

# EDITORIAL REMARKS

## COMPARATIVE EDITORIAL REMARKS ON THE CONCEPT OF GOOD FAITH IN THE CISG AND THE PECL

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### I. GENERAL SCHEME OF INTERPRETATION AND SUPPLEMENTATION IN THE CISG AND PECL

The nature and content of PECL Article 1.106, as well as its function within the instrument to which it belongs, are very similar to those of CISG Article 7. In both cases, the respective provisions provide the built-in interpretation and supplementation mechanism that the drafters have embedded in their corresponding instruments. The relevant provisions provide that the interpretation of the law in both instruments must pay regard to the concept of good faith.<sup>1</sup>

The Notes to PECL Article 1.106(1) confirm that the basic elements found in the structure of PECL Article 1.106 are ei-

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<sup>1</sup> See CISG art. 7(1); PECL art. 1.106(1).

ther virtually identical or express similar ideas to the ones of the corresponding provision in CISG Article 7(1).<sup>2</sup>

## II. GOOD FAITH AND FAIR DEALING IN THE INTERPRETATION OF THE CONTRACT

The concept of "good faith and fair dealing" does not operate merely as a rule of interpretation of each PECL Article. The duty of good faith, as this is embedded in PECL Article 1.201, is mandatory on the parties.<sup>3</sup>

In contrast to CISG Article 7(1) (or any other CISG provision), PECL Article 1.201 imposes upon each party a positive duty of good faith and fair dealing in exercising its rights and performing its duties under the contract. The PECL Comments to Article 1.201 not only refer to good faith as "a basic principle running through the Principles," but also expressly state that "[g]ood faith and fair dealing are required in the formation, performance and enforcement of the parties' duties under a contract, and equally in the exercise of a party's rights under the contract."<sup>4</sup>

On the other hand, the CISG does not contain any express provision that the individual contract has to obey the maxim of

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<sup>2</sup> Cf. PECL art. 1.106 (1), CISG art. 7(1). (The wording of the two provisions is similar, although PECL article 1.106, in addition to "good faith" and "uniformity of application" that are also prescribed by CISG article 7, includes the promotion of "certainty in contractual relationships" as a further relevant factor in the interpretation of the PECL provisions); See also PECL art. 1.106(2) (which refers to domestic law as an ultimate source of supplementation); CISG art. 7(2). The PECL Notes state that "[t]his is in accordance with CISG art. 7(2)." PECL Note 4.

<sup>3</sup> The PECL Comments make it clear that "good faith" is not confined to specific rules and further elucidate the concept by stating that the concept's purpose is: "to enforce community standards of decency, fairness and reasonableness in commercial transactions [ . . . ]. It supplements the provisions of the Principles, and it may take precedence over other provisions of these Principles when a strict adherence to them would lead to a manifestly unjust result." (see PECL Comment B). Note, however, that PECL Comment G unequivocally states that the courts may limit this duty in particular cases, in order to preserve the overriding objectives of "certainty and predictability in contractual relationships." As far as the Convention is concerned, the principle of party autonomy (CISG article 6) is the dominant general principle. See, e.g., JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE UNITED NATIONS CONVENTION 47 (2d ed. 1991); ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 115 (1989).

<sup>4</sup> PECL cmt. A.

good faith.<sup>5</sup> The text of CISG Article 7(1) covers only the application of the CISG, rather than the parties' rights and obligations and their exercise and performance directly. The wording was agreed upon only after lengthy deliberations and it was meant as a final rejection of more far-reaching proposals to apply the principle of "good faith and fair dealing" to the obligations and the behavior of the parties themselves.

There is, however, a strong body of academic opinion holding that the evaluation of the relations, rights and remedies of the parties, could also be subject to the principle of good faith and fair dealing. In accordance with this view, in addition to its interpretative role on the CISG provisions, good faith has at times been recognized as one of the general principles laid down by the CISG.<sup>6</sup> Further, it has found its way into operation of CISG Article 7(2).<sup>7</sup>

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<sup>5</sup> Such a provision was proposed and rejected at the 1980 Vienna Diplomatic Conference; See U.N. Official Records (1981) p. 86.

<sup>6</sup> See CISG art. 7(1); See, e.g., BERNARD AUDIT, *LA VENTE INTERNATIONALE DE MARCHANDISES: CONVENTION DES NATIONS Unies du 11 Avril 1980* [The International Sales of Goods, UN Convention of 11 April 1980] 51 (1990), (where the author states that good faith is one of the general principles, even though it must be considered a mere instrument of interpretation); See also FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW* (1992) at 59, where the authors list the good faith principle among those principles "which do not necessarily have to be reflected in individual rules;" ROLF HERBER & BEATE CZERWENKA, *INTERNATIONALES KAUFRECHT. KOMMENTAR ZU DEM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11 APRIL 1980 ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF* [International Sales Law, Commentary on the United Nations Convention on Contracts for the International Sale of Goods 49 (1991) (where it is stated that the good faith principle is the only general principle expressly provided for by the CISG).

<sup>7</sup> As to the possibility of using the principle of "good faith and fair dealing" on the basis of CISG art. 7(2) as a rule for the contractual relations between the parties, see E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant Conventions and National Laws*, 3 Tul. J. Int'l & Comp. L. 47 (1995). See also Michael Joachim Bonell, *General Provisions: Article 7*, in *COMMENTARY ON THE INTERNATIONAL SALES LAW*, at 85 (1987) (stating "[y]et, notwithstanding the language used in article 7(1), the relevance of the principle of good faith is not limited to the interpretation of the Convention . . . if during the negotiating process or in the course of the performance of the contract a question arises for which the Convention does not contain any specific provision and the solution is found in applying, in accordance with article 7(2), the principle of good faith."); JOSEPH LOOKOFKY, *UNDERSTANDING THE CISG IN THE USA* 19, §§2-10 (1995), (stating "[a]nd since other (very) general CISG principles of loyalty and reliance-protection have also been deduced, the deduction of a general Convention principle requiring the parties to act in good faith seems no great leap, even if it does seem to fly in the face of the *travaux préparatoires*."); Arthur Rosett, *Critical*

The concept's innate definitional difficulties are accentuated by the maxim's suggested dual role in the CISG - i.e., the concept's operation in the CISG's interpretation (in the context of CISG Article 7(1)) and in its gap-filling mechanism (in the context of CISG Article 7(2)), respectively.

### III. EXAMPLES OF SPECIFIC MANIFESTATIONS OF GOOD FAITH IN THE CISG AND PECL

The CISG provides that a contract may usually be concluded, modified or terminated without any formal requirements (*see* CISG Articles 11, 29(1); *cf.* CISG Articles 12, 96). The PECL also has a similar regime (*see* PECL Article 2.101(2)).<sup>8</sup>

Both instruments allow for an exception to this regime, based on the principle of good faith. A party may be precluded by his conduct from asserting such a clause to the extent that the other party has reasonably relied on that conduct. One of the general principles upon which the CISG is based relates to the duty of cooperation, according to which the parties must cooperate "in carrying out the interlocking steps of an international sales transaction."<sup>9</sup> This duty is closely related to the principle that a party can not contradict a representation on

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*Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 Ohio St. L.J. 265 (1984).

<sup>8</sup> However, note that according to PECL art. 2.106(1), a written modification clause establishes "*only a presumption* that an agreement to modify or terminate the contract is not intended to be legally binding unless it is in writing" (emphasis added). On the other hand, CISG art. 29(2) states that contracts containing written modification clauses "may not be otherwise modified or terminated by agreement . . ."

<sup>9</sup> KRITZER, *supra* note 3, at 115. *See also* CISG arts. 32(3), 48(2), 60(a), 65. *Cf.* PECL art. 1.202, which expressly imposes on the parties a duty to cooperate with each other in order to give full effect to the contract. It is stated in the Notes to the PECL that the duty to cooperate is derived from the principle of good faith and fair dealing (*see* PECL Note 1).

which the other party has reasonably relied<sup>10</sup> - *i.e.*, that the parties must not act *venire contra factum proprium*.<sup>11</sup>

However, unlike the CISG, the PECL also provides stringent rules on pre-contractual negotiations - emanating from the concept of good faith - not to continue or break off pre-contractual negotiations "contrary to good faith," making the offending party liable for losses caused to the other party (PECL Article 2.301(2)).<sup>12</sup>

In addition to the negotiation and pre-contractual stage, the concept of good faith in the PECL also manifests itself prominently in the manner that the PECL deals with issues of material validity<sup>13</sup> that the CISG leaves untouched (*see* CISG Article 4(a)). Elements of good faith can be found in the operation of certain CISG provisions.<sup>14</sup> For instance, the parties' ex-

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<sup>10</sup> On contractual formation, both the CISG and the PECL provide that an offer is irrevocable once the offeror has created a situation in which the offeree reasonably relied on the offer as irrevocable and acted in reliance on the offer; *cf.* PECL art. 2.202(3); CISG art. 16(2)(b). *Cf. also* PECL art. 2.106(2); CISG art. 29(2) CISG — which provide a different illustration of the same point for contractual modification or termination.

<sup>11</sup> *See, e.g.*, Gyula Eörsi, *General Provisions, in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, ch. 2, at 2-12 (Nina M. Galston & Hans Smit eds., 1984); Rolf Herber, *Article 7, in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 9, 99 (Peter Schlechtriem ed., 1998); Dietrich Maskow, *The Convention on the International Sale of Goods from the Perspective of the Socialist Countries, in* LA VENDITA INTERNAZIONALE, LA CONVENZIONE DI VIENNA DELL' 11 APRILE 1980 41, 57 (1981).

<sup>12</sup> PECL art. 2.301(3) states: "It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party." *See also* PECL art. 2.302, which provides a remedy for breach of confidentiality in the course of negotiations. For comments on pre-contractual liability under the CISG, refer to "Pre-Contract Formation," A.H. Kritzer ed., at <http://www.cisg.law.pace.edu/cisg/biblio/kritzer1.html>.

<sup>13</sup> *See, e.g.*, PECL art. 4.109, providing that a party may avoid the contract if the other party takes unfair advantage of the former party's dependence, economic distress or other weakness.

<sup>14</sup> There are numerous applications of the good faith principle in particular provisions of the CISG; *see* the examples offered in the Secretariat Commentary to the Draft Convention as manifestations of the concept (*e.g.* CISG arts. 16(2)(b), 21(2), 29(2), 37, 38, 40, 85-88); *Text of Secretariat Commentary on article 6 of the 1978 Draft [draft counterpart of CISG article 7(1)]*, available at <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-07.html>. Note also, that the Secretariat Commentary states: "The principal of good faith is, however, broader than these examples and applies to all aspects of the interpretation and application of the provisions of this Convention."

press contractual obligations contain elements that can be identified as manifestations of a broader principle of good faith.<sup>15</sup>

The PECL are “. . . intended to be applied as general rules of contract law” (PECL Article 1.101(1)), and thus they contain no comparable express obligations. Conversely, the PECL expressly states that contractual obligations may be implied under the concept of good faith and fair dealing (PECL Article 6.102(c)), whereas there is no comparable rule in the CISG’s provisions.

The argument in favor of extending the scope of good faith to the behavior of the parties and attributing to it the quality of a “general principle” of the CISG<sup>16</sup> runs the risk of being driven to the conclusion that, as such, the principle of good faith in CISG Article 7(2) may even impose on the parties “additional obligations of a positive character.”<sup>17</sup>

The possibility of imposing on the parties additional obligations is clearly not supported by the legislative history of the CISG.<sup>18</sup> CISG Article 7(1), as it now stands, is the result of a

<sup>15</sup> See CISG art. 35(3), which provides that the seller is not liable “for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of the non-conformity.”

<sup>16</sup> See Isaak I. Dore & James E. De Franco, *A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code*, 23 HARV. INT’L. L.J. 49, 61 (1982), where the authors state that the good faith provision does not constitute a mere instrument of interpretation, but rather, it “appears to be a pervasive norm analogous to the good faith obligation of the U.C.C.”

<sup>17</sup> Bonell, *supra* note 7, at 8. According to Bonell, “this will be the case, if during the negotiating process or in the course of performance of the contract a question arises for which the Convention does not contain any specific provision and the solution is found in applying, in accordance with Article 7(2), the principle of good faith.”

<sup>18</sup> Cf. Ruling c-529/00 of the Constitutional Court of Colombia (10 May 2000) available at <http://cisgw3.law.pace.edu/cases/000510c7.html>. (In that case, the Constitutional Court of Colombia established the validity of the CISG in Colombia by declaring valid Colombia Law Number 518 of 1999, which approved the CISG. In regards to good faith, in the course of its opinion the court stated: “[T]he exercise of the commercial activity that the individuals develop with other citizens of different States must fit the principle of good faith, just as the Convention stipulates in paragraph number one of article 7. This principle should not only be observed in the contractual relationships or negotiations, but in the relationships between individuals and the State and in the procedural performances;” at *V. Considerations and Foundations, 3. Constitutionality of the Convention*. In other words, the Colombian court, in accordance with the good faith postulate found in

drafting compromise between two diverging views, which reflects the political and diplomatic maneuvering necessary for the creation of an international convention. It cannot now be given the meaning originally suggested by those advocating the imposition of a positive duty of good faith on the parties (*i.e.*, the role of good faith under PECL Article 1.201), as this runs contrary to the letter of the law and its legislative history.<sup>19</sup>

#### IV. CONCLUSIONS

Good faith occupies an integral position in the interpretation and supplementation of the CISG and the PECL. The concept of good faith is called upon in the CISG to guide the interpretation of the unified law text itself, whereas in the PECL it prescribes the behavior of the parties in every specific contract.

The two instruments, apart from a generic textual affinity, have many similarities in origin and substance, as well as a common purpose, which is the unification of international commercial law. Although the PECL could aid the interpretation and application of the CISG where it can be shown that their respective provisions share a common intent, the present writer maintains that the concept of good faith has a different and distinct role in the CISG. As such, good faith in the context of the CISG will acquire its own and unique identity with the further development of relevant CISG case law.<sup>20</sup>

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article 83 of the Constitution of Colombia, appears to have treated the concept of good faith as expansively as it is treated under the PECL).

<sup>19</sup> See also Disa Sim, *The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods* (Sept. 2001), at <http://www.cisg.law.pace.edu/cisg/biblio/sim1.html>. The author provides a thorough discussion of the scope and application of the doctrine of good faith in the CISG, concluding that “. . . good faith can be said to play two roles in the Convention. Firstly, it is a compendious term for the collection of more specific ‘good faith’ principles that can be used to resolve matters governed by the Convention but not expressly resolved by it. Secondly, these very same principles can be used to resolve questions of textual ambiguity. There does not exist, however, a general doctrine of good faith that can serve as a fount of additional rights and obligations.”

<sup>20</sup> Professor Peter Schlechtriem has commented that the importance of the general principle of “good faith and fair dealing” and the details developed out of it depend on the structure and content of the specific legal system in which they are implemented, and on the concrete and specific contract in question. See Peter Schlechtriem, *Good Faith in German Law and in International Uniform Laws*, in Saggi, Conferenze e Seminari No. 24 (Centro di studi e ricerche di diritto com-

Although particular applications of the concept of good faith are present in various settings of the contractual relationship as conceived by the PECL - and to a lesser extent by the CISG as well - the definitional and functional parameters of the concept of good faith in the CISG cannot be provided by a simple synthesis of the relevant provisions in these two instruments.<sup>21</sup>

It is submitted that the concept of good faith in the CISG, as it stands presently, is circumscribed to the interpretation of the law and should not be allowed to impose additional duties of a positive nature to the parties, as it does in the PECL. This limited reading of the role of good faith in the CISG is clearly the one supported by the text and the legislative history of the Convention.

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parato e straniero & Michael Joachim Bonell eds., 1997), available at <http://www.cnr.it/CRDCS/frames24.htm>.

<sup>21</sup> *Contra* Ulrich Magnus, *Editorial Remarks*, in *Guide to Article 7* available at <http://www.cisg.law.pace.edu/cisg/principles/uni7.html>. Professor Magnus' analysis relates to a comparison between CISG art. 7 and corresponding arts. 1.6, 1.7 of the UNIDROIT Principles. However, the value of that analysis is pertinent to our own comparative study, as both the *UNIDROIT Principles of International Commercial Contracts* (1994) and the *Principles of European Contract Law* (complete and revised version 1998) are in the form of international Restatements of Contracts and as such they can be regarded as companions to the CISG. Professor Magnus is of the opinion that the UNIDROIT Principles can aid in the interpretation of the Convention's provisions and states that "the Principles can help to clarify the actual object of the good faith principle contained in the CISG."