Uli Foerstl

The general Principle of Good Faith under the CISG

A functional Approach to Theory and Practice of the United Nations Convention on Contracts for the International Sale of Goods

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Preface and Acknowledgements

The English word 'faith' derives from the Latin word '*fides*' meaning trust and confidence *(Collins English Dictionary, 5th ed., Glasgow, 2000)*. The Latin word *fides* comes from the name of the Roman goddess Fides, the deification of: good faith and honesty, the oath, and that 'one must keep one's word'. In Rome fides was honoured with a temple built near Capitol Hill in 254 BC where sacrificial offerings were presented in recognition of the secret, inviolable trust between gods and mortals *(The New Encyclopædia Britannica, Vol. 4, p. 762, 15th ed. 1990)*. Fides can be found on the backside of antique Roman coins in many variations. The civil variations show the goddess Fides holding ears of grain and a fruit basket. As a symbol of the reliance of Roman emperors on the Roman army, Fides was also shown with standards and other military insignia (*Fides Exercituum or Fides Militum*). In the later Roman period the goddess was called *Fides Publica*. She was considered the guardian of treaties and other state documents, which were placed for safekeeping in her temple *(Schermaier, p. 78)*. Over a period of time the idea of *fides*, i.e. good faith, was separated from the image of the goddess. Interlocked hands were used on Roman coins to symbolise the binding nature of a promise. This shows that the focus of *bona fides*, the Roman notion of good faith, was focused on the principle that 'one must keep one's word'. In modern contract law, this idea became independent from good faith, and today the parties' faith refers to the reliance that the other party will not act against the purpose of the contract.

The following text was submitted to the University of Cape Town, South Africa (UCT) in February 2005 as a research dissertation in fulfilment of part of the requirements for the Degree of Master of Laws (LLM) in Approved Courses and a Minor Dissertation. Bibliography and case law reflect the date of submission.

I would like to thank everyone at UCT for their support. I am deeply indebted to the late Prof R H Christie for supervising the dissertation and for teaching me to look and learn beyond my own jurisdiction.

Table of Abbreviations

A.C.	English Law Reports - Appeal Cases [year, page]
Art.	Article
BGB	Bürgerliches Gesetzbuch (German Civil Code)
cf.	confer
CISG	United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980
CLOUT	Case Law on UNCITRAL Texts
ed.	edition
e.g.	exempli gratia (for example)
et al.	et alia (and others)
et seq.	and following
f., ff.	and following page(s)
fn.	footnote
HGB	Handelsgesetzbuch (German Commercial Code)
ICAB	International Court of Arbitration Bulletin [volume, page]
i.e.	id est (which is)
JZ	Juristen Zeitung [year, page]
NIPR	Nederlands Internationaal Privaatrecht [volume, page]
NJW-RR	Neue Juristische Wochenschrift Rechtsprechungsreport [year, page]
p., pp.	page(s)
para	paragraph
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht [volume, page]
RGZ	Entscheidungssammlung des Reichsgerichts für Zivilsachen [volume, page]
s., sec.	section
SA	South African Law Reports [volume, page]
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

ULIS	Uniform Law of International Sales
ULF	Uniform Law on the Formation of Contracts for the International Sale of Goods
UCC	Uniform Commercial Code (United States)
VJ	Vindobona Journal of International Commercial Law & Arbitration [volume, page]

Table of Contents

Introduction

A. The UN Convention on Contracts for the International Sale of Goods (CISG)

I. Early Attempts to Unify Sales Law

The law of the sale of goods, as most other areas of the law, is a predominantly national affair. This was not always the case: between the thirteenth and the eighteenth century, the *ius commune* was applicable throughout Europe and led to mostly uniform rules applicable across national borders.[1] Moreover, among the travelling merchants in Europe customary rules, applied by merchant courts, developed. It is said[2] that this *lex mercatoria* was based on the same fundamental rules throughout Europe.[3] With the nationalisation and codification of the civil law during the eighteenth and nineteenth century, the uniformity created by the *lex mercatoria* ceased to exist.[4]

Even after the decline of the *ius commune* and the *lex mercatoria* it was recognised that international trade needs uniform rules. In 1926 the International Institute for the Unification of Private Law (UNIDROIT) was founded on the initiative of the League of Nations.[5] The first step toward the unification of the law relating to the international sale of goods is attrib-

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1 See for good faith under the *ius commune* in detail Chapter 1, A, II below.

2 See critically with regard to the universality and consistency of the *lex mercatoria* Eiselen, 116 SALJ 323 at 333 with further references in Fn. 52.

3 Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. III. See for good faith under the old *lex mercatoria* in detail Chapter 1, A, III, below.

4 Cf. in detail e.g. Felemegas, p. 137 ff. But cf. Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. III who insists that the *lex mercatoria* did not cease to exists but only fell into oblivion. The practical effects are, however, the same.

5 Haase/Grimm/Versfeld, p. 1.

uted to the German scholar *Ernst Rabel*. He presented a first provisional report on the possibilities for unifying sales law to UNIDROIT.[6]

II. The 1964 Hague Conventions: ULIS and ULF

The efforts of UNIDROIT, interrupted by the Second World War, led eventually to the Hague Conference of 1964, which adopted two conventions: the Convention for the Uniform Law of International Sales (ULIS), and the Convention for the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), also referred to as the '1964 Hague Conventions'.[7] With only nine states having ratified the Conventions,[8] ULIS and ULF were not considered a success in the unification of international trade law.[9] Despite the lack of their acceptance in practice, ULIS and ULF are not regarded as a complete failure as they played an important role in the process of drafting the CISG.[10] Moreover, ULIS and ULF led to a body of case law within the adopting states that can, with certain restrictions, serve as a starting point in the interpretation of CISG provisions.[11]

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[6] Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I; Eiselen, 116 SALJ 323 at 334.

[7] The texts of ULIS and ULF are, amongst others, reprinted in English, French and German in Mertens/Rehbinder, pp. 25 - 80.

[8] Cf. Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I with a list of the ratifying states in fn. 7. Felemegas, p. 140 counts only eight adopting states, which might be due to the fact that the United Kingdom only ratified with the reservation that the uniform law must be chosen by the contracting parties.

[9] Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I; Felemegas, p. 140; Haase/ Grimm/Versfeld, p. 1.

[10] Eiselen, 116 SALJ 323 at 336; Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I.

[11] Bridge, sec. 2.08.

III. UNCITRAL and the CISG

In 1966 the United Nations Commission for International Trade Law (UNCITRAL)[12] was established as a Permanent Commitee of the United Nations, which started its work on the unification of sales law in 1968.[13] The UNCITRAL working group attempted to achieve a balance in the representation of the various regions of the world in order to avoid the lack of international acceptance which ULIS and ULF had suffered.[14] The UNCITRAL working group held nine sessions.[15] In 1978 it presented a draft convention on sales law, which built the basis for the Vienna Conference of 1980.[16] Forty two of the sixty two states that attended the Vienna Conference voted in favour of the presented draft of the CISG[17] (also called Vienna Convention and in the following referred to as 'the Convention').[18] The CISG came into force on 1 January 1988, one year after the tenth state ratified the convention.[19] By the end of the year 2004 the CISG was adopted by sixty four states.[20] Almost twenty five years after its conclusion and more than fifteen years after its coming into force, the CISG

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[12] Cf. the UNCITRAL homepage www.uncitral.org for an overview over the history and functions of UNCITRAL as well as the texts of legal documents, their status of adoption as well as the *traveaux préparatoires*. Cf. furthermore Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I with an overview of sources in German in Fn. 9.

[13] Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I.

[14] As a result Africa received nine seats, Asia seven, Eastern Europe five, Latin America six and the 'Western States' nine, cf. Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I.

[15] Cf. for the documentation of the working group sessions, Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I, Fn. 10.

[16] Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. I; Felemegas, p. 142 f.; Haase/Grimm/Versfeld, p. 2.

[17] Haase/Grimm/Versfeld, p. 2; Eiselen, 116 SALJ 323 at 337.

[18] United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980.

[19] Cf. Eiselen, 116 SALJ 323 at 337.

[20] For an up-to-date overview over the status of the CISG see www.uncitral.org.

was praised as a great success.[21] However, it is felt that this success is not always sufficiently reflected in publicity and popularity.[22]

IV. South Africa and the CISG

Due to its international isolation during the years of Apartheid, South Africa did not play an active role in the creation of the CISG, although it send observers to some events.[23] In contrast to other UNCITRAL instruments, such as the Model Law on Cross-border Insolvency, South Africa has not adopted the CISG. Ten years after South Africa re-entered the international community as a welcomed member, no visible steps toward an adoption of the CISG have been taken.[24] Scholarly writings have, however, strongly recommended the adoption of the CISG in order to stimulate international trade in South Africa, and to strengthen the role of South Africa as the leading economical force on the continent.[25]

V. Characteristics of the CISG

The CISG builds a uniform text of law for international sales of goods. It is a so called 'self-executing' convention, which means that it does not have to be brought into force by an act of the domestic legislator.[26] This form of legislation guarantees the highest degree of uniformity, since changes cannot occur in the process of transformation into domestic law, as is often the case with other, 'normal' international conventions. The CISG combines the two subject matters of ULIS and ULF - the rules for

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[21] See as only a few of many e.g.: Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. III; Eiselen, 116 SALJ 323 at 345;

[22] Will, Part II, p. 5.

[23] Eiselen, 116 SALJ 323 at 323 f.

[24] Other than e.g. with regard to the Model Law on International Commercial Arbitration for which at least a draft for the transformation into South African Law exists.

[25] Eiselen, 116 SALJ 323 at 367 ff.; Haase/Grimm/Versfeld, p. 61 f.

[26] Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. II.

formation of the sales contract and the substantive provisions - in one legal text. The Convention is divided into four parts: the general rules and scope of application (Part I); the formation of the contract (Part II); the substantive rules for the sales contract (Part III); and the final public international law provisions (Part IV).

The CISG is drafted in a style closer to a civil law code than to common law legislation in that it contains more abstract terms and generalised rules instead of the detailed provisions and explicitly formulated legislation.[27] The fact that the CISG contains more indefinite legal concepts and terms is attributed to two factors: a compromise between irreconcilable conflicts of interests; and the necessity to obtain a certain degree of flexibility, because a revision of the text of the CISG would require the consent of all signature states.[28] The character of the CISG as an international body of law forbids it to simply import concepts from domestic law, or to interpret terms as they are known in domestic law.[29] This, together with the fact that there is no possibility to appeal to a highest judicial authority in order to obtain a definite interpretation of the CISG, build a challenge in maintaining uniformity in the day to day application of the CISG.[30]

B. The Scope and Methodology of the Dissertation

I. Good Faith and the CISG: the Problem

The term 'good faith' appears only once in the CISG - in Art. 7(1) CISG, which reads:

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[27] Eiselen, 116 SALJ [1999] 333 at 340.

[28] Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. II.

[29] Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. III.

[30] Schlechtriem/Schlechtriem, *Commentary*, Introduction, sec. III.

> 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.

The location of good faith within the provision about the interpretation of the Convention and the wording of Art. 7(1) CISG are the result of a difficult compromise the drafters of the CISG reached. This compromise was necessary because of the different opinions about the role, good faith should assume under the Convention. The divergence was mainly caused by the different attitudes domestic legal systems have toward good faith. Although the term 'good faith' is known in most jurisdictions, the substantive content of good faith as well as the context of its application vary so widely that it is said that a 'common core' cannot be deduced.[31]

The compromise reached with Art. 7(1) CISG, poses a great problem because it creates uncertainty with regard to the scope of application of good faith under the CISG. This dissertation approaches this problem from three angles. Firstly, the controversy surrounding the meaning of 'good faith' will be examined.[32] Secondly, the scholarly debate about good faith in the CISG will be analysed.[33] Thirdly, the application of good faith under the CISG in judicial practice will be discussed.[34]

II. The Structure of the Dissertation

This dissertation consists of three chapters. The first chapter provides an overview of the historical development of good faith,[35] the different approaches toward the concept of good faith in contemporary domestic leg-

[31] Cf. e.g. Felemegas, p. 192.

[32] See Chapter 1.

[33] See Chapter 2.

[34] See Chapter 3.

[35] See Chapter 1, sec. A below.

al systems,[36] and the developments with regard to good faith on an international level.[37] Finally, some general conclusions are drawn from the historical and domestic understanding of good faith, which are made in anticipation of the analysis of good faith within the CISG.[38]

The second chapter provides a theoretical analysis of good faith under the CISG, consisting of a discussion of the legislative provisions and their legislative history and the academic controversy following from the wording of Art. 7(1) CISG.[39] It will be shown that a deductive approach to good faith is even less promising under the CISG than under domestic systems of law.[40] Hence, the scope of good faith can only be determined by an inductive method, which has to consider the other means provided by the CISG in order to fulfil the functions of good faith.[41]

The third chapter discusses the existing case law with regard to good faith under the CISG and examines whether or not one can state that certain specific doctrines emerge under a general notion of good faith within the CISG.[42]

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[36] See Chapter 1, sec. B below.
[37] See Chapter 1, sec. C below.
[38] See Chapter 1 sec. D below.
[39] See Chapter 2, section A below.
[40] See Chapter 2 section B below.
[41] See Chapter 2 section C and D below.
[42] See Chapter 3 below.

Chapter 1: The Development of Good Faith

In order to understand the concept of good faith as well as the existing controversies surrounding good faith in the CISG, the following chapter briefly summarises the origin and the development of good faith in legal history.[43] It provides an overview of the different appearances of good faith (or its complete absence) in selected contemporary domestic legal systems,[44] and the UNIDROIT Principles of International Commercial Contracts.[45] It will be shown that the ideas of what good faith is and the purpose it ought to serve differ considerably from one jurisdiction to another. Hence, the different functions good faith is required to fulfil will be examined as well as some of the existing misconceptions about the substantive content of a general principle of good faith.[46]

A. The Historical Origins

I. Roman Law

The principle of good faith as a legal concept first emerged in Roman law as *bona fides*.[47] It was developed as a procedural standard clause, known as *exceptio doli*. Claims had to be adjudicated according to strict law (*iudicia stricti juris*) and the *exceptio doli* clause provided the judge with the necessary discretion in order to reach a just solution. *Bona fides* allowed him to decide the case in accordance of what he deemed fair and reasonable.[48]

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[43] See section A below.

[44] See section B below.

[45] See section C below.

[46] See section D below.

[47] The exact date is contentious. *Cicero* is the oldest written source mentioning *bona fides*. He refers to a case decided on the basis of *bona fides* around 100 BC, cf. Schermaier, p. 68. Estimations reach from third century BC to the second half of the second century BC as the time of origin, cf. Schermaier, p . 71 f. with further references.

[48] Schermaier, p. 76; Zimmermann/Whittaker, p. 16.