Good Faith

Article 7

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

Good faith permeates U.S. contract law in both the common law and UCC. Even though the UCC attempts to define good faith, it remains a fairly ambiguous term and the definition seems to depend upon the context in which the question of good faith arises. The CISG incorporated the concept of good faith (though very narrowly, it appears) through Article 7 but it did not define the term anywhere in the Convention. Though the Secretariat Commentary to Article 7 delineates a number of times where the CISG requires the observance of good faith, the Commentary states that it is clear that good faith applies to all aspects of the CISG—not just these Articles.1 The identified articles include:2

- Article 16(2)(b) addressing whether it was reasonable for the offeree to rely on the court holding an offer irrevocable when the offeree acted in reliance on the offer;
- Article 21(2) dealing with a late acceptance sent so that, if the transmission had been normal, it would have reached the offeror in time;

2. Id.
• Article 29(2) describing when a party may not rely on a clause in a contract requiring a writing for either a modification or abrogation of the contract;
• Articles 37 and 38 dealing with the seller’s rights to remedy nonconformities or defects in the goods;
• Article 40, which precludes a seller from relying on the buyer’s failure to give notice of nonconformity as required by Articles 38 and 39 where the nonconformity relates to facts which the seller knew or could not have been unaware of and did not disclose to the buyer;
• Articles 49(2), 64(2), and 82 dealing with losing the right to avoid the contract; and
• Articles 85 and 88 requiring parties to take steps to preserve the goods.

At the Convention in Vienna, when the delegates debated whether to add good faith into the CISG, they discussed the potential problem with resorting to domestic law in conjunction with Article 7. There was a great disparity of opinion. The problem caused by Article 7 is that it states that good faith comes into play when interpreting the Convention but does not require good faith in the conduct of the parties during the formation or performance of the contract. This dichotomy has caused a great deal of scholarly debate. According to Peter Schlechtriem, a participant at the drafting meetings for the CISG, there was a sentiment among some participants that good faith should include the conduct of the parties. There also was great concern about including good faith in the CISG. These concerns included: (1) the significant number of domestic laws and their disparate treatment of good faith, (2) the lack of sanctions for violating good faith, (3) that the great breadth of the principle was too broad, and (4) the lack of uniformity in the doctrine’s application. This led to the withdrawal of proposals to include good faith in other parts of the CISG, even though everyone agreed that it was certainly desirable to follow and observe good faith.\(^3\) It remained in Article 7, which on its face appears very narrow since the link is to the interpretation of the Convention and not the behavior of the parties.

A constant question with the requirement of good faith is how to define it. Although it is a concept that U.S. attorneys should be familiar with, many common law countries do not include a requirement of good faith. A concern with the use of good faith in the CISG was how to develop a uniform definition within the context of a uniform law enacted in many different countries. Because each country’s domestic law may have a different interpretation of the meaning of good faith, it is quite difficult to have a uniform interpretation. Many cases from different countries regarding good faith in the case law have been gathered in various sites devoted to the CISG. Reading and analyzing those cases leads to the conclusion that there is no uniformity when interpreting Article 7 and its rule on good faith.\(^4\) Despite the fact that many participants at the drafting convention in Vienna expressed a real concern that the CISG, and in particular good faith, should not be interpreted according to domestic law, the courts and arbitral tribunals continue to do so.

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U.S. courts certainly have used domestic law, usually the UCC, on a number of occasions to help interpret the CISG.\(^5\)

Although good faith has sparked much discussion amongst international scholars writing about the CISG, it has barely been mentioned in U.S. cases involving the CISG. In one of the few U.S. cases mentioning good faith, the buyer argued that a court should grant summary judgment because the seller acted unreasonably and against good faith when it hired a shipper to transport a product from Argentina to Houston even though it knew or could have discovered that the transporting ship had problems making it unseaworthy. The buyer argued that the CISG required that the seller act in good faith when performing the contract, so its argument went to the conduct of one of the parties and not the interpretation of the law. Although the court did not analyze whether this duty of good faith existed, throughout the opinion it never expressed any doubt that the CISG requires the parties to act in good faith. Instead of focusing on good faith, the court denied the seller’s motion for summary judgment by analyzing the issues with the carrier using Article 32 and stating that it required the seller to provide appropriate transportation.\(^6\) One other U.S. case cited to Article 7 for the proposition that the CISG “intended to ensure the observance of good faith in international trade” but did no analysis beyond that.\(^7\) There are many scholarly articles that debate how to interpret good faith and whether the CISG requires good faith in the parties’ conduct.\(^8\) Although U.S. courts may continue to assume the CISG requires parties to act in good faith, it is not clear that other countries’ courts and tribunals will do the same. It is probably a better practice to use good faith only as a supplemental argument and to find a substantive Article in the CISG to rely on when claiming breach of contract under the CISG.

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Duty to Read

In commercial law today, parties often contract by sending forms back and forth in an exchange that is referred to as “the battle of the forms.” These forms are often preprinted standard forms. There may be an order, an acknowledgment, or a reply on standard forms of either the buyer or seller. On these forms, each party may try to add terms that are advantageous to their own cause such as disclaimers of warranty, limitations of remedy, or a demand to have all remedies available in the event of a breach. There also may be forms from the buyer stating the specifications required in a product or forms from the seller stating that a product meets certain specifications. To complicate matters, some or all of the language in various forms may be written in different languages. This is especially true for contracts governed by the CISG given the nature of the Convention and its international context. In the hectic business world, there may be little time to read these forms carefully or at all. The CISG deals with whether specific terms from the various forms will be included in the contract in its rules governing contract formation.9 The issue of whether parties intended to include certain terms also may be analyzed using CISG Article 8 and by considering the subjective and objective intent of the parties.10

In addition to contract formation, another issue that may arise with standard forms is whether a party has read the forms or, if she has not read the forms, whether she will be bound to the terms contained in the various forms. Does it matter that the forms might be written in a different language or that a party did not fully comprehend or read the forms? Of course, we all know that parties are supposed to read their contracts before they sign them and a failure to do so will not relieve a party of a contractual obligation. This duty to read may be even more important with contracts governed by the CISG because they are often between parties who speak different languages, and the multiple forms they use are often written in different languages. MCC-Marble, a well-known CISG case, dealt with the question of whether a party who signed an agreement written completely in Italian, even though he did not read or speak Italian, could be held to the terms in that document. The court reiterated the fact that a party has a duty to read what he signs and that a failure to do so will not relieve a party of any obligations under a contract. In a footnote, the court stated that it was astounding that a party who was experienced in commercial business would expect not to be held to a contract he signed simply because he could not understand the terms. The court thought that amounted to reckless behavior and reiterated that a party who signs a contract “will be bound by [the contract terms] regardless of whether they have read them or understood them.”11 Another example of this issue occurred in a later case where the parties exchanged forms that contained terms

10. The Eleventh Circuit stated, “[t]he plain language of the Convention, therefore, requires an inquiry into a party’s subjective intent as long as the other party to the contract was aware of that intent.” MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d’Agostino, S.p.A., 144 F.3d 1384 (11th Cir. 1998).
11. Id. at 1387 n. 9; see also Israeli v. Dott. Gallina S.R.L., 632 F. Supp. 2d 866 (W.D. Wis. 2009). Although the court did not use the CISG in this case when it determined whether a forum selection clause was enforceable even though it was written in a foreign language, it cited to the MCC-Marble case when it held that parties have a duty to read their contracts and a failure to read will not affect the validity of the contract.
written in Italian and English. The court found that it was irrelevant that part of the form was in Italian, stressing that the sophistication of the parties belies any suggestion that one party might not have understood some of the terms because they were written in a different language.\textsuperscript{12}

A case from Alabama, that it seems should have been governed by the CISG because it involved a corporate buyer in Alabama and a corporate seller in Germany, concerned an exchange of forms written in several languages including English and German. The case dealt with whether a forum selection clause written in German on the back of one of the seller’s forms became part of the contract. Although the CISG was not mentioned in the case, the principles of the duty to read are quite applicable. The buyer claimed that the forum selection clause was not part of the contract because the buyer did not receive an English translation and the term was not discussed between the parties. The court, quoting from \textit{Gaskin v. Stumm Handel GmbH}, stated:

It has often been held that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it whether he reads them or not. Ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them.\textsuperscript{13}

Although the duty to read is important in all contracts, it may be even more imperative that parties involved in a CISG contract be reminded of this duty since many of these contracts are created with forms written in different languages.

\textbf{Practice Pointers/Checklist}

\begin{itemize}
  \item ✔ Does the good faith issue in question pertain to any of the specifically identified articles? (Article 7)
  \item ✔ Does the good faith issue pertain to interpreting the contract under the CISG or the formation of the contract? (Article 7)
  \item ✔ How does the applicable jurisdiction interpret good faith? If a U.S. court, has it used the UCC to interpret good faith? (Dingxi; Hilaturas; Macromax)
  \item ✔ Are there numerous forms from both parties that contradict or add terms?
  \item ✔ Did the parties intend to include certain terms that are covered by the CISG? (Article 8; MCC-Marble)
  \item ✔ Is a party trying to argue that it should not be held liable to terms it did not read or understand?
\end{itemize}

Cases Cited

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