

## **Good Faith, the Common Law and the CISG\***

### **1. Introduction**

It is a notorious fact that one of the pressure points emerging when the common law and the civil law are set against each other lies in their differing attitudes to the notion of good faith. This was a matter of some significance during the evolution of the CISG. Good faith is such a corner stone of civilian thinking, along with the dependence of the civil law upon so-called general clauses, that its absence from the core of common law thinking gives rise to a pressing need for the common law attitude to be explained, as though the common law were placed on the back foot. Consequently, and also because the majority of legal systems are civilian in nature, I shall start with an explanation of the common law attitude towards good faith, taking my own law, English law, as the point of departure.

The issue of good faith is sometimes presented as though it measured the ethical content of a legal system. Approaching it from that angle, a requirement of good faith conduct in the law of contract could be seen as a defining feature of legal systems in the romano-canonical tradition, whereas its absence in legal systems belonging to the common law tradition could be seen as a measure of the materialistic character of that tradition. That is a crude dichotomy, of course, and it invites demolition. Indeed, one might say that it has been set up for the purpose of being demolished.

Before considering the presence of good faith in the common law tradition, it is necessary to have a sense of what we mean by good faith. It is striking to see how frequent this elementary point is avoided in discussions about the rights and wrongs of importing good faith. At one end of a graduated scale, good faith amounts to honesty. At the other end, it amounts to paying proper regard to the interests of the other contracting party perhaps even at the expense of one's own practical interests. In the American Restatement Second of Contract, good faith appears as good faith and fair dealing,<sup>1</sup> which arguably stops short of paying regard to the interests of others and certainly does not require the sacrifice of self-interest for the benefit of the other contracting party.

### **2. The Common Law Attitude**

#### **(a) ethical conduct and the common law**

Is it true to say that the common law in general turns its back on any need for ethical conduct? The following two examples clearly deny this. The first example concerns equitable discretionary remedies, such as injunctions and specific performance, which

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<sup>1</sup> §205.

may be withheld from someone who does not come to court with “clean hands”.<sup>2</sup> A second example of the ethical conduct of a litigant being subjected to close scrutiny concerns those relationships where one party’s interests are subordinated to those of another. We call these fiduciary relationships and, broadly, they arise where one party reposes trust and confidence in another and that other undertakes to act in the interests of the confiding party.<sup>3</sup> Fiduciary relationships are usually nominate instances, such as trustee and beneficiary, or principal and agent, but they can also arise in an innominate way where the circumstances of a particular relationship in fact justify it.<sup>4</sup> Fiduciary relationships are most unlikely to arise in sale transactions. Indeed, sale is the paradigmatic arm’s length transaction. There are numerous other examples that could be given that will not be investigated here but mention might be made of contracts of the utmost good faith, notably insurance contracts, which require full and candid disclosure on the part of the insured. It is tempting to see their recognition as ethically inspired but a better explanation may be that full disclosure is a necessary means for the insurer to measure the risk and to maintain a sufficient fund to meet demands upon it by other insureds.

#### (b) abstraction and legal rules

A profound difference between the common law and civil law exists in the way that legal rules are conceived. The two systems pitch legal rules at different levels of abstraction, with the civil law taking the more abstract approach. This is not unrelated to the different way in which the two legal traditions draw the line between questions of law and questions of fact.<sup>5</sup> It is hard to imagine a French court at the level of a *cour d’appel* or upwards devoting anything like the same attention to principles and rules of damages assessment as is paid to them by their common law equivalents in England. Again, the many rules of law dealing with the formation of a contract in English law can be contrasted with an observation contained in the notes to Article 1101 of the Code civil dealing with contractual formation,<sup>6</sup> that it is a matter for the “*pouvoir souverain des juges du fond*” to determine the will of the parties.

In so far as good faith is concerned, English law does not have the same taste as certain civil law systems for expressly recognising a principle of good faith in contract law (however that might be defined). It is, however, able by virtue of more detailed rules to achieve many of the same results. In the process, English law resists the temptation to gather those rules together in the form of a broader rule that would summarise them and would aspire to add some predictive measure of how problems, whose resolution is not

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<sup>2</sup> For a recent summary of the scope of this doctrine, see *ORB arl v Ruhan* [2016] EWHC150 (Comm) at [99]-[100].

<sup>3</sup> For a nuanced discussion, see JD Heydon, MJ Leeming and PG Turner, *Equity Doctrine and Remedies* (5th edn, 2015), para 5-005.

<sup>4</sup> e.g., *Lloyds Bank Ltd v Bundy* [1975] QB 326.

<sup>5</sup> See B Nicholas, *The French Law of Contract* (2nd edn 1992) at 18. Referring first to French law he states: “The view of cases as illustrations, which is an aspect of the tendency of a ‘law of the book’ to formulate broad rules, leaves a large area to fact. In the Common law, by contrast, since the law evolves from the cases, there is a constant tendency for fact to harden into law. Case-made rules are by their nature narrow.”

<sup>6</sup> Dalloz edition.

explicitly provided for, may be disposed of in the future. The codifying impulse in English law, apart from a surge in the late 19th century and a temporary flirtation with codification on the part of the Law Commission in the 1960s, has never been strong. English courts have also been resistant to the temptation to overgeneralise, and have at times criticised a tendency for their judgments to be interpreted as if they were the words of a statute. The preference has on the whole been to leave matters that have not received full argument to be dealt with on another day.

(c) commercial certainty

The common law sets great store by commercial certainty. Even Lord Mansfield, the great 18th century judge whose writings display a deep learning in and appreciation of the civil law, set great store by certainty: “In all mercantile contracts the great object should be certainty. And therefore, it is of more consequence that a rule should be certain, than whether it is established one way or the other. Because speculators in trade then know what ground to go upon.”<sup>7</sup> Note the absence of any reference to fairness or justice. Certainty, however, is not a value that is promoted relentlessly. For example, a fundamental clash has been observed in recent years between the compensatory principle in contract damages cases and the so-called “desideratum” that damages should be set in such a way as to provide certainty even if this approach did not provide accurate compensation. The clash occurred in a case where, according to the minority view, damages for future losses after the termination of a contract for breach should, in the interests of certainty, not take account of an event that subsequently happened and that demonstrated the claimant’s loss to be less than it appeared it would be at the date of termination. The majority view was that accurate compensation trumped certainty so that the subsequent event should be taken into account.<sup>8</sup> The conventional view is that certainty encourages investment in and commitment to contractual ventures. For example, a rule that requires a documentary presentation to be closely or exactly compliant with the demands of a documentary letter of credit is designed to do this, though whether it fulfils the design in practice, given that the majority of documentary presentations in fact made are in one or more particular non-compliant, is perhaps a moot point.

Contract is increasingly an agglomeration of standard forms, not all of which are generated by one of the contracting parties and imposed on the other. To the extent that a clear meaning can be ascribed to a well-established term, and that a judicial interpretation of this term acquires a binding authority for future occasions, then the cause of certainty is advanced. Certainty would not be advanced if the motives of the party relying upon the clause could be questioned so as to determine whether a clause might be invoked in that party’s favour. So far as the process of contractual interpretation is treated as a matter of law, then judicial decisions can be attached to the principle of binding judicial authority. Once interpretation strays from the written word to the background circumstances of the

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<sup>7</sup> *Vallejo v Wheeler* (1774) 98 ER 1012, 1017.

<sup>8</sup> *The Golden Victory* [2007] UKHL 12, [2007] 2 AC 353.

contract, which has happened in England within the last twenty years or so, then certainty is compromised.<sup>9</sup>

Certainty is also compromised by the introduction of judicial discretion, whether as a feature of the common law or as a matter of legislation, as has occurred in the matter of unfair contract terms regulation.<sup>10</sup> In this instance, the notion of reasonableness with some legislative guidelines has been given an extensive role, though it should be noted that the increasing separation of consumer and commercial transactions has led to a marked judicial reluctance to treat exemption and related clauses as unreasonable in commercial cases. In a similar way, the old prohibition against penalty clauses has been revised so that, as between arm's length commercial parties, they will be allowed to stand if a legitimate commercial objective is being pursued in a proportionate manner.<sup>11</sup> Apart from this, it is an entirely legitimate question to ask how and to what extent a regulatory criterion of reasonableness differs from a requirement of good faith, and whether much of the disagreement between common law and civil law mentalities is a matter of semantic style. One response is to say that the difference is not easily measurable but that reasonableness is legislatively sanctioned to work only within a particular sector of contractual activity, whereas the civilian principle of good faith is given full rein.<sup>12</sup>

#### (d) commodities markets

The commodities markets are notoriously volatile, some, such as oil, being more volatile than others. They can reel under the shock of regional wars, global financial crises and even a slowdown in one of the world's major economies. Volatility spells risk and risk gives rise to a practical need to hedge against risk and to a need also for dynamic markets in which entry on the part of speculators is needed to encourage price stability. The reliability of contract as a risk-controlling mechanism is almost too obvious to be stated, and contract can hardly be a reliable mechanism if it does not give rise to *ex ante* certainty. It is not just the markets in the commodities themselves, whether they concern grain, metals or oil, that are volatile; the related freight markets are highly sensitive to price movements in commodities, such sensitivity also extending to the shipbuilding market.<sup>13</sup>

Contracts of this nature have exercised a very substantial influence on the development of English contract law from at least the second half of the 19th century. Indeed, it is arguable that they have distorted the character of English law by crowding out cases of a more domestic character. Litigation is fuelled by money and, as intricate and interesting a consumer dispute or other minor matter may be, in a country where the costs of litigation are high it is the big money cases that by and large get to court and drive the development

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<sup>9</sup> The case law has been notoriously in flux. See below.

<sup>10</sup> Unfair Contract Terms Act 1977.

<sup>11</sup> *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2015] 3 W.L.R. 1373.

<sup>12</sup> Cf in French law the non-adoption of lesion as a general ground for relief (C civ Art 1118) and its restriction to particular cases of partition of estates, infants' contracts and sale of land (C civ Arts 887, 1305 and 1674).

<sup>13</sup> MG Bridge, "Description and the Sale of Goods: *The Diana Prosperity*" in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing, 2008), pp.321-49.

of the law. A striking feature of English case law, contrasting significantly with a country like France, is just how few cases arrive before the higher courts, namely, the (single) Court of Appeal (for England and Wales) and the Supreme Court.

The influence played by the big money cases in the development of English law is complemented by the judicial concern for the importance of finance-related activity in the British economy. The City of London is not just a leading centre for finance; it plays also a key role in legal and insurance services and in commodities trading. Popular references may be made, for example, to the Rotterdam spot market, but the most important places for trading in oil are London, New York and Singapore.<sup>14</sup> The importance of these ancillary services for the British economy is reflected also in the development of the Commercial Court, the recent setting up of a Financial List,<sup>15</sup> and the encouragement given to arbitration by granting only a minimal supervisory role to the courts.<sup>16</sup> It is evident too in the activities of the Financial Markets Law Committee, originally established under the aegis of the Bank of England but now a free-standing and influential body that draws attention to developments that threaten certainty in the financial markets.<sup>17</sup>

A characteristic feature of commodities contracts is the preference they express for English law and the antipathy they show to uniform law, such as the CISG. GAFTA (the Grain and Feed Trade Association) accounts for 80 per cent of the world's international physical trade in agricultural commodities, providing for the application of English law and for the exclusion of the CISG.<sup>18</sup> It might be said that this is, in the jargon of the social sciences an example of path dependency, and due to the historical origins of GAFTA in the Liverpool Corn Trade Association, but this explanation is inadequate for at least two reasons. The preference for English law is expressed also by non-UK based entities. Total, for example, is a French oil company. Its standard form contracts for crude oil on CIF and FOB terms both provide for the application of English law and for the exclusion of the CISG. Furthermore, the integration of a long-used trading form in a legal system cannot be over-estimated. The famous GAFTA 100 contract is the descendant of form number 1 of the Liverpool Corn Trading Association, dating from the late 19th century. This form, like similar forms, has been developed in concert with the actions of the English courts so as to achieve a state of symbiosis. The continuing preference of the form (and of the traders it represents) for English law and for the exclusion of the CISG

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<sup>14</sup> C Jago and L Bossley, *Trading Refined Oil Products* (Consilience 2013), pp.14-15. Rotterdam is a major destination for crude oil and is the leading refining centre.

<sup>15</sup> This was announced by the Lord Chief Justice on 8 July 2015 and crosses the division between equity and common law by drawing upon judges in both Queen's Bench and Chancery Divisions.

<sup>16</sup> See the Arbitration Act 1996, especially s.69. For judicial concerns on how this impedes a common law starved of litigation, see the speech of the Chief Justice of England and Wales *Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration* (the Bailii Lecture, 9 March 2016), available at [www.bailii.org](http://www.bailii.org). A negative response from practitioners in the field of arbitration was the predictable response. See, eg, W Rowley, "London Arbitration under Attack", *Global Arbitration Review*, 16 May 2016, available at <http://www.20essexst.com/news>.

<sup>17</sup> The Committee has reported on the threats to derivative markets posed by the UN Convention on Contracts for the International Sale of Goods: "Issue 130 – Implementation of the Vienna Sales Convention" (April 2008).

<sup>18</sup> GAFTA has over 1500 members in 89 countries see the GAFTA website ([www.gafta.com](http://www.gafta.com)).

cannot be put down to the legal equivalent of what Marxists call false consciousness, as though they could be brought round to the virtues of adopting the CISG if only they could observe it in the right conditions, whistling at the same time the Ode to Joy from Beethoven's Choral Symphony.

The commodities cases are replete with examples of what might be called bad faith conduct that goes unpunished. Thus a buyer of March shipment goods on CIF terms can terminate the contract for shipment out of time even though the buyer's only reason for doing so is a fall in the rice market;<sup>19</sup> the FOB seller of Australian barley, who has gone short and does not have a cargo available to fulfil the contract, can lawfully object to the buyer's nomination of a vessel that can load the cargo only in some and not all of the deepwater ports of South Australia and Victoria, even though the monopoly exporter<sup>20</sup> is willing to provide a cargo for the nominated vessel at some of those ports;<sup>21</sup> and the FOB seller of feed barley can refuse to allow the buyer to substitute a perfectly suitable vessel for the one already nominated and now prevented by maritime casualty from arriving in time in the loading port.<sup>22</sup> And many more examples could be cited. When contract law and standard forms allow such actions to be taken, the courts may draw breath through bared teeth but they will not sacrifice certainty on the altar of justice in the individual case.<sup>23</sup> In a real sense, the disciplining of traders who take sharp, meritless points is left to the market itself. There are relatively few traders; they know each other very well; and they are perfectly able and willing to reciprocate at a later date.

(e) contractual interpretation and the matrix

Some contracts involve significant forward planning, complex drafting, negotiation and give-and-take. Others do not. Commodities contracts are usually concluded informally and at speed on standard forms, with courts unwilling to take liberties with the wording of standard forms,<sup>24</sup> especially if, as is the case with dry commodities, they are drafted in a bipartisan way to accommodate the needs of traders who are both buyers and sellers. Standard form contracts act in practice as a form of private legislation.

In the case of bespoke contracts,<sup>25</sup> the principle of contractual certainty has been heavily compromised in recent years by a judicial willingness to penetrate the written language and find the true intent of the parties with the aid of a close examination of the contract background (or matrix of fact). English law does not as such espouse and label a so-

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<sup>19</sup> *Bowes v Shand* (1877) 2 App Cas 455.

<sup>20</sup> The Australian Barley Board, a public authority.

<sup>21</sup> *Richco International Ltd v Bunge & Co Ltd (The New Prosper)* [1991] 2 Lloyd's Rep 93.

<sup>22</sup> *Cargill UK Ltd v Continental UK Ltd* [1989] 2 Lloyd's Rep 290. According to Parker LJ at p.295: "It is common place for parties, if they can, to cancel contracts in order to take advantage of changes in the market when, but for the change, they would have been content to refrain from cancellation."

<sup>23</sup> For a rare and controversial case that might suggest otherwise, see *Panchaud Frères v Ets General Grain Co* [1970] 1 Lloyd's Rep 53.

<sup>24</sup> See *The Bonde* [1991] 1 Lloyd's Rep 136.

<sup>25</sup> Also one-side contracts offered on a take it or leave it basis: see *Investors Compensation Scheme Ltd v West Bromwich Building Society Ltd* [1998] 1 WLR 896.

called “clear-meaning” rule,<sup>26</sup> but it has long had the reputation of a law that attaches fundamental importance to the written language of the contract. Recent developments have permitted courts to go behind the written screen to discover an ambiguity that would not be apparent on the face of the document alone. This development, far from being just a neutral attempt to discover the truth of the matter, has given rise to the danger of some courts imposing on contracting parties a reasonable contract and not necessarily the contract to which they committed themselves. This has happened broadly in two ways. First, once ambiguity has been discerned, courts have selected the meaning that accords with commercial common sense, which may be treated as a surrogate for the commercially reasonable solution.<sup>27</sup> A later judicial reaction against this emphasises that the courts ought not to impose a reasonable contract on the parties.<sup>28</sup> Secondly, in inferring implied terms in an incomplete contract, the processes of implication and interpretation have been said to be the same in that a court implying terms is only after all seeking out the meaning of the parties.<sup>29</sup> This development has threatened a greater degree of judicial intervention in contracts than has proved acceptable in the past<sup>30</sup> and for that reason has been the subject of a recent reaction.<sup>31</sup> The law in the last few years has been moving back and forth like a pendulum but the augurs point to a reaction in favour of traditional values.<sup>32</sup> What is noticeable, however, in this entire process is the absence of any reference to good faith.

(f) current position in English law

Until quite a short time ago, it might fairly have been said that any debate about the overt presence in English law of a general principle of good faith and fair dealing was starved of oxygen. The House of Lords had ruled in very strong terms that there was no role to be accorded to such a principle in the adversarial world of contract formation.<sup>33</sup> This firm stance did not rule out good faith in the performance of contracts, but there was no relish for the adoption of such a principle in that area: the doctrine of fiduciary relations had in a sense occupied the field in its application to contracts that called for closely cooperative action, with one party reposing trust and confidence in the other.

There are currently signs, nevertheless, of some disturbance in the force.<sup>34</sup> There are two areas of activity that repay interest. First, there are cases where one party is invested with a discretion and the question arises whether an account must be taken of the interests of

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<sup>26</sup> Unlike the common law of the United States.

<sup>27</sup> *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900.

<sup>28</sup> *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619.

<sup>29</sup> *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 (Lord Hoffmann).

<sup>30</sup> See *The Moorcock* (1889) 14 PD 64 (implying terms in a contract only as a matter of “business necessity”).

<sup>31</sup> *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] 3 WLR 1843 (reaffirming the strict tests for implying contractual terms).

<sup>32</sup> As demonstrated in *Liverpool City Council v Irwin* [1977] AC 239 (terms not be implied in a contract merely because it is reasonable to do so).

<sup>33</sup> *Walford v Miles* [1992] AC 128.

<sup>34</sup> A useful expression derived from the Star Wars films.

the other party when that discretion comes to be exercised.<sup>35</sup> Secondly, the practice is developing of parties inserting in their contracts a duty to negotiate or settle differences in good faith.<sup>36</sup> In addition to these two developments, a particular judge has shown an inclination to countenance the imposition of a duty of good faith in the performance of contracts,<sup>37</sup> though it is far from clear whether he has more than basic honesty in mind and there are few signs that his call possesses a general appeal<sup>38</sup> outside the ranks of those academic lawyers who are waiting for a sign to lead them into the promised land of ethical contracting. Indeed, the Court of Appeal has recently drawn attention to the potentially baneful effects of a general principle of good faith: “[T]he better course is for the law to develop along established lines rather than to encourage judges to look for ...some ‘general organising principle’ drawn from cases of disparate kinds...There is...a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement. The danger is not dissimilar to that posed by too liberal an approach to construction...”<sup>39</sup> Contracting parties are always at liberty to subject themselves to a good faith standard, but this is not something that an English court will freely infer from a contract.<sup>40</sup>

As for contractual discretion, the interesting aspect of this development lies in the connection that is made between the private contract law and administrative law. For nearly seventy years, there has been a principle of administrative law that the decisions of a public authority may be reviewed if they are decisions that no reasonable authority could have taken.<sup>41</sup> This strikes at aberrant decisions and is by no means the same thing as requiring the authority to act reasonably; the language of good faith, moreover, is nowhere mentioned. Although the language of administrative law has been rejected in contract cases where one party is given a discretion to exercise under the contract, a similar principle is employed,<sup>42</sup> though it has been firmly stressed that it has no part to

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<sup>35</sup> See *British Telecommunication plc v Telefónica O2 UK Ltd* [2014] UKSC 42 at [37] (and cases therein cited).

<sup>36</sup> *Petromec Inc v Petroleo Brasileiro SA Petrobas (No 3)* [2005] EWCA Civ 891 at [120]-[121], [2006] 1 Lloyd’s Rep 121.

<sup>37</sup> *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd’s Rep 526 (Leggatt J).

<sup>38</sup> *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200. For a recent statement of the position, see *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC (Comm) at [249]-[250], noting the absence of a general duty of good faith but accepting that a duty of good faith could play a limited role as “an incident of certain categories of contract (for example, contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one)”.

<sup>39</sup> *MSC Mediterranean Shipping Co SA v Cottontext Anstalt* [2016] EWCA Civ 789 at [45].

<sup>40</sup> *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat) at [86]; *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 at [68] (“an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it”).

<sup>41</sup> *Associated Provincial Picture House Ltd v Wednesbury Corpn* [1948] 1 KB 223.

<sup>42</sup> *Socimer International Bank Ltd v Standard Bank Ltd London (No 2)* [2008] Bus LR 1304 at [66], referring to “honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality”. See also, eg, *Paragon Finance plc v Nash* [2002] 1 WLR 685; *Ludgate Insurance Co Ltd v Citibank NA* [1998] Lloyd’s Rep IR 221; *British Telecommunication plc v Telefónica O2 UK Ltd* [2014] UKSC 42 at [37].



play when it comes to the exercise of “absolute contractual rights”.<sup>43</sup> It should be noted that the courts have striven for exact language to capture the control that must be exercised in cases of this nature; they have not been content to throw a broad blanket of good faith over the contracts in question. It may be, too, that the preferences thus displayed by English courts express as much as anything the relations between a trial court and an appeal court. Too broad a test might be insufficiently indicative of what a trial court is doing and invite an appeal court to intervene more than its resources allow; a narrower and more precise test permits a sufficient degree of supervision leading to selective intervention.

English courts have long shied away from imposing a duty on contracting parties to negotiate. In this regard, they have shown a commitment to freedom *from* contract to add to their long-standing commitment to freedom *of* contract. Even if no problems are posed by the doctrine of consideration, and even though courts have been willing to use implied terms to fill very substantial contractual gaps,<sup>44</sup> they have stopped short in the past of enforcing so-called agreements to agree in the absence of criteria in the contract referring them to an objective standard of what the parties were seeking to achieve.<sup>45</sup> The essential objections have been twofold. First, it is not for the courts to make the parties’ contract for them. Secondly, such an agreement is too uncertain to be enforced. That now sees to be changing in the light of developing contract practice making more use of such clauses, and similar clauses called for attempts to resolve disputes before formal steps are undertaken. A higher imperative than refraining from interference in the contractual process is giving effect so far as possible to what the parties have sought to do.<sup>46</sup>

(g) the American position

It is all very well to speak of the common law position on good faith, but what does this mean when it comes to the express recognition of good faith and fair dealing in the American Uniform Commercial Code<sup>47</sup> and the Restatement Second of Contracts?<sup>48</sup> One response is that the imperatives of legal development in the United States have led to the creation of a legal system that displays some of the features of the civil law. The US

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<sup>43</sup> *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200. See also *Lomas v JB Firth Rixon Inc* [2012] EWCA 419 at [46] (the right to terminate for the other party’s breach of contract is not a discretionary matter); *Greenclose Ltd v National Westminster Bank plc* [2014] EWHC 1165 (Ch) at [144]-[154]; *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472 (Comm) at [242] *et seq.* The court in *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star)* [1993] 1 Lloyd’s Rep 397, 404, considered that the notion of fairness merely described the result arrived at by controlling a discretion in the manner stated above.

<sup>44</sup> *WN Hillas & Co Ltd v Arcos Ltd* [1932] All ER 494.

<sup>45</sup> *May and Butcher v R* [1934] 2 KB 17n; *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 WLR 297. They have departed somewhat from this firm stance in the case of contracts that have already been performed in part: *Foley v Classique Coaches Ltd* [1934] 2 KB 1; *Queensland Electricity Generating Board v New Hope Collieries* [1989] 1 Lloyd’s Rep 205.

<sup>46</sup> *Petromec Inc v Petroleo Brasileiro SA Petrobas (No 3)* [2005] EWCA Civ 891, [2006] 1 Lloyd’s Rep 121, 154: “It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered.”

<sup>47</sup> See §§1-304 and 2-103.

<sup>48</sup> §205.

Supreme Court in 1938 rejected the notion of a federal common law,<sup>49</sup> with the result that few cases on private law, and fewer still on private contract law, are determined by that court. The creation of a uniform private law is in effect delegated to legislative and quasi-legislative bodies such as the National Conference of Commissioners on Uniform State Laws and the American Law Institute. Rendering contract law into a legislative form – at least if the intricate techniques of the Whitehall parliamentary draftsman are not employed – naturally encourages a higher degree of abstraction. When the specific outcomes of cases decided by reference to the good faith standard, or considered so to have been, are analysed, they add nothing to what could have been achieved by using existing canons of contractual interpretation and implied terms.<sup>50</sup>

### 3. Article 7(1)

#### (a) not binding on the parties

Article 7(1) calls for the interpretation of the CISG with regard being paid to “the observance of good faith in international trade”. This was a compromise reached after a number of common law countries objected to the imposition of a duty of good faith on the contracting parties themselves. In this regard, the CISG differs from other instruments, such as the Principles of European Contract Law and the Unidroit Principles of International Commercial Contracts, that expressly impose a duty of good faith on the contracting parties.<sup>51</sup> Article 7(1) is expressed in the passive voice and does not indicate exactly who or what should be paying regard to good faith. Since, however, contracting parties make and perform contracts, and courts and tribunals interpret and enforce those contracts, the bearers of the duty can only be courts and arbitrators. Even so, that duty must be mediated through the States parties to the CISG. Despite this, the first English language version of a leading text on the CISG asserted that a duty on courts and tribunals was tantamount to a duty on the contracting parties themselves.<sup>52</sup> At the risk of oversimplifying it, the argument ran in the following vein: “Parties derive their rights and duties from the contract in accordance with the CISG; the CISG is to be interpreted in accordance with good faith; therefore the parties’ rights and duties are subject to good faith.”<sup>53</sup>

This argument of course begs the question. Suppose contracting parties wish to allow for the avoidance of a contract in the case of non-performance according to a test that is less demanding than the fundamental breach test in Article 25. Article 6 gives them the freedom to do this. On a falling market, the buyer declares avoidance of the contract, as

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<sup>49</sup> *Erie Railroad Co v Tompkins* 304 US 64 (1938).

<sup>50</sup> An exercise I carried out some years ago: MG Bridge, “Does Anglo-Canadian Law Need a Doctrine of Good Faith?” (1984) 9 Can Bus LJ 385. The answer to the question in the title was no.

<sup>51</sup> According to Art 1.7(1) of the Unidroit Principles: “Each party must act in accordance with good faith and fair dealing in international trade.”

<sup>52</sup> P Schlechtriem and I Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford, 1<sup>st</sup> edn, 1998), p 63 (Schlechtriem). Subsequent editions of this text have made it clear that Art 7(1) does not sanction the imposition of a duty of good faith on the contracting parties themselves.

<sup>53</sup> MG Bridge, *The International Sale of Goods* (Oxford, 3<sup>rd</sup> edn, 2014), para 10.41.

the contract expressly permits. The seller, invoking the principle of good faith, now complains that the buyer would not have done this if the market had been steady or if it had risen. As the seller might say, the buyer is not abiding by the spirit of an agreement that, in a dynamic market, was designed to allocate market risk between the parties. If good faith is to have any meaning, then it must have a role to play in a case of this kind. Yet, to say that the parties' choice of a lower standard of non-performance is subject to the requirements of good faith is to assume that good faith is embedded as a restriction on the freedom granted to them by Article 6.

(b) must there be prima facia ambiguity?

If we take instead good faith as a principle of interpretation to be applied by courts and tribunals, then what does this mean and when does it come into play? The issue we are now squarely facing is that of fidelity to the written text. Do the words of the CISG have a meaning that imposes itself upon the court or tribunal, or do they simply act as a point of departure to a forum that draws its inspiration from them? It is well known that Justice Scalia of the US Supreme Court was a so-called "originalist", who resisted dynamic interpretations of the Constitution to give the Constitution meaning and effect in cases that the founding fathers either did not or could not have had in mind. This of course is a serious matter for an instrument that is over 200 years old and one that is calculated to divide a court, some of whose members see the Constitution as a living and evolving organism and some of whom see it as holy writ that, if it is to be changed, should so be done by the proper legislative procedure. Given the difficulty of effecting constitutional change, originalism is a profoundly conservative doctrine.

The CISG, which came into force in 1988, has been subjected to calls for dynamic interpretation.<sup>54</sup> It has also been claimed that Article 7(1) should on this basis be interpreted as giving rise to a duty of good faith on the contracting parties themselves.<sup>55</sup> The argument ignores the legislative record of the CISG,<sup>56</sup> accelerates the history of the CISG and, in its disregard of the wording of the CISG, is seriously at odds with the rule of law. It is all very well to turn to good faith to clarify an ambiguous text, but a provision of the CISG that is clear on its face does not merit such unwarranted interference. How are contracting parties to plan for the future and assess risk if their efforts are to be subjected to an occult, broad standard that has never been subjected to a rigorous definition or, so far as I can see, any real attempt to answer hard questions? In what sense are they trusting their fate to the law if there is no predictability in its application? Lord Mansfield's words on commercial certainty, quoted above, reimpose themselves at this point.

(c) interpretation and the rule of law

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<sup>54</sup> For discussions of dynamic interpretation, see A Janssen and O Meyer (eds), *CISG Methodology* (Sellier, 2009) (essays by Magnus, Eiselen and Gruber).

<sup>55</sup> S Kröll, L Mistelis and M del P Perales Viscasillas (eds), *The United Nations Convention on Contracts for the International Sale of Goods* (Beck/Hart/Nomos, 2011), p 121 (M del P Perales Viscasillas).

<sup>56</sup> See below.

On the issue of the rule of law and departure from the written text of the CISG, it is worth looking at two examples that do not explicitly invoke good faith but that might fairly be said to be representative cases of dynamic interpretation. The first of these examples is the decision of the Belgian Cour de cassation<sup>57</sup> in which the court invented a rule that contracts could be revised to the advantage of a contracting party claiming that supervening hardship had altered the basis of the contract. In the case of supervening events that create an impediment to the performance of the contract, the CISG contains a provision that exempts the non-performing party from liability in damages and to that extent sanctions a degree of withdrawal from contractual responsibility.<sup>58</sup> It does not have a rule dealing with hardship that, by increasing the responsibilities of the other party under a revised contract, does the very opposite of sanctioning withdrawal by a non-performing party. In contrast, the Unidroit Principles have extensive provisions expressly permitting revision of the contract in cases of hardship<sup>59</sup> but a similar proposal, though considered, was not adopted in the text of the CISG.<sup>60</sup> The Belgian case concerned the cost of raw materials required by the seller who, so far as I can see, might have protected itself by first obtaining a binding contract to supply materials at a stated price or by entering into a hedging transaction. As for whether the Cour de cassation was actuated by notions of good faith, we may never know. The spare style of the court's judgment gives us less to go on than a palaeontologist with a few bones has when imagining a newly discovered species of dinosaur.

The second example concerns decisions on fundamental breach. The test for a fundamental breach in Article 25 of the CISG is concerned exclusively with the effects of a breach. It is solely driven by the factual consequences of the particular breach. Unlike the Unidroit Principles,<sup>61</sup> Article 25 does not sanction an inquiry into additional factors, such as the importance of a particular term in the trade. Indeed, a clear provision in the Hague Law of 1964 (ULIS) that failure to deliver on time in the case of market-quoted goods gave rise to a right of avoidance was not adopted.<sup>62</sup> It is always open to contracting parties to opt out of the fundamental breach rule,<sup>63</sup> but this was not used as the basis of certain German decisions that have sought to accommodate the importance of time and documents in certain areas of international sale.<sup>64</sup> As exercises in commercial reality, the

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<sup>57</sup> Cour de cassation (Belgium) 19 June 2009, CISG-Online 1963 (Pace).

<sup>58</sup> Art 79.

<sup>59</sup> Arts 6.2.1-3.

<sup>60</sup> See the peremptory rejection of a hardship provision in the 1977 draft by the Committee of the Whole: A/32/17, Annex 1 paras 458-60. Despite this rejection, see the assertion of the CISG Advisory Council, Opinion No 7, that hardship can be brought in under Art 79.

<sup>61</sup> Art 7.3.1.

<sup>62</sup> Art 28 (ULIS): "Failure to deliver the goods at the date fixed shall amount to a fundamental breach of the contract whenever a price for such goods is quoted on a market where the buyer can obtain them."

Similarly, consider this passage from the UN Secretariat Commentary on the 1978 draft (Art 45): "The rule that the buyer can normally avoid the contract only if there has been a fundamental breach of contract is not in accord with the typical practice under CIF and other documentary sales. Since there is a general rule that the documents presented by the seller in a documentary transaction must be in strict compliance with the contract, buyers have often been able to refuse the documents if there has been some discrepancy."

<sup>63</sup> Art 6.

<sup>64</sup> See BGH 3 April 1996, CISG-Online 135 (Pace), asserting that the fundamental character of a breach can be derived from the contract itself. See also OLG Hamburg 28 February 1997, CISG-Online 261

decisions in themselves are perfectly sensible and, had the CISG been responsive to the concerns they evidence about the suitability of the text of commodities dealings, would have made it a more attractive instrument for commodities traders. But these decisions pay no respect to the wording of the CISG. A legal instrument that blows in the discretionary winds cannot provide the uniformity and certainty that prompted the quest for legal uniformity.

(d) appearance in the case law

The question now is how Article 7(1) has been handled in the case law. German, Dutch and Spanish courts have held that it is against good faith for a court to give effect to a jurisdiction clause on the back of a contractual document when a contracting party would not expect to see it there.<sup>65</sup> What has that to do with good faith? If one party wishes the other to agree to a jurisdiction clause, then the proper approach is to ensure that both parties consent to it, which turns upon due notice being given of the existence of the clause.<sup>66</sup> In the absence of such notice, how can there be any consent? Contract is the product of consenting parties and is not the result of a unilateral imposition of the will of one party on another. A contracting party who has not been sufficiently informed of a clause cannot be said to have agreed to it. A French court appears to have used Article 7(1) as a justification for requiring a buyer to pay damages for abuse of the legal process arising out of the way it conducted litigation based on a meritless claim.<sup>67</sup> How this outcome is to be integrated into the interpretation of the Convention is a complete mystery. There are various ways in which abusive litigation can be dealt with, for example by means of a costs order, but an award of damages on the basis of Article 7(1) does not come close to providing a justification for the award. In a way that is hard to understand, a German court dispensed with the need for a declaration of avoidance to be made to a seller who had clearly renounced the contract, though Article 26 unambiguously calls for notice and leaves on its face no room for exceptions.<sup>68</sup> Article 7(1) was said by the court not to open up the CISG to interpretation in the light of every single equitable consideration, but it did pave the way for taking into account concretised examples of good faith in national legal systems. Even if sense can be made of that assertion for an instrument that is supposed to stand above national law, it is still hard to know how good faith comes into play. There are other ways of saying that the seller might not take the arid, technical point that it had not received a declaration of avoidance. A declaration can surely be made by informal means and it certainly can be implied from

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(Pace); OLG Düsseldorf 24 April 1997, CISG-Online 385 (Pace). The stance adopted by these courts accords with the position stated by the Federal Republic of Germany when unsuccessfully proposing an amendment to draft Art 25 that in the event was not carried: see the 12th Meeting of the First Committee (A/CONF.97/C.1/SR.12): J Honnold, *Documentary History of the Uniform Law for International Sales* (1989), 521.

<sup>65</sup> See OLG Celle 24 July 2009, CISG-Online 1906 (Pace); LG Neubrandenburg 3 August 2005, CISG-Online 1190 (Pace); BGH 31 October 2001, CISG-Online 617 (Pace); OLG München 14 January 2009; Rb Rotterdam 25 February 2009; Audiencia Provincial de Navarra 27 December 2007 (Pace).

<sup>66</sup> This approach seems to be mainly due to the actions of German courts, seeking a way round domestic law so that in international sales a party should not have to inquire about the content of the other's standard terms.

<sup>67</sup> Cour d'appel de Grenoble 22 February 1995, CISG-Online 151 (Pace).

<sup>68</sup> OLG München 15 September 2004, CISG-Online 1013 (Pace).

conduct. Apart from these cases, there is little to remark in the judicial treatment of good faith in Article 7(1).

#### 4. Article 7(2)

##### (a) the legislative history

The Working Group on the occasion of its ninth meeting observed that the majority of national representatives supported the inclusion in the CISG of a general concept of good faith and fair dealing, which had proved to be a useful regulator of conduct in some legal systems.<sup>69</sup> Contrasting views were expressed on whether this would aid uniformity in practice or would require substantial judicial interpretation over time to become effective.<sup>70</sup> There was, nevertheless, considerable opposition to the above text that was proposed by Hungary.<sup>71</sup>

Further on in the legislative process, it became clear that opinion amongst the national representatives was quite sharply divided. Against good faith were those who wanted to know how a moral imperative could be applied to particular transactions and who thought that judges would resort to their own legal and social traditions at the expense of uniformity. It was also said to be unnecessary to spell out good faith in the CISG since it was implicit in all business laws. Furthermore, the sanction for breaching good faith was not stipulated so that the matter would have to be remitted to national laws as a validity issue<sup>72</sup> at the expense of uniformity. In support of good faith were those who saw good faith as a universal norm and who saw its omission as an act of opposition to good faith, a particularly serious matter given the need for good faith in trading relations with developing countries and for content to be given to the development of a new international economic order. This theme also surfaced in the discontent some supporters of good faith expressed about the reference to fair dealing. In an argument that makes no more sense now than it did then, they thought that fair dealing was too close to established international business practices, which in respect of developing countries could not be said to be fair, to be acceptable. Fair dealing therefore meant unfair dealing. It should, they said, be replaced by a reference to international cooperation. A compromise solution, that good faith be built into the interpretation of the CISG and not imposed on the parties, was floated and the matter remitted to a working group of six countries, which proposed a text very close to the current Article 7(1). This was accepted by the Commission.<sup>73</sup> Attempts were made at the diplomatic conference in Vienna to translate good faith in interpreting the CISG to good faith in interpreting the contract of sale<sup>74</sup> but there was insufficient support for this proposal.<sup>75</sup>

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<sup>69</sup> A/CN.9/142, 19-30 September 1977, para 71.

<sup>70</sup> A/CN.9/142 para 74.

<sup>71</sup> "In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith. [Conduct violating these principles is devoid of legal protection.]" The first sentence only was adopted by the Working Group: A/CN.9/142 para 77.

<sup>72</sup> Under Art 4(a).

<sup>73</sup> See UNCITRAL 1978 Session, Doc. B(3) (A/33/17, Annex 1, paras 42-60).

<sup>74</sup> Fifth Meeting of the First Committee, 13 March 1980 (A/CONF.97/C.1/SR.5), paras 6, 14, 40-41, and 43-44.

(b) can we infer good faith as a general principle?

An express provision requiring good faith and fair dealing to be a norm binding on the contracting parties was therefore rejected in the legislative process, but Article 7(2) called for a reference to the general principles on which the CISG was based when it came to matters that were dealt with in the CISG but not expressly settled by it. The question is whether this formula opens the door to those who see good faith as an existing, universal norm.<sup>76</sup> Two lines of inquiry suggest themselves. First, how far can we say that good faith has been recognised as a general principle underlying the CISG? Secondly, a harder question, are there unresolved matters that can be settled by invoking good faith?

On the first question, the Secretariat Commentary on the 1978 draft identified a number of provisions as expressive of the principle of good faith. These were provisions concerning irrevocable offers, late acceptances, informal contractual modification, cure of defective goods, exclusion of notice of defect, loss of the right to declare a contract avoided, and the duty to preserve goods.<sup>77</sup> This is very much a mixed bag of provisions that can be grouped under the heading of good faith only if good faith is given the broadest possible meaning. The only surprise is that the Secretariat Commentary did not add to the mix a number of other provisions that might with equal justification be said to encompass such a broad and meaningless notion of good faith. For example, room could just as well have been made for provisions dealing with interpretation, discrepancies between offer and acceptance, fundamental breach, notice of defect, requiring repair, providing specifications, suspension of performance, anticipatory fundamental breach and adequate assurance, mitigation of loss, and non-responsibility for the other party's failure to perform.<sup>78</sup> The problem with a concept that explains everything is that it explains nothing. Good faith can explain why contracts should be performed (*pacta sunt servanda*), but it can equally justify why they should not be performed (eg, exemption). If it is to serve any purpose at all, good faith must serve more than the taxonomic purpose of grouping and classifying provisions of a text; it must also guide conduct and have a predictive value.

Turning now to the case law on good faith in Article 7(2),<sup>79</sup> what does it tell us? The rewards of examining the case law are very slender. Good faith may be thrown into the mix for no explained reason.<sup>80</sup> The last thing one sees in the case law is a systematic examination of the CISG to derive therefrom a principle of good faith that is needed to dispose of a problem for which the CISG makes no provision. We see that good faith

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<sup>75</sup> Ibid, paras 55 and 62.

<sup>76</sup> A related question, that need not be considered her, is whether there may occur legitimate resort to the Unidroit Principles of International Commercial Contracts in the interpretation of the CISG.

<sup>77</sup> Arts 16(2)(b), 21(2), 29(2), 37 and 48, 40, 47(2), 64(2) and 82, and 85-88.

<sup>78</sup> Arts 8, 19(2), 25, 39, 46(3), 65, 71, 72(2), and 80.

<sup>79</sup> The case law is often unclear as to whether Art 7(1) or Art 7(2) is in play. The same may be said about the UNCITRAL Digest, which gathers together the case law.

<sup>80</sup> eg, MKAC Arbitral Tribunal Case No 95/2004 27 May 2005, CISG-Online 1456 (Pace).

explains the principle of estoppel (or *non venire contra factum proprium*).<sup>81</sup> Does this estoppel principle, which must be or come close to being a universally accepted principle, need to be explained in this way? Again, does good faith need to be employed when principles of interpretation in Article 8 apply?<sup>82</sup> What has good faith to do with calculating a claimant's rate of interest?<sup>83</sup> Does good faith, rather than the quality provisions of Article 35, require that flour be of an international standard?<sup>84</sup> Is there a need to resort to good faith when a sales order has been consensually annulled yet the seller later demands that the buyer perform?<sup>85</sup> Good faith bulks larger when the matter concerns the exercise of a right or remedy. A court in one case held that a seller was not acting in good faith when it launched proceedings for the price of goods shortly after the due date without giving the buyer a chance to explain.<sup>86</sup> National rules of civil procedure, staying proceedings or imposing costs orders, are usually apt to deal with this kind of thing. Standing back from the cases, one is driven to the following conclusion: looking for a substantial and meaningful manifestation of good faith in the case law of the CISG is like fishing in the wrong part of the Sea of Galilee.

(c) conclusion

My conclusion is a brief one. Those fearful of the disruptive effect of good faith should perhaps stop worrying. It has played only a small part in the case law, has not shown in practice any meaningful content, and does not appear to have been invoked in a destructive way. They may, however, be concerned about the lack of rigour in judicial reasoning that resorts to such a concept and deplore a certain intellectual laziness in such reasoning. Those who support the existence of a role for good faith may be content to see the flag being flown, though if they have ambitions for a more ethical contract law there is little evidence to show that good faith is taking the law further in that direction. Above all, the standard of discussion of good faith in the case law is profoundly disappointing.

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<sup>81</sup> See, eg, OLG Karlsruhe 25 June 1997, CISG-Online 263 (Pace); Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft 15 June 1994 SCH-4366, CISG-Online 120 (Pace); Handelsgericht des Kantons Zürich 30 November 1998, CISG-Online 415 (Pace).

<sup>82</sup> Primo Tribunal Colegiada en Materia Civil del Primo Circuito 10 March 2005, CISG-Online 1004 (Pace).

<sup>83</sup> Court of First Instance Larissa Decision 165/2005.

<sup>84</sup> Hof's-Gravenhage 23 April 2003, CISG-Online 903 (Pace).

<sup>85</sup> Hof van Beroep Gent 15 May 2002, CISG-Online 746 (Pace).

<sup>86</sup> Tribunale di Padova 25 February 2004, CISG-Online 819 (Pace).