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The principle of good faith in international sale of goods

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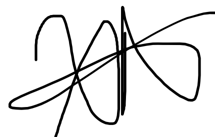

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This dissertation was written as part of the LL.M in Transnational and European Commercial Law, Banking Law, Arbitration/Mediation at the International Hellenic University.

Summary of the dissertation

"Good faith, bona fide, Treuglauben, buena fe " is a very important principle in many different aspects in our life. It has a different name in different countries and languages, but is it only the name that differs, or does also the meaning differ from country to country?

Through my dissertation, I am taking the opportunity to further research and analyze the facts, the theories, comments, opinions and the bibliography of the definition and the understanding of the principle of good faith in the international trade. The subject, due to its international character can have a very important role in the international transactions and contracts. The reason of its importance is the tremendous effect on the international trade in the contractual and precontractual obligations. The relevance increases due to the differing interpretation of the principle in legal traditions.

Good faith is a principle which is not explicitly defined and regulated in the Vienna Convention and therefore it can result to legal consequences for the parties before and during a binding contract. My paper is going to provide a detailed overview of the subject, how it is enforced in different states depending on the domestic law and morals of the countries, and also by providing research based on case law, court decisions and their scientific interpretation.

The trigger point for me to choose defending this subject as my master thesis, was the lecture on Transnational Commercial Law by Prof. Teresa Rodriguez de las Heras Ballell during the last fall and the summer semester of the LL.M program of the International Hellenic University. During this course, the professor offered us the opportunity to thorough analyze the United Nations Convention on International Sale of Goods and also interpret the principles which are not detailed listed in the Convention.

Through case solving technics used by the professor, my interest on the subject and on its legal aspects increased. I noticed that, the *"Good Faith"* is found five times in the Vienna Convention: in the Preamble, Art. 26, 31, 46, and 69 but none of them determines exactly how it is to be enforced in the contractual obligations by the parties, especially by the seller. During the lectures we were offered by the professor scientific commentary about article 7 of CISG. I was interested in finding out more scientific information about the subject, and that is why I believe that my thesis is my way to contribute in the research and interpretation of the good faith principle in international trade.

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I. Preface

What is the CISG all about and what makes it so important today? These should be the first two questions anyone answers in order to follow any research about good faith in the business world. CISG is a *multilateral treaty* that was adopted in 1980, came into force in the year 1988[1] and today includes more than 80 countries. Efforts to achieve a treaty which will be successful in the international transactions have taken more than 70 years.[2] Some of the contracting states today are Greece, Austria, Germany, USA, Spain, and Turkey.[3] The expansion in different countries and continents shows the uniformity potential and the creditability CISG offers.

The Vienna Convention applies to the contracts of sale of goods between parties whose places of business are in different states aiming to remove legal barriers between the contracting states. It applies regardless to the civil or commercial character of the parties.

The Vienna Convention offers the regulation of the international sale but doesn't provide analysis of several definitions, leaving space for interpretation. First of all, the place of business of the parties should be in different states, as mentioned in art. 1 of the Convention but there is no further definition of what is qualified as the place of business of each party. Would for example a subsidiary qualify as a place of business of a party? CISG embraces subsidiary places and art.10 provides with some regulation on the matter. [4]

Another not specifically defined clause is to be found in article 7, the so-called *good faith principle*. The Convention states *the need of serving in good faith* in international trade. The good faith is meant to govern the contracts in the international transactions between the contracting states but what does exactly mean that for the parties? And what if each country has different standards of what good faith is meant to be or does simply not acknowledge that

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[1] Source: *https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg*, retrieved on: 01.11.2020, Title: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG).

[2] *Christophe Bernasconi*, The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1), Chapter 1. Introduction: A glance back, p.1-2.

[3] Source: *https://www.cisg.law.pace.edu/cisg/countries/cntries.html*, retrieved on: 01.11.2020, Title: CISG: Table of Contracting States.

[4] *Christophe Bernasconi*, The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1), Chapter 2.1.2 What is meant by place of business? p. 4.

principle in the precontractual stage? Does the good faith clause apply to already made contracts or does it include the precontractual negotiations as well? [5]

“one may acknowledge the power and attraction of a general idea but the idea may be so general that it is of no practical utility to the merchant.” [6]

[5] *Diane Madeline Goderre,* International Negotiations Gone Sour - Precontractual Liability under the United Nations Sales Convention, III. The Role of Good Faith and Fair Dealing in Precontractual Liability: Divergent Views, p. 8

[6] *Benedict Sheehy,* Good Faith in the CISG: The Interpretation Problems of Article 7, 2. Conceptual Problems of Good Faith, p. 7

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II. Introduction

CISG is the only treaty which has so extensively been discussed by the end of the Second World War. Some of the points of this long discussion were followed by articles included in the treaty, certain points still exist today in the form of unanswered questions. The Vienna Convention doesn't apply to all international contracts, but it has earned the title of a "*skillful*" and "*effective*" tool in the international trade. We can identify, for the first time through the Convention, a chance for a global unity in international sales. The success of the CISG is also noted in the amount of the signatory countries. This number shows clearly the trust of different states around the world to the Convention. Therefore, it is also of great importance the scope of application of the Vienna Convention, which is divided in the personal, territorial, temporal and material. Article 1 is considered to be the most important article of the Treaty because it sets the territorial and personal sphere of application. [7]

As a result of the above-mentioned points, the fact that CISG dedicates one article (art. 7 CISG) about the maintenance of the good faith in international trade is remarkable. That shows clearly, the importance that the Convention wants to point out, in keeping the good faith principle alive in the international transactions between the signatory states.

A. Determining a contract as international – Article 1 and Article 10 of CISG

Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.[8]

According to article 1 the Vienna Convention is only applicable to international contracts. This clause distinguishes the international contracts from the domestic ones. The latter are governed by the domestic laws. CISG governs contracts of private businesses, therefore neither contracts between firms and consumers nor contracts of services. CISG can also apply by virtue of the parties' choice and when private international laws lead to the law of a

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[7] *Christophe Bernasconi*, The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1), Chapter 1. Introduction: A glance back p. 1-2.

[8] Source: *https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf*, retrieved on 02.11.2020, Article 1, United Nations Convention on International Sale of Goods (CISG).

Contracting State. The nationality of the parties is irrelevant for the Convention. Certain matters as for example, the validity of a contract, are excluded from the Convention. [9]

What determines the internationality of the contract? The parties' places of business. If company A has its place of business in the USA and company B has its place of business in France, then that qualifies as an international contract. A problematic arises when the good, that the French company purchases, for example, is for a construction in Germany. The purchased good never passes the French boarders, so it is going straight to the place of the construction a.k.a Germany. According to the Convention the qualification is still determined through the place of business of the company B and therefore Germany as the place of the construction is irrelevant for the qualification of the contract as international. [10]

What happens if a company has more than one places of business? If one party has more than one places of business, then it is determined by the place that has the closest connection to the contact and its performance.

Article 10

For the purposes of this Convention: (a) If a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;[11]

Article 10 is also very important to examine before qualifying a contract as international. The following court decision offers explanation about the application of Article 10 in qualifying a contract as international.[12] The buyer, whose place of business is France, has made a purchase offer to the seller of the product. The offer lands in France where the representer of the seller is. The seat of the seller is in Germany, where the order confirmation, the invoice and the delivery of the product came from. The French court decided in this case that, although

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[9] Source: *https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg*, retrieved on: 01.11.2020 Title: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG).

[10] *Christophe Bernasconi*, The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1), Chapter 2.1. The basic criterion: the parties' places of business, p. 2.

[11] Source: *https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf*, retrieved on 02.11.2020, Article 10, United Nations Convention on International Sale of Goods (CISG).

[12] Source: *https://www.uncitral.org/pdf/english/clout/digest2008/article010.pdf*, retrieved on: 02.11.2020, Title: UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, p. 44.

the German company might have an office in France, the closest relationship to the contract and its performance is established by the offices of the company in Germany.[13]

On the other hand, we should not automatically assume that the seat of the company is always the relevant place for determining the internationality of the contract. An example would be the case of the Austrian company closing a contract with a swiss branch which has its headquarters in Lichtenstein and the delivery place of the purchased good is Russia. Although Liechtenstein was not at the time a contracting state, the relevant place of business is the Swiss branch and the court decided that the CISG is applicable. [14]

B. Opt Out of CISG – Article 6 CISG

Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

Article 6 provides for the parties the option to opt out of the Convention. The B2B contracts preserve the maximum freedom in contracts and autonomy. This maximum freedom and autonomy for the business parties are also ensured in GISG. Therefore, if the contract parties choose a domestic law instead, they can preclude the application of the Convention.

Let´s see in practice how it works. Let´s imagine that the parties choose the application of Austrian law. The fact that, they choose the Austrian law as the applicable law in their contract, doesn't automatically preclude the Convention. CISG is considered as a part of national law of the contracting states. Therefore, by application of Austrian law the Convention is applicable in B2B contracts. [15] For several reasons, as for example the lack of validity regulation in the Convention, parties choose often to preclude CISG in their contracts.

C. What is good faith in international trade? - Article 7 CISG

[13] *Case French v German Company*, Case Law on UNCITRAL texts (CLOUT) case no. 400, Source: *https://cisgw3.law.pace.edu/cases/001024f1.html*, retrieved on: 02.11.2020.

[14] *Case Austrian v Swiss branch*, Case law on UNCITRAL texts (CLOUT) abstract no. 261, source: *https://cisgw3.law.pace.edu/cases/970220s1.html*, retrieved on: 02.11.2020.

[15] *Perner/Spitzer/Kodek* – Chapter 11.2 – UN Sales Law (1. Part) – Civil Law, Type: Video (Part of Teaching Material from Univ. Prof. Dr. Stefan Perner of a lecture from the WU-Vienna School of Economics), Date created: 01.08.2019, Published by Manz, Available at: *https://rdb.manz.at*, *https://www.youtube.com/watch?v=vqyZLkJDkKc&ab_channel=Wirtschaftsuniversit%C3%A4tWien*.

Some issues and principles, as the rule explained above about the relevant place of business and the opting out of the convention, are explicitly enshrined in the Vienna Convention. Some others, as the good faith principle of article 7 of the Convention gives the opening for interpretation, commentary and scientific research.

To answer the question of what good faith means for the international trade, we, first, have to answer what article 7 means for the Convention. As Prof. Dr. Ingeborg Schwenzer explains in her publication, the article has a double meaning. Article 7 (1) is there to establish an autonomous interpretation of the provisions of the Convention and article 7 (2) is ensuring the gap filling. [16] Filling the internal gaps under (2), means interpreting the case in compliance with the general principles that CISG is relying on. If there are no general principles to rely on, then domestic law will apply according to private international law. [17]

Article 7

(1) In the interpretation of this Convention, regard is to be had to itsinternational character and to the need to promote uniformity in its -application and the observance of good faith in international trade. (2) 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.[18]

In most civil law jurisdictions of the EU there is a general good faith provision named in the Civil Code. Some European countries also have a particular definition of the good faith concept. Most of the systems identify a subjective and an objective good faith. The subjective good faith is the concept of not having the obligation to know about facts of the case the so called *bona fide* of the party. The objective good faith refers to the obligation of acting in accordance with the contract governed by norms. We can point out explicit reference to the

[16] *Prof. Dr. Ingeborg Schwenzer LL.M,* The Application of the CISG in Light of National Law, International Commercial Law, p. 45-46.

[17] *André Janssen/Navin G. Ahuja*, The Imperfect International Sales Law: Revamp, Supplement or Leave it Alone?, International Commercial Law (IHR) 2020, Chapter: 6. Imperfections due to the external and internal gaps of the CISG, 6.2 External gaps p. 6.

[18] Source: *https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf*, retrieved on 02.11.2020, Article 7, United Nations Convention on International Sale of Goods (CISG).

above-mentioned distinction of good faith for instance in the German law but not in in the French law. [19]

Another important aspect to consider about good faith is, the differences of the concept in the civil law and common law jurisdictions. Here we should point out that these two jurisdictions are the most popular for the states to follow around the world. Therefore, considering the differences of these two systems, we can conclude to the different approaches around the concept of good faith. But that doesn't also mean, that countries which have the same legal system, have also the exact same approach around good faith.

A good example is France and Germany, which both have civil law jurisdictions. France has a general approach around the subject of good faith, whereas Germany has devoted over 500 pages in order to give a specific definition to the principle. [20] An example of the German law referring explicitly to the good faith principle in the Civil Code is the §815 BGB (Bürgerliches Gesetzbuch). The claim of the party depends on its good faith, the so called "*Treu und Glauben*". [21]

Considering the information given above and the broad and international character of the CISG, one might think it would be important for the Convention to include in the Preamble or under the article, a particular definition of what good faith should be considered as. But, what if the CISG intentionally excludes a concrete definition of the good faith? In order to answer that, we should focus on cases and the differences of the legal systems in the contracting states, that are based, partially, on the customs, national principles and workflow of each country.

D. Popularity of CISG over the years: Example of USA

China, Japan and Canada are the common states, that are seeking business partners in US. The USA chose to become a signatory country of the CISG. The fact that a large and powerful country chose to be included in the Convention, shows its importance in international scale. But does a declaration of membership of a country ensure the enforce of the Convention in the territory as well? Let's review that issue based on a survey.

[19] *Hesselink, Martijn W.*, Chapter 27 The Concept of Good Faith (February 26, 2004), 1. INTRODUCTION, p. 619-620.

[20] *Benedict Sheehy,* Good Faith in the CISG: The Interpretation Problems of Article 7, 1. Introduction, p. 3-4.

[21] *Heinrich Tetzner.,* Zivilrecht Juristenzeitung 14(15/16), Chapter: Zivilrecht, p. 482-483.

Professor Michael Wallace Gordon in his survey, as published in 2015 in *Business Law Today,* chooses to observe if Florida attorneys actually understand and apply the Vienna Convention in the correct way and in the appropriate cases. The survey included the lawyers of Florida who practice or have connection with cases of international law. Unfortunately, the survey showed that an unpleasant percentage of 3 attorneys of international law out of 10 only have sufficient knowledge of Convention.

Ten years after the survey, an attorney named George Philipopoulos sent a new survey to a group of lawyers, in order to examine if the knowledge of the US lawyers around the Vienna Convention was improved in different ways and the sufficient appliance of CISG has increased. The outcome of the survey was rather negative. The US attorneys chose rather to opt out of CISG, if possible, than studying the law and consider using the Convention in the contracts of their clients.

The main question is if lawyers are still avoiding the CISG today. The answer would be no because the courts reports show that the cases, where CISG is applied, have surprisingly risen in the last years. Important point is also, that a not well- presented attempt to opt-out today, might be ineffective if written incorrectly. [22]

As a conclusion, taking in consideration the survey reference, we can point out, that CISG has entered and established itself over the years in the business world. The fact that over the years the education of jurists around the Convention has leveled up, indicates the effectiveness of the treaty.

III. The moral vs the legal principle of good faith

Due to the insufficient definition of the good faith in international business there has been a lot of discussion about the dilemma, if the good faith principle includes only the moral part of the parties negotiations and obligations without bringing any legal sanctions with it, or if it goes beyond the moral principles set by the parties, receiving legal binding form in the precontractual negotiations and contractual obligations.

If we accept only the moral principle of good faith, then breach of contract based on *"bad faith"* will be overturned in every court. On the other hand, if the moral obligation levels up to a legal

[22] *Kristen David Adams and Candace M. Zierdt*, Business Law Today (June 2015 Journal Article), published by: Law Association, Title: United Nations Convention on Contracts for the International Sale of Goods, p. 1-2.

obligation of the party, then lawyers, commentators and judges are confronted with the problem of how to analyze the meaning of the principle and how to interpret and use it.

If good faith is expressed as a moral principle, we can consider the characteristics of honesty and loyalty as the standards for the parties' obligations. But even if we include these moral standards, one's loyalty as well as honesty might differ from the others. The moral obligation actually is translated as the interest of one party in account of the other. On the one hand, the moral character of good faith could prevent an unjust decision in a case. The unwell interpreted norm could lead to an unfair decision. Moral interpretation of good faith could win this unfair decision. In that way, the moral value of good faith could play an important role in the law. [23]

On the other hand, the whole approach of a moral obligation is too theoretical to be taken into account in the business world. One might think a decision against him is unfair and good faith should be able to overturn his cases' decision, another might defend the argument, that the norm is clear, and decision was made in compliance with good faith. A so theoretical approach, without any binding piece of legislation, could lead to an even bigger dispute of the parties, disrespect of court decisions and difficulty of enforcement by the states. The feeling of the power of a person to be able to overturn a decision based on his moral good faith could lead to a chaos in the jurisdiction of a state.

The good faith is mentioned as an open norm. The difference of good faith is that there is no concrete rule, as there is for the other principles in contract law. According to this interpretation, good faith in article 7 (1) is considered as a norm which cannot be included in the legislation as abstract, because its application is based on the facts and circumstances of each individual case and it should be concretized on the case in order to be applied. [24] As an open norm, the good faith is offering the advantage of a wide interpretation, but a balance should be set in order to provide security next to flexibility. [25]

An example of application of good faith in individual cases is the OGH 8Ob104/16a of the Austrian Supreme Court, where the good faith principle in this case is provided by a court decision. The one party of the contract is from Italy and the other from Austria. Both parties did not explicitly exclude the application of CISG in their contract, according to article 6 of the

[23] *Hesselink, Martijn W.*, Chapter 27 The Concept of Good Faith (February 26, 2004), 2.2 Normative concept, p. 620-621.

[24] *Hesselink, Martijn W.*, Chapter 27 The Concept of Good Faith (February 26, 2004), 2.3 Open Norm, p. 621-622.

[25] *André Janssen/Navin G. Ahuja*, The Imperfect International Sales Law: Revamp, Supplement or Leave it Alone?, International Commercial Law (IHR) 2020, Chapter 7. Imperfections due to the use of open norms and flawed drafted provisions in general, 7.1 General, p. 7.

Convention. The seller and the buyer entered the contract without explicitly acquaint the terms and conditions. Due to the fact that the one party never made them available to the other, this is an infringement of good faith based on the Convention. The party has the obligation to make them somehow available to the other, in order to act in favor of the contract and therefore in good faith.[26]

Defined as an open norm, references to the good faith principle can be found in different European legislations. In the German Law for example, article §242 refers to the obligation of the seller to perform the contract preserving good faith. In Switzerland article 2 of the Civil Code refers to the obligation of acting in good faith when fulfilling the contractual obligations. In Austria, article §914 of Civil Code (ABGB) refers to the fair practices in the performance of contracts in general.

Another argument which should be discussed at that point is the possible fading of morality as a fundamental element of the jurisdiction's development. The norms´ purpose is to help the society maintenance. Decreasing the value of the moral good faith could lead to the norms being less humane. That could lead to decisions enforced only by the book, without human intervention having any value in the process.

The moral principle should work supplementary to the legal rules. Every country adopts its own moral principles, which might differ from one another, but there should be common guidelines about what is to consider as moral under the good faith principle, which will base on the legal rules set by jurisdictions, judgements, legal systems etc.

IV. The civil law vs the common law approach

A. Common Law approach

Common law tends to generally reject the application of good faith in international contracts. In the past, during the time when there were still merchant´s court, there has been a sign of existence of good faith in trade. This sign seems to have been disappeared after that time. Over the years, courts seem to use good faith principle only to fight the problems of extreme injustice. Nowadays, common law in England rejects the application of *culpa in contrahendo* and therefore good faith is difficult to apply.

[26] Austrian Supreme Court Decision (OGH), 29.06.2017, 8Ob104/16a.

Comparing the English common law with the American, we can underline particular differences in the development of good faith. USA have chosen to include good faith in the UCC (Uniform Commercial Code). In the USA, the principle of good faith is interpreted in three different ways. It can be interpreted in the restrictive way, determining the indirect terms of the contract and as the *"excluder principle*", which excludes the specific bad faith types of behavior. The third way to interpret good faith is as a restriction of the benefits of the contract and limitation of the development and exercise of norms.

Bad faith in American common law constitutes a breach of contract. The indicator of bad faith is the lack of performance of the contract. There are remedies in case of bad faith, as for any other breach of contract. Bad faith can independently constitute a lack of performance of the contract, even if there is no other breach of contract. The American jurisdiction provides remedies for a breach of contract based on bad faith. The appropriate remedies depend on each particular case. What counts as good faith? There are several examples of what can be determined as bad faith in contractual liability. Bad faith is when a party fails to perform an obligation that was agreed by the parties or when a party fails to pay the price on due day. [27]

As a result of the above-mentioned countries, we can clearly point out the rejection of the English courts to enforce the principle of good faith, but in other common law societies (here USA) the principle has established itself in the judicial procedure.

B. Civil Law approach

The civil law appears to have a different approach around the subject of good faith. The main difference to common law is that civil law includes the principle of good faith (only the intensity depends on the country). [28]

In order to examine the civil law approach, we should first mention the impact that results from the European countries. At that point, it would be important to examine the definition of PECL about good faith. PECL article 1:102 [29] describes good faith as the obligation of the parties to

[27] *Speidel, Richard E.*, "The 'Duty' of Good Faith in Contract Performance and Enforcement." Journal of Legal Education, 1996, p. 537–543.

[28] *Benedict Sheehy,* Good Faith in the CISG: The Interpretation Problems of Article 7, 1 6. Interpretations of Commentators p. 19-24.

[29] Principles of the European Contract Law, Chapter 1, Section 2: General Duties, Article 1:201: Good Faith and Fair Dealing (1) Each party must act in accordance with good faith and fair dealing, (2) The parties may not exclude or limit this duty, available at: *https://cisgw3.law.pace.edu/cisg/text/textef.html#a1201*.

act as ordered by the contract and article 1:201 [30] to not exclude or limit this duty. We can point out the importance of good faith for PECL and how it can influence the expansion of CISG's good faith principle. [31]

For example, the German law has devoted over 500 pages regulating what is considered as *"Treu und Glauben*". The Italian law considers the good faith as a legal obligation of openness, fairness and social solidarity. The French Civil Code describes the principle of good faith as *"shallow"*. [32]

The first case where good faith appeared on scene in civil law was in 1993. The case was about *Eximin*, the Israeli seller and *Textile and Footwear*, the Belgian buyer. The buyer ordered boots from the seller with of Levi's Jeans symbol in order to sell them in the US. The US Custom Authorities couldn't allow this product to be imported because of violating Levi's trademark. The boots were imported without the symbol and in fact with a lower price in the US market. The buyer requests from the seller compensation for the loss.

The Court decided that the seller is not fully responsible for the breach of trademark of another party in this case, because both parties are or should have been aware of the infringement of trademark of Levi's. The Court decided that the seller and the buyer, knowing about the infringement are acting in bad faith and therefore they should carry the costs in half, 50% each.

The case is showing how the good faith principle can be enforced in the judicial procedure. The Court decided about the obligation of the seller in acting in good faith based on the Art. 39 of the Israeli contract law. This case helps us understand that the CISG doesn't set a concrete obligation of what to consider as good faith in every single contract, but the principle was and is a restricted principle, which needs interpretation and complementation of domestic law. [33]

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[30] Principles of the European Contract Law, Chapter 2, Section 2: Offer and Acceptance, Article 2:201: Offer (1) A proposal amounts to an offer if: (a) it is intended to result in a contract if the other party accepts it, and (b) it contains sufficiently definite terms to form a contract, available at: *https://cisgw3.law.pace.edu/cisg/text/textef.html#a1201*.

[31] *Bruno Zeller*, Good Faith - The Scarlet Pimpernel of the CISG, Part 1: Domestic Interpretation of good faith (iii) Good faith and the European Contract Law, Pace Law School Institute of International Commercial Law, May 2000.

[32] *Benedict Sheehy,* Good Faith in the CISG: The Interpretation Problems of Article 7, 1 6. Interpretations of Commentators p. 19-24.

[33] *Case 3912/90: Eximin v. Textile and Footwear,* Israeli Supreme Court, Date: 22 August 1993, available at: *http://cisgw3.law.pace.edu/cases/930822i5.html*,

There are a lot of other cases, some of them I will mention at the next chapters, that prove the existence of good faith in civil law jurisdictions. An important point is the difference of level of enforcing good faith in the civil law jurisdictions. Is there actually uniformity in the exercise of good faith within the same legal system?

V. Good faith in negotiations

As we have already interpreted in the previous chapters, there are different approaches about the degree to which breach of good faith is countable for a legal system. The different approaches are mostly based on the diverse system of the countries in which good faith in enforced. The most important differences result from common and civil law jurisdictions.

Following these differences of good faith in contractual liability in the practice and interpretation, the same problem of liability of good faith will consequently occur in the precontractual negotiations stage between the two systems.

A. Precontractual liability in civil law jurisdictions

In the civil law jurisdiction, where the contractual obligation of good faith is recognized and enforced, the precontractual good faith has also been established. *“Culpa in contrahendo”* is recognized and enforced based on contract and tort law of each jurisdiction.

Culpa in contrahendo means *fault in negotiation* in Latin and its definition roots back to 1861. The meaning of precontractual negotiation is for the parties to act properly and in good faith before closing the contract, when they are still negotiating about the goods and the conditions of a contract. The concept of culpa in contrahendo goes back to Roman law, according to which principle a party, who suffered damage by another, could claim compensation, even if the contract is invalid.

The source of precontractual obligations in modern times lies in the German contract law. The German law takes over the definition of culpa in contrahendo originated in Roman law and enforces it as a law in the precontractual negotiations. The German law has helped to expand the meaning of the roman doctrine in many other civil law jurisdictions such as France, Switzerland and Austria.

The principle ensures to compensate the party, that relied on the validity of a contract and suffered damages. Damages are caused in the precontractual stage by two behaviors according to the doctrine. The first one is, if one party is intentionally preventing the establishment of a contract, and the second is, when a party fails to inform properly the other

party about facts and circumstances that might have changed, and which might affect the closing or the conditions of the contract. [34]

An example about acting in bad faith in precontractual negotiations is the following. A seller has agreed with the buyer for the seller to keep a specific offer available for a specific time and therefore give time to the buyer to accept or decline the offer. The buyer comes back to the seller in order to announce the acceptance of the offer and the seller has made the offer unavailable by selling it to someone else, although the expiration date was not due. The buyer, by having faith in the seller´s saying, has also purchased other goods related to this one and has turned down several other offers about the same product. The other offers are not available anymore and he cannot work without having this product. He should therefore be able to claim compensation for the other purchased goods, which are not useful without that product, for the offers he lost because of trusting this seller, for the time, which he will need in order to find a new offer, and for the money he will lose because he will not be able to work without this specific product until he finds a new offer.

B. Precontractual liability in common law jurisdictions

The common law jurisdictions follow their traditional view around the good faith approach. Common law jurisdictions are basically encouraging the model of freedom in negotiations. According to that, a party is not obliged to provide the other with security while in negotiations and has no obligations regarding the offer he/she will make. Parties are starting precontractual negotiations with the aim to achieve a mutual agreement but before the agreement they carry no obligations. According to this approach, in the above-mentioned example, the buyer who suffers from loss of other offers and time as well as money from the unavailability of the product, will not get any compensation, because there is no legal binding contract. [35]

As mentioned earlier, UCC (Uniform Commercial Code) is of significant importance for the US, because of its crucial role in the contracts of sale of goods.[36] The UCC chooses to imply the duty of good faith in contractual obligations under Article 2. Although that counts as an

[34] *Diane Madeline Goderre,* International Negotiations Gone Sour - Precontractual Liability under the United Nations Sales Convention, III. The Role of Good Faith and Fair Dealing in Precontractual Liability: Divergent Views, A. Culpa in Contrahendo: The Civil-Law Answer, p. 8- 10.

[35] *Diane Madeline Goderre,* International Negotiations Gone Sour - Precontractual Liability under the United Nations Sales Convention, III. The Role of Good Faith and Fair Dealing in Precontractual Liability: Divergent Views, B. Precontractual Liability at Common Law: Sneaking in the Back Door, pp. 10-13.

[36] Source: *https://www.uniformlaws.org/acts/ucc*, Uniform Commercial Code, Uniform Law Commission, retrieved on: 13.11.2020.

indicator of enforcement of the principle of good faith for the US, there is no specific precontractual liability implication.

Why would the precontractual liability of acting in bad faith be excluded from the table of American negotiations? One aspect is that, the freedom of negotiating increases the freedom to search the market and receive several offers, and as a result of that, it also increases the market movement and development for the US. So, the freedom should be the motive for the parties not to be afraid to enter negotiations and consequently contracts. US focuses on the economic consequences only of the contractual obligations. [37]

Although US has chosen to follow the above-mentioned policy on precontractual negotiations, there are sometimes exceptions in common law where precontractual liability can be identified and enforced.

In case of *Yam Seng Pte Ltd. v International Trade Corporation Ltd*, the International Trade Corporation, gave the right to Mr. Seng to sell in Asia, Middle East, Africa and Australia, fragrances of "Manchester United". The International Trade Corporation decided to renounce its agreement with Mr. Seng. The High Court of England decided on causation of the case that the English courts should not always reject the good faith. In this case, Mr. Leggatt, decided that there should be, in specific contracts, an implication of good faith and honouring an agreement. But the court referred only to the contractual obligations. The court didn't take a step further to decide including the obligations, which might result from negotiations. [38]

Although there have been developments of the English courts in adopting the good faith in contractual obligations, the main aspect about the freedom of precontractual negotiations without liability, as in the US, sustains. They define it as *freedom of and from contract*.

Quoting Lord Ackner, the best option for English legislation in 1992 was to avoid the recognition of good faith in precontractual negotiations. If there is no obligation in negotiations, then the parties have the right to negotiate with third persons and have the right to retrieve

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[37] *Diane Madeline Goderre,* International Negotiations Gone Sour - Precontractual Liability under the United Nations Sales Convention, III. The Role of Good Faith and Fair Dealing in Precontractual Liability: Divergent Views, B. Precontractual Liability at Common Law: Sneaking in the Back Door, p. 11.

[38] *Case Yam Seng Pte Limited v. International Trade Corporation Limited*, Case No: HQ11X00722, High Court of Justice Queen´s Bench Division, Judgement of 01 February 2013, available at: https://www.trans-lex.org/382600/_/yam-seng-pte-limited-v-international-trade-corporation-limited-01st-february-2013-%5B2013%5D-ewhc-111-/, retrieved on: 29.11.2020.

information without entering any legal obligation. Furthermore, Lord Ackner believed that negotiations are not always fruitful, so there is no point in enforcing binding negotiations.

According to English common law, precontractual good faith obligation can be challenged on different grounds. It can be challenged on public policy grounds, functional grounds and its difficulty of drawing a line between moral and legal obligation. On a functional ground, the position of being able to challenge the negotiation agreements without any legal basis, might bring dysfunctionality during legal proceedings, because of the excessive amount of cases landing in the courts. Regarding the third ground, the problem results from the difficulty of the legal instruments to identify when the good faith principle is breached, respectively, in which cases.[39]

C. Comparing the legal approaches

At that point, we can clearly compare the two very different legal approaches of the two main systems around the world, the common and the civil law jurisdictions. The civil law approach is near to the European principles, in most of which, the civil code recognizes binding obligations for the buyer and for the seller in the precontractual stage as well as in the contractual stage, even if that is not explicitly written down in the contract. In a following chapter we will analyze in detail how the domestic laws in different European countries have established good faith in a direct or indirect way through their legislation and if that is affecting the transactions of the state and of other states in the international ground. The civil law approach ensures the obligations of a seller, if a binding offer is made. For the Europeans that creates a safe environment for international transactions, having in mind that every buyer has the right to decide about an offer within an agreed and scheduled time. For the seller this agreement should be working as well. His offer is going to help him create a trustful negotiation environment with his client, which will lead him to be one step closer in winning over more customers. At that point, we should mention, that the general aim of the European economic area is to create secure transactions. That helps us understand, that the most important point of the civil law legislations is to create a secure environment for contracts and therefore for transactions, which the non-Europeans can also trust.

On the other hand, the common law jurisdictions prefer to not regulate the good faith in precontractual negotiations, letting the principle on the background, but enforcing it when a relevant case appears. The common law doesn't deny the evidence of good faith in

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[39] *Leon E. Trakman and Kunal Sharma*, The Binding Force of Agreements to Negotiate in Good Faith, II. Challenges to a Duty to Negotiate in Good Faith, pp.600- 604.

negotiations, but it also doesn't establish a clause for it, in order for every claimant to be able to demand compensation based only on the principle of good faith. The approach of not recognizing breach of good faith in negotiations roots back to the royal legal enforcement of the 19th century. Considering that, the historical influences in the different jurisdictions have played an important role in the development of the law, and as a matter of fact in the progress of interpretation and enforcement of good faith.

But as we saw earlier, there are certain cases where common law enforces precontractual liability. US courts basically recognize liability in negotiation stage under three theories. The first one is restitution, if the one party gets monetary benefit during negotiations. The second theory is misrepresentation. That means when a party gives intentionally wrongful information about the goods during negotiations, in order to persuade and win over the other party to enter a binding contract. The third theory regards the estoppel principle. According to that theory, it consists a breach of contract, when a person makes a promise with the intention to cause a disadvantage to the other party and persuade him afterwards to negotiate in desired terms. [40]

D. What is the Estoppel Principle and how is it relevant in the interpretation of good faith?

A very important question while being in negotiations is, what happens if somebody acts contrary to promises and statements, which he made. Let's imagine, A has made a promise to B to proceed to a specific obligation. At that point, International Law presents four dogmatic aspects around these promises: The recognition of a legal position, the acquiescence, the waiver and the estoppel. All four of these categories have their roots in the principle of good faith. [41]

The main difference between these aspects, is that three of them, recognition, acquiescence and waiver are unilateral transactions and therefore the legal position can change automatically, in comparison to the estoppel principle. An example are the nuclear tests that France operated in the South Pacific, against which New Zealand and Australia brought legal actions to the International Court of Justice (ICJ). Before the verdict of the ICJ, France has promised to stop from that point on, to operate these atom bomb tests. The Court declared a

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[40] *Diane Madeline Goderre,* International Negotiations Gone Sour - Precontractual Liability under the United Nations Sales Convention, III. The Role of Good Faith and Fair Dealing in Precontractual Liability: Divergent Views, B. Precontractual Liability at Common Law: Sneaking in the Back Door, pp. 10-13.

[41] *Andreas Kulick,* Estoppel im Völkerrecht — Antworten auf drei dogmatische Fragen, A. Einführung: Unterschiedliche Lösungen für dasselbe Problem?, pp. 522-523

recognition of fault of France, the defendant, and then the case was declared as closed. [42] That shows how a recognition as a unilateral act works in practice.

On the contrary, estoppel cannot be interpreted as a unilateral act. The estoppel can be interpreted as the act when the legal position stays the same, but the other party is prevented from appealing to this. So, the legal position is not changing, but it includes a burden of proof.[43]

Let's explain the principle based on the *Barcelona Traction* case. Belgium filed a case against Spain and after that, Spain filed four objections on the case. Belgium was claiming compensation caused to the domestic shareholders of Barcelona Traction according to which Spain was acting against the principles of international law by the measures, which were taken. The Court decided that Belgium has no right to exercise diplomatic protection to its nationals in a Canadian Company, because of the measures that the Spanish organs have taken. Deciding in favour of Belgium could open a pandoras box of other claims of companies´ shareholders. In this case, we can see, that although Belgium's claim was dismissed, the case was based on the concept of estoppel, so there is a stable legal position, not unilateral, and a burden of proof on the actions. [44]

For the good faith principle, the most important connection is located in the promissory estoppel. What is the promissory estoppel?

"Promissory Estoppel Is A Shield, Not A Sword" [45]

Promissory Estoppel is nowadays wide interpreted and enforced. The important problem in contracts is the relationship between reliance and bargain. These two definitions are very closely related. Reliance in contract law arises after a bargain, or a bargain hunting. According to the objective observation, reliance comes in negotiations but can only be proved if the

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[42] *Case Australia v. France – Nuclear tests*, ICJ No.400, International Court of Justice Judgement of 20 December 1974, available at: https://www.icj-cij.org/public/files/case-related/58/058-19741220-JUD-01-00-EN.pdf, retrieved on: 15.11.2020.

[43] *Andreas Kulick,* Estoppel im Völkerrecht — Antworten auf drei dogmatische Fragen, A. Einführung: Unterschiedliche Lösungen für dasselbe Problem?, B. Die Entwicklung des Estoppel-Prinzips unter besonderer Berücksichtigung der Rechtsprechung internationaler Gerichte und Tribunale, pp. 522-531.

[44] *Case Belgium v. Spain - Barcelona Traction*, ICJ No. 50, International Court of Justice Judgment of 24 July 1964, available at: https://www.icj-cij.org/en/case/50/judgments, retrieved on: 15.11.2020.

[45] Video available by Blackstone School of Law regarding Promissory Estoppel, Title of the Video: Limitation#3: Promissory Estoppel Is A Shield, Not A Sword (21), Available at: https://www.youtube.com/watch?v=NYha32_lAwA&ab_channel=BlackstoneSchoolofLaw, Accessed on 19.11.2020.

parties have proceeded to bargain. But then, if the exchange has already occurred, then the whole meaning of trusting in the contract deletes its substance, because the parties, at that point, are already bound through the contract.

According to that logical observation, the promise could never be enforceable in legal proceedings. So therefore, we can establish, that through the promissory estoppel, the donative promises have to be fulfilled during the proceedings. By the time we establish the necessity of promissory estoppel, another issue arises. The reliance principle has the potential to overwhelm the expectation principle. If in all cases the expectation principle was enforced, then most of the cases would end up in court, based on what each buyer might expect from the seller in the contract, based on their precontractual negotiations. That would end up, for the reliance interest, to have a higher importance in addition to the actual expectation interest. Taking that into account, the bargain stays as the main concept of contract law, but it has been given important legal value to the protection of reliance thus the promissory estoppel.

Let's take a closer look to a common law interpretation of estoppel. The principle doesn't create new claims, it can only prevent a party from maintain at a strict right in the case that this right would be unfair if exercised. The promissory estoppel is acting as a shield, not as a sword. It can stop actions of preexisting obligations, not create new ones. The promise should wait to be sued based on a preexisting obligation.

The Second Restatement of Contracts analyzes, that there should be remedies available to base the breach of promise in a negotiation. But these remedies should be limited to the court's choice. Some other commentators pointed out, that if the compensation of promissory estoppel is to be established in law, then there should be a criterium of expectation in order to be able to measure the amount of compensation, due to the difficulty in proving the amount of damage. Based on that, in several cases the concept of promissory estoppel is actually used as the expectation damage, measured by the expectation interest. [46]

The common law estoppel in theory is relevant only for cases referring to past or present events. But in practice, this doesn't seem to be a rule that is actually followed. A good example is available at the case *Fenner v. Blake.* In this case the owner of the house made an oral agreement with the tenant to end the tenancy earlier that the valid day of notice. The owner therefore sold the house on the agreed day. The owner sued the tenant for breach of their oral

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[46] *Jay M. Feinman*, Promissory Estoppel and Judicial Method, I. The development of Promissory Estoppel, pp. 681-687.

agreement. Here the parties made an oral agreement and the tenant's statement has a future intention. But the decision included that promise as a fact of the case. [47]

To sum up, the promissory estoppel seems to have established an important value in the legal system, and judges of courts are considering the factors of a promise made during the negotiations, or/ and without a binding contract as facts of the case to base their decision upon. Both legal systems have implemented the promissory estoppel and the evidence of that is resulting from numerous cases.

VI. The remedies

The first matter to be analyzed is what exactly is included in the scope of application of the CISG, in order to be able to determine the remedies, that are resulting from the good faith principle. In comparison to the PECL[48] and the UPICC [49], the CISG, as of the article 4 of the Convention, excludes issues with agencies, assignment of claims, set off, limitation period, method of calculating interest. These matters are governed by the domestic law of each country. [50]

The Convention establishes under article 7 the obligation to preserve the concept of good faith in international trade but excludes the exact definition of what is to consider as binding. In many systems non- performance remedies can be based on good faith. Most of the legal systems have accepted the principle of *exceptio non adimpleti contractus.* Until the one party fulfills its obligations under the contract the other party has the defense claim to not perform its obligation as well. [51]

Based on CISG and the good faith, the seller has the obligation to deliver a conforming and functioning product and the buyer has the obligation to pay the price. The starting point of the remedy of a buyer, who relied on the agreement with the seller, is article 45 CISG. If the seller fails to perform any of the obligations, the buyer may claim performance of the contract

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[47] *Singh, M.,* Equitable and Common Law Estoppel Distinguished, University of Malaya Law Review, pp. 296-299.

[48] PECL: Principles of European Contract law, available at: https://www.trans-lex.org/400200/_/pecl/, retrieved on: 23.11.2020.

[49] UPICC: Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts, available at: https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses, retrieved on: 23.11.2020.

[50] *Busola Omosalewa Akinyera*, Applicability, Similarities, Differences among CISG, UPICC and PECL And the Binding Nature of the Concept of Good Faith under These Instruments, pp. 4-16.

[51] *Hesselink, Martijn W.*, Chapter 27 The Concept of Good Faith (February 26, 2004), 3.1.8. Remedies for Non-Performance, pp. 633-635.

including substitute delivery or repair, avoidance of the contract, price reduction and/or damages. In other words, if the seller didn't deliver the goods as promised, that constitutes a breach of good faith and as a matter of fact a breach of contract and the available remedies are going to be used in the cases.

Article 46 CISG regulates the lack of conformity of the delivered products to the buyer, unless that is unreasonable. If the product doesn't meet the standards, the buyer can request repair or if the product cannot be repaired, request a substitute only if this constitutes a fundamental breach of contract according to article 25 CISG.

According to article 49 of the Convention, the buyer has the right to avoid a contract if there is a fundamental breach. According to the article 50 CISG the buyer has the right to reduce the price he will pay, if the product is not conforming to the standards set by the contract. That seems fair, considering that the buyer relies on the conformity of the product that he/she will receive from the buyer. In case of non-conformity, the party could have made another deal with another seller, which he would have considered better. Therefore, a reduction of the price seems to regard good faith as well.

Any breach of contract can cause damages to the other party. A party can claim damages according to article 45 (1), article 74 to 77 CISG. The contract is regarded as a promise of the result that a party will get (guarantee-based system). [52]

Clearly there are remedies available for any breach of contract. The good faith principle has a broad and general character. Therefore, it is difficult in some jurisdictions, to determine a breach of contract only based on article 7 of CISG. The remedies starting from article 45 of the Convention set as a standard the existence of good faith of the parties when closing a contract. Anyone who suffered a loss because of relying on the good faith of the other party, which has caused a breach of contract, can claim compensation.

VII. Good faith around the world- Is it possible to create uniformity?

As analyzed in the previous chapters, the Vienna Convention offers much interpretation and as a matter of fact a lot of scientific research about how every country reacts with the articles of CISG. So, the next important question, is what impact has the CISG, under which also Art.7 of the Convention, on the national legal systems around the world. A good point is that the

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[52] *Peter Huber,* CISG – The Structure of Remedies, A. Outline of the Buyers Remedies under CISG, pp. 14-18.

Vienna Convention might influence the views, enforce and reforms of the domestic legislation in the states but it is important to keep in mind, only because a state is a contracting member of CISG doesn't automatically mean, that the state applies the Convention in its transactions, and especially the same way as the other states do. As referred to in article 6 of the Convention, there is the Opt Out option. Business actors have the option to opt out of the Convention partially or wholly. Could that prevent uniformity?

Another important point is, what happens with the articles that are not exclusively regulated by the Convention, as for example article 7. In order to avoid any mistake in enforcement, it is important for the jurists of the contracting states to be informed about interpretation and case law of the CISG. The CISG represents around the two thirds of worlds trade. That shows us the importance of the adoption of the Convention. It is also remarkable, how it can affect the domestic and international trade and therefore the correct use of the articles of the Convention could cause a world's uniformity in transactions.

In the last years there have been reports in order to determine the application of CISG by the states and how effective that is. The reports show the results of 23 countries, which don't apply CISG in the same way and extent. In some states the education of jurists and students has brought a positive outcome and enforce of the CISG like China, Israel, Russia and Slovenia, but in some others despite the education provided, is barely noticeable. Most of the contributions are available in the English language, but there are also a few in French and Spanish. [53]

Let's see in detail the diversity of good faith around the world based on different cases and interpretation. As I have already mentioned in the previous chapters, the Germans refer to good faith as *Treu und Glauben.* This definition covers in German, the good will (Gutwilligkeit) and the good belief (Gutgläubigkeit). The BGB (Bürgerliches Gesetzbuch), which is the German Civil Code, refers to the good faith several times, but this as well cannot require as a precise definition on the matter. Quoting Zeller *"it is impossible to find in German law a definition of what exactly good faith means, despite the fact that the observance of Treu und Glauben as noted in §242 and §157 has been enacted since 1900".* [54]

[53] *Bridge, M.,* The Modern Law Review, *72*(5), (2009). Title: Reviews, pp. 867-

[54] *Prof. Dr. Camilla Baasch Andersen*, Good Faith? Good Grief!, Abstract, I. Introduction, pp.310- 313.

On the other hand, the fact that the European countries choose to apply the good faith principle in several cases in their domestic courts, shows the success of adapting the principle as their own. The breach of good faith can result in unfairness, invalidity for mistake or fraud. [55]

In Australia, the case *Renard Construction (ME) Ltd. v. Minister for Public Works* brought the judges one step closer to the concept of good faith. In the Australian Court of Appeals, where this case landed, the judge has considered several factors that bring the common law system closer to the idea of recognizing good faith in trade. By referring to the article 7 in this case, the judge intended not only to observe the article of the Convention as such, but also implied the general duty of good faith that should govern the international transactions.

In France, it seems also that the good faith principle has earned a place in the legal system. In the case *SARL Bri Production "Bonaventure" v. Societe Pan African Export*, the buyer from the US sued the seller for breach of contract. The seller is from France and the buyer brought his claim before the French court. The agreement of the parties included, that the products will be resold to a third party from South America. The buyer sold them to a Spanish third party. The buyer didn't present this fact to the seller. During the time of the delivery the seller found out that the buyer sold products to a Spanish third party and he refused to deliver the last installment of the agreement. The buyer sued the seller for breach of contract. The court decided that the case falls under article 7 of CISG, because the buyer acted in bad faith in the agreement, which he had with the seller.

Other indicators of uniformity in good faith are the arbitral awards. In the arbitral decisions generally, there has been great influence from the good faith principle. Arbitrators tend to base the decision of the arbitration procedure, the so-called arbitral awards, considering the breach of contract based on bad faith. [56]

According to Goderre "*the lack of uniformity in good faith is almost inevitable".* There would have been better chances to create uniformity if there was a definition of this subjective clause. Because of the non-existence of an objective norm, the courts must search for reliance of their

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[55] *Hesselink, Martijn W.*, Chapter 27 The Concept of Good Faith (February 26, 2004), 3. Good Faith in practice, p. 627-632.

[56] *Diane Madeline Goderre,* International Negotiations Gone Sour - Precontractual Liability under the United Nations Sales Convention, IV. Precontractual Liability under the Convention, pp. 15-20.

decisions about good faith, at the general principles upon which the Convention is based and at the private international law. [57]

In Germany, as previously mentioned, the judges often enforce the principle of good faith in cases, when needed. Germany has also made an effort to define good faith and add it in the legal system, through the Civil Code. In the *machinery case*, the seller from Germany sells a used gear- cutting machine to the Spanish buyer. The order confirmation included the standard conditions of sale and an exemption of liability of the seller for any defects on the product. The delivered machine was only functional with assistance of external experts. The buyer claims reimbursement. The court has observed that the standard terms and conditions around the world could differ. The buyer should acknowledge the standard conditions. The problem is that it is difficult to await in every single agreement for the buyer to declare the knowledge of these conditions after asking for them. That would result to less contracts made and unwillingness to form a contract by the parties. Therefore, the German Supreme Court (Bundesgerichtshof) decided that, according to the good faith principle, the parties have the duty to cooperate and the seller should bring the standard terms (inquire about the standards) at the buyer's disposal, in order for them to be part of a binding contract. [58]

In Austria, the good faith principle follows the German standard, which recognizes in several cases a breach of contract in case of bad faith. In the *coffee machines case*, the Italian seller sold coffee machines to the Austrian buyer and the buyer sold these to its customers. Unfortunately, the sold coffee machines were defective and the attempts to repair the problem didn't help. The machines have lost their commercial value and the buyer refused to pay the price. In this case, the Supreme Court of Austria (Oberster Gerichtshof) decided the appliance of article 7 of CISG, according to which the good faith should govern this contract. [59]

Every country interprets and enforces the good faith in a way, which is compatible and useful for the country's jurisdiction. The important point is, that the countries have established good faith in their national jurisdictions. The uniformity of good faith or not is a subjective decision, due to many different opinions and references.

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[57] *Diane Madeline Goderre,* International Negotiations Gone Sour - Precontractual Liability under the United Nations Sales Convention, VI. The Future of Precontractual Liability under the Convention, p. 21.

[58] *Machinery Case,* Case Nr. VIII ZR 60/01, German Supreme Court (Bundesgerichtshof), Judgement of 31 October 2001, Available at: http://cisgw3.law.pace.edu/cases/011031g1.html, Accessed on: 24.11.2020.

[59] *Coffee Machines Case*, Case Nr: 3 Ob 193/04k, Austrian Supreme Court (Oberster Gerichtshof), Judgement of 23 May 2005, Available at: https://cisgw3.law.pace.edu/cases/050523a3.html, Accessed on: 24.11.2020.

To sum up, the uniformity might have been reached, because the countries are primarily preserving the same idea, which is the reliance of the parties on an agreement. The differences on the level of interpretation and acceptance is another point, which is also important, but not vital for the uniformity. That is so, because there is very little chance that all the states are going to understand and enforce a so general principle, the good faith, exactly in the same way. There are also other norms, which interfere with good faith in each country, and therefore, every jurisdiction should regulate the principle in accordance with its own norms, in order for the good faith to win a place in the domestic legal system.

VIII. Conclusions

CISG has managed to enter into the contracts and play an important role in the international trade. The Convention offers a choice of law, which is neutral and internationally recognized. Why would someone choose the Convention over the domestic law? Because the domestic law is not familiar to all different international traders, so that makes it much more difficult for a seller to trust a party whose applicable law is not the same one as his, and the same would apply to the buyer as well. Moreover, the CISG offers a flexible regulation in international trade. It sets the basic rules in international transactions. But it also leaves space to be filled with the national law. This creates a balance between the CISG and the contract and civil law of each county, which will apply it. The Convention doesn't want to create a dependance relationship between the articles of CISG and the national law and it also doesn't want to outshine the national law entirely. That explains why the balance is so important when applying the CISG. [60]

The next important point is, that it is impossible to either accept only the moral or only the legal principle of the Convention. There are, of course, considerable arguments in both of the aspects. The moral compass of the principle is of great importance but only following that, it would create a problem in the legal process. On the other hand, following the strict paragon of what is only explicitly regulated in a convention, without any regard in the meaning, interpretation and references of the articles of a Convention, is also not a current method of enforcing the norms. There is not a correct answer in what is more important, or what is correct in this dilemma. The current way of dealing with articles where there is room for interpretation,

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[60] *Lisa Spagnolo,* Opening the Pandora´s Box: Good Faith and Precontractual Liability in the CISG, I. Introduction, A. Background to CISG, pp. 262- 264.

is to be up to date about cases and their decisions of the courts or arbitration awards, having an open mind about what the article is including and how it is applicable in practice, keeping in mind what the aim of the article is and how it is and/or it is going to be accomplished in the practice.

Good faith seems to have different ways of enforcement between the states, and especially when analyzing the two most famous legal systems, the common and the civil law system. As already interpreted in this paper, there are some cases where the legal systems accept bad faith as liability of the party, and some others, where the good faith principle as in article 7 of the Convention is not having a place in the decision-making process.

The important point is that the systems, one way or another, have been trying to explore the meaning of the principle and to enforce it on several cases. The meaning of good faith as a general term in international contract law, is to contribute to the aim of keeping the promises made by the parties before and during a contract. It is an idea open for development, improvement and interpretation. The aim is, for the judges, judicial bodies, lawyers, law students, jurists in general, to keep up the effort of learning about the application and enforcement of the principle and try to be part of the evolution and improvement. That is how the good faith clause can actually always improve its place in the judicial procedures in the international trade.

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