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Good Faith - The Scarlet Pimpernel of the CISG

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Introduction

Much has been said and written on good faith, which undisputedly is an integral part of the CISG pursuant to article 7(1). But what exactly is good faith and how is it to be found? The famous passage in "*The Scarlet Pimpernel*"[1] is very apt to describe the search for good faith.

> *"They seek him here they seek him there . . . everywhere. Is he in heaven, is he in hell, that . . . elusive Pimpernel?"*

In our search for the elusive meaning of good faith, the question needs to be posed whether we are looking too hard in the wrong places or are we looking without seeing the obvious? This paper is an attempt to explain the meaning of good faith and how it is to be applied pursuant to article 7(1). Goode [2] as late as 1992 suggested that "we in England find it difficult to adopt a general concept of good faith'; "we do not know quite what it means."[3]

Goode's comments are not helpful in our search for a meaning of good faith. The undisputed fact is that good faith not only has to be observed in international trade but also is firmly tied to the mandate of uniformity. In other words, good faith cannot be applied with domestic concepts and principle in mind. Such a combination suggests that recourse to domestic definitions of good faith is contrary to the autonomous interpretation of the CISG pursuant to article 7(1). This was confirmed in *Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd y Seolia Confectionery Co*. (Dulces Luisi)[4] where the court stated that the principle of good faith must be interpreted internationally without "resorting to its meaning under Mexican law."[5]

The problem of the search for a concrete meaning of good faith can be very simply stated. The CISG makes it mandatory to apply good faith to interpret the Convention. However, the CISG has not given a definition of what good faith actually means. One fact has been established in *Dulces Luisi*, namely, that domestic definitions of good faith cannot be used to interpret the Convention. Such a view is neither new nor unique to the CISG. The House of Lords, in a 1962 decision, stated that:

> "It would be deplorable if the nations should, after protracted negotiations, reach agreement . . . and that their several courts should then disagree as to the meaning of what they appeared to agree upon."[6]

In our context, the disagreement would not center on the inclusion of good faith as a principle but as to what good faith actually means. It appears that we have reached an impasse. Let us take another approach. It would be easy to achieve uniformity in applying good faith if we could access a common set of rules explaining how good faith is to be applied. But "it will be impossible to satisfy this hope, because there is, in fact, no such common stock of concrete rules."[7] Such an outcome is not surprising. To have such a common stock of concrete rules would mean that it is possible to span different legal systems rather than to work from a common conceptual basis. It is exactly this problem, namely, the desire of the Convention "not to identify itself with any legal system but to conjugate with all"[8] which gave rise to the need to introduce a tool to interpret the application of the Convention. As only certain issues are regulated in the CISG and others such as validity are excluded, gap filling together with the principle of good faith must overcome this problem.

In my view, the solution to this problem requires that knowledge of good faith as expressed in domestic law is needed to give us a starting point. With such a "bundle of knowledge" an examination of the CISG and its jurisprudence will lead

us to discover what good faith means and how it has to be applied.

Part 1 will concentrate on an examination of the state of law in Australia in relation to good faith. Since *Renard Constructions (ME) Pty Ltd v Minister for Public Works*[9] much has changed in Australia as far as an understanding of good faith is concerned. This paper will demonstrate that in Australia an understanding and application of good faith has advanced to such a level that the gap between the concept of good faith as expressed in Article 7(1) and the domestic understanding has narrowed considerably. It will also show that such a development is not isolated as good faith features prominently in the new Principles of European Contract law. Part 2 will examine good faith pursuant to article 7(1) with the help of available CISG jurisprudence. An attempt will be made to open the debate towards the possible creation of a "common stock of concrete rules." Part 3 will conclude the argument.

Part 1: Domestic Interpretation of good faith

(i) Introduction

In the same year, when Goode commented that good faith is a "vague concept of fairness which makes judicial decisions unpredictable"[10] Justice Priestly had a completely different view. He argued in *Renard Construction* that:

> "The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith with are regarded in many civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contract. Although this implication has not yet been accepted to the same extent in Australia as part of judge-made Australian contract law, there are many indications that the time may be fast approaching when the idea, long recognized as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States." [11]

Justice Priestly alluded to an important point, namely, that good faith as an idea has been implicitly used in Australian domestic law. He contrasts this by pointing to the fact that the "ideas" he is talking about are not yet explicitly used. What does this mean? Perhaps we should go back to the English views on good faith where the concept of fairness as expressed in good faith is still viewed as being in conflict with predictability of outcome. It is implicitly recognized that good faith is not only expressed as a principle of fairness, it also contains elements of mutual confidence. By analogy, an example can be quoted which expresses such a concept in domestic law namely the Trade Practices Act 1972 (Cth) s 52(1) which states that "A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." It is important to note that Fox J.[12] said:

> "Section 52 is a comprehensive provision of wide impact, which does not adopt the language of any common law cause of action. It does not purport to create liability at all; rather it establishes a norm of conduct . . ."

Two points need to be noted, firstly, that s 52(1) does not adopt the language of any common law action, and secondly, that a "norm of conduct" has been established. Such comments lead to the belief that, by implication, good faith has been established in Australia. It also points to the fact that the English notion of good faith as a concept of fairness is far too narrow and hence wrong.

(ii) Good faith in Australia

Good faith is not any more just implicitly used in Australia. Courts had to increasingly rule on the meaning of "good faith" with the help of an ever-increasing jurisprudence. Good faith has moved well beyond a "vague concept of fairness". Sheller J.A. in *Alcatel Australia Ltd. v Scarcella* [13] commented that:

> "The decisions in Renard Constructions and Hughes Bros mean that in New South Wales a duty of good faith both in performing obligations and exercising rights, may by implication be imposed upon the parties as part of a contract."[14]

Good faith was noted as an obiter in *Renard Construction* but it is clear that it has been developed further and has been given serious consideration. Broadly speaking, good faith has been given two divergent meanings. Miller J. in *Bond*

Corporation Pty. Ltd. v. the Western Australian Planning Commission (Bond) [15] noted that:

> "The first is a broad or subjective view which requires inquiry into the actual state of mind of the person concerned . . . The second involves the objective construction of the words by the introduction of such concepts as an absence of reasonable caution and diligence. The particular interpretation apt to the use of the words in a given legislative context will depend on the decision-maker's elucidation of the purpose of the legislature."[16]

Miller J. alludes to the point that good faith has a subjective meaning, namely, as to the state of mind; the second meaning is a objective one based on the construction of words within a given legislative context. The first meaning as to the state of mind has been viewed as being imprecise and not capable of giving rise to an enforceable obligation. As it is only declaratory, Giles J. in *Elizabeth Bay Developments Pty Ltd v. Boral Building Services Pty Ltd* [17] noted that:

> "It is difficult to regard the parties as having undertaken in 1993 to declare at a future time that they had a commitment to good faith . . . the cumulative uncertainty of 'commitment', 'attempt', 'negotiate' and 'in good faith' is forbidding."[18]

Lord Atkin was even more blunt when he declared that "the concept of a duty to carry on . . . in good faith is inherently repugnant to the adversarial position of the parties . . .."[19] The problem with such statements is that it has not been recognized that good faith, as a state of mind, does not need to have a particular outcome. Good faith as a state of mind indicates amongst other things what attitude and commitment parties exhibit to each other. Importantly, what actions or attitudes exhibited by one party did the other party rely on to make their decisions? A further point to be noted is that even if a problem is forbidding in its vagueness,

> "The courts should strive to give effect to the expressed agreements and expectations of those engaged in business, notwithstanding that there are areas of uncertainty and notwithstanding that particular terms have been omitted or not fully worked out."[20]

The effect of such endeavors is that certainty and predictability is maintained. It can be argued that the conduct of parties is determined by their state of mind. Therefore a state of mind of parties will be translated into "conduct " of the parties. It is well established in our law that equity regulates the quality of contractual performance.[21] It can also be argued that performance equates to conduct.

This leads us to the second meaning of good faith, namely, that good faith is viewed as a concept. At first glance, a concept is capable of being a term at law. However, there are divergent views on this matter. In order to include good faith into contractual performances or conduct, Gummow J. observed that:

> "It requires a leap of faith to translate these well established doctrines and remedies into a new term as to the quality of contractual performance."[22]

Gummow J. was rather cautious in his remarks but did not reject the concept out of hand. If we consider that these comments were made in 1993, we could speculate and perhaps suggest that with the advances in thinking on good faith, Gummow J. would have made that "leap of faith" today. Wright J., on the other hand, in *Asia Pacific Resources Pty Ltd v Forestry Tasmania* [23] rejected the implication of good faith as a term of law:

> "The novel good faith concept, . . . whilst capable of statement with beguiling simplicity can never be a pure question of law . . . because even its most ardent proponents appear to recognize that good faith is incapable of abstract definition and can only be assessed as being present or absent if the relevant facts are known or are cable of being known."[24]

There are several points well worth noting. Wright J. did recognize that good faith is a concept but he rejected the concept as a question of law as it is incapable of abstract definition. The point is that in order for a concept to be applicable, an abstract definition is not required all the time. Wright J. himself pointed this out. Good faith can be applied if the relevant facts are known or capable of being known. As a concept, therefore, good faith is tied to known facts or practical applications. The fact is that good faith does not need to be independently defined or reduced to a rigid rule: "it acquires substance from the particular events that take place and to which it is applied."[25]

The problem with associating good faith to a concept is that there is little agreement what the core principle of good faith might be. To call it, as in the CISG, a general principle does little to illuminate the debate beyond the point that good faith will take on meaning or "substance from the particular event that takes place and to which it is applied."[26] Stapleton did identify and enunciate a conceptual common denominator of good faith.[27]

> "The good faith doctrine comprises standards/obligations/considerations that seek to temper the deliberate pursuit of self-interest in situations where the conscience is bound. . . . To act in good faith requires that you do not act dishonestly, do not deliberately contradict yourself or deliberately exploit a position of dominance over another."

What we appear to end up with is a concept or a principle that is simple and easily applicable. It still requires a state of mind conducive to the standards described above but good faith can also be tied to events or particular situations.

What must be kept in mind is that even if there are rules and phrases of good faith developed in a particular system, they must be able to be transplanted into the CISG. Conceivably, they could have been written to satisfy a particular need, which is not apparent in the CISG. Rules are only meaningful within a particular context. As an example, it can be said that most of the common law countries do not recognize a duty of good faith in negotiations, that is, in pre-contractual relations.[28] There is also the danger in this approach that rules or principles which were developed with the facts of a given case in mind are applied as a reference to other cases or developed as a source of more general rules and hence implemented into a normative text.[29]

It appears that the judiciary in Australia has firmly established the practice to not only look at domestic but also international jurisprudence as well as consulting doctrines worldwide. It can be confidently argued that the precedent established by *Fothergill v. Monarch Airlines*[30] (Fothergill) when dealing with international conventions has spilled over into the interpretation of domestic law. A strong argument could be advanced that the judiciary is well prepared to apply the CISG pursuant to article 7. The reason is that courts in Australia have overcome the historical limitations imposed by the common law.

In sum, good faith contributes towards an understanding of a new concept not previously found within our domestic system of law. *Fothergill* has provided the first stage by pointing to a different way in interpreting international conventions. In *Fothergill*, it was observed that aids of interpretation, which could not be legitimately used in interpreting domestic legislation, are to be used to interpret international conventions. In Australia, this process progressed further and these tools, previously restricted to the interpretation of international conventions, have found their way into the interpretation of domestic law. In *Aiton*, Einstein J. not only quoted extensively domestic sources but international ones as well. Of significance perhaps is that he noted:

> "It (good faith) has been propounded as a fundamental principle to be honored in international commercial contracts: see e.g. Unidroit . . . Its more open recognition in our own contract law is now warranted."[31]

The gap between the interpretation of domestic law and international conventions has been significantly narrowed. The climate has been created where an understanding of article 7(1) of the CISG is easier and clearer.

(iii) Good faith and the European Contract Law

The European Community as a trading block has a considerable influence on world trade. It is therefore of value to briefly take note of the new Principles of European Contract Law (PECL) and see how good faith is placed within the Principles. This brief examination is also of importance as a considerable number of decided CISG cases originate in Germany, which is part of the EU. It also allows us to examine briefly how the EU like the CISG solved the problem of "not to identify itself with any legal system but to conjugate with all."[32]

PECL article 1:102 declares that "Parties are free to enter into a contract and to determine its context subject to the requirements of good faith ."[33] This is a clear indication that good faith must be an integral part of every contract and furthermore pursuant to PECL article 1:201 the parties "may not exclude or limit this duty." Such a mandate makes it obligatory for any court to search and make sure that good faith is present and for the parties to include good faith as an integral part of the contract. PECL Article 1:106 lays down guidelines for the interpretation and supplementation of

the Principles which includes the promotion of good faith.[34] In my view the only observation which can be made at this stage is that PECL and the CISG contain in essence the same rules. The only difference is that the rules are expressly stated in PECL whereas the CISG appears to have opted for a more implied statement of the full applicability of good faith. Only through careful examination can the extent of the influence of the good faith be found within the CISG. Of interest is that good faith as a rule appears not only in a general sense but also in specific provisions of the present principles.[35] As an example good faith is an important aspect pursuant to article 6:102, when implied terms of a contract are to be determined.[36] Good faith is defined as to "enforce community standards of decency, fairness and reasonableness in commercial transactions."[37] In order to be implemented in the EU as a meaningful law, good faith was recognised to at least being a guideline for contractual behaviour by all Member States. Not surprising Germany is at the forefront of recognising good faith as an integral part of their domestic contract law whereas England and Ireland are considered to have no such general obligation.[38] PECL article 1:201 represents a general consensus of most EU countries except England and Ireland where it still is an advance on their law.[39]

Part 2: Good faith and the CISG

(i) Introduction

The above discussion has shown that domestic Australian and EU law contains attempts to interpret good faith. Commentators have labored in the past to find a difference between civil law and common law countries in the treatment of good faith. Certainly there was in the past quite a gap between the perception of what good faith means in the two "camps". Also much has been written by referring to traveaux préparatoires. The fact is that all these comments have historical value. In other words, they are far too dated to have any significance in the current debate of what good faith means. This does not indicate that past experiences should not be studied. Their value is to point out past differences and show errors, which ought to be avoided. It should not be said from scholars of the CISG that the only thing they learn from history is to perfect their mistakes.

Since Justice Priestly opened the debate properly in *Renard Constructions,* in Australia much has changed. Canadian literature [40] also indicates that it changed its perception of good faith. As pointed out above, civil law and common law perceptions and applications of good faith are not "a gulf" apart; the gap has narrowed considerably. In Europe the difference will certainly narrow further with the introduction of PECL. For that purpose it is of no value to look back too far into history, specially, as history in this aspect is outdated and of no current practical value.

For this reason, it can be argued that the domestic and trade block approaches to the examination of good faith could be used to determine the meaning of good faith within the CISG. To take this path one has to be acutely aware not to fall into the trap of transplanting principles from domestic law into the CISG. The discussion of article 7 clearly indicated that there is no such a mandate. Many scholars and judges alike have expressed such views. As an example, Meagher J.A. noted that:

> "The interpretation of a particular phrase used in municipal law and the change over the years in that interpretation cannot guide the interpretation of the same phrase that might appear in an international agreement."[41]

However, in my view, it is permissible to duplicate an approach to interpretation, which helps to explain the principle within the Convention. In other words and by analogy with sociology, we are looking at the socialization process and not the outcome or product of socialization. A process can be duplicated like the production of bricks but the outcome of putting bricks together; that is, the finished house -- or the concept in our case -- can vary enormously depending on the culture of the society and cannot be duplicated. In our case, it is the mandate of international uniformity, which will determine the outcome. For the above reasons the discussion is twofold, firstly, good faith is examined as a state of mind and secondly, good faith is looked at as principle found in various articles.

(ii) Historical approaches to good faith

Various commentators have suggested that there are four possible approaches to the role of good faith. Firstly, it is used to only interpret the CISG; secondly, that the conduct of the contracting parties is governed by good faith; thirdly, that

good faith is a general principle of the CISG; and fourthly, that good faith is a general principle of lex mercantoria and of the UNIDROIT Principles of International Commercial Contracts.[42] The first comment is that good faith may well be a general principle of the UNIDROIT Principles and even of lex mercantoria, but to use principles, which are not tied within the Four Corners of the CISG, would do violence to its mandate. Such an approach must be rejected on the same grounds one would reject the argument that domestic principles, which are similar to the ones found in the CISG, or track the CISG, are to be used in its interpretation. The homeward trend has been condemned and rejected by scholars and judges alike.

The second comment would be that the three remaining points are not logical extensions of article 7(1). If article 7(1) had provided a tool by which the CISG is interpreted, such a tool would need to be a general principle. A provision is what it says, a singular point within a legislation. It is only repeated if another provision repeats the same message. In order for a concept to apply to all provisions and articles, it has to be a principle. If it is a principle it not only applies to the interpretation of all articles but it also indirectly will affect the conduct of parties. It can therefore be suggested that there are really only two approaches to an understanding of the role of good faith. Firstly, it is a principle to be used to interpret the Convention as a whole, which is a principle expressed as a state of mind. Some articles specifically refer to the general principle of good faith and therefore good faith is linked directly to specific situations and for that reason, the second approach is that good faith must be viewed as a principle with specific situations in mind.

(i) (iii) A principle expressed as a state of mind

Good faith, as discussed above, covers the application of the Convention as well as the parties' rights and obligations. In simple terms, it is a "general duty" based on judicial interpretation of community standards, reasonableness and fair play.[43] PECL in its official comments also views good faith as a community standard of fairness and reasonableness.[44] It must be stressed that good faith as indicated is a general duty and not a duty based on morality. It would be presumptuous to suggest that article 7(1) is based on morality. Such a concept would never lend itself to become a uniform concept, as morality is a social duty based on cultural norms. International law and, in particular, good faith must be a concept capable of treading a middle ground, that is acceptable to all and for that reason its definition must be a general rather than specific duty.

So far the discussion only centered on the application of good faith, that is, when and where it is to be applied. What has not been done is to attempt what good faith actually means within the context of the CISG. A brief examination of domestic law and its treatment of good faith opened a small window of understanding. Most importantly, it showed two things; namely, that there is no universally accepted definition of good faith and that each country treats the principle of good faith differently. One fact emerges clearly, namely, that domestic interpretation and definitions of good faith cannot be transplanted into the CISG as explained in *Dulces Luisi*.

There is no controversy in stating that article 7(1) urge the judiciary and the parties to the contract to observe good faith in international trade. An argument can be mounted that the treatment of good faith as expressed by scholars pursuant to article 7 shows some similarities with domestic law.

The mandate of article 7(1) is to interpret the Convention in good faith. In my view, it refers to the state of mind of those interpreting the Convention. The natural or normal state of mind when interpreting the Convention is with good faith. It can be argued that there is no need to refer in the jurisprudence to article 7(1) as this article is applied to every case at hand in the "normal course" of interpreting the CISG. In a German case [45] the court looked at the relationship between articles 49 and 48. Article 49, which covers the buyer's rights to avoid the contract, prevails over the seller's rights to cure defects, which are covered in article 48. The court noted, by referring to the underlying purpose (*Sinn und Zweck der Vorschrift*), that article 49 only prevails if the delivery of non-conforming goods amounts to a fundamental breach. Of significance was the courts view that even if the defect is serious, it does not amount to a fundamental breach if the seller is willing to deliver substitute goods without unduly inconveniencing the buyer. Such an attitude or choice of words clearly indicates that the court took note of the mandate of good faith. The state of mind of the court was such that it automatically in the normal course of action applied good faith.

The Bundesgerichtshof of Germany [46] had to decide whether the seller waived his right to rely on articles 38 and 39.

The CISG deals with such a waiver under article 40. However, the court noted that the seller waived his right in an implied manner; thus the court did not rely on article 40. The fact that the seller entered into protracted negotiations over the lack of conformity and even offered compensation and paid for an expert at the buyer's request showed that the seller by implication waived his rights to rely on article 39. Such an argument is based on an implied recognition that the CISG must be interpreted with good faith and also that the parties to a contract can rely on good faith behavior. Again article 7(1) was not expressly quoted which suggest that good faith is a state of mind.

The problem is how would we find out if the CISG was not interpreted in good faith? An answer would be that the CISG is not applied correctly. But such an outcome could equally well be the result of ignorance or mistake of any kind. The only conclusion we can draw is that interpretation of the CISG in good faith could minimize errors, but in the end we are still dealing with a state of mind and therefore we cannot identify real measurable outcomes. The application of good faith after all demands a "holistic approach." Such a view is strengthened if we by analogy look at history. Historians believe that information in letters and chronicles mainly describes items, which are new or newsworthy. People seldom report facts, which are either known by the other party or are universally known. It can therefore be argued that good faith is the state of mind, which is expected to pre-exist by all those interpreting the CISG. Only if the balanced state of affairs, that is, the presence of good faith is disturbed, is there a need to comment and explicitly apply article 7(1). When bad faith is exhibited, we know that good faith is not applied. There is an ever-increasing jurisprudence developing to prove the above point. An important case, which needs to be quoted, is *SARL Bri Production "Bonaventure" v. Societe Pan African Export.*[47] It was specified that jeans were to be sent to South America and Africa. The purchaser, however, despite assurances to the contrary, sent the jeans to Spain. The plaintiff claimed 10,000 francs as compensation for abuse of process. The court agreed with the plaintiff's position and found that the buyer acted contrary to the principles of good faith in international trade pursuant to article 7(1). This is a very interesting position. On the one hand, the court applied article 7(1) to the relations between parties and it also used the principle of good faith as a tool to levy, in essence, a fine. In my view, the principle of good faith cannot be used in such a way, especially as the court also awarded damages of a further 10,000 francs under article 700 of the French code of civil procedure.

No direct penalties or remedies flow from the principle of good faith, as applicable to the Convention as a whole. The same applies to the parties. If a party fails to exhibit good faith and is not in direct breach of any other articles within the Convention, the CISG through article 7(1) does not allow the court "to manufacture" remedies or principles as shown in *Bonaventure* where the court awarded 10,000 francs damages. The Australian Trade Practices Act in s 52 also applies a similar mandate in stating that a corporation shall not engage in conduct that is misleading or deceptive. Fox J.[48] states that [s 52] "does not purport to create liability at all; rather it establishes a norm of conduct." However, unlike the CISG, the Trade Practices Act introduced consequences for failure to observe s 52 "elsewhere in the same statute, or under general law."[49] As the CISG does not provide for failure to observe article 7 and hence creates a gap, the courts are free to apply domestic law as shown again in *Bonaventure* where the court applied French domestic law to compensate the plaintiff for abuse of process.

(ii) (iv) As a principle in prescribed situations

So far we have shown that good faith is a state of mind to be applied to the Convention as a whole as well as to the behavior of contractual parties. Article 7(1) however embodies another concept. Good faith is not only applicable to the interpretation of the Convention, it is also a principle contained in several articles. The comments of the Secretariat indicate that "among the manifestations of the requirement of the observance of good faith are the rules contained in [several] articles."[50] If there is a breach of these articles the court is required to invoke the principle of good faith. However, in these circumstances we are not dealing with a general concept but with specific circumstances. The court therefore is excused from debating what good faith actually means. Good faith has lost its abstract definition by taking on "substance from the particular event that takes place and to which it is applied."[51] There are several articles, which contain good faith as a principle and only some will be discussed to illustrate the above point.

a) Article 40

Beijing Light Automobile Co., Ltd v. Connell Limited Partnership (Beijing Metals)[52] is a leading case. It revolves around whether article 40 was applicable. A lock plate, which was installed in a machine, broke four years after

installation. Pursuant to article 39(2) the buyer loses the right to rely on a lack of conformity of goods after two years. However, article 40 states: "The seller is not entitled to rely on the provisions of article 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer." Article 40 is a "safety valve" which allows a buyer to overcome articles 38 and 39 if the reason for his late discovery of non-conformity is based on the seller exhibiting bad faith (or not exhibiting good faith). The seller, in other words, has an obligation to disclose defects.[53] The first comment the court made is that article 40 is only to be applied in special circumstances. The court must be convinced that a fact of which the buyer had knowledge of or ought to have had in its mind resulted in a loss to the buyer. Such conduct can be described as an awareness of bad faith.

> "The requisite state of awareness that is the threshold criterion for the application of article 40 must in the Tribunal's opinion amount to a least a conscious disregard of facts that meet the eyes and are of evident relevance to the non-conformity."[54]

Such a ruling is consistent with the views of the Oberlandgericht München [55] which noted that bad faith is shown if the seller ignores faults which are obvious to the eye and which are discoverable by simple care and attention of the seller.

The courts have not resolved an issue of conceptual nature but rather put a practical interpretation to a conceptual issue. In another case, the Landgericht Stuttgart [56] criticized the lower court as they allowed article 40 to be used despite the fact that the seller tried to use the article to overcome his breach of the contract. This is a clear indication that the principle of good faith was applied correctly in the spirit and manner contemplated by those who prepared article 7(1).

b) Article 49(2)

Article 49 allows the buyer to declare the contract avoided, however, if the seller has delivered the goods the buyer loses that right subject to basically two exceptions. Firstly, "in respect of late delivery, within a reasonable time after he has become aware that delivery has been made"[57] and secondly, "in respect of any breach other than late delivery, within a reasonable time:"[58] The question is what is the meaning of reasonable time? It has been suggested that reasonable time in this context more or less means immediately.[59] Another point worth noting is that avoidance is not available for trivial departures that may be redressed by damages.[60] Such a position is obvious, as it is important in international trade that re-shipping and re-dispositioning needs to be avoided and should only be an option under special circumstances as described by article 49(2).

The fact that the buyer loses the right to avoid the contract after delivery is made is an expression of good faith as otherwise it would allow the buyer to "deliberately exploit a position of dominance over others."[61] Once goods have left a country, a seller is committed to expense and inconvenience -- a position that undoubtedly can be exploited. The exceptions mirror the view that late delivery when detected early can still either be aborted or losses minimized. Other breaches must be communicated within a reasonable time. A German decision [62] pointed out that a buyer could not rely on article 49(2)(b) because the attempt to avoid the contract was too late. The seller wrote that it would make good any quality defects in the future. The court indicated that such a statement does not constitute an abandonment of the duty to notify the seller within a reasonable time of the desire to abandon the contract. The Bulgarian Chamber of Commerce and Industry in *Arbitration Case 11/1995*, 12 February 1998 [63] refused the application of the defendant to have the contract avoided because the goods were delivered and the buyer did not give reasonable notice. In fact, he sold 90% of the goods and therefore waived the right to protection under article 49(2). A Spanish court [64] ruled that a 48-hour period was sufficient to avoid the contract after the buyer was notified of a late delivery. It was noted that this was the third late delivery. As the buyer did not complain as to the late delivery on the two prior occasions, he could only avoid the contract as far as the third delivery was concerned.

c) Article 29(2)

Article 29 allows a contract to be modified or terminated by mere agreement of the parties. However, if the contract is in writing and specifies that modifications must be in writing, such a contract may not be modified in any other way. "However a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct."[65] The intent of this article is clear. If a party deliberately contradicts the content of the contract by his conduct and the other party relies on such conduct, this constitutes a breach of good faith in line with

article 7(1). In other words, the reliance provision addresses the specific problem of abuse of a "no-modification" clause.[66] *Graves Import Co. Ltd. and Italian Trading Company v. Chilewich International Corp*.[67] noted that the buyer was precluded from asserting that there was an oral modification as the contract incorporated a no-oral modification clause. It is clear that the above facts do not correspond to a breach of good faith, rather they are a breach of an express term on which the other party relied. Another point was noted in *Société Camara Agraria Provincial de Giupuzcoa v. Andre Margaron*,[68] namely, that conduct must be a positive act and not just a conclusion gained from the general mood of a meeting. However, silence can be construed as conduct under certain circumstances. If the circumstances indicate that a party refrains from action, which the party is entitled to take, such as the insistence on a substitute delivery, the other party can interpret such conduct as a modification or termination of the agreement.[69] Cases dealing with a breach of good faith pursuant to article 29(2) are rare and hence the observation has to be made that such breaches are either not taken to court or are not a mischief which needed fixing. However, article 29(2) does contribute to the general mood of article 7(1) which indicates that dealings between parties must be in good faith which will ultimately contribute to a smooth and efficient way "to do business".

d) Articles 38 and 39

These two articles are interrelated and should be treated together. Article 38 obliges the buyer to examine goods "with as short a period as is practicable in the circumstances." Pursuant to article 39, the result of these examinations must be communicated to the seller "within a reasonable time after he has discovered or ought to have discovered it." The principle of good faith clearly indicates that a buyer must establish efficient and expeditious business practices. Goods, which show defects or cause disputes should not be left in a country in storage because costs should be held to a minimum. The seller must be afforded the opportunity at the earliest possible opportunity to make a decision as to the fate of the goods in order to minimize unnecessary costs.

The Landgericht Berlin [70] refused the application for damages as the defects in children's shoes was easily discoverable and should have been noted at delivery. The defects were only communicated to the seller after three months. The court indicated that pursuant to article 38 the buyer should have inspected the shoes at delivery or at least within a week and should also notified the seller pursuant to article 39 within a week after discovery of the defects.

A court in Riedlingen made an interesting observation [71]. Parma ham was delivered at Christmas but only inspected after the holiday period. The court held that the defendant was obliged to at least spot check the goods upon delivery, which would have satisfied the obligations under article 38 specially as the Parma ham was "going off" two to three hours after unpacking. Another German case is noteworthy. Cloth was found to be defective but examination was undertaken too late. The court took into consideration that the defects were apparent to the eye and therefore the delay of one week to inspect the goods was unreasonable.

Article 39 at first glance poses the problem of notification. If there is a lack of conformity of the goods, the buyer must notify the seller "within a reasonable time after he has discovered or ought to have discovered it" otherwise he will lose that right. The question is not what constitutes a "reasonable time" which has been discussed at length in legal literature.[72] The question at hand is what constitutes a breach of good faith. In other words, a lack of conformity must be notified immediately not only after it is discovered but also after it ought to have been discovered. It poses an obligation upon the buyer to expediently make sure that the goods supplied correspond with his expectations. The seller must be able to rely on the good faith of the buyer to expediently close the transaction, that is, terminate the contract by performance or otherwise notify the seller that there is a breach of the contract. The German Bundesgerichtshof made an interesting observation.[73] The court found that the important question in relation to conforming to article 39 was the buyer's state of knowledge at the time of making the complaint. The problem was not an apparent defect but a latent one. The added difficulty was that the cause of the complaint could have been the fault of the buyer through an error by his workforce. The difference between this conclusion and the one derived at by the appeals court [74] was the fact that the Bundesgerichtshof allowed one week for the buyer to make a decision as what to do next and for the initiation of necessary measures. It would be an exhibition of bad faith if buyers would be rushed into making complaints which given a little time could have been cleared up by an internal or external investigation. This decision has found the balance between the obligation to submit a timely complaint and the necessity to give a reasonable time to the buyer to prepare a reasoned and valid complaint in line with the principle of good faith.

However the Bundesgerichtshof in their statement used the term "regular" period, which Schlechtriem [75] correctly pointed out gives rise to concern. Reasonable time is not a question of law but rather a question of fact. If we would consider for a moment that the court set a precedent of one month then the question, which needs answering is whether such a precedent is in line with the principle of good faith. Schlechtriem alluded to the fact that it is not and that each case must be looked at on its own merits [76]. Reasonable time when defined by case law and legal scholars would need to take into consideration the mandate of good faith in order to achieve uniformity pursuant to article 7(1)

Part 3: Conclusion

In sum, this paper has shown that good faith despite its "beguiling simplicity" is an elusive term. The CISG in article 7(1) prescribes that good faith is to be used in the interpretation of the Convention but fails to give an explanation or definition what exactly good faith means. The examples of the current state of judicial thinking on good faith not only in Australia but also in the EU have alluded to the fact that good faith could be approached in two ways. In other words, good faith comes in two "packages". One is the application of good faith as a state of mind of those interpreting and using the CISG. The second aspect is that good faith is a concept or principle contained in provisions throughout the CISG. As such, the meaning of good faith is tied firmly to a legislative context and therefore the "elucidation of the purpose of the legislation."[77]

The problem with a state of mind is that it is not measurable and cannot give rise to legal obligations for failure to observe good faith. By implication, however, good faith can and has been used to impose upon parties' obligations by interpreting the CISG in a manner, which closes the door on deliberate pursuit of self-interest, deliberate exploitation of dominance over others and discourages dishonest behavior.[78] *Dulces Luisi*, *Bonaventure* and the above German cases illustrate this point. In my view, the uniform development of good faith as a state of mind is the culmination of the socialization process. It will become the expression of the culture of the CISG. Because it is the culture -- hence underpinning the success of the application of the Convention -- good faith is also a principle or doctrine of the CISG.

Good faith as a principle in a prescribed situation depends on its meaning on the "elucidation of the purpose of the legislation." However, article 7(1) not only contains the principle of good faith, it also demands "a uniformity in its application." As such, the two meanings of good faith must be brought together again. Only by having the culture of the CISG firmly in ones mind is it possible to apply the purpose of the legislation uniformly.

In sum, there has to be a separate birth of the two meanings of good faith. Once born, there has be a union of the two and only together will they be able to conjugate and apply the CISG with uniformity and good faith by having regard to its international character as prescribed by article 7(1).

FOOTNOTES

* Bruno Zeller, Lecturer, Victoria University of Technology, Melbourne. I like to thank Professor A. Kritzer for his invaluable comments in the preparation of this article.

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12. Brown v Jam Factory Pry Ltd (1981) 53 FLR 340 at 348

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71. Amtsgericht Riedlingen, 21 October 1994, 2C 395/93

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