

Good Faith: The Houdini Principle of Law? A Comparative Examination.

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Part 1. Introduction:

The principle of good faith appears well-established in the Convention for the International Sales of Goods (CISG) and United States Uniform Commercial Code (UCC). The principle itself has served both the common and civil law significantly for many decades. The existence of CISG and the concomitant interest generated in its proper interpretation and application is *prima facie* evidence that the international process could indeed produce uniform rules of substantive law. This achievement set in motion a number of efforts in various international fora and will probably continue to do so if the efforts of the United Nations Commission on International Trade Law (UNCITRAL) are any indication. Because of its nature, uniform international commercial law presents special challenges to those who interpret it.

As stated in its preamble, the CISG was created “to contribute to the removal of legal barriers in international trade and promote the development of international trade.”¹ The issue this paper will analyse is whether the principle of good faith is applied autonomously in either the domestic or transnational setting. The added issue is that the principle

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¹United Nations Convention on Contracts for the International Sale of Goods, Preamble, Apr 11, 1980, 1489 U.N.T.S. 3 [hereinafter Convention on the Sale of Goods].

of good faith suffers a universal problem as to its definition and application in any system of law.

If not properly applied, the good faith principle can give rise to a “homeward trend,” which is to be discouraged as it produces a result which is not in line with the underlying principles of either the CISG or the UCC. Clayton P. Gillette and Robert E. Scott have argued that the homeward trend “induces tribunals both to ignore non-domestic law and assume that ‘international’ interpretations reflect domestic ones.”² The principle of good faith is found in the CISG as well as in the UCC. The issue is—as Professor Franco Ferrari pointed out—these expressions are “concepts that are independent and different from national concepts.”³ In the U.S., several judgments using the CISG are clear examples of the homeward trend. In *Zodiac Seats US LLC v. Synergy Aerospace Corp.*,⁴ the Court applied the CISG and noted that the CISG governed the contract. However, not a single reference to the CISG jurisprudence as well as academic writing was used by the Court. Rather, the Court cited only domestic jurisprudence. On the other hand, the court’s opinion is an improvement over *Delchi Carrier S.P.A v. Rotorex Corp.*,⁵ wherein the Court erroneously noted “[case law] interpreting analogous provisions of Article 2 of the Uniform Commercial Code . . . may also inform a court where the language of the relevant CISG provisions tracks that of the UCC.”⁶ Such a statement is in direct breach of Article 7(1) which states:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Convention on the Sale of Goods, *supra* n. 1, art. 7.

Article 7 has three key requirements embedded in the

²Gillette & Scott, *The Political Economy of International Sales*, 25 *Int’l Rev. L. & Econ.* 446, 472 (2005).

³Franco Ferrari, *Homeward Trend: What, Why and Why Not*, in *CISG Methodology* 171, 176 (A. Janssen and O. Meyer eds.).

⁴*Zodiac Seats US, LLC v. Synergy Aerospace Corp.*, 2020 WL 1703572 (E.D. Tex. 2020).

⁵*Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995).

⁶*Delchi*, 71 F.3d at 1028.

interpretive mandate. First regard has to be had to the international character, second any interpretation must promote uniformity, and third, the principle of good faith is to be observed.

Based on the above, Article 7 mandates that interpretation must be “autonomously,” not “nationalistically” and no recourse to domestic law or principles must be sought. This is especially important when provisions of the CISG “track” the ones in the UCC. The issue is simply as Professor Ferrari noted that it is wrong to assume that “international” interpretation reflects domestic ones.⁷

This paper will first attempt to construct a universal definition of good faith which can instruct the application of good faith generally. It will investigate the application of good faith within the UCC as noted in Parts 2 and 3. The application and understanding of good faith in the CISG is laid out in Part 4. This will be followed in Part 5 by a conclusion.

Part 2. The definition of good faith:⁸

Good faith has emerged as a recognized principle in domestic and transnational contract law. The important part is that good faith is used as a term in both the CISG as well as the UCC. There is no debate that the overall utility of good faith is to modify the behaviour of parties. It is also uncontested that good faith relies on a pattern of facts. The question is whether good faith can and is being defined, as it is a metaphysical concept that can take on life only within a social context. It is clear that the term “good faith” has found its way into the CISG and the UCC and is therefore applied by courts. The problem, therefore, is whether there is a universal definition of the principle; if so, the question then only turns on the issue of its application. The term good faith has been used to equate to:

Unconscionability, fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, decent behaviour, a common ethical sense, spirit of solidarity, community standards of fairness and honesty in fact.

⁷Ferrari, *supra* n. 3, at 204.

⁸This part relies on a paper given at the Hong Kong University Law School in relation to the annual Hochelaga Lectures in 2014.

Keily, *Good Faith & The Vienna Convention on Contracts for the International Sale of Goods*, 3/1 VJ 15, 17 (1999).

If all such terms constitute “good faith,” it would suggest that good faith is an extremely versatile principle. However, this cannot be the case, as each of these terms reflects different standards. Hence a better argument is that good faith is undefinable. It could be said that we do not know what it is, but we recognise it once we see it. Again, this is a rule of thumb, but not a satisfactory definition of good faith. The only certainty is that good faith is a principle enshrined in legislation, and is in effect a “general duty” based on reasonableness, measured by social standards. Another way to put it is that if bad faith is exhibited, we do know that good faith is not. This is also unhelpful, as bad faith and good faith are both cultural norms and need defining.

Good faith stops the pursuit of self-interest and dishonest behaviour, but a clear definition is elusive. The argument this paper proposes is that good faith is an undefinable term but that the question is not to define the term but ascertain what its function is. In other words, we need to determine what facts will trigger an application of the principle of good faith; that is, good faith needs to be conceptualized to serve its legal purpose. Professor Robert S. Summers and J.L. Austin, a British philosopher of language, attempted to define the purpose and function of good faith. Paraphrasing Austin, Summers wrote: “the attempt to capture in a set of normally necessary and sufficient conditions some characteristic or characteristics common to all things that are or could be called ‘good faith’ is doomed to failure.”⁹ From a linguistic point of view, this is correct; however, as the term good faith is a statutory principle, some meaning or definition must be found. Yet, Summers was of the view that: “[g]ood faith is not only peculiarly and pervasively relevant in contractual matters; it is also part of a family of general legal doctrine, including implied promise, custom and usage. Fraud,

⁹Summers, *The General Duty of Good Faith—its Recognition and Conceptualisation*, 67 *Cornell L. Rev.* 810, 828 (1982).

negligence and estoppel, which perform significant functions in this field.”¹⁰

Summers in effect stated the obvious, but the important fact is that good faith is a legal principle which needs to be applied and cannot be ignored. Following Summers’s arguments, good faith performs a policy function by regulating the behaviour of the parties involved in the formation and execution of contracts. Summers points to the problem in practical application of a “mother principle” by observing that: “[s]ometimes what a judge means by good faith might be instantly obvious but frequently it will not be. When it is not, it may be that he is using the phrase loosely. But even if he is using it with care, there may still be unclarity.”¹¹ Summers follows up this argument by stating that the term good faith is “best understood as an ‘excluder’ that is, it has no general meaning or meaning of its own but . . . serves to exclude many heterogenous forms of bad faith.”¹² In effect, he “borrowed” from Austin insofar as the term defies all definition, but relied on both Aristotle and Austin, who articulated the excluder theory, which in the view of Summers satisfies the criteria of adequacy.¹³ Simply put, as good faith cannot be defined, the excluder theory is the next best option. The point is that, in order to fulfill the mandate of the law, a working solution must be in place. It is this working solution that has, in our view, emerged as a central feature of the principle.

The significance of Summers’s theory is demonstrated by the fact that the Restatement (Second) of Contracts adopted the theory in Section 205, commenting that:

[g]ood faith performance . . . of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excluded a variety of types of conduct characterised as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness.

¹⁰Quoted in Robert S. Summers, “Good Faith” in General Contract Law and Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195, 198 (1968).

¹¹Summers, *supra* n. 10, at 200.

¹²Summers, *supra* n. 10, at 196, 262.

¹³Summers, *supra* n. 9, at 821, 827.

Restatement Second, Contracts § 205, comment a.

Therefore, the main issue with the excluder theory is that, instead of looking at the positive principle (good faith), it rests on a recognition of what bad faith is. Arguably, Summers recognized the problem of courts using fiction in order to apply good faith. At the same time, the problem is that to “rule out specific conduct” is left to a subjective deliberation no different to actually applying good faith.

Professor Steven J. Burton responded to Summers’s theory by stating:

Courts generally do not use the good faith performance doctrine to override the agreement of the parties. Rather, the good faith performance doctrine is used to effectuate the intentions of the parties, to protect their reasonable expectations though interpretation and implication.

Burton, *More on Good Faith Performance: A reply to Professor Summers*, 69 Iowa L. Rev. 497, 499 (1984).

The importance of Burton’s reply lies in his understanding that courts are upholding contractual agreements within the reasonable expectations of the parties. Therefore, Burton recognizes that good faith is part of every contract, whether the legal system uses it by implication or through express terms. Of significance is that Burton focuses on the intention of the parties when entering a contract, evidence of which is gleaned not only by words expressed in the contract but by interpretation and implication. The result, therefore, is that a certain degree of discretion in performance is expected or even needed.¹⁴ In essence, Burton expects that courts use a degree of discretion, and good faith is their tool for doing so in order to establish the duty contemplated by the parties at formation. He specifically noted:

Good faith performance occurs when a party’s discretion is exercised for any purpose within the reasonable expectation of the parties at the time of formation - to capture opportunities that were preserved upon entering the contract interpreted objectively.

Burton, *supra* n. 14, at 501.

Thus, it is no surprise that Summers criticised Burton’s

¹⁴Burton, *More on Good Faith Performance: A reply to Professor Summers*, 69 Iowa L. Rev. 497, 501 (1984).

approach, as they propose different paths to a possible understanding of the function of good faith. Summers argues that “such formulation provides very little, if any, genuine definitional guidance.”¹⁵ Moreover, Burton never intended to provide a definition of good faith, and Summers himself argued that good faith is not able to be defined. What Burton has done—by noting “good faith performance occurs”—is to provide a tool to capture the opportunities that are reasonably contemplated by the parties entering a contract. It follows that the reasonable expectations of the parties is an interpretative issue. The court will determine the facts and hence determine the duties of the parties. Burton’s theory therefore attempts to divert the focus of the court away from a definitional question of what good faith is, to a factual question of what the contemplations of the parties were when entering a contract.

This approach overcomes Summers’s problem of the excluder theory, which did not resolve the question of what bad faith actually means. In brief, Summers did not explain what behaviour needs to be excluded. Summers did justify this approach by arguing that as good faith has no general meaning of its own, it can be derived only from its opposite, which is bad faith.¹⁶ There is authority which rejects the “amorphous concept” of bad faith in determining whether good faith has been observed. It is difficult to distinguish:

a bad faith discharge from no-cause discharge [which is permitted under the at-will doctrine] or a discharge in violation of public policy [which is not permitted] and on the further ground that bad faith standard would require a judicial inquiry into the subjective intentions of the party who is alleged to have violated the covenant.

Metcalf v. Intermountain Gas Co., 116 Idaho 622, 778 P.2d 744, 4 I.E.R. Cas. (BNA) 961, 113 Lab. Cas. (CCH) P 56136 (1989) (holding modified on other grounds by, *Sorensen v. Comm Tek, Inc.*, 118 Idaho 664, 799 P.2d 70, 5 I.E.R. Cas. (BNA) 1301 (1990)) (quoted in 82 Am. Jur. 2d Wrongful Discharge § 69 (2021)).

Based on the above, Summers also criticized Burton

¹⁵Summers, *supra* n. 9, at 829.

¹⁶Summers, *supra* n. 10, at 201.

because the latter did not define “discretion in performance.” Summers specifically noted that Burton was “content, for example to leave the general test of reasonableness of expectations relatively unanalysed.”¹⁷ Discretion in performance is a matter of fact which will be elicited by courts based on evidence. In other words, it is fact finding mission for courts to determine the expectations of the parties and whether the parties acted within the reasonable expectations. Centrally, Burton’s theory is that the principle of good faith sets the limits as to what the parties’ reasonable expectations were at the formation of the contract.

Viewed this way, the courts therefore have a functional tool to resolve disagreements, and the legal tool to do so is the principle of good faith. The conclusion is that good faith does not need to be defined. It takes on life of its own, within given facts, and is therefore a functional tool. Moreover, the fact that courts to date refer to Burton and Summers confirms the view taken in this paper and it underlines the importance of the work done by the two professors. Therefore, a search for the golden fleece is not necessary. The fact is that good faith is applied to different situations in the contractual cycle. This point will be examined in the context of the UCC and the CISG.

Part 3. Good faith under the UCC:

To start with, the United States is the only major common-law country where good faith is enshrined in legislation, due to the work of Professor Karl Llewellyn, Chief Reporter for the UCC. On the other hand, it should be remembered that the law did not always consider good faith as a mitigating factor. In 1874, the Minnesota Supreme Court stated:

If a man bind himself, by a positive, express contract, to do an act in itself possible, he must perform his engagement, unless prevented by the act of God, the law, or the other party to the contract. No hardship, no unforeseen hindrance, no difficulty short of absolute impossibility, will excuse him from doing what he has expressly agreed to do. This doctrine may sometimes seem to bear heavily upon contractors; but, in such cases, the hardship is attributable, not to the law, but to the contractor himself, who has improvidently assumed an absolute, when he might have undertaken only a qualified liability.

¹⁷Summers, *supra* note 9, at 833.

Menard v. Crowe, 20 Minn. 448, 451, 20 Gil. 402, 1874 WL 3729 (1874).

100 years later the same Court noted:

Architects, doctors, engineers, attorneys, and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminable nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. . . . Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can reasonably be expected from similarly situated professionals.

City of Mounds View v. Walijarvi, 263 N.W.2d 420, 424 (Minn. 1978).

To start with, each State has its own separate and relatively self-sufficient body of general contract law based loosely on the UCC. 50 different opinions arguably are possible.

Against the backdrop of the above, two commentaries are of importance in guiding the interpretation of the UCC. First, as noted above, the Restatement (Second); second, the official comment on the UCC Article 1-203.

Article 1-203 of the UCC includes a general provision, namely that “[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.”¹⁸ The definition of good faith is provided in Article 2-103, which states “(b) ‘**Good faith**’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” In addition, Article 1-201(2) (General Definitions), states “‘Good faith,’ except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.” Article 2 refers also to good faith, but attached to specific rules—for example, Article 2-305 (open price terms). As already noted above, the UCC influenced the drafters of the Restatement (Second) to include language similar to that in Article 1-203, with the addition of “fair dealing.” Of importance is that Article

¹⁸U.C.C. § 1-304.

1-102(3) explicitly provides that the effect of the provisions of the UCC might be varied by agreement; however, the obligation of good faith “may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.”¹⁹ The effect is that the duty of good faith cannot be excluded, and it will fill gaps in the contract, but some courts still have determined that the principle of good faith does “not block [the] use of terms that actually appear in the contract.”²⁰

Article 2-311 of the UCC mandates that if a party is entitled to specify particulars, “the range of permissible variation is limited by what is commercially reasonable.” Professor Daniel Markovits explains by noting: “Where the parties have failed to make adequate arrangements for some contingency *ex ante*, they must employ good faith in making arrangements *ex post*.”²¹ In addition he noted:

In all these ways, the duty of good faith in performance regulates advantage taking within the contract relation. Unsurprisingly, therefore, good faith becomes particularly important where structural circumstances make it impracticable or even impossible for the parties to regulate such advantage taking directly and expressly, because prior agreements cannot effectively reach them.

Markovits at 274.

It is observable that the law changed to be more flexible and less dogmatic, and therefore it is understandable that Professor E. Allen Farnsworth noted that the UCC did include express terms into Articles 1 and 2. As the standards are flexible because contracts are more sophisticated and complex hence it is “attractive to leave the resolution of some

¹⁹U.C.C. § 1-302.

²⁰*Kham & Nate’s Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357, 20 Bankr. Ct. Dec. (CRR) 1305, 23 Collier Bankr. Cas. 2d (MB) 1118, Bankr. L. Rep. (CCH) P 73565 (7th Cir. 1990).

²¹Daniel Markovits, *Good Faith as Contract’s Core Value*, in *Philosophical Foundations of Contract Law* 272, 273 (Gregory Klass et al. eds., 2014).

potential disputes to flexible standards such as good faith.”²² Farnsworth has noted that U.S. courts have a “tendency to express contract law in terms of flexible standards rather than rigid rules [and] there is no better example of this than our duty of good faith and fair dealing in the performance of contracts.”²³ Good faith assists judges to be more flexible, and good faith permits the judiciary to use some degree of discretion. However, sometimes it appears that courts use good faith to add terms to a contract, which is indeed an attractive error.

Hence the issue of the scope of good faith in contractual dealings is still a problem. Farnsworth in 1963 commented that the definition leaves the duty “so enfeebled that it could scarcely qualify . . . as an ‘overriding’ or ‘super-eminent’ principle.”²⁴ The question therefore is: has anything changed? The UCC uses terms such as “fair dealing” or “honesty in fact,” which can be translated as meaning “best efforts.” This is so as Article 2-103 does not provide a dogmatic definition. In 1984, Farnsworth did ask when “best efforts” are enough to avoid liability for breach of contract. The issue is how to blend the interpretation of contractual terms, which cannot be ignored, with the technique of implying terms into the contract.²⁵ Farnsworth, relying on *Zilg v. Prentice-Hall*,²⁶ noted:

In breaking down the contract into two stages, one requiring best efforts and the other only good faith, the court juxtaposed two conveniently vague standards, of which one has lately received much attention while the other has been largely ignored.

Farnsworth, *supra* n. 22, at 8.

²²Farnsworth, Ten Questions About Good Faith and Fair Dealing in United States Contract Law, [2002] Austl. Mining & Petrol. L. Ass’n Yearbook 3, 1.

²³Farnsworth, *supra* n. 23, at 2.

²⁴Farnsworth, Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code, 30 U. Chi. L. Rev. 666, 674 (1963).

²⁵Farnsworth, On Trying to Keep One’s Promises: The Duty of Best Efforts in Contract Law, 46 U. Pitt. L. Rev. 1, 4, 7 (1984).

²⁶*Zilg v. Prentice-Hall, Inc.*, 717 F.2d 671, 9 Media L. Rep. (BNA) 2257, 43 A.L.R.4th 1163 (2d Cir. 1983).

Good faith has been defined in the UCC, but “best efforts” has not been given the necessary attention despite the fact that the standard is more exacting.²⁷ Should someone obligated to use “best efforts” to accomplish something be held to a higher standard than someone obligated to use “reasonable efforts” to accomplish the same thing? Federal and state case law in the U.S. on this issue is all over the map, which only adds to the confusion. As far as good faith is concerned, Farnsworth correctly noted in 2002 that the law on good faith is stated as a flexible standard.²⁸

In *Conoco v. Inman Oil Co.*, the court noted that good faith enjoins each party “to do nothing destructive of the other party’s right to enjoy the fruits of the contract and to do everything that the contract presupposes they will do to accomplish its purpose.”²⁹ In *Dickey v. Philadelphia Minit-Man Corp.*, the court opined that good faith can be accommodated in relation to the “exercise of legitimate business judgment.”³⁰ The suggestion is that legitimate business interest cannot be exercised in bad faith. Arguably, the best indication of the application of the principle of good faith is in cases where a merger clause has been included into the contract, as in *Allapattah Services, Inc. v. Exxon Corp.*³¹ The pertinent issue in that case was whether a merger clause in the contract was the final and exclusive statement of the terms of the contract. The court noted:

the UCC’s definition of agreement necessarily contemplates that the parties’ obligations transcend the written words within the signed document: Agreement means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance. UCC § 1-201.

²⁷Farnsworth, *supra* n. 25, at 8.

²⁸Farnsworth, *supra* n. 22.

²⁹*Conoco Inc. v. Inman Oil Co., Inc.*, 774 F.2d 895, 908, 1985-2 Trade Cas. (CCH) ¶ 66823, 41 U.C.C. Rep. Serv. 1602 (8th Cir. 1985) (rejected on other grounds by, *Six West Retail Acquisition, Inc. v. Sony Theatre Management Corp.*, 2000-1 Trade Cas. (CCH) ¶ 72823, 2000 WL 264295 (S.D. N.Y. 2000)).

³⁰*Dickey v. Philadelphia Minit-Man Corp.*, 377 Pa. 549, 105 A.2d 580 (1954).

³¹*Allapattah Services, Inc. v. Exxon Corp.*, 61 F. Supp. 2d 1308, 41 U.C.C. Rep. Serv. 2d 118 (S.D. Fla. 1999).

Allapattah, 61 F. Supp. 2d at 1315 (internal quotation marks omitted).

As surrounding circumstances, like trade usage, are a factor to be taken into consideration when interpreting the contract, “familiarity with the commercial context in which the agreement was formed”³² is essential. The court agreed that a merger clause cannot be modified except “by a course of actual performance.”³³ The yardstick to measure the validity of a modification of the merger clause is good faith. As the court noted:

Modifications to contracts under the UCC, however, must meet the test of good faith. *See* UCC § 2-209, cmt. 2. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a modification without legitimate commercial reason is ineffective as a violation of the duty of good faith.

Allapattah, 61 F. Supp. 2d at 1315.

The importance of good faith cannot be underestimated and is demonstrated by the dedication of a section of the *Allapattah* opinion to a discussion of the principle. Another example can be found in *Brooklyn Bagel Boys, Inc., v. Earthgrains Refrigerated Dough Products, Inc.*,³⁴ where the court noted that the UCC:

imposes an obligation of good faith in the performance of all contracts under its domain, this duty merely guides the construction of contracts and does not create independent duties of the contracting parties.

Brooklyn Bagel, 212 F.3d at 381 (citation and quotation marks omitted).

Importantly, in *Allapattah* the Court also recognized that there is no exact formula for application of the principle of good faith, hence “courts have looked at the ambiguities inherent in the UCC’s definition to define the concept within

³²*Allapattah*, 61 F. Supp. 2d, at 1315.

³³*Allapattah*, 61 F. Supp. 2d, at 1317.

³⁴*Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough Products, Inc.*, 212 F.3d 373, 41 U.C.C. Rep. Serv. 2d 445, 151 O.G.R. 205 (7th Cir. 2000).

the context of the agreement.”³⁵ The important point in applying good faith is to focus on commercial reasonableness, which “acts as a guide for courts to determine whether a party acted in good faith.”³⁶ Arguably, the Court in *Allapattah* applied Professor Burton’s theory, namely that good faith needs to be applied “to capture opportunities that were preserved upon entering the contract interpreted objectively.”³⁷ In sum, good faith is applied to contractual performance and enforcement.

Part 4. Good Faith and the CISG:

The CISG does not have a definitional section. In order to overcome this issue, the drafters chose words with no domestic connotation—that is, “earthy” words which take on substance within the given contexts of the principles underlying the Convention. Professor Ulrich Magnus has argued that “[u]nder . . . the CISG . . . the applicable concept of good faith is not based on any specific national good faith concept, but rather it is based on an international trade standard.”³⁸

Article 7(1) of the CISG is the only article within the Convention that deals explicitly with good faith. It states that

in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Professor Michael Bonell, in tracing the history of the CISG and particularly of the principle of good faith, argues that the interpretation of a uniform law is of particular

³⁵The court relied on the comments of Farnsworth, *supra* n. 24.

³⁶*Allapattah*, 61 F. Supp. 2d, at 1323.

³⁷Burton, *supra* n. 14, at 373.

³⁸Ulrich Magnus, Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts, 10 Pace Int’l L. Rev. 89, 91 (1998).

importance.³⁹ Any legislation, whether of national or international origin, raises questions concerning the precise meaning of its individual provisions. Moreover, such legislation, by its very nature, is unable to anticipate all of the problems to which it will be applied.⁴⁰ Only if the presence of good faith is disturbed is there a need to comment and apply explicitly Article 7(1). Arguably, the only time good faith is present is when bad faith is apparent. The Colombian Constitutional Court⁴¹ noted:

There is nothing more against reality: in all juridical systems that recognize the principle of good faith, validation is a form of granting security to the life of business and, in general, to all judicial relationships.

While good faith is noted in Article 7, the controversial issue is whether good faith is only applicable to the interpretation of the Convention or whether it also extends to the behaviour of parties. One author has argued that “[g]ood faith, does not impose obligations on the contracting parties unless their contract provides for good faith.”⁴² Viewed differently, it is correct to argue that “[g]ood faith has two distinct functions or roles. First good faith is examined as a state of mind and secondly it is looked at as a principle found in various articles.”⁴³

In responding to this dichotomy, the answer can be found to this question by examining, Article 7(2), whereby, it states:

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

³⁹Michael Joachim Bonell, Article 7, in *Commentary on the International Sales Law: The 1980 Sales Convention*, 65 (C.M. Bianca & M.J. Bonell eds., 1987).

⁴⁰Bonell, *supra* n. 39.

⁴¹CISG Case Presentation: Columbia 10 May 2000 Constitutional Court, <https://web.archive.org/web/20200131043515/http://cisgw3.law.pace.edu/cases/000510c7.html> (last visited June 21, 2020).

⁴²Walt, *The Modest Role of Good Faith in Uniform Sales Law*, 33 B.U. Int'l L.J. 37, 41 (2015).

⁴³Zeller, *Good Faith—Is it a Contractual Obligation?*, 15/2 Bond L. Rev. 215, 220 (2003).

Convention on the Sale of Goods, *supra* n. 1, art. 7.

This issue was highlighted by Professor Joseph Lookofsky, who argued that the distinction between good faith interpretation and good faith performance is proving to be more apparent than real, especially since matters governed by the CISG which are not expressly settled in it are to be settled in conformity with the *general principles* on which it is based.⁴⁴ Most importantly, it is “logically impossible to apply good faith to the Convention as a whole without influencing or affecting the behaviour of the parties.”⁴⁵ In fact, the general Convention principles of reasonable conduct and *venire contra factum proprium* have, for a long time, been identified as specific elements of an even more general Convention principle which requires both CISG parties to act in good faith.⁴⁶ The comments by the Secretariat, which are the closest counterpart to an Official Commentary, support this notion stating: “[t]here are numerous applications of this principle in the particular provisions of the Convention. Among the manifestations of the requirement of the observance of good faith are the rules contained in [several] articles.”⁴⁷ Professor Steven Walt therefore is not correct to suggest that “if good faith governs the parties’ agreement at all, it does so only under applicable domestic law.”⁴⁸ It is correct to suggest that good faith in Article 7(1) only applies in the interpretation of the Convention. On the one hand, Article 7(2) directs the court to look at general principles in order to settle matters which are not expressly governed. One of the general principles is the duty to cooperate. If a party does not cooperate it acts in bad faith which is the opposite of good faith. On the other hand, good faith and bad

⁴⁴Joseph Lookofsky, The 1980 United Nations Convention on Contracts for the International Sale of Goods, in *International Encyclopaedia of Laws: Contracts 1-192* (Jacques Herbots ed., 2000).

⁴⁵Bruno Zeller, The United Nations Convention on Contracts for the International Sale of Goods: A Methodology for its Interpretation and Application 102 (PhD Thesis, University of Melbourne, 2001).

⁴⁶Bonell, *supra* n. 39.

⁴⁷Faculty of Law: University of Basel, 1979 Secretariat Commentary, CISG-online (2021), <https://cisg-online.org/Travaux-preparatoires/1979-secretariat-commentary>.

⁴⁸Walt, *supra* n. 42.

faith are intertwined and the argument of Professor Magnus is correct. Yet, an additional consideration is clouding the issue—namely, is good faith a principle which masquerades in various disguises which is not only limited to the CISG but to the principle of good faith in general? The answer is yes. However, it is not the label given to a principle which is important but the function it has, in this case, on the remedial system in cases of breaches of contract. This is so as the law only recognises a wrong if it has already recognised a pre-existing duty.⁴⁹ It is therefore important to understand what the pre-existing duty is. The CISG not only invokes good faith in the interpretation of the Convention itself, but it also extends it via general principles to the actions of the parties. The general principle is the duty to cooperate, which is found in many articles—that is, prescribed situations—such as Article 80, which notes that “a party may not rely on the failure of the other party to perform, to the extent that such failure was caused by the first party’s act or omission.”⁵⁰

Viewed this way, the question is how far does this duty extend? The answer can be found in Article 8, which mandates that statements and conduct of a party are to be interpreted according to their intent, and the other party could not have been unaware of what that intent was. The intent must be interpreted subjectively, but failing that, the court will revert to an objective appraisal of the intent. In addition, Article 8 also notes that the courts can resort to an examination not only of the negotiations but also of practices between the parties, usage, and subsequent conduct. In effect, the period examined can commence at the pre-contractual time until the contract is executed.

Part 5. Conclusion:

The importance of the principle of good faith in contracts cannot be underestimated. The principle itself has a legal and policy outcome. The point to be made is that, at first glance, good faith appears to be applied in the same fashion in the UCC and the CISG. However, this is not correct as variations are observable. Hence, care needs to be taken not

⁴⁹Edelman, *The Benefit of Legal Taxonomy*, 1 *Curtin L. & Tax Rev.*, 1, 5–6 (2014).

⁵⁰Convention on the Sale of Goods, *supra* n. 1, art. 80.

to engage in a homeward trend. The temptation is real, as the U.S. law and principles track the CISG in part. The important point to note is that the UCC only “guides the construction of contracts and does not create independent duties of the contracting parties.”⁵¹ It is the performance and enforcement of contract which are subject to good faith under the UCC. The CISG on the other hand goes further than the UCC. Under Article 8, contractual, precontractual and post-contractual conduct are subject to the principle of good faith. The effect is that the factual basis used to reach a decision has been expanded. The Court in *Brooklyn Bagel* erred as a matter of law by relying primarily on the face of the contract and the document allegedly incorporated by reference—it should have also considered extrinsic evidence concerning all relevant circumstances of the case. These include the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties, and a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts.⁵² Other courts in this district and around the U.S. have determined that Article 8 of the “CISG rejects the parol evidence rule and clearly instructs the court to admit and consider probative parol evidence regarding the parties’ negotiations inasmuch as that evidence reveals the subjective intent of the parties.”⁵³

Finally, this paper has demonstrated that good faith does not need to be defined. It is our view that the principle itself takes on life within given facts and is therefore a functional approach. The fact that courts still today refer to *Burton* and *Summers* confirms the view taken in this paper and it underlines the importance of the work done by the two professors. This, in and of itself, highlights the ongoing

⁵¹*Brooklyn Bagel*, 212 F.3d at 381 (citation and quotation marks omitted).

⁵²Faculty of Law: University of Basel, *Transmar Commodity Group Ltd. v. Cooperativa Agraria Industrial Naranjillo Ltda.*, CISG-Online (2018), ¶ 9, <https://cisg-online.org/search-for-cases?caseId=8974>.

⁵³Faculty of Law: University of Basel, *Nucap Industries, Inc. v. Robert Bosch LLC.*, CISG-Online, https://cisg-online.org/files/cases/8741/fullTextFile/2827_96316039.pdf.

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debate about how to define the principle, and where and how it will be applied, and for what. It is well-understood that the principle today has a central role in transnational contracts that utilize the provisions of the CISG.