.[19]

Even though much has happened since the Roman time, the principle of good faith seems to have endured, and today it is a principle recognized in many modern legal systems. Nevertheless, depending on where you look, the definition or application found will differ widely.[20] For example, good faith may apply in pre-negotiations, in performance of a contractual obligation or as a mere method of interpretation.[21]

2.4 Good Faith as Understood in Common Law Countries

2.4.1 In General

As an introductory note to the following sections, the reader shall bear in mind that civil law countries in general take a more generous attitude towards the application of good faith than common law countries do.[22] In modern civil law systems, it is not unusual that the obligation of good faith extends to both contract formation and contract performance. Common law

[15] Cicero, translation by Miller, 1913.
[16] See for example Zeller, 2003, 221 and Sim, 2001.
[17] Powers, 1999, 334.
[18] Munukka, 2007, 17.
[19] Bell, 2007, 9 and Farnsworth, 1963, 670.
[20] Powers, 1999, 334-335. Also see Bell, 2007, 9 for a more detailed review on how the theory of consensus has influenced civil contract law.
[21] Powers, 1999, 349.
[22] Powers, 1999, 335.

countries on the other hand traditionally only, if all, extend the duty of good faith to contract performances and not the formation.[23]

The two following sections will examine The United States and the United Kingdom, both with a very deep-rooted common law tradition. Even so, both countries have a very different approach to the concept of good faith.

2.4.2 The United States

There is no doubt that an implied covenant of good faith historically has been present and influenced American case law.[24] Today good faith is codified both in the Restatement (Second) of Contracts as well as in the widely adopted Uniform Commercial Code.[25] Since the UCC is a model statute, the individual states have to adopt it, or parts of it, in order for the code to become binding. As a whole, the code covers the most important aspects in commercial transactions and has had a major impact on U.S. state law.[26]

Restatement (Second) § 205 does not define good faith, but it does recognize it as an implied covenant by stating:

> "Every contract imposes upon each party a duty of good faith and fair dealings in its performance and its enforcement."[27]

A corresponding provision is found in § 1-304 UCC:

> "Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement."

Contrary to many other legal systems, American law not only recognizes an implied covenant of good faith, the UCC also provides a definition of what good faith means. However, a problem has long been that different definitions have been used throughout the code. Before the Article was reversed in 2001, the general definition in § 1-201 (19) UCC defined good faith as "[---] honesty in fact in the conduct or transaction concerned". Beside this purely subjective definition, a special definition in § 2-103, only applicable to merchants, described good faith as "[---] honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade".[28] Practitioners and judges not only had to conclude what statute that applied to a certain situation. In the case of the UCC, they also had to determine what definition to apply**.** The critics argued that the honesty-in fact test in 1-201 (19), also described as the pure heart/empty head test, was

[23] Powers, 1999, 335.
[24] Dubroff, 2006, 559.
[25] UCC § 1-304 (2005 ed.) and Restatement (Second) of Contracts § 205.
[26] Klass, 2010, 26.
[27] Restatement (Second) of Contracts § 205.
[28] Also see summary made by Dubroff in Dubroff, 2006, 559.

an anomaly in defining good faith performances. Since one purpose of the UCC was to promote uniformity in commercial transactions, it was pointed out that the code would be better off with just one uniform definition.[29]

Today the general definition is found in Article 1-201(20). It stills makes a reference to the actor's state of mind, but it also includes an objective standard and describes good faith as:

> "[---] honesty in fact and the observance of reasonable commercial standards of fair dealing."[30]

Thus, it is clear that the American legislator has struggled in defining good faith. Although the official text of the UCC was revised in 2001 it is also clear that there is still no complete understanding in the U.S. as to what good faith really means. Even so, examining American case law as well as doctrine, some characteristics are possible to observe.

First, before the incorporation of the implied covenant of good faith into the UCC and the Restatement (Second) of Contracts, far from all U.S. states recognized its existence.[31] A New York court however, recognized and defined good faith already in 1933 as:

> "[---] every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract, there exists an implied covenant of good faith and fair dealing."[32]

However, it was not until the 1960's that the real trend towards acceptance started. At this time judgments imposing a duty of good faith outside the contexts of good faith purchases increased markedly. So did the scholarly writings on the subject.[33] The final enactment of the covenant in both the UCC and the Restatement (Second) of Contracts therefore constituted an important acknowledgment of the principle in American law.[34]

Second, the references to *performance* and *enforcement* in the two codifications indicate that the implied covenant of good faith generally does not extend to events before a contract finally is agreed upon.[35] Instead, pre-negotiations in American law are subject to the "aleatory view". This means that each party engages in negotiations at its own risk. Even though the duty of good faith does not extend to the negotiation stage, the parties are often subject to other legal obligations. For example, a party who makes a

[29] Boklach, 1992, 674-687.
[30] UCC § 1-201(20) (2005 ed.).
[31] Dubroff, 2006, 571.
[32] Kirk Lashelle Co. v. Paul Armstrong Co. 199 N.E. 163 (N.Y. Ct. App. 1933), also see comment on the case made by Dubroff in Dubroff, 2006, 565. The meaning of the phrase "fair dealing" will be further discussed below, see *infra* p. 17.
[33] Summers, 1981-1982, 811.
[34] See for example Dubroff, 2006, 571.
[35] Klass, 2010, 40.

material misrepresentation might be held liable even if two negotiating parties never reach a final agreement. Further, during the negotiations the parties might decide to engage in a preliminary agreement. The difference here, as opposed to an implied covenant of good faith, is that the parties to the contract have expressed their wish to be bound by good faith. There are several examples of such agreements and the extent to which a court would enforce them varies. The common view is however that a simple "agreement to agree" is too indefinite to enforce. On the other hand, a specific "contract to negotiate" is an example of a pre-agreement that a court might recognize and enforce. Such contract imposes a duty on the parties to negotiate in good faith even though they are not obligated to reach a final agreement.[36]

Third, two uses of good faith exist in American law; "good faith performance" and "good faith purchase". The distinction between the two is particular favored by Allan Farnsworth who argues that while good faith purchases relate to a party's state of mind and excuses a party that had no need to be suspicious, the notion of good faith in performance or enforcement is subject to a more objective test. Good faith in performances shall include an investigation of a party's decency, fairness or reasonableness and is described by Farnsworth as an implied term that requires cooperation by the parties so the other party is not deprived of what it reasonably could expect.[37]

The phrase "fair dealing" has not always been included in the general definition of good faith. One might ask what difference it makes. The Court of Appeals for the Seventh Circuit dealt with the question in the case *In Re Ocwen Loan Servicing*. One of the claims raised by the plaintiff was that the defendant had violated the duty of "good faith and fair dealings". The court pointed out that "most state laws impose a duty of good faith in performances of contracts, meaning that the party to a contract cannot engage in opportunistic behaviour."[38] The court continued to explain that "fair dealings" adds nothing extra above the duty of good faith by declaring that "the full name is merely what is called a "doublet", a form of redundancy in which lawyers delight, as in "cease and desist" and "free and clear".[39] Farnsworth on the other hand has argued that the reference to good faith and fair dealings in for example the Restatement (Second) of Contracts § 205, makes it particularly suitable for good faith performances. He adds to this statement that good faith in terms of honesty is more suitable for good faith purchases.[40]

In conclusion, it is obvious that American law recognizes good faith as an important principle in Contract law. However, the question of its exact meaning remains. Although courts as well as the legislature have tried to implement and develop clear definitions of good faith, the result has not

[36] Klass, 2010, 98.
[37] Farnsworth, 1963, 668-669.
[38] In re Ocwen Loan Serviscing LLC Mortgage Litig., 491 F.3d 638, 646 (7th Cir. 2007).
[39] In re Ocwen Loan Serviscing LLC Mortgage Litig., 491 F.3d 638, 646 (7th Cir. 2007).
[40] Farnsworth, 1963, 668.

been as satisfactory as they intended. As a result at least three different aspects of good faith performances have been particularly debated in doctrine.

Already in 1963 Farnsworth presented the first approach. His main argument is that good faith is the source of additional duties. As described above one such duty may for example be the duty of cooperation. However, Farnsworth also underlines that the possibility to impose additional duties from the implied covenant of good faith in American law, is not as extensive as in for example German law.[41]

A second aspect is presented by Robert S. Summers. He argues that the notion of good faith in performances are best understood as an excluder. He means that the notion of good faith has no meaning of its own, but that it excludes various behaviors of bad faith.[42] When it is clear that a seller who is concealing a defect in a product is acting in bad faith, the opposing duty of good faith would be to fully disclose material facts. Summers also points out that someone who simply concludes that good faith means honesty, is wrong since honesty only out rules dishonesty. Contractual bad faith on the other hand, does not necessarily have to be immoral. To the contrary, someone who thinks he or she is acting in the other party's best interest may be found to be in breach of the duty of good faith performance.[43]

A third American authority, Steven J. Burton, contributes with a third view of good faith performances that focuses on the intention and expectations of the parties. He argues that the notion of good faith functions as a limiting standard that rests in the expectations that steams from the underlying reasons set forth in the agreement.[44] Burton's view is often described as the view of "forgone opportunities" since Burton argues that it would be bad faith to "recapture opportunities forgone in contracting". All three views have been applied by American courts and Farnsworth argues that courts have been right when they have treated the views as cumulative and consistent.[45]

Even though this paper does not aim to render the proper role of good faith in American law, the different opinions presented by these three authorities prove just how much confusion good faith may cause even within a country.

Another way to facilitate and create an understanding of good faiths' scope and application in American law may be presented in a description of four different levels. In such description the first level would be the implied covenant of good faith. Since the covenant is implied, everyone has a duty to act in good faith even without an expressed reference in the actual

[41] Farnsworth, 1993 and Farnsworth. 1963, 679.
[42] Summers, 1968, 196. Also se Summers, 1981-1982. Good faith in German law will be examined below, see *infra* section 2.5.2.
[43] Summers, 1968, 203-204.
[44] Burton, 1994, 1564.
[45] Farnsworth, 1993.

contract. While the second level describes how good faith may be used to define rights and duties under a contract, the third level describes how good faith may be used to explain additional duties. In the latter scenario courts may refer to good faith to describe something that historically has been implied. The concept will basically function as a replacement for an already existing implied term. According to the fourth level, good faith may be used to reach the behavior of a defendant, even though he or she has not acted in breach of the contract. Such usage is probably the most radical one since it may create responsibilities contrary to what the parties expressed in their contract.[46]

Not all American courts would apply good faith to the extent of this fourth level. *Sons of Thunder Inc. v. Borden Inc.* is however an example of how a party was held liable for breach of the duty to perform in accordance with good faith and fair dealings, even though the party exercised a right under the contract. The contract between the defendant, Borden, and the plaintiff, Sons of Thunder, stated that the plaintiff was to supply the defendant with a minimum quantity of clams to market price every week. The term of the contract was one year, including the possibility of a five year renewal if not terminated. The important, and later disputed, termination clause stated that either party could terminate the contract upon 90 days of notice prior to the automatic renewal date. Relying on the contract the plaintiff made certain investments in order to meet the minimum requirements. However, it was the defendant who later failed to meet the contractual obligations to purchase the specified amount. Finally the defendant decided to invoke the termination clause. After the termination, the plaintiff sued and claimed that the defendant both breached the contract itself by terminating the contract contrary to the termination clause, but also that the implied covenant of good faith and fair dealings had been breached. At trial it was found that even though the defendant's termination itself did not necessarily constitute a breach, the implied covenant of good faith had not been respected. The defendant argued that as long as the contract is honored, any covenant of good faith cannot be breached. The appellate court agreed but the Supreme Court concluded that a party may breach the covenant of good faith even when a right in the contract is exercised. In reaching its conclusion, the Supreme Court considered the defendant's performance during the contractual period. Several circumstances, e.g. the fact that the defendant did not buy the minimum amounts, made the court conclude that the defendant had destroyed the plaintiff's reasonable expectations and right to receive the fruits of the contract. Therefore the defendant breached the implied covenant of good faith found in New Jersey's common law.[47]

It is important to emphasize that far from all jurisdictions in the U.S. would apply good faith to the same extent as the court in New Jersey did.[48] Once again, this just confirms how different the duty of good faith may be applied.

[46] Rohwer & Skrocki, 2006, 257.
[47] Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396 (1997).
[48] Rohwer & Skrocki, 2006, 257.

Further, it is also important to note that expressed terms stated in contracts will in general control implied terms. As a way to get around the implied covenant of good faith it has therefore been suggested that careful drafting may be the answer.[49] In doing so one shall bear in mind that the UCC expressly forbids any definite denial of good faith in agreements. Since a wish by the parties not to be bound by good faith would be void, this indicates that good faith must mean more than just a reflection of the intention of the parties. In conclusion the implied covenant of good faith means that the parties must fulfill their duties and carry out their rights in accordance with some objective standards.[50] As was presented earlier, this is also something that is recognized in the new definition of good faith in the UCC. On the other hand, this is not to say that the parties cannot make reasonable limitations of the scope of the good faith duty with regard to specific contractual obligations.[51] In *United Airlines v. Good Taste* the Alaska Supreme Court allowed such contractual limitation by approving an at-will termination clause. The parties had agreed that Illinois law should govern their agreement and with regard to the implied covenant of good faith the Supreme Court concluded that:

> "[---] Illinois courts have never held the implied covenant to require good cause or a legitimate business reason for terminating a contract with an express no-cause termination provision. [---] The duty of good faith and fair dealing does not override the clear right to terminate at will, since no obligation can be implied which would be inconsistent with and destructive of the unfettered right to terminate at will."[52]

In conclusion, American law has recognized and codified an implied covenant of good faith that relates to all contracts, although the extent of the application may differ between the states. Even though the duty cannot be disclaimed in general, the parties do possess the power to use drafting to limit the covenants scope and to define what they want good faith to mean. It is also clear that the good faith principle in general does not extend to pre-contractual obligations in American law.

2.4.3 The United Kingdom

Traditionally English law has taken a reluctant approach to good faith and there still seems to be no general recognition of the principle as such in English law.[53]

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[49] Coyne, 2001.
[50] Rohwer & Skrocki, 2006, 258.
[51] Klass, 2010, 42-43. Also see UCC § 1-302 (b): "The obligation of good faith, diligence, reasonableness and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of such obligation is to be measured if such standards are not manifestly unreasonable[---]."
[52] United Airlines Inc. v. Good Taste, Inc. (7/9/99) sp-5139.
[53] Hofmann, 2010, 163. Also see McKendrick, 1999, 40.

An interesting remark is that even though the United Kingdom historically has played an active role in the development of international laws, the United Kingdom did not ratify the CISG once the negotiations were over.[54] It has been argued that one of the possible reasons why the United Kingdom still has not ratified the CISG is because of the reference made in CISG Article 7.1 to good faith as an interpretation tool. English lawyers rather prefer to rely upon the case law decided under national laws, then to adhere to the unfamiliar interpretation of the CISG.[55]

However, to conclude that English law is not concerned with matters of good faith at all would be too hasty. In fact, several areas of English law remind of good faith. Concepts of fairness, reasonableness and equity are all examples of elements that English law considers. To give the notion of good faith the status of a general principle has never been an alternative though.[56] Given the fact that other common law countries, with the U.S. as a leading example, have accepted a more general doctrine of good faith, the question is why the United Kingdom remains reluctant to do so. A simple explanation would be that English courts in general have an aversion towards general principles. Traditionally they rather focus on definitive facts than vague and uncertain principles that may lead to arbitrary results.[57] The freedom of contract is often described as the concept of good faith's repellent[58] and indeed a characteristic of English law is that the relationship between two parties are and shall be governed by the terms of the agreement. A party may not successfully argue and rely on notions of good faith if it cannot be deduced from the contract itself.[59] The quote "the predictability of the legal outcome of a case is more important than absolute justice"[60] is illustrative and shows just how much English law values the contract itself. Even though this approach might lead to a harsh result for a party, this is a consequence English law is willing to take. The benefits of certainty in especially business litigation, is simply valued higher.[61]

To me this English approach sounds much more radical than the American, but something that is often pointed out is that English law, in substance, is not that different from countries who have accepted a general doctrine of good faith.[62] When other jurisdictions might use good faith in order to reach a certain outcome, the same result may be reached by applying for example the doctrine of frustration or estoppel found in English law.[63] The question is what difference it makes. Is the debate of the United Kingdom's acceptance of good faith of mere theoretical importance? The fact is that the

[54] Zeller, 2002, 168.
[55] Hofmann, 2010, 152.
[56] Chitty, 2004, 21.
[57] McKendrick, 1999, 46-47.
[58] Munukka, 2005, 243.
[59] McKendrick, 1999, 40.
[60] Goode, 1992.
[61] Goode, 1992.
[62] McKendrick, 1999, 42.
[63] Styles, 1999, 168.

refusal in English law to resort to good faith both has both advantages and disadvantages. Not applying a general principle of good faith may be considered a strength since the application of the alternative relevant rule opens up for the opportunity to give clear explanations and clear guidance.[64] On the other hand, the unwillingness to accept good faith as a general principle is an obvious disadvantage. After all there is a trend towards uniform laws on an international level and the CISG for example, has turned out to be a success. It is certainly not helpful that a country insists that domestic law is superior to international conventions and therefore decides not to join the international cooperation.[65]

Let it be that English law does not recognize a general principle of good faith but it is somewhat remarkable that a reference to good faith has been disapproved in cases where the parties actually contracted for it.[66] Such interference with the freedom of contract was made in *Walford v. Miles*. One of the issues in this case was the validity of a lock-in agreement. A lock-in agreement is an agreement where the parties agree to exclusively negotiate with each other. Even though the parties voluntarily expressed such wish in their contract, the lock-in agreement was held invalid by the court. Lord Ackner declared that "a duty to negotiate in good faith is as unworkable in practise as it is in inherently inconsistent with the position of a negotiating party". According to the judge a duty to negotiate in good faith was simply too vague and uncertain to enforce.[67] If anything, this holding proves just how reluctant English courts are to accept the concept of good faith.

This case has been criticized since it denies a duty to negotiate in good faith even if such obligation voluntarily is understood and expressed by the parties.[68] It is worth pointing out that the issue in *Walford v. Miles* was a pre-contractual obligation. As was shown under section 2.4.2, even American law despite its generous approach towards good faith in general, denies a general duty to negotiate in good faith. Still, the point is that in *Walford v. Miles* the parties expressly agreed to negotiate in good faith. The question is why the parties should be denied the opportunity to create such obligation. As pointed out by scholars a duty to negotiate in good faith is highly valuable especially in long-term relationships. The question asked by many is why any inherent uncertainty in a duty to negotiate in good faith should trump the freedom of contract and the commercial benefits predicted by the parties.[69] There is indeed a measure of irony in Lord Ackner's holding. The concept of freedom of contract, which otherwise is so essential to uphold in order to preclude uncertainties coupled with good faith, is apparently not as important if used in support of said principle.[70]

[64] McKendrick, 1999, 44.
[65] Zeller, 2007, 6-7.
[66] Zeller, 2003, 231.
[67] Walford v. Miles [1992] 2 A.C. 128, 138. Also see comment made on the case in; Chitty, 2004, 18 and McKendrick, 1999, 51.
[68] McKendrick, 1999, 51.
[69] McKendrick, 1999, 51.
[70] Zeller, 2003, 230-231.

Another interesting remark is that judge Ackner's statement sometimes is used as an argument against good faith *per se*, even though it is obvious that the notion of good faith as "unworkable in practise" clearly referred to good faith in pre-contractual relationships.[71]

In conclusion, the English judicial practice often leads to outcomes corresponding to what other legal system would refer to a result of good faith, even though such principle is not accepted as a general principle of English law. Therefore, the actual consequences of this aversion may not matter for purposes of English domestic law, but since the principle of good faith has been pointed out as one of the reasons why the United Kingdom has not adopted the CISG, their reluctance clearly has consequences on another level.

2.5 Good Faith as Understood in Civil Law Countries

2.5.1 In General

The relationship between the parties is generally the one in focus in civil law countries. This philosophy of contract is also the fundamental basis for the generous approach towards good faith in civil law countries. The obligation does not only exist once the contract is created, it generally applies during the creation itself.[72]

The following two sections will examine how Germany and Sweden have adopted the concept of good faith. Although Sweden is not considered as one of the classic civil law countries, for the purpose of this thesis the Swedish approach towards good faith will be studied in the following.

2.5.2 Germany

As to clarify how indefinite the concept of good faith is, it is often stressed that "even in Germany" a clear definition of good faith is hard to find.[73] The reason why Germany is used as the comparative example is probably because Germany is the one country with the most well-established good faith tradition of all.

Without a doubt, the principle of good faith has had a pervasive impact on several aspects of German law. It has even been said that the principle, stated in § 242 BGB, is dominating the entire legal system.[74] Such statement

[71] Sims, 2004, 217.
[72] Munukka, 2005, 240.
[73] See for example Zeller, 2003, 219.
[74] See Styles, 1999, 159.

is perhaps an exaggeration, but the truth is that good faith does not only apply to German contract law. It applies to tort law, public law, law of property and procedural law as well.[75] The extensive German jurisprudence reveals that courts have applied § 242 BGB to supplement the law itself as well as relevant contracts, to limit the exercise of contractual rights, but also to correct unjust results of law.[76]

The wording of the famous provision in § 242 BGB reads; "the debtor is obliged to perform in such a manner as good faith requires, regard being had to general practice".[77] As been pointed out before, civil law systems intend to focus on the relationship between the parties, and the German concept of good faith indeed relies on the idea that the interest of the parties as well as reasonable reliance on the contract shall be protected at all times.[78] Undoubtedly, the wording in § 242 GBG is general but it has been argued that the ambiguousness of the provision has become its strength and it has offered legitimacy to numerous German judgments.[79] On the other hand, the vagueness in § 242 BGB has also been subject to a lot of criticism. In order to provide clarity it has been emphasized by the German Federal Supreme Court that courts are not to arbitrary use § 242 BGB in order to create results as they see fit, especially not when contracts or the law calls for a different outcome.[80]

In addition to § 242 BGB there are several provisions based on the concept of good faith in German law. For example § 157 BGB, also a very important provision in German law, states that the parties must interpret a contract in accordance with good faith and with regard to common usage.

Although German jurisprudence has brought clarity to when and how good faith is to be applied, nothing can change the fact that the wording of the term "Treu und Glauben" is very general and as always, general principles are coupled with uncertainty. In Germany however, the uncertainty is limited due to the fact that successful applications of good faith often is incorporated in law.[81] An example of this is the codification of the overt judicial control of standard contract terms. Before it was finally codified into the German Standard Contract Terms Act 1976, it had been applied by courts for decades by virtue of § 242 BGB. Accordingly, uncertainties tied to the application of good faith may at least be limited by virtue of law.[82]

In conclusion, if a principle is said to be dominating the entire legal system, that principle is without a doubt a well-established one. Since these words have been used to describe good faith's role in German law, it is obvious that Germany has one of the most extensive recognitions of the principle of

[75] Hofmann, 2010, 159.
[76] Zimmenmann & Whittaker, 2000, 24-26.
[77] Markesinis, 1997, 511.
[78] Hoffman, 2010, 159. Also see Munukka, 2005, 240.
[79] Markesinis, 1997, 511.
[80] Hofmann, 2010, 160.
[81] Hofmann, 2010, 161.
[82] Zimmermann & Whittaker, 2000, 30.

good faith. In German law good faith applies to both pre contractual obligations, contract performances and contract interpretation.

2.5.3 Sweden

When the Swedish equivalent to the notion of good faith is to be analyzed, the dividing line between good faith performances and good faith purchases is especially useful.[83] A literal translation of good faith into Swedish would namely be "god tro", but a Swedish reader who concludes that good faith means "god tro" is mistaken. While the notion of "god tro" rather corresponds to good faith purchases, the closest term to good faith performance in Swedish law is probably the "duty of loyalty.[84] Such duty calls for consideration of the other party's interest even though it is not possible to conclude exactly when it will become crucial to the outcome.[85] The fact is that a general principle of good faith, to this date, is not codified in Swedish law, but the most common definition of the duty found in doctrine is:

"A party is obliged to have due regard to the interests of its counterpart."[86]

From this definition it is obvious that the duty of loyalty is party-oriented, i.e. that the parties have certain duties towards each other.[87] As been pointed out before, the concept of good faith in civil law jurisdictions normally relates both to the relationship between the parties as such as well as the protection against unconscionable contracts.[88] Christina Hultmark concludes that even though no general principle of good faith is expressly codified in Swedish law, there are many provisions in support for the principle. She points out that the most important one is the general clause against unconscionable terms, found in § 36 of the Contract Act 1915.[89] Jori Munukka however, argues that there is no obvious connection between an obligation imposed directly upon parties to take due considerations to each others' interest, and a duty of reasonableness in Swedish law. Therefore, the concept of good faith in Sweden does not necessarily include both. With regard to § 36 of the Swedish Contract Act 1915, Munukka points out that it does not mention good faith, or a duty of loyalty. Instead it was only the principle of reasonableness that was established in the important general

[83] See how Farnsworth used the distinction when he discussed good faith in American law: Farnsworth, 1993 as well as the discussion in section 2.4.2.
[84] In Swedish; "*Lojalitetsplikt*". See Munukka, 2007, 1 and Holm, 2004, 197.
[85] Munukka, 2007, 461.
[86] Munukka, 2007, 1.
[87] Munukka, 2005, 242.
[88] Munukka, 2005, 240.
[89] Hultmark 1999, 310 also see Grönfors, Dotevall, Avtalslagen (1 sept. 2010, Zeteo) commentary to § 36.

clause. Munukka therefore concludes that the duty of good faith in Swedish law is an independent contractual obligation.[90]

In the Swedish context, the duty may be described as a guide or a standard that the parties have to adhere to, but uncertainties exist as to exactly when or how the principle will apply.[91] The same applies to exactly when a breach of the duty will render liability or an obligation to pay damages.[92] Instead, the circumstances in each case will become crucial and the meaning and scope of good faith will vary with them. Type of contract, risks taken, money invested and the parties' objective expectations are all factors that may affect the level of good faith required. As a general observation it is evident that the Swedish duty of good faith, or loyalty, is more significant in long-term relationships, than in short-term relationships.[93]

Good faith in Swedish law often functions as the source of additional duties to be imposed on the parties to a contract. Such additional duty may for example be a duty to cooperate in order to achieve the objectives of the contract. Others are the duties to disclose, clarify and inform. The duty of care and the obligation to mitigate damages in the case of a breach are two other examples. The latter may require a party to actively take positive actions to limit damages but also the negative equivalent not to act in a way that may worsen damages already occurred. Another factor mentioned in doctrine is a duty to respect confidentiality.[94]

To find Swedish case law that acknowledge the duty of good faith is difficult. However, some cases may be worth mentioning. In RH 2001:77, the Swedish Appellate Court pointed out that "a general principle of contractual relationships is that a party is obliged to show diligence in compliance with the obligations imposed by a party under the contract".[95] A building contractor, who had failed to report emerging problems during the performance of the contract, was found to be in breach of required diligence.[96] Even though the court never mentioned a duty of good faith *per se*, a reasonable conclusion is that the principle was applied in order to supplement the contract with additional obligations.[97]

Another case of interest is NJA 1990 p. 745. Here, the Swedish Supreme Court discussed the role of a duty of loyalty in a pre-contractual situation. Two parties, X and Y, had agreed that Y should obtain the exclusive right to resale a certain product. However, a prerequisite for a final agreement

[90] In Sweden a clear distinction between the principle of reasonableness (in Swedish: *Skälighetsprincipen)* and the duty of loyalty (*Lojalitetsplikten)* exists. See comment on the subject made in Munukka, 2005, 240.
[91] Nicander, JT 1995/96, 32-33, 35.
[92] Nicander, JT 1995/96, 49.
[93] Nicander, JT 1995/96, 32-33, 35.
[94] Nicander, JT 1995/96, 32. Also see Munukka, 2007, 143-184 for a more detailed analysis on what these duties may require.
[95] RH 2001:77.
[96] In Swedish; "*omsorgsplikt*".
[97] This view is also supported by Munukka, See Munukka, 2005, 242.

between X and Y was that X had to receive a license for the product from a third party. In order to do so, X engaged in an agreement for cooperation with the third party. After a while a letter was sent to Y where X informed that an agreement for cooperation had been signed with the third party, and that the agreement included a right for Y to later sign a sales agreement. Even though the agreement for cooperation later resulted in a license, X decided not to contract with Y after all. Y, who had relied on the agreement with X, sued X and claimed damages. The Swedish Supreme Court held that even though no definite agreement between X and Y was agreed upon, the negotiations had reached a certain level, a level where the parties where obligated to show loyalty to one another. Since it took X a month before letting Y know that they no longer intended to contract with Y, the Supreme court held that X was to be blamed for the disrupted relationship. However, the Supreme Court also held that the duty of loyalty in this case was not enough to constitute damages.

Even though a duty of loyalty applies in pre-contractual situations it is considered weaker than the duty that applies once a contract is signed. The reason for this is the balance between the duty of loyalty and the principle of freedom of contract in general, and the right not to contract in particular.[98]

In sum, in an international context the Swedish approach towards good faith is somewhere in the middle. Unlike the United States and Germany, there is no statutory basis for the principle and courts seldom refer to it. It has therefore long been debated whether such general duty is a part of Swedish law at all. Today however, doctrine seems to agree on that some form of good faith and fair dealing do exists, and that it does so as a general principle of law.[99]

2.6 Conclusion: "Defining the Undefineable"

Even though Paul J. Power's article mainly addresses the issue of good faith under the CISG, its title "Defining the Undefinable" is very illustrative for the task of defining good faith in general.[100] As the above overview intended to prove, with the United Kingdom as one extreme and Germany as the other, a uniform definition among different legal systems is impossible to render. While English law is reluctant to recognize good faith as a general principle, the United States has codified the principle and recognizes it as an implied covenant to all contracts. In Sweden, there is still no codified principle of good faith and references are hard to find in Swedish jurisprudence. However, there seems to be consensus in Swedish doctrine that such principle does exist. In Germany, there is no doubt; the

[98] Munukka, 2007, 422.
[99] Munukka, 2005, 236-237 and Holm, 2004, 182.
[100] Powers, 1999.

principle of good faith is well-established and it has even been said that it has influenced the whole legal system.

The problematic task of defining good faith may be the reason why it is uncommon that domestic codes include a definition of the concept. American law has made a try, but clearly the ambiguity as to what good faith really means remains. In conclusion, providing a workable definition of good faith might not be as desirable after all. Understanding different applications of good faith seems to be a more practical and efficient way to approach the problem. As was argued under German law, even though the concept is not to be applied arbitrarily, any inherent vagueness coupled with the concept of good faith may also be its strength. As was pointed out above,[101] good faith is commonly applied in German law and it has also been used to create new concepts. Concepts that later has become so established of its own that the legislator has decided to codify it.

In trying to understand how good faith functions, it might be helpful to see if there is anything that all systems have in common with regard to when and how to apply the concept. Before answering that question, the reader ought to recall that the above overview only examines four different countries, all of them with different understandings of good faith. Presumably, a more extended investigation would render as many understandings as countries scrutinized.

Anyhow, the first common feature understood among all examined countries seems to be that the term is inherently elusive without an exact meaning. Again, this supports the statement that the task of defining good faith is futile. However, with regard to how good faith functions it always seems to revolve around what is considered to be fair under some objective standards. For example the German good faith provision in § 242 BGB not only states that a debtor must perform in good faith, but that general practice must be observed too. It has also been pointed out that Farnsworth means that objective standards shall be taken into account when matters of good faith are to be determined under American law. Personally I agree with this. Good faith is often expressed in terms of "not destroying the other party's expectations". This indicates that the other party's state of mind will matter. On the other hand, as Farnsworth indicated, a subjective test alone cannot be the only one when determining good faith performances since it would only exclude "deliberate unfairness [---] and deceit".[102] Applying objective standards and evaluate the specific facts in each case is a better and more fair way to determine good faith performances.

Further, all countries seem to agree that the appropriate standard of good faith will vary with the specific circumstances in each case. It is therefore necessary that any reference to good faith is made generally and open-ended.

[101] See *supra* section 2.5.2.
[102] Farnsworth, 1963, 672.

Common for American, German and Swedish law also seem to be that they all acknowledge the principle of good faith as party-oriented. Even though good faith is not codified in Swedish law, the principle has been used to impose additional duties upon the parties to a contract. In all three countries it seem to be a general understanding that good faith performances require each party to a contract to consider the interests of the other party and not to destroy the other party's expectations. In order to act fair and meet the standard of good faith, parties are therefore required to respect confidentiality, disclose, inform, and cooperate. This common core, even though it is narrow in scope, at least give some guidance for the continued discussion.

Even though I am not convinced, for the reason set forth above, that it is possible to render a workable definition at all, I do believe that Paul J. Powers's attempt to define good faith deserves some attention in this context. By compiling different domestic interpretations of good faith, he concludes that good faith may be defined as:

> "an expectation of each party to a contract that the other will honestly and fairly perform his duties under the contract in a manner that is acceptable in the trade community. The duty of good faith is an international doctrine that requires parties to an international transaction to act reasonably, as they would expect the other party to act." [103]

Like stated above, I do agree with Powers that good faith always seems to return to what is fair and to what the parties may expect from each other. However, as Bruno Zeller points out, the concept of good faith, especially under the CISG, has another function. As will be described in the next section, a literal reading of the good faith provision found in the CISG requires the Convention to be interpreted in good faith. Since Zeller looks at the role of good faith under the CISG as dual, and Powers' definition only defines one function, he means that Powers' definition fails as a workable tool.[104]

While reading the following chapter the reader shall bear in mind what was concluded in this first part of the paper: Good faith is an elusive term that apparently is understood differently in different legal systems. Moreover, the fact that "good faith countries" recognize the duty of good faith as party-oriented, is something that especially shall be kept in mind.

[103] Powers 1999, 351.
[104] Zeller, 2003, 220.

3 Good Faith Under the CISG

3.1 Why International Harmonization of Contract Law is Important

The adoption of the CISG represents an important milestone in the international unification of contract law. The CISG was drafted by the UNCITRAL and was unanimously adopted in 1980. Unlike its predecessors, ULIS and ULF, both adopted in 1964, the CISG would turn out to be significantly more successful.[105]

The preamble to the CISG recognises several benefits from the implementation of uniform laws. It reads:

"THE STATE PARTIES TO THIS CONVENTION,

[---] 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, [---]."[106]

In addition, uniform laws also create certainty and efficiency and is therefore of huge importance in a world where transactions constantly are made across borders.[107] Other recognized advantages are that unified laws often a more cost-effective and that they provide a neutral alternative that favors neither party.[108]

The CISG is applicable to the sale of goods made between parties with places of business in different states. For the Convention to be applicable, these states must be contracting states.[109] To this date, the CISG has more than 70 signatories[110] and is therefore often described as a huge success.[111] Yet, it is important to note that reservations have been common when states have adopted the Convention. It is clear that such reservations limit the effect on the intended unification. It seems as if states, even though they realize the benefits from unification, still are not ready to entirely give up their domestic laws and what is familiar to their legal systems.[112] Another

[105] Bonell, 1996, 26-27.
[106] See the preamble to the CISG.
[107] Felemegas, 2007, 8-11.
[108] Sim, 2001.
[109] CISG Article 1.1(a). According to CISG Article 1.1(b) private international law may also lead to applicability.
[110] For a complete list of all the contracting states, see the UNILEX website available at: (http://www.unilex.info).
[111] See for example Hofmann, 2010, 168 and Huber & Mullis, 2007, 1.
[112] Hofmann, 2010, 168.

limitation, or alternatively put, a threat to unification, is recognized by John Honnold:

"One threat to international uniformity in interpretation is a natural tendency to read the international text through the lenses of domestic law."[113]

Whether this has been the case or not for the purpose of good faith under the CISG will be discussed below.[114]

Moreover, conventions are often the result of compromises and no matter how well balanced or how well drafted they are, there will always be gaps. Therefore, the CISG has its own built-in gap filling provision in Article 7.2. Even though the trend towards harmonization speaks for itself and guidance primarily is to be sought in general principle upon which the CISG is based, Article 7.2 states that as a last resort the interpreter may look to the law applicable by virtue of private international law. Thus, domestic laws may continue to play a role in international trade.[115] In the same time, in the pursuit of uniformity and internationalisation, it is of major importance that judges are not influenced by domestic standards, thus threatening the goal of international uniformity. This is something that is clearly recognized and stated in CISG Article 7.1.[116]

The question is if it is possible for national courts to, in practice, overlook and ignore national standards when interpreting the CISG. As have been shown, most countries recognize that parties to a contract are required to act in accordance of good faith, but there is no unified understanding of exactly how this shall be accomplished. As a result, good faith has in fact been described as a major hindrance to harmonization of international contract law.[117] The following section will therefore examine the meaning of good faith under the CISG and if a unified interpretation has been conducted.

3.2 CISG Article 7.1 and its Legislative History

3.2.1 Three Elements of Interpretation

The CISG itself does not contain a definition of good faith but Article 7.1 reads:

"In the *interpretation* (emphasis added here) of this Convention, regard is to be had to its international character and to the need to promote uniformity in

[113] Honnold, 1988, 207.
[114] See *infra* section 4.1.
[115] Zeller, 2007, 1.
[116] See CISG Article 7.1 and the comment made by Felemegas, 2007, 12.
[117] See for example Munukka, 2005, 230.

its application and the observance of *good faith* (emphasis added here) in international trade."

Being an international legal instrument, issues of interpretation inevitably becomes important. Even though it is true that the precise meaning of a used term often becomes the subject of divergent opinions in all legal systems, it is equally accurate that problems of interpretation becomes even more evident when the instrument has been drafted on an international level.[118] An important insight is that the success of the CISG is not only depending on whether sovereign states decide to ratify it. In order for the CISG to become an effective unifying body of law in practice, it is equally critical that the Convention is interpreted in a consistent way.[119] The drafters therefore provided the CISG with its own interpretation provision in Article 7. CISG Article 7.1 establishes three important elements to be considered when interpreting the Convention. These are "international in character", "uniformity" and "good faith in international trade".[120]

Since the two first elements accentuate the international character of the CISG and the importance of a uniform interpretation, Article 7.1 has been described as the most important provision of the whole Convention.[121] Some may therefore be surprised to find that no international court with sole "CISG jurisdiction" has been established. Instead, disputes arisen under the CISG are left to be solved by domestic courts and sometimes arbitral tribunals.[122] It is true that once ratified, the CISG becomes part of that state's domestic law. However, it cannot be emphasized enough how important it is that the interpretation of the Convention at all times must be performed independently from any domestic standards. This is the underlying meaning of the first element and that regard must be taken to the international character of the CISG.[123] In other words, the interpreter may never presume that a term used in the CISG means the same thing as in the domestic system. Instead, the "CISG-meaning" must be superior and followed by the individual states.[124] Since the CISG must be interpreted with regard to its international character in order to promote uniformity, and a uniform interpretation in the same time is necessary to maintain the international character of the CISG, it is often said that the first two elements are closely linked to one another. In conclusion, each element of the two is a prerequisite to the other.[125]

What about the third element found in Article 7? How shall the interpreter deal with the reference to good faith? The tribunal in *Dulces Luisi, v. Seoul International* acknowledged the importance of that good faith must be

[118] Felemegas, 2007, 10-11.
[119] Felemags, 2007, 6.
[120] CISG Article 7.1.
[121] See Keily, 1999 and Zeller, 2007, 26.
[122] Felemegas, 2007, 8.
[123] Felemegas, 2007, 6.
[124] Huber & Mullis, 2007, 7.
[125] Felemags, 2007, 12.

interpreted internationally. Thus, good faith must be interpreted independently from any domestic standards.[126]

3.2.2 Good Faith Finds its Way into the CISG

It is interesting, but maybe not surprising, that the legislative history of the Convention reveals that the important Article 7, and in particular the inclusion of the third element, caused a lot of debate throughout the drafting process.[127] The first country to introduce a good faith provision into the drafting process was Hungary. It was suggested that good faith should be included as a positive duty and apply to the conduct of the parties in the formation of a contract. Some, but far from everybody, shared the broad Hungarian idea of good faith.[128] Among those who proved reluctant was the Swedish representative, Lars Hjerner. In 1980 he rejected Canada's proposition to impose a positive duty on parties to a contract.[129] Some of the arguments presented against good faith during the drafting process may be recognized from the description of the United Kingdom's aversion in section 2.4.3.

For example, it was pointed out that good faith as a concept was too vague and too uncertain. Since some considered the concept as implicit in all business law anyway, it was also held that a reference to good faith would be superfluous.[130] Others pointed out that good faith was a moral obligation and not a legal one. Another strong argument was that it was an ambiguous term known differently in different countries and that an implementation of good faith therefore would pose a threat to the ultimate goal of the Convention, namely uniformity.[131]

The other side, the favoring side, argued for an implementation of a party-oriented duty to act in good faith. Such duty should not only extend to performances under the contract but to the formation of the contract as well.[132] Finally however, the representatives for either side managed to reach a settlement and good faith was implemented, but not as a positive duty imposed on the parties. Instead, Article 7.1 states that good faith shall be observed as the third element in the interpretation of the Convention, but

[126] Compromex Arbitration (Mexico) Award of November 1998. Case abstract available at: [http://cisgw3.law.pace.edu/cases/981130m1.html]. Present case is also noteworthy for the fact that the tribunal concluded that the CISG was applicable even though South Korea was not a State signatory. Without further explanation the tribunal reached its conclusion on the applicability of the CISG.
[127] Keily, 1999.
[128] See Powers, 1999, 341 with further reference to "John O. Honnold, Documentary History of the Uniform Law for International Sales, 1989, 298".
[129] Munukka, 2005, 237.
[130] Spagnolo, 2008, 269. Also see Powers, 1999, 342 with further reference to "John O. Honnold, Documentary History of the Uniform Law for International Sales, 1989, 299".
[131] Keily, 1999 with further references to John O. Honnold, Documentary History of the Uniform Law for International Sales, 1989, 369.
[132] Komarov, 2005-2006, 81.

it does not say anything about the contract. Even though such wording seems to be clear, the function and exact meaning of good faith under the CISG has been widely debated among commentators. The question is if good faith is, as a literal reading indicates, a mere interpretation tool of the CISG, or if it has a dual role and imposes duties directly on the parties as well.[133]

3.3 Different Interpretation Alternatives of the Role of Good Faith under the CISG

3.3.1 Good Faith as a Mere Interpretation Tool

With support in the legislative history and a literal reading, some commentators insist that the reference to good faith in CISG Article 7.1 is nothing more than a tool for interpretation available to judges and arbitrators.[134]

This restrictive view was confirmed in the *Industrial Equipment Case*. Due to the German buyer's failure to pay for some deliveries, the Spanish seller brought claims before an arbitral tribunal. Among the counterclaims presented by the buyer were damages for failure to deliver spare parts. The sole arbitrator recognized that under German law a producer of machines is obligated to supply replacement parts. This duty is attributable to the duty of good faith stated in § 242 BGB. However, the arbitrator distinguished this duty from good faith as understood in CISG Article 7.1 and concluded that good faith in the CISG only refers to the interpretation of the Convention itself. The arbitrator also emphasized that no collateral obligation may be deduced from the reference.[135] Following this ruling, the notion of good faith in CISG Article 7.1 may not be a source of parties' obligations under a contract.

3.3.2 Good Faith as a Positive Duty Imposed on the Parties

Despite the narrow wording of Article 7.1, the German authority Peter Schlechtriem is one of the proponents determined that good faith is not limited to the interpretation of the Convention. Instead, good faith according to him also exists as an obligation addressed to the parties. However, Schlechtriem is not the only one in favor of this view and a common argument is that it is impossible to make a distinction between the

[133] Felemags, 2007, 13. Also see Zeller, 2003, 220.
[134] See especially Allen Farnsworth in Farnsworth, 1995, 56.
[135] ICC Arbitration Award 8611 of 1997, See abstract available at [http://www.unilex.info/case.cfm?id=229] and [http://cisgw3.law.pace.edu/cases/978611i1.html].

interpretation of the Convention and the interpretation of the individual contract. The contract therefore includes a general duty of good faith, a standard derived from the CISG. To clarify the reasoning further; both the CISG and the contract outline rights and duties of the parties. Since it is clear that the CISG has to be interpreted in good faith and the contract must conform to the CISG, the good faith provision applies to the rights and duties under the contract as well.[136]

The critics mean that there is no reason why a distinction is not possible. Determining the meaning of the CISG is one thing while determining the meaning of the contract is another. Disa Sim points out that even though the CISG imposes duties and confers rights to parties to a contract, it is important to keep in mind that it is the provisions of the CISG as already interpreted that apply to a contract.[137]

Michael Joachim Bonell is another authoritative represent for the view that good faith under the CISG Article 7.1 is addressed to the parties as well. He means that "[---] even as a simple aid to the interpretation of the Convention's specific provisions the principle of good faith may have some impact on the behaviour of the parties".[138] In support for this view, Bonell points to several situations. For example, he uses Honnold's argument that a party who exercises its right under CISG Article 47 or Article 63, and demands performance within an additional period, must in good faith accept the requested performance. Another example pointed out by Bonell is that a "good faith interpretation" of a CISG provision may lead to that a party under certain circumstances is prevented from invoking rights and remedies normally granted to him under the Convention.[139]

Contrary to what was concluded in the *Industrial Equipment Case*, courts and tribunals have more than once used CISG Article 7.1 to impose an obligation to act in good faith upon parties. Three different cases will briefly be reviewed here.

In the *Bonaventure Case,* a French seller and a U.S. buyer had entered into a sales agreement for the sale of jeans. It was specified in the contract that the purchased jeans were to be sent to South America and Africa only. Since the seller found out that the buyer, in breach of the contract, had sent the jeans to Spain, the seller refused to make further deliveries. The buyer brought proceedings in a French court and claimed damages for breach of contract. The seller on its part, countered with a claim for damages since the distribution of jeans into the Spanish market seriously impeded a parallel distribution agreement. The French court looked to CISG Article 25[140] and

[136] Schlechtriem, 1998, 63, and Enderlein & Maskow, 1992, 54, also see Sim, 2001, footnote 174 with further reference to additional writers in support for this view.
[137] Sim, 2001.
[138] Bonell in Bianca & Bonell, 1987, 84.
[139] Bonell in Bianca & Bonell, 1987, 84.
[140] CISG Article 25 reads: "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee

found that the buyer had breached the contract by not telling the seller that the jeans were sent to Spain. The court went on and also declared that it was contrary to the principle of good faith in Article 7.1 to initiate a suit when the claimant itself clearly had breached the contract. In conclusion, such abuse of process was not in accordance with the obligation to observe good faith in international trade established in CISG Article 7.1.[141]

The holding in this case has been described as "unfortunate" since the French court failed to observe that the CISG does not govern matters of civil procedure.[142] Even though matters of procedural law clearly falls outside the scope of the Convention, other commentators mean that a method that focuses on differences between substantive law and procedural law is not an appropriate method of interpretation for the purpose of the CISG. Their main argument is that something that would be considered as procedural law in one jurisdiction, might be consider as substantive law in another. Such method would therefore be counterproductive.[143]

However, whether or not one would agree with the French court, there are more cases to be found in favor of the view that CISG Article 7.1 imposes duties directly upon parties.

In the *Mushroom Case,* the Hungarian arbitral tribunal reached a similar conclusion as the French court in *Bonaventure* did. The tribunal declared that Article 7.1 is not merely an interpretation tool, but also a standard of behavior the parties must respond to. Thus, the arbitrator held that the issuance of a bank guarantee which had already expired was a breach of the principle of good faith.[144]

The German Provincial Court of Appeal in the *Automobile Case* also used good faith in CISG Article 7.1 in a way that had consequences for the parties' rights and duties. In this case the defendant, a German seller, and the plaintiff, an Italian buyer, had contracted for the sale of some cars. Before the last delivery the plaintiff informed the defendant that "extreme exchange rate fluctuations" made it impossible to receive the goods and asked for a postponement. Despite the plaintiff's request the defendant cancelled the orders. Even so, the defendant got paid for a bank guarantee that the plaintiff had issued in favor of the defendant. Since no second delivery was made, the plaintiff claimed repayment of the guarantee sum and damages. The court ordered the defendant to repay the guarantee money but dismissed the plaintiff's claim for damages. Since the goods had been ready for delivery when the plaintiff asked for a postponement, there was no

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and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."

[141] France 22 February 1995 Appellate Court Grenoble, available at: [http://cisgw3.law.pace.edu/cases/950222f1.html]

[142] Sim, 2001.

[143] The "awarding of interest" is an example. Some countries consider it to be a substantive matter while others regard it as procedural, see Gotanda, 2005, 121.

[144] Hungary 17 November 1995 Budapest Arbitration proceeding Vb 94124, available at: [http://cisgw3.law.pace.edu/cases/951117h1.html].

fundamental breach on behalf of the defendant that would allow the buyer to avoid the contract for non-delivery. The court finally pointed out that it in any case would be contrary to the principle of good faith in Article 7.1 to allow the defendant to declare the contract void two and a half years after the event took place.[145] Thus, the court used the principle of good faith in Article 7.1 to bar the plaintiff from avoiding the contract. The rights and duties of the parties were thus affected due to the application of the principle of good faith in Article 7.1.

In conclusion, there are several cases in support for that CISG Article 7.1 not only shall be considered by courts and tribunals when interpreting the Convention. No matter how desirable this approach may be, at least two problems with the inclusion of such positive duty of good faith have been pointed out in doctrine. One issue is the applicability of CISG Article 6.[146] This provision allows the parties to opt out from the CISG, i.e. to agree that the Convention shall not be applicable in case of a future dispute. If CISG Article 7.1 indeed is a duty addressed to the parties, then the parties may use CISG Article 6 to exclude the application of good faith.[147] The counter argument would be that even though parties are given the right to freely choose whether CISG shall govern their contract or not, the interpretation established in CISG Article 7 must be considered once the parties agreed that CISG shall govern.[148] Another problem is the fact frequently pointed out above; CISG Article 7 was the result of extended negotiations between those who favored a broad application of good faith and those who strongly rejected it. To interpret the provision broader than what the drafters finally decided to put down in words, would be to challenge their expressed intention.[149]

3.3.3 Good Faith as a General Principle

3.3.3.1 Does a General Principle of Good Faith underly the CISG?

It would be too ambitious to think that the CISG could cover all possible situations relating to the sale of goods in an international context. Since CISG Article 7.2 provides a method for "gap filling" it is therefore an important provision. Due to the way Article 7.2 is drafted it is widely recognized that there is two different types of gaps; external and internal. While external gaps are issues not governed by the Convention at all, internal gaps are those covered by CISG Article 7.2. Article 7.2 namely states that when matters are governed but not settled in the Convention, guidance shall be sought in general principles on which the Convention is

[145] Germany 8 February 1995 Appellate Court München, available at: [http://cisgw3.law.pace.edu/cases/950208g1.html]
[146] CISG Article 6 reads: "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".
[147] Felemagas, 2007, 14.
[148] Felemegas, 2000-2001, 115-265.
[149] Felemegas, 2007, 14.

based.[150] Further, the Article states that only in absence of such principles, the interpreter may look to domestic laws.[151] Due to the importance of uniformity, and the fact that any use of domestic standards poses a threat, it has been argued that domestic law only shall apply to external gaps.[152]

However, I have two objections to this latter statement. First of all, it indicates that the CISG prevents domestic laws to fill internal gaps but such conclusion is clearly contrary to what Article 7.2 states. For the sake of unification, I do agree that filling internal gaps with domestic laws must be the absolute last option, but that is not to say that it will not or cannot happen. Second, even though I am not sure it is what the commentator suggests, I still would like to point out that it is not totally clear that domestic laws unconditionally shall apply to external gaps. What I especially have in mind is cases when the parties expressly wished for the CISG to be the applicable law. Even though an issue not governed by the Convention might occur, it is not unreasonable that the parties, who expressly contracted for the CISG, want the Convention to settle the matter anyway. Both the Convention and the relationship between the parties are international in character and therefore even external gaps arguably may be resolved by principles underlying the Convention.

In conclusion, at least in terms of internal gaps, even though general principles often are vague and open-ended, if they indeed represent the spirit of the CISG they are at least better than the use of domestic standards. It is therefore essential that interpreters submit to a thorough examination when deciding whether good faith is one of the general principles underlying the Convention or not.

With regard to how to solve internal gaps there is a strong academic opinion in favor of a broad interpretation of Article 7.2. As such, the Article allows internal gaps to be solved either by analogue or by an application of a general principle.[153] With regard to which method that takes precedence, commentators seem to agree that gap filling by analogue shall be the first step when a matter is governed but not settled by the Convention. Only if the question remains unsolved the interpreter shall look to general principles of the CISG.[154] Even though the dividing line between the two methods is somewhat blurred, they shall not be confused with each other. The

[150] CISG Article 4(a) expressly states that the CISG does not govern matters of validity; "This Convention governs only the formation of the contract of sale and the rights and obligation of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: the validity of the contract or of any of its provisions or of any usage". A matter governed but not settled for the purpose of Article 7.2 would for example be the determination of an exact interest rate. CISG Article 78 states: "If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74".

[151] See for example Zeller, 2007, 30.

[152] Zeller, 2007, 29-30.

[153] See for example Bonell in Bianca & Bonell, 1987, 78 and Enderlein & Moskow, 1992, 58, 60.

[154] See for example Bonell in Bianca & Bonell, 1987, 78-80 and Felemegas, 2000-2001.

analogous method is rather a question of whether an existing provision may be extended to cover a similar situation, than if a general principle exists. Bonell argues that when a specific matter is governed but not settled in the CISG and it would be "inherently unjust" not to reach the same result, an "extension" may be reasonable to apply.[155]

The second method differs from the first since it does not extend the application of specific provisions. Instead it is a matter of ascertain whether the provisions of the CISG can be said to express general principles, applicable on a broader scale.[156]

Thus, the question is if good faith is such general principle. One argument is the fact that good faith is mentioned in CISG Article 7.1. The general reference to the principle indicates that good faith is one of the general principles underlying the Convention.[157] On the other hand, critics ward this argument by saying that a concept may not be elevated to a general principle just because it is mentioned once.[158] However, there are other arguments in support of a general principle of good faith. A strong initiating argument is the very nature of Article 7.2. By referring to "general principles" the article takes on a liberal approach towards interpretation. Such approach is familiar to many civil law countries where interpreters are used to find resort in broad principles, e.g. good faith. Since CISG Article 7.1 calls for an interpretation that promotes good faith in international trade, this also applies to the interpretation of Article 7.2. Therefore, one may conclude that Article 7.1 supports an interpretation of Article 7.2 that results in a finding of a general principle of good faith under the CISG.[159] However, even though it is easy to conclude that the CISG welcomes a liberal approach towards general principles, this is not enough. Good faith as such, has to be established as one of them.

Moving on in the search for a convincing argument, one will find that it is commonly held among international commentators that the concept of good faith has inspired so many provisions[160] in the Convention that it must be considered as a general principle underlying the Convention as a whole.[161]

Even though Farnsworth have held that it would be "a perversion of the compromise to let a general principle of good faith in by the back door",[162]

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[155] Bonell in Bianca & Bonell, 1987, 78-80.
[156] Bonell in Bianca & Bonell, 1987, 78-80.
[157] Spagnolo, 2008, 275.
[158] Sim, 2001.
[159] Bell, 2007, 17-22.
[160] See Digest of Article 7 case law, 2008, that declares that following articles manifest the principle of good faith: Article 16.2.b; for when an offer may be irrevocable depending on reasonableness and reliance, Article 21.2; on when late acceptance may be considered on time, Article 29.2, Article 37 and 46; on a right for the seller to cure non-conformities in the goods, Article 40; on when a seller may not rely on buyer's failure to give notice, Article 47.2; when the right to declare a contract avoided, Article 85-88; for a duty to preserve the goods.
[161] Sim, 2001, also see Bonell in Bianca & Bonell 1987, 85.
[162] Farnsworth, 1995, 56.

several cases decided under the CISG have confirmed that good faith is one of the general principles of the CISG.

For example, this was the conclusion in the *Cowhides Case* where the tribunal basically referred to good faith as a general principle underlying the CISG.[163] The same conclusion was made in a Dutch case (*Kunsthaus Math. Lempertz v. Wilhelmina van der Geld)* from 1997.[164]

In another Dutch case, *Cooperative Maritime Etaploise v. Bos Fishproducts*, a French seller and a Dutch buyer had contracted for the delivery of fish. Due to bad quality the buyer refused to pay full price. The Dutch court however, found that the buyer had failed to give notice within a reasonable time after discovery and therefore had lost its right to obtain price reduction. The buyer was given a relatively short period to examine and give notice. Reaching this conclusion the court relied on CISG Article 38 and 39, but it also made a reference to a general principle of good faith to give additional support to the conclusion. The Dutch court pointed out that the CISG and the UNIDROIT Principles goes further than French law (the law applicable to the contract) which only includes a subjective interpretation of good faith. Under the CISG on the other hand, the court argued, there is an objective duty of good faith. In sum the court recognized good faith as a general principle underlying the Convention and even though it had enough support in other provisions it used good faith as an additional reason why the buyer had lost its right to complain about the quality of goods.[165]

This case has been subject to criticism. Disa Sim points out that the reference to good faith was simply unnecessary since the court had enough support already. According to her, the reference becomes especially superfluous since the principle is vague and uncertain.[166] Others, to the contrary, mean that this is the appropriate way to apply the notion of good faith; as a final test to ensure that the outcome is just.[167]

In the *Use Car Case* the German Appellate Court referred to "general principles embodied in CISG Article 7.1" and held that a fraudulent seller may not rely on CISG Article 35.3. Even though the court recognized that the buyer had acted negligent, it held that the buyer deserved some protection.[168] It is not unreasonable to conclude that it was good faith the court meant when it referred to general principles embodied in Article 7.1.

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[163] ICC Arbitration Case No. 7331 of 1994 available at: [http://www.cisg.law.pace.edu/cases/947331i1.html#ce], also see comment made by Spagnolo, 2008, 277.
[164] Netherlands 17 July 1997 District Court Arnhem, available at: [http://cisgw3.law.pace.edu/cases/970717n1.html].
[165] Netherlands 5 March 1997 District Court Zwolle, available at: [http://cisgw3.law.pace.edu/cases/970305n1.html] and comments made by Sim, 2001.
[166] Sim, 2001.
[167] Sheehy, 2004, 30.
[168] Germany 21 May 1996 Appellate Court Köln, available at: [http://cisgw3.law.pace.edu/cases/960521g1.html].

In an Austrian case, the *Rolled Metal Sheets Case*, the German buyer had sent the Austrian seller two notices of non-conformity. After the second notice, the seller argued it was not done timely, and therefore refused to pay damages pursuant to CISG Article 39. The sole arbitrator recognized that the buyer's notice, given months after delivery, indeed was too late. However, the arbitrator also stated that the general principle of good faith in international trade not only means that a legal right (for example the right to raise a defense) intentionally may be waived, but that it can be objectively forfeited too. Since the seller's conduct, after receiving the notice of non-conformity from the buyer, made the buyer believe that no defense of late notice was going to be raised, the arbitrator held that the seller, as a result of the principle of good faith, was not permitted to raise the defense of late notice available in CISG Article 39.[169]

3.3.3.2 The Role of the UNIDROIT Principles as an Assistance for the Interpretation of the CISG

In sum, there is a relatively extensive jurisprudence in support for good faith as a general principle underlying the CISG. However, the above review only focuses on whether there is a general principle of good faith within the CISG itself. Some commentators go even further and points to an additional argument. This argument is based on the premise that when the CISG lacks guidance, the interpreter may resort to the UNIDROIT Principles of International Commercial Contracts.[170] The preamble of the UNIDROIT Principles declares that, *inter alia*, the model rules may be used to interpret or supplement international uniform law, i.e. an instrument like the CISG.[171] This however does not mean that the CISG welcomes such assistance.

The relationship between the CISG and the UNIDROIT Principle has been highly controversial and the attention of scholarly writings. Those who favor an application of the UNIDROIT Principle in interpreting the CISG point to the fact that the UNIDROIT Principles represent "general principles of international commercial contracts".[172] It is evident that some courts have confirmed this approach. In a recent case from 2009, the Belgian Supreme Court recognized, after considering both CISG Article 7.1 and 7.2, that gap filling must be uniformly conducted. According to the court, regard must be taken to "general principles governing the law of international commerce". The court went on to declare that the UNIDROIT Principles provides such principles and therefore may be used to interpret the CISG.[173] Far from everyone would agree that the Belgian court was right in this conclusion. The other side points to the fact that the UNIDROIT Principles was drafted

[169] Austria 15 June 1994 Vienna Arbitration proceeding SCH-4318, available at: [http://cisgw3.law.pace.edu/cases/940615a4.html].
[170] Veneziano, 2010, 140-141 and Felemgas, 2000-2001.
[171] The Preamble of the UNIDROIT Principles 2004 reads: [---] They may be used to interpret or supplement international uniform law instruments [---].
[172] See Bonell, 1999, 12-13.
[173] Scafom International BV v. Lorraine Tubes S.A.S - Belgium 19 June 2009 Court of Cassation, available at: [http://cisgw3.law.pace.edu/cases/090619b1.html].

after the CISG, and therefore is an inappropriate assistance. Proponents for a third view represent a view somewhere in between these two positions. According to them, the UNIDROIT Principles may be used to supplement the CISG but only if it is necessary to bring clarity to an already existing general principle underlying the CISG.[174] This latter view is arguably the most appropriate approach since Article 7.2 after all establishes that in the event of a gap, a solution shall be sought within the CISG.[175]

If courts find legitimacy in a resort to the UNIDROIT Principles when interpreting the CISG, it may indeed affect the way of looking at good faith under the CISG. Article 1.7 of the UNIDROIT Principles establishes:

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

In conclusion, the UNIDROIT Principle clearly imposes a duty to act in good faith upon the parties. Courts or tribunals, who seek guidance in the UNIDROIT Principles, may therefore find and apply a broad understanding of good faith.[176]

It is evident that doctrine is not unified as how to deal with the differences in wording presented by the CISG and the UNIDROIT Principles. One may always argue and return to the fact that the drafters of the CISG never adopted the wording of the UNIDROIT Principles.[177] On the other hand, Michael Bridge holds that even though the CISG is silent on a general duty of good faith and the UNIDROIT Principles obviously is not, this does not necessarily mean that there is a conflict on the matter between the two.[178] Even though Bridge's comment was made without further explanation, it does make sense if one agrees with Bonell's statement that Article 7.1 imposes positive duties upon the parties. Finally, Zeller argues that the UNIDROIT Principles shall not apply if the same meaning of good faith cannot be established within the CISG. He means that such approach shall be rejected on the same grounds one would reject an application of domestic principles.[179]

Before moving on to the next chapter it is worth mentioning that the same argument against good faith pointed out in the last part of section 3.3.2 applies to the interpretation alternative in this section as well. It is impossible to ignore the fact that an explicit standard of good faith and fair dealing constantly was rejected during the negotiating process. However, Bridge questions if this really means that good faith as a general principle

[174] Bonell, 1999, 12-13.
[175] See Keily, 1999: "[---] if there are gaps, its is only logical that a solution is sought by looking within the four corners of the CISG [---].
[176] Spagnola, 2008, 277.
[177] Sim, 2001.
[178] Bridge, 1999, 60.
[179] Zeller, 2000.

was rejected, or if the intention only was to exclude any expressed mentioning of the standard.[180] To continue Bridge's reasoning one may argue that the drafters excluded an expressed party-oriented duty to act in good faith in Article 7.1, but in the same time opened up for it by allowing general principles by virtue of Article 7.2.

John Felemegas presents another valuable aspect. Although realizing that the legislative history is important as an interpretative aid he states that it "[---] cannot hold the CISG its life-long prisoner". Instead, case law decided under the Convention serves as a better interpretation tool in the pursuit of uniformity.[181]

[180] Bridge, 1999, 59.
[181] Felemegas, 2000-2001.

4 Analysis

4.1 Have National Courts and Arbitrators Managed to Observe the International Character of Good Faith under the CISG?

Predictability, removal of legal barriers and a more efficient legal environment are benefits derived from uniform laws. The CISG recognizes all these elements but also emphasizes uniformity as one of its ultimate goals. With over 70 signatories the CISG has been described as a huge success. However, ratifying alone is not enough to achieve uniformity. It is equally essential that the Convention is interpreted and applied in a unified manner. CISG Article 7 is therefore one of the most important provisions of the whole Convention. The first paragraph of Article 7 points out that interpreting the Convention requires that regard must be taken to the international character of the CISG, the need to promote uniformity and good faith in international trade.

The role of good faith has turned out to be one of the most debated concepts of the whole Convention and as was presented under section 3.3, at least three different interpretations exist in doctrine. Despite its clear wording there are many commentators in favor for that Article 7.1 not only applies to the interpretation of the Convention, but that it imposes positive duties upon the parties as well. Other commentators seem to support a literal reading of Article 7.1 but argue that good faith is one of the general principles underlying the Convention by virtue of Article 7.2.

Before discussing the proper role and status of good faith under the CISG in section 4.2, there is reason to comment the role of judges and arbitrators. Even though it is emphasized in article 7.1 that uniformity is to be promoted at all times, tribunals and national courts have struggled to create a unified jurisprudence with regard to the role of good faith. Does this simply indicate that total uniformity was an unrealistic goal or is it a result of the interpreters' failure to distance themselves from domestic standards? Honnold never uses the word "unrealistic" but he does recognize that:

> "We cannot expect perfect uniformity in applying the convention -- or, for that matter, any other statute. But we can look forward to international commercial law that is more helpful and predictable than the present Babel of competing systems."[182]

[182] Honnold, 1988, 210-211.

In my opinion, whether this humble approach towards uniformity is justified or not is a question of why absolute uniformity has not been achieved. If the divergent jurisprudence on good faith is a result of the interpreters' failure to ignore domestic standards, the rendered decisions constitute a breach of Article 7.1. If the non-uniform jurisprudence on good faith on the other hand, is the result of different interpretations of good faith as understood in an international context, Honnold's statement is more acceptable.

Thus, the question is if it is possible to determine a connection between the nationality of a particular judge or an arbitrator and his or her understanding of good faith as expressed in a rendered decision. Clear statements verifying the fact that the interpreter has been inspired by domestic standards are probably difficult to find. However, by looking at decision makers' understandings of good faith as fixed in their judgments or awards, and compare them to the legal traditions in the national legal systems they are used to, it may be possible to conclude whether they have managed to comply with the elements stated in CISG Article 7.1 or not.

It is impossible not to reflect over the fact that all three cases presented under section 3.3.2 were decided under civil law jurisdictions. As the first part of this paper concluded; civil law countries often consider good faith to be party-oriented. Moreover, Honnold has recognized that: "One threat to international uniformity in interpretation is a natural tendency to read the international text through the lenses of domestic law".[183] The question is if these cases are the result of such natural tendency. Did the French court, the Hungarian arbitral tribunal and the German court all failed to distinguish good faith as an international concept when they recognized a party-oriented duty to act in good faith? After all, as we have learned, Hungary was the country who first presented the idea of good faith as a positive duty during the negotiating process and in Germany good faith is widely recognized as a duty to be imposed upon parties to a contract.

With regard to the cases acknowledging good faith as a general principle, they were also decided under civil law jurisdictions. Again, the use of general principles is without a doubt something civil law jurisdictions are more used to.

Thus, in my opinion there is without a doubt a link. Whether this connection is sufficient to conclude that the interpreters have failed to observe the international character of the CISG is not as obvious though. The fact that a holding conforms to the domestic understanding of good faith, does not mean that the same understanding is in fact not the proper role of good faith under the CISG. An important clarification needs to be done here. This subsection does not examine the proper role of good faith under the CISG. It only aims to address whether national courts have managed to ignore national standards when interpreting the CISG. This mean that even though

[183] Honnold, 1988, 207.

they might apply the interpretation alternative of good faith that serves the purpose of the CISG best, they might do it for the wrong reasons.

A main problem becomes evident; the discussed cases do not provide a comprehensive description of how and why the decision makers reached their conclusions. Unfortunately, this makes it difficult to pursue the task and to conclude whether they have failed to observe the international character of good faith under the CISG or not. Moreover, the list of cases briefed and analyzed in this thesis is by no means exhaustive. Therefore there is an obvious danger in drawing any hasty conclusions about any failure to observe good faith in an international context.

Nevertheless, what all these cases do demonstrate is that judges and arbitrators from civil law countries at least do not refrain from approaching the good faith provision in a broad manner. Arguably, the fact that they regard good faith as a positive duty upon the parties alternatively as a general principle, without further explanations, proves that they are confident in such holdings. Even though it is tempting to argue that this confidence stems from the legal tradition they are used to, it is impossible to make such conclusion with definite certainty.

In my opinion, it is a major problem that courts and tribunals so easily move away from the literal wording of the Convention without explaining why. The wording of Article 7.1 is clear but still decision makers constantly found that it is not only addressed to the judiciary but to the parties as well. Like the next section will analyze, moving away from the literal wording might be the appropriate way to interpret the good faith provision, but in order for such interpretation to be justified it must be reasonable to require the decision maker to explain why. Another important aspect of this is the fact that achieving uniformity requires courts to observe how other courts previously have interpreted the CISG. It is easy to see that if they do not, the desired and necessary uniformity will be inhibited. Thus, since a rendered decision may affect future holdings, clear and detailed reasoning will definitely serve the objectives of uniformity.

In conclusion, no uniformity as how to apply good faith exists in the jurisprudence of the CISG. No one but the actual decision makers can be blamed for this. The non-coherent jurisprudence is without a doubt an aggravating circumstance since uniformity is one of the stated goals of the CISG. Even though courts possibly have failed to ignore domestic standards of good faith when interpreting the CISG, they definitely have failed in another respect too. Due to the important goal of uniformity, it arguably does not matter how courts decide to apply good faith – as long as they all apply it in the same way. Of course, this requires that rendered cases are made easily accessible both with regard to where they are stored as well as translated into an appropriate language. However, it does not matter how accessible a judgment is if it does not contain valuable guidance. My opinion is that if the decision makers of the CISG start to render more

detailed holdings, uniformity with regard to the concept of good faith will follow.

Finally, to avoid translation costs and more importantly the risk of influence from domestic standards, a solution would be to establish an international alternative to the use of national courts. There are examples of such courts in other areas of international law. The International Criminal Court and the Internal Court of Justice are two examples. Why not establish an international commercial court with sole "CISG jurisdiction"? Bonell describes this idea as totally unrealistic and points to the differences in social, political and legal structure among the signatory states. To expect them to grant an international court compulsory jurisdiction would simply be too much to ask.[184] Disa Sim also points out that merchants often prefer arbitrators to settle disputes due to the benefits of confidentiality. The risk is therefore that merchants would oppose an international court that cannot offer the same benefits.[185]

Thus, since an international alternative to domestic courts seems unlikely for the purpose of the CISG, maybe Honnold is right after all; perfect uniformity is not possible. However, it is not acceptable that the non-uniformity is the result of hasty conclusions on the role of good faith. Even though the CISG does not define good faith, the Convention clearly states that good faith has to be interpreted in an international context and in a way that promotes uniformity. Today we are not quite there. Only the future will reveal how national courts and tribunals decide to take on the task of applying good faith, and moreover; if they will do it for the right reasons.

4.2 The Proper Role of Good Faith Under the CISG – Which Interpretation Alternative Serves the Goal of the Convention Best?

While Article 7.1 is the only provision in the Convention expressly mentioning good faith, this paper has raised three possible interpretations of how good faith functions under the CISG.

Under the first interpretation, CISG Article 7.1 is read literally and only allows the decision maker to observe good faith in the interpretation of the Convention. According to this strict view, courts or tribunals do not have mandate to impose a positive duty of good faith upon the parties. Neither may they find that good faith is one of the general principles underlying the Convention. Farnsworth is clear in his statement and argues that it would be "a perversion of the compromise to let a general principle of good faith in by

[184] Bonell in Bianca & Bonell, 1987, 89.
[185] Disa Sim, 2001.

the back door".[186] The compromise Farnsworth refers to is of course the final wording of good faith as laid down in Article 7.1 and the fact that it was preceded by extended negotiations on what the proper function of good faith should be. I agree with Farnsworth that it is obvious that those who were against a positive duty of good faith finally won the battle.[187]

Nevertheless, it is equally true that the role of good faith under the CISG has caused a lot of confusion in both doctrine and among decision makers even after the adoption of the Convention. For example, Article 7.1 has been described as a "strange arrangement" and "an awkward compromise".[188] With these remarks in mind my question is how much value it is reasonable to attribute to the legislative history in terms of good faith. Felemegas' answer is that it would be unreasonable to let the legislative history "hold CISG its life-long prisoner", and thus directly contradicts Farnsworth.[189] In my opinion, even though the legislative history certainly cannot be ignored, it cannot be the only tool in determining the meaning of good faith under the CISG either. Just like Felemegas points out a persuasive and unified case law may and must serve as a complement in interpreting the proper meaning of a certain provision of the CISG. This is particularly true for the purpose of good faith since it was only after prolonged negotiations the drafters were able to agree on a settlement. However, due to the existing confusion on good faith it is further important and desirable that the decision makers with great accuracy specify how good faith is to be applied.[190]

Even though the sole arbitrator in the *Industrial Equipment Case*[191] was clear when he confirmed good faith's role as purely interpretative, only one case in support for this view is not very convincing. Moreover, the arbitrator's statement only referred to how good faith is to be understood for the purpose of Article 7.1:

> "Since the provisions of Art. 7(1) CISG concern only the interpretation of the Convention, no collateral obligation may be derived from the promotion of good faith [---]."

My point is therefore that even though this holding clearly rejects the view that Article 7.1 imposes a positive duty upon the parties, it cannot be used as an argument against good faith as one of the general principles by virtue of Article 7.2.

In fact, this type of reasoning may be applied to Article 7.1 in general. Just because Article 7.1 refers to good faith as one of three elements for the interpretation of the Convention, does this necessarily also mean that all

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[186] Farnsworth, 1995, 56.
[187] See how Powers refers to the negotiating process on good faith as a "battle" finally won by the common law delegates in Powers, 1999, 352.
[188] See Farnsworth, 1995, 56 with further references.
[189] Felemegas, 2000-2001.
[190] See *supra* section 4.1 for a more detailed discussion on this matter.
[191] ICC Arbitration Case No. 8611 of 23 January 1997, available at: [http://cisgw3.law.pace.edu/cases/978611i1.html].

other ways of applying good faith is excluded? While Farnsworth statement definitely indicates that he would answer yes to this question,[192] others do not seem as convinced. Bridge for example points out that just because an expressed standard of good faith was excluded under Article 7.1, this does not mean that good faith as a general principle for the purpose of Article 7.2 was rejected.[193]

Even though I recognize that a narrow interpretation, close to the wording of the text, leaves no room for arbitrary interpretations and thus serves the goal of uniformity, there are at least three concerns with such literal reading. Each of these concerns may be used as arguments for that Article 7.1 does impose a positive duty directly upon the parties, or alternatively that good faith is one of the general principles underlying the Convention. Since both of these methods affect the behavior of the parties, it arguably does not matter which one the decision maker decides to rely on. In the following I will discuss these three concerns and explain why or why not I think they give support for either view. Finally, I will present the alternative that I think serve the goals of the Convention best.

The first concern with a narrow and restricted interpretation like the one Farnsworth represents, is the fact that "promote" in Article 7.1 arguably not only refers to "uniformity" but to the "observance of good faith" too. Thus, if one of the stated goals of Article 7.1 is to promote the observance of good faith in international trade it is clear that a less restricted interpretation of Article 7.1, recognizing a party-oriented duty to act in good faith, would definitely serve this goal better. It is equally true that an establishment of good faith as one of the general principles by virtue of Article 7.2 indeed would contribute to the promotion of good faith in international trade. The problem with the former alternative is the aggravating factor that such inclusion is against the wording and moreover the legislative history of the Article.

Commentators who nevertheless argue that good faith in Article 7.1 not only applies to the interpretation of the Convention, often hold that the Article is addressed to the parties as well as courts and arbitrators. Further, as pointed out in section 3.3.2, doctrine frequently points out that since the CISG governs the contract, the CISG is an inseparable part of the Contract. Since the CISG has to be interpreted in good faith this applies to the contract too. Disa Sim challenges this view and points out that when the CISG is used as an assistance to interpret a contract, it is the CISG as already interpreted that assist. She therefore means that interpreting the CISG in good faith is one thing and interpreting the contract is another. With the clear language of Article 7.1 and its legislative history in mind, I am inclined to agree with this latter view. Even though I realize that the

[192] Farnsworth, 1995, 56.
[193] Bridge, 1999, 59.

interpretation of the Convention may, like in the *Automobile Case*,[194] in turn have an effect on the parties' conduct, that is not the same thing as to conclude that the duty to act in good faith can be derived directly from the words of Article 7.1. This position is further enhanced by the fact that if there are two methods that arguably leads to the same result, why not apply the method that the Convention has opened up for? While imposing a positive duty upon the parties by virtue of Article 7.1 frustrates both the wording as well as the legislative history, establishing a general principle of good faith by virtue of Article 7.2 does not. Since the intended general principles nowhere are stated, good faith may well be one of them. In my opinion, to establish good faith by virtue of Article 7.2 will not undermine the authority of the Convention in the same way as the conclusion that Article 7.1 contains a positive duty of good faith will.

The French court in the *Bonaventure Case* clearly was of another opinion and held that the parties have a duty to observe good faith by virtue of Article 7.1. The *Mushroom Case*[195] and the *Automobile Case*[196] also recognized a party-oriented duty to act in good faith under the CISG. As was pointed out above, it would be unreasonable if the legislative history would be the only tool in determining the meaning of good faith. A conclusive jurisprudence is therefore equally important since it shows how the rule functions and is understood in practice. However, just a few cases are neither enough to conclude that there is a trend towards acceptance for a party-oriented duty under Article 7.1, nor is it enough to amend the expressed words of Article 7.1. The latter is true especially since the legislative history says otherwise. Moreover, with as many cases in support of good faith as a general principle underlying the Convention, it becomes evident that there is no conclusive jurisprudence in favor for this view.

The second concern with a strict interpretation is that it frustrates the continued development of the Convention. It is important to remember that the CISG was drafted over 30 years ago and without a doubt international commerce is an area in constant change. Thus, there is an obvious need for flexibility in order for the CISG to continue to be a successful instrument in international trade. Since the CISG cannot be amended by legislation,[197] it is important that judges do not contribute to a more rigid system than it necessarily has to be. A special concern in this context is the ability of the CISG to adapt to new developments and potentially also new understandings of good faith. Assume that all nations in the future would

[194] Germany 8 February 1995 Appellate Court München, available at: [http://cisgw3.law.pace.edu/cases/950208g1.html]. Also see comment made on the case in Section 4.2.2.2.
[195] Hungary 17 November 1995 Budapest Arbitration proceeding Vb 94124, available at: [http://cisgw3.law.pace.edu/cases/951117h1.html].
[196] Germany 8 February 1995 Appellate Court München, available at: [http://cisgw3.law.pace.edu/cases/950208g1.html].

[197] Just like many other international conventions the CISG does not contain a provision that enables a legislative or editorial change of the CISG. This is a fact generally known, accepted and observed by many commentators. See for example Keily, 1999.

adopt the same understanding of good faith. The problem with a strict application of Article 7.1 is that it would not support or allow the CISG to adjust to such development.

On the other hand, in my opinion there is no need to amend the exact meaning of Article 7.1 as laid down by the drafters in order to promote good faith in international trade and to achieve flexibility, as both these goals are met in Article 7.2. Therefore, even though an interpretation close to wording is justified for purposes of Article 7.1 the third concern with regard to a restricted interpretation that excludes all other functions of good faith, including good faith's role as a general principle, relates to the very nature of Article 7.2. Since this Article clearly opens up for the use of general principles it is obvious that the drafters did not intend a strict interpretation of the Convention as a whole. Another valid remark pointed out by Gary Bell is the fact that Article 7.1 relates to Article 7.2 as well.[198] Thus, in establishing a general principle of the Convention the interpreter shall consider what is established in Article 7.1, i.e. the promotion of good faith. It is easy to see that an interpreter who takes on a strict approach towards interpretation will be more inclined to turn to domestic laws. From the conclusion drawn in section 2.6, the reader knows how differently good faith is applied in different domestic legal systems. Not finding a general principle of good faith and instead turn to domestic law will therefore severely challenge the desired uniformity.

However, even though this is a good starting point it is not enough. It has to be determined whether good faith is one of the general principles underlying the Convention, something that is not done just because it can be concluded that such result would be in accordance with the stated goal of Article 7.1.

One argument pointed out in doctrine is that good faith is mentioned in CISG Article 7.1. However, I am surprised anyone would argue that good faith is one of the general principles simply because it is mentioned once. The fact that something is "underlying" clearly indicates that the particular principle has to run through the Convention. However, the reference to good faith in Article 7.1 is important for the establishment of a general principle for another reason. If one accept, which I do, that Article 7.1 states that good faith in international trade shall be both observed and promoted, these two goals apply to the interpretation of Article 7.2 too.[199] Without a doubt, concluding that good faith is one of the general principles by virtue of Article 7.2 would promote good faith in international trade since it would apply on a much broader scale. Farnsworth's statement deserves some attention here as well. The reader might recall that he has held that it would be "a perversion of the compromise to let a general principle of good faith in by the back door".[200] However, if it is possible to conclude that good faith is

[198] See Bell, 2007, 17-22

[199] Also see Gary Bell's reasoning where he points out that there hardly cannot exist a better way to promote good faith than to establish good faith as one of the general principles underlying the convention. See Bell, 2007, 17.

[200] Farnsworth, 1995, 56.

one of the general principles underlying the convention, Farnsworth argument would fall short. It would namely prove that the principle of good faith was present when drafting and therefore no one is opening a "back door" to let good faith in. Rather, the principle of good faith was there all along, effecting and influencing the provisions of the Convention.

Indeed a common argument in doctrine is that the principle of good faith has inspired several provisions of the CISG.[201] In total the 2008 UNCITRAL Digest identifies 11 provisions that recognize rights and duties attributable to the principle of good faith. For example, CISG Article 16.2.b states that an offer is irrevocable if the person who received the offer had reason to rely on the offer and also acted in reliance with it. Further, CISG Article 21.2 regulates when a late acceptance may be excused and shall be deemed on time.

Disa Sim on the other hand, argues that these provisions manifest other, more specific principles. If I understand her correctly she would for example mean that the principle of reasonableness, and not the general concept of good faith, is the one stated in CISG Article 16.2.b. In her opinion good faith has no meaning of its own; instead it is too vague and uncertain as a concept. In contrast to Disa Sim my point is that the fact that good faith is being open-ended and provides different tools for the interpreter is its' strength. In *Cooperative Maritime Etaploise v. Bos Fishproducts*[202] the court applied the general principle of good faith to assure that the outcome was fair and just. In this case the court clearly looked for something more in support for their holding and found it in the general principle of good faith**.** It is true that all the 11 provisions establish different specific duties of good faith. However, the point is still that all of them, no matter which specific duty they represent, are attributable to the general principle of good faith. The conclusion is therefore that all these manifestations of good faith as seen together prove that good faith exists as an over-all general principle. Further, it is a fact that the drafters did include and mentioned good faith in the Convention, no matter how indefinite one may argue the concept is. The drafters even did so without defining its scope or its meaning. In my opinion this proves that the drafters were confident that the principle of good faith gradually would take form and develop under the Convention. Not as a positive duty hidden in Article 7.1, but as one of the general principles underlying the Convention by virtue of Article 7.2.

So what does this mean in practice? Peter Winship provides a hypothetical example of how a general principle of good faith may be used to fill a gap for the purpose of CISG Article 34. Article 34 reads:

"If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract [---]"

[201] See *supra* section 3.3.3.1.
[202] See abstract available at [http://cisgw3.law.pace.edu/cases/970305n1.html] and *supra* section 3.3.3.1.

Assume that a buyer and a seller have contracted for the sale of some specified goods. The contract obligates the seller to hand over documents, but is silent on the location. The problem in such situation is that CISG Article 34 does not provide any guidance as to where that location may be. CISG Article 34 namely refers to the place specified in the contract. In conclusion an internal gap exist. Winship argues that if this internal gap was to be filled with a general principle of good faith by virtue of Article 7.2, good faith would require the seller to hand-over the documents at a place convenient for the buyer. As long as the seller does this, the buyer may not refuse the handing-over.[203]

The example provided by Winship is one, but there are more examples to be found in the case law decided under the CISG. In *Cooperative Maritime Etaplosie v. Bos Fishproducts,* the Dutch Court recognized a general principle of good faith and used as an additional reason why the buyer had fail to give notice about non-comfirmity in time. Despite Disa Sim's criticism towards this holding, the problem as I see it is not that the court found additional support in a general principle of good faith, but rather that they failed to explain why.

The same point applies to the sole arbitrator's holding in the *Rolled Metal Case.* As a result of the principle of good faith the arbitrator pointed out that a legal right, like the right to raise a defense, not only may be intentionally waived but objectively lost too. Therefore, since the seller, who after receiving the buyer's notice of non-conformity, acted as if no defense was going to be raised, was not permitted to raise the defense of late notice available in CISG Article 39. Again, a general principle of good faith was concluded and applied but the interpreter failed to explain why such principle exists.

In sum, these examples show how a general principle of good faith may function in practice but there is no definite support in the jurisprudence as to why good faith is one of the general principles of the CISG. Nevertheless, my answer is that several provisions in the CISG lay down various forms of good faith. In addition good faith is mentioned in article 7.1 as one of the elements and goals to be observed when interpreting the convention. The interpreter therefore has good reasons to apply good faith as one of the general principles that underlies the Convention. Moreover this position does not frustrate the wording of the convention in the same way as the conclusion that good faith as a positive duty may be derived directly from article 7.1 does.

The next question is if the establishment of a general principle of good faith is so desirable as one may look outside the CISG for assistance. Even though Article 7.2 clearly states that internal gaps are to be solved by

[203] Winship, 1988, 8.

general principles within the CISG itself, some commentators argue that the interpreter may seek guidance in the UNIDROIT Principles.

Unlike CISG Article 7.1, there is no confusion on the role of good faith under the UNIDROIT Principles. Instead the UNIDROIT Principles clearly adopts the view of good faith that was rejected by the drafters of the CISG and makes clear that "each party must act in accordance with good faith and fair dealings in international trade".[204] It is therefore obvious that an interpreter who looks to the UNIDROIT Principles for guidance may be inclined to impose a positive duty of good faith.

As we have seen it is commonly held that Article 7.1 in essence contains the same duty. If one agrees with this, refuge to the UNIDROIT Principles would only reaffirm the already existing duty under the CISG. However, the UNIDROIT Principles arguably goes further than the CISG in terms of pre-contractual obligations during the negotiation process.[205] For examples, the UNIDROIT Principles states that it would be contrary to the principle of good faith to enter into negotiations with no intention to reach an agreement.[206] Even so, Ulrich Magnus argues that in terms of contract interpretation, the textual differences can be ignored and therefore he thinks the Principles "could and should" assist in the interpretation of the CISG.[207]

Zeller on the other hand has argued that any assistance by the UNIDROIT Principles shall be rejected for the same purposes that the application of domestic laws shall be rejected. However, in my opinion Zeller fails to observe that the UNIDROIT Principles represents rules drafted on an international level and as such they cannot be rejected for the same purposes as domestic laws. Since an application of domestic standards may lead to different results depending on what jurisdiction the dispute is settled in, the application of domestic standards is the ultimate threat to the uniformity that the CISG seek to achieve. In contrast, refuge to the UNIDROIT Principles at least would give the same answers every time and thus contribute to uniformity.

Since Article 7.2 clearly instructs the interpreter to look for general principles underlying the convention, I agree with those commentators who argue that the UNIDROIT Principles may only assist to bring further guidance when such principle already has been established under the CISG. Since good faith in my opinion is one of the general principles underlying the Convention for the reasons discussed earlier, an interpreter may therefore look to the UNIDROIT Principles for further guidance. As I pointed out before, the actual result might not differ; the parties may be held

[204] UNIDROIT Principles Article 1.7.
[205] Whether or to what extent the CISG imposes any pre-contractual obligations is uncertain. For further information on this matter see for example Spagnolo, 2008 and Goderre, 1997.
[206] See UNIDROIT Principles Article 2.5.3.
[207] Magnus, "*Comparative editorial remarks on the provisions regarding good faith in CISG Article 7(1) and the UNIDROIT Principles Article 1.7*", in Felemegas, 2007, 45-48.

to a behavioral standard no matter if CISG Article 7.1, Article 7.2 or even if the UNIDROIT Principles are the basis for this holding. However, since uniformity is one of the ultimate goals of the Convention, in my opinion it is desirable that this is applied to the argumentation which leads to the result too.

Let us return to Winship's hypothetical example about a buyer and a seller who contracted for the sale of goods to see how my conclusion advises an interpreter to proceed in practice. According to the example the contract obligates the seller to hand over documents, but is silent on the location.[208] In the same time CISG Article 34 states that the documents must be handed over at the time and place required by the contract. Since neither the contract nor the CISG give us the location an internal gap exists. The interpreter shall then look to Article 7.2 and will there find that an internal gap may be filled by general principles upon which the Convention is based. If the interpreter looks to the Convention as a whole he or she will find that the principle of good faith is reflected and manifested in several provisions throughout the Convention. The same interpreter will also observe that Article 7.1 obligates him or her to promote good faith international trade. In sum, the interpreter may conclude that good faith is one of the general principles underlying the Convention. Since good faith at this point is confirmed as one of the general principles, the interpreter may look to the UNIDROIT Principles for further guidance. In sum, the good faith principle, established within the CISG and reaffirmed by the UNIDROIT Principles, will require the seller to hand-over the documents at a place convenient for the buyer. The buyer will have a corresponding duty not to refuse the handing-over as long as the seller fulfills the duty.[209]

The CISG is already described as a success but as we have seen the Convention is by no means perfect. The proper role of good faith has indeed caused a lot of confusion, both when the Convention was drafted but also when it has been applied in practice. However, for the reasons presented above, I am convinced that Paul J Powers was right when he made a comment on good faith in Article 7.1 and predicted that:

> "the common law delegates may won the battle, but they did not win the war."[210]

[208] Whinship, 1988, 8. It may be noted here that even though Peter Winship presented an example of how a general principle of good faith may function he is one of them who thinks that the Convention only supports the use of good faith as a mere tool of interpretation.
[209] Winship, 1988, 8.
[210] Powers, 1999, 352.

5 Conclusions

The main purpose of this thesis has been to study the proper role on the concept of good faith under the CISG, and particularly to answer two questions.

CISG Article 7.1 is the only provision in the Convention expressly mentioning the concept of good faith and has therefore served as the base for the analysis. CISG Article 7.1 states that when interpreting the Convention three elements must be observed: the international character of the Convention and the need to promote uniformity and good faith.

The first question asked in this thesis was whether national courts have managed to meet the first requirement in Article 7.1 and thus ignore domestic standards of good faith when interpreting the Convention.

Analyzing the jurisprudence of the CISG has revealed that countries who domestically recognize a broad understanding of good faith at least have not refrained from applying the same broad understanding of good faith under the CISG. Whether this means that they have failed to observe the international character of good faith is not easy to conclude though, mainly because they have failed in another manner. Unfortunately, the judgments lack further explanations and detailed reasoning on why the particular court has considered good faith to function in one way or another under the CISG. However, what one may conclude is that civil law countries are confident in applying good faith in a broad manner, both domestically and when interpreting the CISG.

The second question aimed to establish the most proper role of good faith under the CISG.

Even though the drafters agreed to only include good faith as a tool for interpretation, the debate has continued even after the enactment of the CISG. At least three different interpretations of the proper role of good faith under the CISG exist and as a matter of fact, there is case law to be found in support for each and one of them. This paper early pointed out that there are several problems with a strict interpretation of the reference to good faith in Article 7.1. The conclusion is therefore that the proper role of good faith cannot merely be a tool for interpretation.

As far as the actual result is concerned, this thesis has pointed out that it might not make a difference for the required behavior of the parties whether an interpreter extends Article 7.1 to impose a positive duty of good faith, or whether good faith rather is applied as a general principle by virtue of Article 7.2. Even so, for the following reasons this essay has concluded that the most proper role of good faith under the CISG is the latter alternative.

Extending CISG Article 7.1 to include a party-oriented duty of good faith clearly frustrates the intention and the settlement reached by the drafters. To establish a general principle of good faith by virtue of Article 7.2 does not. This latter conclusion is based on the fact that good faith is one of the elements recognized by Article 7.1 and shall therefore be both observed and promoted in the interpretation of the Convention. The interpreter shall therefore promote good faith when searching for a general principle by virtue of Article 7.2. Since several principles of the CISG manifest duties and rights attributable to the general concept of good faith the conclusion is that good faith is one of the general principles underlying the Convention.

As a final note, a well-established general principle of good faith as understood in an international context will prevent the interpreter from looking to domestic laws and as such, the ultimate goal of the CISG, uniformity, will be served.

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