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Good Faith Principle Under Vienna Sales Convention - A Comparative Study

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GOOD FAITH PRINCIPLE UNDER VIENNA SALES
CONVENTION - A COMPARATIVE STUDY

by

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GOOD FAITH PRINCIPLE UNDER VIENNA SALES CONVENTION - A COMPARATIVE STUDY

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To the memory of my mother

Gao Wanrong
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I. INTRODUCTION

Good faith is a general principle of law recognized by almost all civil law countries and a number of common law countries. The Vienna Sales Convention introduces this principle in its general provision Article 7(1). Article 7(1) states that "in the interpretation of the Convention, regard is to be had . . . to the need to promote . . . the observance of good faith in international trade." A novice might be surprised to find that "good faith" is incorporated in a provision dealing with the interpretation of the Convention. At first glance at least, this placement of the requirement of good faith suggests that it is directed to the courts, rather than to contracting parties.

1 See Newman, The General Principles of Equity, in Equity in the World's Legal Systems 589, 600 (R. Newman ed. 1978). Newman states that good faith principle "is in accordance with the code of fair play of everyday ethics, is written into the civil codes in almost all civil-law systems and is thoroughly established in Anglo-American equity."

2 Final Act of the United Nations Conference on Contracts for the International Sale of Goods, U.N. Doc. A/Conf. 97/18, Annex I (1981) [hereinafter Vienna Sales Convention, the Convention or CISG]. The Convention first came into force on January 1, 1988 and it governs the sale of goods between private parties whose places of business are in different nations and whose nations are Contracting Parties to the Convention. As of May 19, 1995, forty-five countries, which account for over two-thirds of all world trade, had become parties to the Convention.

3 Id. art. 7(1). This provision reads in full, "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."
parties. Our novice may feel more perplexed when he can not find a definition or any explanation with regard to the good faith concept in the whole text of the Convention. This perplexity, similarly encountered by judges, necessarily gives rise to problems in applying the Convention's good faith principle: what function does good faith perform under the Convention? And what meaning should be given to the good faith concept? We can hardly get affirmative answers from the good faith provision itself. The function and the concept of good faith within the context of the Convention remain ambiguous and controversial. Good faith is therefore considered as a buried principle under the Convention.

Nevertheless, the good faith principle plays a beneficial role in many contractual contexts. Businessmen assume and even rely on the opposite party to act in good faith throughout the course of their contractual dealings. Trust and mutual confidence in good faith dealings are

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4In national laws, good faith is a requirement imposed on parties. See eg., German Civil Code Section 242 states, "[t]he debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage."; Section 1-203 of the UCC provides that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

5Gyula Eorsi, General Provisions, in International Sales: The United Nations Convention on Contracts for the International Sale of Goods s 2.03 (N. Galston & H. Smit eds.1984). Eorsi commented that "... as a compromise good faith could survive but should be shifted to the provisions on interpretation of the Convention, thus consigning it to a ghetto and giving it an honorable burial."

professed by international business partners. Good faith has already been acknowledged as a shared value in international trade. As the Vienna Sales Convention has been rapidly occupying the field of international commercial contracts with respect to the international sale of goods, refinement of legal standards of good faith under the Convention is of great significance for fulfilling the Convention's role in governing international sales transactions.

According to the Convention's uniform interpretation principle, good faith should not be construed using notions of good faith in national laws. Nevertheless, good faith is a concept originally rooted and evolved in national laws. The Convention's drafters did not create this concept in the international vacuum without referring to any national elements of good faith. Therefore, understanding of national approaches and experiences with regard to good faith will provide a helpful background for discerning its meaning and function under the Convention. Professor Honnold suggests that construing good faith under the Convention may be based on domestic elements that "reflect a consensus -- a 'common core' of meaning" among national


\[\text{See supra note 2.}\]

\[\text{John Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention (2d ed.1991) 147 (Stating "[t]he Convention's goal 'to promote uniformity' should bar the use of purely local definitions and concepts in construing the international text")}.\]
laws.\textsuperscript{10} Thus, a comparative study of good faith as applied in the civil and common law systems and as treated in UNIDROID Principles will lead us to a better understanding of their counterpart under the Convention.

The purpose of this work is to propose a uniform understanding of the Convention's good faith principle by clarifying its function, by setting forth its conceptual boundaries, and by defining the scope of its related obligations under the Convention. To lay ground work for this, Chapter II reviews the drafting history of Article 7(1) which presents the legislative disputes leading to a compromise good faith provision under the Convention. This compromise provision merely formulates good faith as an interpretation instrument. The discussion that follows analyzes the impact of this compromise provision and argues that good faith should also operate as imposing an obligation on parties. Chapter II also addresses the vagueness problem which stems from the aforementioned indefiniteness of the concept of good faith under the Convention.

This compromise and the conceptual vagueness problem are rooted in the fundamental disagreement between the civil and common law systems. To review the differing treatments of good faith in the two systems, Chapter III

\textsuperscript{10}Id. For a similar affirmation, see Peter Schlechtriem, Uniform Sales Law 38 (Wien, 1986)(stating that "[w]hether or not effective international standards of good faith can actually be determined must be left to studies in comparative law."
first examines the principle of good faith as set forth in the various civil law systems. These systems treat good faith as an objective concept. Here the obligation of good faith has been broadly imposed so that civil courts can use this principle to pursue equitable results with considerable flexibility. While common law systems, as surveyed in Chapter IV, apply good faith more narrowly. A scrutiny of this principle under the U.C.C. reveals two things. First, the adoption of an objective standard of commercial reasonableness has been the prevailing treatment to good faith concept. Second, the imposition of the good faith obligation should be limited to protecting reasonable contractual expectations of the contracting parties. While other major common law countries follow the U.C.C. approach, England still has an unreceptive attitude to the general principle of good faith.

Next, Chapter V examines the broad formulation of the principle of good faith in UNIDROIT Principles, which reflects the recent development with regard to good faith at the international level.

Finally, Chapter VI returns to the Convention context to construe a concept of good faith and define the scope of good faith obligation based on the preceding "common core" elements found in national laws and UNIDROIT Principles. This Chapter then applies this understanding to various situations which may arise under the Convention's substantive provisions.
The conclusion that follows is that good faith is a highly desirable general principle and that national judges should, and can save the buried "good faith" of the Convention and develop it as a substantially uniform principle in the international sales law.
II. GOOD FAITH PROVISION UNDER THE CONVENTION

A. A "compromise" result in Article 7(1)

By its terms, article 7(1) of the Convention deals with the interpretation of the Convention. Why was "good faith" placed in the strange location under the Convention? This special arrangement is perhaps best understood in light of the controversy which surrounded the drafting of the provision.

The incorporation of good faith principle was an issue subject to extensive disputes in the Convention's drafting history. As early as the Hague Diplomatic Conference in 1964, explicit reference to good faith as a general principle was opposed by the French delegate, Professor Tunc, on the ground that it might lead to divergent and even arbitrary interpretations by national courts. At the 8th session of the UNCITRAL's Working Group in 1977, the Hungarian delegation proposed the following new provision for contract formation provisions: "In the course of the formation of the contract the parties must observe

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11CISG art. 7(1). This provision emphasizes that the Convention must be interpreted with regard for its special character and purpose.


13UNCITRAL, the abbreviation of United Nations Commission on International Trade.
the principles of fair dealing and act in good faith."\(^\text{14}\) Although the proposal was subsequently adopted by the Working Group at its ninth session, it was rejected by a majority of the UNCITRAL representatives.\(^\text{15}\) Representatives who opposed the insertion of the provision noted that, although good faith and fair dealing were highly desirable principles in international commerce, the way in which they were formulated was too vague and thus were likely to generate uncertainty and non-uniformity in its application.\(^\text{16}\) They also pointed out that since the draft did not specify the consequences of failure to observe this principle, remedial measures would be left to national laws with the result that no uniformity of sanctions would be achieved.\(^\text{17}\) The stronger opposition was from common law delegates, who could not accept that good faith principle would also cover the formation of contracts.\(^\text{18}\)


\(^{16}\)Michael J. Bonell, Article 7, in COMMENTARY ON THE INTERNATIONAL SALES LAW; THE 1980 VIENNA SALES CONVENTION 69 (Cesare M. Bianca and Michael J. Bonell eds., 1987).

\(^{17}\)Id.

\(^{18}\)See E. Allan Farnsworth, Problems of the Unification of Sales Law from the Standpoint of the Common Law Countries, in PROBLEMS OF UNIFICATION OF INTERNATIONAL SALES LAW 20 (1980). In common law country, the principle of good faith is confined to performance and enforcement of contracts, not extended to formation of contracts. See discussion infra pp.61-65.
One the other hand, representatives who favored adopting the good faith principle asserted that the insertion of the provision would be consistent with the aims of the new international economic order and would promote high standards of behavior in international trade transactions. They argued that because of its universal recognition there would be little harm in including in the Convention the principle of good faith, which was of necessity vague even in national laws.

In view of the sharp split of opinions, UNCITRAL decided to refer the provision to a small working group to draft a compromise. By relegating the relevance of good faith to Article 7(1), a hard-won settlement was reached between those "who would have preferred a provision imposing directly on the parties the duty to act in good faith, and those who on the contrary were opposed to any explicit reference to the principle of good faith in the Convention." This peculiar result has been described as a "strange arrangement," "an awkward compromise", and ironically, "a statesmanlike compromise."

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19 Eorsi, supra note 12, at 349.

20 Id. (noting that "even the 'Treu und Glaubern' of the German BGB remained vague for a long time until judicial practice eventually defined its exact meaning.")


22 Bonell, supra note 16, at 83-84.

23 Eorsi, supra note 12, at 354.
B. **Good faith--more than an interpretation principle**

Through the resulting compromise in Article 7(1), good faith principle gained a foothold in the Convention.\(^2\)\(^6\) Taken literally, this compromise result does no more than instruct courts interpreting the Convention’s provisions to consider “observance of good faith in international trade” as one important factor.\(^2\)\(^7\) This treatment of the good faith principle is in marked contrast to that in national laws, where good faith is generally formulated as a principle directly imposing an obligation of good faith on contracting parties.\(^2\)\(^8\) The question that has to be raised is what impact the Convention’s principle of good faith may have on the behavior of the contracting parties. Commentators remain divided on this issue.\(^2\)\(^9\)

According to some commentators, Article 7(1) should be read literally and good faith under the Convention is


\(^{27}\)Farnsworth, supra note 18 at 19.

\(^{28}\)Eorsi, supra note 12, at 348 (Professor Eorsi states that “it is hoped that this meager result represents a modest start.”)

\(^{29}\)CISG art. 7(1).

\(^{29}\)See supra note 4.

\(^{29}\)Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods* 23 Int’l Law. 443, 467-468 (1989) (stating that almost everybody disagrees as to the impact that the principle of good faith may have on the behavior of the parties to international sales contracts).
relevant solely as a tool of interpretation to which judges must make recourse for avoiding the danger of reaching inequitable results due to rigidly reading the Convention’s provisions.\textsuperscript{30} Professor Farnsworth supports this view by stating that Article 7(1) falls short of imposing a duty of good faith on parties and whether the contracting parties are subject to a good faith duty is to be settled by national laws.\textsuperscript{31} Professor Hillman also treats the Convention’s good faith only as a supplement to the interpretation of the Convention and is opposed of the view that there exists an affirmative obligation requiring the contracting parties to act in good faith.\textsuperscript{32} Objecting to using the Convention’s good faith principle to deal with the question of whether a party performs his obligations in good faith, those commentators hold that courts can directly apply a good faith standard set forth in national law to measure the contracting parties’ behavior.\textsuperscript{33}


\textsuperscript{32}Hillman, Article 29(2) of the United Nations Convention on Contract for the International Sale of Goods: A New Effort at Clarifying the Legal Effect of “No Oral Modification” Clauses, 21 CORNELL INT’L L.J. 449, 458 (1988); See also Winship, Formation of International Sales Contracts Under the 1980 Convention, 17 INT’L LAW. 10, 22 (1983) (stating “good faith is relevant to interpretation of the Convention; there is no general obligation that the parties carry out their obligations in good faith.”)

\textsuperscript{33}See Note, Unification and Certainty: The United Nations Conventions on Contracts for the International Sale of Goods, 97 HARV. L. REV. 1984,
Conversely, some commentators support the view that the good faith under the Convention also deals with the behavior of the contracting parties. Professor Bonell stated that good faith in Article 7(1) "necessarily directed to the parties to each individual contract of sale." \(^3^4\) Professor Erosi also noted that the Convention's good faith principle "may play an active role [policing the contractual behavior] in spite of its location in the Convention." \(^3^5\)

A close scrutiny of the status of good faith under the Convention will reveal that the second view is preferable. First, the impact of the inclusion of "good faith" in Article 7(1) goes beyond its role as a mere interpretation instrument. Where a judge employs this instrument to interpret the Convention's provisions, the parties' behavior might indeed be measured by a good faith standard. \(^3^6\) To illustrate the impact of the interpretation principle to the parties, one commentator gave the following example of a case:

Under Article 24, a declaration of acceptance "reaches" the addressee when "it is . . . delivered . . . to his place of business or

1991 (1984) (stating "[i]n applying [article 7], national courts remain free to draw on domestic . . . conceptions of good faith.").

\(^3^4\) Bonell, supra note 16, at 84.


\(^3^6\) Ferrari, supra note 23 at 215.
mailing address . . ." If a party knows that the other party who has a place of business is away from his home[mailing address] for a considerable period of time, and he nevertheless sends the declaration to the mailing address, he may violate the requirement of good faith.38

In interpreting Article 24 under this circumstance, a court might hold the declaration of acceptance should be sent to the place of business rather than the mailing address considering "observance of good faith in international trade." Such interpretation would actually require the accepting party to act in good faith sending the declaration to a proper place where the addressee can receive the declaration duly.39

Furthermore, good faith has been embodied in the Convention as a pervasive norm analogous to the good faith obligation in national laws.40 Although in absence of an explicit requirement for the parties to act in good faith, an obligation of good faith imposed on the parties might be established through the Convention's gap-filling provision Article 7(2), which provides that:

37CISG art. 24.

38Id. Erosi, supra note 34 at s 2.03.

39Id. Erosi sees no distinction between interpreting the Convention and Interpreting the contract. In his opinion, " interpretation of the two cannot be separated since the Convention is necessarily interpreted by the parties also; after all, the Convention constitutes the law of the parties insofar as they do not make use of Article 6 on freedom of contract." Id.

Questions concerning matters governed by the 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 principle, in conformity with the law applicable by virtue of the rules of private international law.\textsuperscript{41}

Since the Convention fails to expressly address the question whether the parties are subject to an obligation of good faith, we should first resort to the Convention’s general principles according to the interpretative guideline of Article 7(2).\textsuperscript{42}

Good faith has been considered as one of the general principles laid down by the Convention.\textsuperscript{43} Even though there is only one express reference to the good faith term in Article 7(1), the relevance of the good faith principle is not limited to the interpretation of the Convention. The

\textsuperscript{41}CISG art. 7(2).

\textsuperscript{42}Id. Recourse to general principles in filling the gaps reflects a method well-established in civil law codes. The term general principle sounds alien to common lawyers. The common law notion of general principles is different from the civil law’s in that in civil law the source from which the general principles are derived is the legislation, whereas in common law, the source is basically the case law. See Ferrari, supra note 29 at 220-221. However, the original civil law approach of general principles has already gained acceptance in some common law statutes. The good faith principle under the U.C.C. is a typical example. Indeed, good faith has been established as a basic principle running throughout the U.C.C. (U.C.C. 1-203. Comment), and as “the foundation upon which the Code was drafted.” Servbest Foods, Inc. v. Emnessee Industries, Inc., 82 Ill.App 3d 662, 674, 403 N.E. 2d 1, 11 (1980) (citing R. Anderson, Anderson’s Uniform Commercial Code s 1-203: 1 (1981)).

\textsuperscript{43}See e.g., Bernard Audit, La vente internationale de marchandises 51 (1990) (stating that good faith is one of the general principles, even though it must be considered a mere instrument of interpretation); Schlechtriem, supra note 12 (stating good faith is “one of the general principles that must be regarded in interpreting and extending the uniform law”).
Secretariat Commentary declares that the principle of good faith "applies to all aspects of the interpretation and application of the provisions of this Convention." 44 Furthermore, the Commentary points out that the principle of good faith has been embodied in numerous substantive provisions of the Convention dealing with the conduct of the parties such as the non-revocability of certain offers, the seller's right to remedy non-conforming goods, and the parties' obligations to take steps to preserve the goods. 45


45 See id. A list of applications of the good faith principle in particular provisions of the Convention has been provided in the Commentary, where it is stated that "[a]mong the manifestations of the requirement of the observance of good faith are the rules contained in the following articles:

- article 14(2)(b) [which became final art. 16(2)(b)] on the non-revocability of an offer where it was reasonable for the offeree to rely upon the offer being held open and the offeree acted in reliance on the offer;
- article 19(2) [which became final art. 21(2)] on the status of a late acceptance which was sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time;
- article 27(2) [which became final art. 29(2)] in relation to the preclusion of a party from relying on a provision in a contract that modification or abrogation of the contract must be in writing;
- article 35 and 44 [which became final articles 37 and 48] on the rights of a seller to remedy non-conformities in the goods;
- articles 38 [which became final art. 40] which precludes the seller from relying on the fact that notice of non-conformity has not been given by the buyer in accordance with articles 36 and 37 [which became final articles 38 and 39] if the lack of conformity relates to facts of which the seller knew or could not have been unaware and which he did not disclose to the buyer;
Thus, based on this general principle, the contracting parties are subject to an obligation of good faith throughout their contractual dealings including the formation, performance and enforcement of the contract.

The most recent development of good faith principle at the international level—in UNIDROIT Principles—renders further support to the second view that gives good faith a broader interpretation under the Convention. UNIDROIT Principles, which are viewed as "a component part of the 'general principles' underlying the Convention," may play a gap-filling role in the interpretation or supplementation of the Convention through the Article 7(2) gap-filling rule of the Convention. Resorting to the UNIDROIT Principles rather than to national laws is considered to be a preferable means to deal with unsettled problems under the Convention, because it promotes the uniform application and interpretation of the Convention by precluding an easy resort to national laws and keeping the settlement of the dispute within its international legal habitat.

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46 UNIDROIT Principles, see infra note 257.


48 Id. at 1153.
contrast to the Convention’s ambiguous formulation of good faith, UNIDROIT Principles explicitly establish good faith as a principle governing the parties’ contractual dealings. With recourse to UNIDROIT Principles through the Article 7(2) of the Convention, an obligation of good faith would be imposed on the contracting parties to international sales contracts.

Considering the interpretation provision Article 7 as a whole, we can find the first view questionable, which rejects good faith as a general requirement under the Convention. First, Article 7(1) requires interpreting courts to consider the Convention’s “international character” and the “need to promote uniformity.” If good faith is not recognized as a general principle of the Convention, courts will arguably be free to apply their own national laws in defining good faith. Allowing courts to apply national laws will inevitably lead to differing interpretations with regard to the good faith requirement because of the great diversity among jurisdictions. This result would conflict with the Convention’s goal contemplated in Article 7 (1), i.e., the promotion of the Convention’s uniform application. Secondly, Article 7(2) requires courts ruling on questions that the Convention

\[49\] See infra note 263.

\[50\] CISG art. 7(1).

\[51\] See HONNOLD, supra note 9.
does not expressly address to decide such questions in accordance with the general principles on which the Convention is based. Only when a general principle cannot be ascertained, the dispute is to be resolved by national law to which the rules of private international law lead. The first view ignores the fact that good faith duty has been incorporated in the Convention’s numerous provisions and it is thereby qualified as a general principle of the Convention. Leaving the issue of good faith to be determined by national law without first making recourse to such general principle disobeys the directive of Article 7(2).

Moreover, the legislative history and intent do not give support to the first view. Although placing the term good faith in the interpretation provision, the drafters did not deny that the good faith principle might be

\[52\text{CISG art. 7(2).}\]

\[53\text{Id. It should be noted that using a general principle to deal with unsettled questions is limited by the application scope of the Convention. The Convention does not apply to some sales and certain aspects of a sale otherwise covered in national sales law. For example, Article 5 states the Convention “does not apply to the liability of the seller for death or personal injury caused by the goods to any person.” But under Article 2 of the U.C.C., claims for personal injury may be based on a breach of warranty according to s 2-606. See THE AMERICAN LAW INSTITUTE, THE DISCUSSION DRAFT OF UNIFORM COMMERCIAL CODE REVISED ARTICLE 2. SALES 10-11 (April 14, 1997)(stating since the Convention does not address the issue of contractual privity, non-privity actions are permitted under local U.S. law). Thus, when the Convention expressly excludes its application to some sales or certain aspects of a sale(See also Article 2 and Article 4), courts can not resolve those issues by using a general principle on which the Convention is based.}\]
relevant to the behavior of contracting parties. Since UNCITRAL is a political organization whose members represent national governments, the compromise result in Article 7(1) reflected a political settlement rather than the direct interest of international commerce. Most of the Convention's drafters recognized that good faith was a highly desirable principle in international trade despite its unusual formulation in Article 7(1). This belief is evidenced by their embodying the requirement of good faith into numerous provisions concerning the parties' rights and obligations to the contract.

Based on the foregoing discussion, it can be found that the principle of good faith under the Convention does not only constitute an interpretation instrument, but also concerns with the parties' behavior. An obligation of good faith should be established by the general principle of good faith that underlies the Convention's specific provisions.

C. An undefined concept and the vagueness problem

The Convention does not contain a definition for the concept of good faith. Since the term good faith is only

\[\text{See supra text accompanying notes 16-20.}\]

\[\text{Carbonneau & Firestone, supra note 24, at 73.}\]

\[\text{Schlechtriem supra note 10 at 39 (stating "even those [drafters] who had previously opposed [proposals with regard to good faith principle] indicated again and again that it would be desirable to observe the good faith principle.")}\]
referred once in the interpretation provision, we can get little help from the statutory language and context to discern the meaning of the concept. In the legislative history, there was rare discussion referring to defining this concept, except asserting the vagueness of this concept as an argument to reject the inclusion of good faith principle as a whole.\(^5^7\) In absence of a definition of the good faith, the standard of good faith behavior and the scope of good faith obligation remain ambiguous. So although good faith has been established as a principle concerned with the parties’ behavior, it provides no guidance for judges to apply this principle to govern the parties’ contractual dealings. Furthermore, the inherent vague nature of the good faith concept adds more difficulty to its application.

Nobody denies that good faith is a vague concept. There are wide differences of view over the meaning of this concept. This is true even as far as domestic law is concerned.\(^5^8\) Good faith is vague because the parties may disagree on the components of good faith conduct.\(^5^9\) A party who conducts his activities in a manner consistent with his

\(^5^7\)See supra text accompanying note 16.

\(^5^8\)Farnsworth, supra note 31, at 59. (states that there are three different definitions of good faith applied by American courts, i.e., Justice Scalia’s “implying terms” definition, Summers’ “excluder” definition, and Burton’s “foregone opportunity” definition.)

own concept of good faith may discover that his standard of good faith conduct differs greatly from that of the opposite party or of a third party who sits in judgment of the dispute. 60 Although the principle of good faith has been generally accepted, there is no uniformly recognized definition that gives good faith a general meaning, even in a single legal system. 61 As one scholar describes, good faith is a "concept which means different things to different people in different moods at different times and in different places." 62

Because of the vagueness of the concept, a judge often wrestles with deciding whether a party's conduct complies with the requirement of good faith. Domestic judicial experience provides us with more pictures with regard to this vague concept. The following two American cases illustrate that the possibility of variations in the requirements of good faith exits in similar or even a single situation.

The first case Mott Equity Elevator v. Svihovec 63 (the wheat case) involved the sale of wheat from the defendant

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60 Id.

61 In Civil Law countries, good faith takes the form of a blank concept and remains undefined. See discussion infra pp.27-28; In common law countries, like America, there has been controversy as to defining good faith concept. See infra text accompanying notes 166-170.


63 236 N.W. 2d 900 (N.D. 1975).
seller to plaintiff buyer. The seller informed the buyer he would deliver the wheat pursuant to the contract term "March Delivery", but the buyer refused to accept the wheat during that month and for two months thereafter because of a shortage of boxcars. In earlier June the seller resold his wheat at a slightly higher market price without notifying the buyer. In September when market prices fortuitously had doubled from the contract price, the buyer required the seller to make delivery of the wheat under the contract. Here, the court rejected the buyer's argument that the seller was not entitled to resell his wheat without giving reasonable notice of intent to resell, and held that the seller had not acted in bad faith when he resold his wheat after the buyer refused to accept delivery.\(^4\) In this case, while the court imposed on the buyer an affirmative duty of incurring costs of additional storage space to provide reasonable facilities for the receipt of the wheat, the seller was not obligated by any duty of good faith to undertake that relatively effortless notification task.\(^5\)

In the second case *Baker v. Ratzlaff* (the Popcorn case)\(^6\), the plaintiff buyer entered into a contract with the defendant seller, which authorized the seller to

\(^4\) *Id.* at 909.

\(^5\) *Id.*

terminate the contract upon failure of the buyer to make payment upon the deliveries. Payment was to be made after each of the three separate deliveries. The buyer accepted first two truckloads of the seller’s popcorn at his plant but made no payment at the time of delivery. The buyer testified that the practice was that copies of weight tickets were sent to his office where checks were written and mailed. Approximately one week after the first two deliveries, the seller sent a written notice of termination claiming that the buyer had breached the contract. Within a few days after receipt of the termination notice, the buyer paid for both deliveries in full. However, the seller had already entered into a contract with a third party for the sale of the balance of his popcorn at a much higher price. The court held that the seller breached his duty of good faith by declaring a termination of the contract upon a "technical pretense", because of his failure to demand payment at the time of delivery and in the subsequent telephone conversations with the buyer, and his hasty resale of the popcorn to another buyer at a price nearly double the contract price.\footnote{id. at 157.}

In the popcorn case, the seller was held breach of the duty of good faith although he first notified the buyer of the termination according to the contract and then resold the goods. While in the wheat case, the seller was not
found absence of good faith even though he did not give any notice to the seller or terminate the contract before he resold the goods. Moreover, the wheat case court reasoned that the seller did not breach the duty of good faith because no evidence showed his taking advantage of a rising market to resell the goods.\(^6\) It seems that had the seller been motivated by the ability to profit form resale of his goods in such circumstance, the decision might have been different.

From the above two domestic cases, we can see how the components of good faith requirement vary with context, even with regard to the same single duty to give resale notification. Since the concept of good faith does not provide a definite standard to measure the parties’ good faith conduct, judges may apply the principle of good faith on a case-by-case basis and give good faith specific meanings in specific circumstances.\(^6\) Thus, critics argue that this vague concept grants judges too much discretion to assure predictability and certainty and that parties are not able to avoid violations of the good faith requirement with consistency.\(^7\) Nevertheless, the problems with the

\(^6\)Svihovec, 236 N.W.2d at 909.


\(^7\)See, Gillette, supra note 59, at 621; Diederichsen infra note 104 at 277.
vague concept of good faith have not prevented the principle of good faith from developing in national laws.\textsuperscript{71} It is true that the concept of good faith remained vague for long time since its inclusion, but later judicial practice defined its meaning and developed specific rules and general standards for its application.\textsuperscript{72} Domestic experience also demonstrates that the good faith obligation can be enforced with sufficient consistency regardless of the vagueness of its connotation.\textsuperscript{73}

In the Convention context, however, the task of giving meaning to good faith is even more difficult than in domestic law because of differing notions of good faith in various legal systems and the lack of case law as an aid to discern the vague concept in specific cases. The undefined status of "good faith" as well as the inherently vague nature of this concept may create problems for courts in deciding when and how to apply the good faith principle.\textsuperscript{74} On the one hand, a court may ignore this principle altogether because of its vague formulation. On the other hand, a court may abuse this principle by freely attaching

\textsuperscript{71}Dore & Defranco supra note 40, at 61-62.

\textsuperscript{72}See discussion infra pp.29-32.

\textsuperscript{73}See Gillette, supra note 59, at 646.(noting "German experience suggests the possibility that an imprecise standard of good faith can have independent status and still be enforced with sufficient consistency to avoid the administrative difficulties [of identifying the good faith conduct] addressed above.").

\textsuperscript{74}Dore & Defranco, supra note 40, at 61.
the concept a notion so as to reach a result which the
court happens to consider fair in the situation. 75 In
either case the role of good faith principle and its
uniform application will be destroyed.

To solve such problems, it is desirable to promote a
uniform understanding of the Convention’s good faith
concept and the scope of good faith obligation. For this
task, We shall first examine the principle of good faith in
national laws and another international source -- UNIDROIT
Principles. The following comparative study may provide us
with possible common bases for the analysis of the
Convention’s good faith principle.

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75 Id.
III. GOOD FAITH PRINCIPLE IN CIVIL LAW SYSTEM

A. General

In civil law countries, which generally have more experience with the principle of good faith than common law countries, references to "good faith" appear in various codes in both specific provisions and in "general clauses". All of those code provisions and "general clauses" formulate the concept of good faith loosely. The legislators did not give a general definition of good faith. The following description of the German Civil Code's

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76 As to reference to good faith in "general clause", the well-known example is Swiss Civil Code which incorporates the principle of good faith in Article 2 of its Preliminary Chapter stating "[e]very person is bound to exercise his rights and fulfill his obligations according to the principles of good faith." This article as a "general clause" governs the whole field of rights and obligations in Swiss Civil Code. In other civil codes, such as German Civil Code and French Civil Code, good faith appears in some specific provisions governing a particular subject-matter, but those specific provisions may evolve into a general principle throughout all a civil code. To give an example of the German Civil Code, its section 242 states "[t]he debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage." This article seems to concern only the obligation of debtor. "It was, however, clear from the beginning that the precept of acting in accordance with accepted legal custom and giving consideration to the justified interests of the other party, does not apply to the debtor alone but has to be valid for the creditor" (Newman, supra note 1, at 278). As to its further sweeping extensions, Professor Dawson writes "the requirements of good faith have transformed the law of contracts and have penetrated deeply throughout the whole German private law." (John P. Dawson, Unconscionable Coercion: the German Version, 89 HAR. L. REV. 1041, 1045 (1976)).
approach to good faith concept is applicable to most civil law codifications generally:

Utilizing the general concepts developed by civil-law theory, [the makers of the German Civil Code] sought to lay down abstractly formulated rules, couched in terms of rigidly defined concepts and comprising as many individual solution as possible . . . Still, they had sufficient insight into the variety and variability of life-situations to insert in the Code a number of blanket concepts . . . such as 'good faith' (Treu und Glauben), 'good morals' (gute Sitten), 'fairness' (Billigkeit), and the like, which left some lee-way for judicial law-finding.  

The blanket concept of good faith opened up a wide discretion for judges to deal with changing circumstances. Judicial interpretation of this blanket concept produced a mass of case law, which contributed much to the development of good faith principle in the codified civil law. In major civil law countries, good faith has evolved into a principle of the greatest importance for the entire field of private law by the process of interpretation by courts and legal writers. A brief review of such process with regard to the good faith provision of one important civil


79O’CONNOR supra note 77, at 85.
code may provide us with some ideas of this blanket concept in civil law system.

B. The development of good faith principle in German law

The most famous legislative formulation of good faith principle is that found in section 242 of German Civil Code. It states "[t]he debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage." This seemingly innocent provision received a reluctant response by the judiciary at the beginning. During the first two decades after 1900, article 242 was rarely used for any purpose. The reluctance of the judiciary was eventually overborne by the disastrous inflation after World War I. The hardship and dislocation created by the rapid and catastrophic decline in the value of German mark induced the courts to intervene. To deal with the intolerable injustice, the German Supreme Court, the Reichsgericht, finally employed


81 Id.

82 Dawson, supra note 78, at 465. (referring to J.W. Hedemann, DIE FLUCT IN DIE GENERALKLAUSEN 9-10 (Tubingen, 1933)).

83 The inflation began during the war and finally in November 1923 the mark plummeted to less than a trillionth of its value. As to application of article 242 to the problems created by the inflation, see generally, Nussbaum, MONEY IN THE LAW 199-204, 206-215 (2nd ed.1950); Dawson, Effect of Inflation on Private Contracts: Germany 1914-1924, 33 MICH. L. R. 171 (1934).

84 Dawson, supra note 78, at 465.
the article 242 and concluded that the contractual obligation to effect performance according to the requirement of good faith could not be fulfilled by tendering payment with worthless currency. The German courts "revalorized" the various money debts for contractual parties, converting them into stable money values, by individualized means considered to be just and equitable according to the specific circumstances.

Good faith principle derived from BGB 242 was the stated legal basis for the decisions of thousands of the revalorization cases. However, in applying such principle to those cases, the courts did not develop a corpus of definite standards by which the contractual performance could be measured. In each case, the judge only investigated particular circumstance of the case and then exercised his discretion to arrive a decision which he

85 100 R.G.Z. 129 (Sept. 21, 1920), translated by Von Mehren & J.Gordley, THE CIVIL LAW SYSTEM 733 (2nd ed.1977). This breakthrough case involving a long-term lease in which the lessor had promised to supply steam heat; the increased cost of coal and labor had produced a net loss for the lessor almost ten times the annual rent. The court stated that the conditions created by the unexpected outcome of the war and the unexpected overturning of all economic relations required the judge to interfere with existing contractual relation, and the price term for the steam heat supplied should be revised according to the requirement of good faith and fairness. Id.

86 E.J. CoHN, MANUAL OF GERMAN LAW 60 (2nd ed.1968). By converting the contract price into current money, the judge actually rewrote contract terms for parties under the requirement of good faith. See infra discussion accompanying note 124.

87 O'CONNOR, supra note 77 at 87.

88 Id.
conceived to be consistent with the "sense of fairness, justice, and 'conscience' of the German people."^89 At this stage, the concept of good faith remained vague and amorphous in the mind of German judges, even no more clear than their feeling of equity. Good faith was only an instrument or slogan employed by them to deal with the dramatically changed and unforeseen circumstances.

This situation gave rise to much confusion and criticism.\(^90\) Concerned about "judicial security", German legal scholars started a "campaign" to impose order on judge-made chaos.\(^91\) They classified conglomerate mass of solutions attributed by courts to article 242, and extracted specific rules from those solutions that could be gathered in clusters or "types".\(^92\) Treating those specific rules as though they had been detached from their source in Article 242, German courts came to apply good faith in the form of specific rules.\(^93\) Those rules provided

\(^{89}\) Id.

\(^{90}\) Cohn, supra note 86, at 206. It was criticized that the courts, in dealing with those revaluation cases based on the good faith provision, were in danger of becoming institutions to distribute the goods of life in accordance with ethical points of view.

\(^{91}\) Dawson, supra note 78, at 496.

\(^{92}\) Id. For example, the specific rule "might relate to a course of conduct (e.g. pre-judicial delay in asserting a claim, assertion of fact or intention on which others had relied) or some identifiable disruption in a legal relation (e.g. failure to co-operate or changed conditions in contract). Id.

\(^{93}\) Id. as to those specific rules developed by German courts and legal scholars, see supra discussion with regard to the scope of good faith obligation at pp.35-41.
courts with more clear guidance, and at the same time placed some limitation on their discretion in applying good faith principle to specific case. Thus although the BGB contains no general definition of "good faith", the concept of good faith could be more clearly perceived from those specific rules and their applications than from the mass of revaluation cases.94

C. Good faith--an objective concept in civil law system

In BGB 242, the fact that the good faith term is coupled with "common usage" suggests that good faith should be understood as an objective concept. As Professor Powell pointed out, the success of the German principle of good faith has been largely due to the fact that it consisted, in essence, in appeal to common usage.95 German judges measure contractual performance by a standard of good faith "according to common usage", rather than according to parties' subjective intentions or judges' subjective and abstract higher order of values.96 Even in revalorization

94O'CONNOR, supra note 77, at 88.


96O'CONNOR, supra note 77 at 89. Professor O'Conn nor comments that any departure from the standard of good faith "according to common usage" to one according to a (subjective) vague and abstract higher order of values brings with it a new risk of German good faith chaos greater than that presented earlier by the revalorization cases. It is worth noting that some German legal scholars in recent years proposed using a subjective good faith standard to excuse non-performance of a contract when performance conflicts in some way with the conscience or "finer feelings" of a party. According to this proposal, for instance,
cases where German courts invoked those "high-level moral and social ideals that hover about the formal valid legal norms," the decisions rendered were based on an objective test---a realistic assessment of the particular circumstance according to commonly held view on justice and fairness. 97

In other civil law countries, the concept of good faith has also been elaborated in a way that effects the common usage or commercial standards rather than subjective judicial whim. In France, good faith is considered as an objective concept in the contractual context. 98 French courts use Article 1134 of French Civil Code to deal with unfair or dishonest conduct in performance of the contract. 99 The cases offered by one leading textbook as examples of moral judgments on the honest conduct of a party are also cases where the decisions might be justified

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97 "Id.

98 Id. at 95. (referring to Professor Vouin's conclusion that good faith in contractual contexts is an objective concept, determining in an abstract manner the rights and obligations of the parties. (R. Vouin, LA BONNE FOI 454 (Bordeaux, 1939))

99 "Article 1134, para.3, of French Civil Code states: "Agreement lawfully formed take the place of law for those who have made them. They cannot be revoked except by mutual consent or on grounds allowed by law. They must be performed in good faith." (the translation is that given in Von Mehren-Gordley, THE CIVIL LAW SYSTEM (2nd ed. 1977)).
on the objective basis of commercial usage.\textsuperscript{100} That is to say that good faith does not rest in the subjective discretion of judges, but is grounded in commercial standards.

The most recent legislative treatment to good faith concept in civil law warrants attention. The new Dutch Civil Code differentiates good faith in the sense of observance of reasonable commercial standards of fair dealing from good faith in the sense of honesty in fact.\textsuperscript{101} To prevent any possible confusion, the Dutch legislature uses the term good faith only in the latter sense, and describes the term in the former sense by the concept of "reasonableness and equity".\textsuperscript{102} However, the Dutch legislature has adopted an objective test in using both senses of this concept, as Professor Hartkamp pointed out that:

In Contract law, acting in good faith refers to the observance of reasonable commercial standards of fair dealing, or as the Dutch legislature has put it, acting in accordance with reasonableness and equity. This is a purely objective test . . . In the other sense, good faith refers to a test that originally was purely subjective, indicating a state of mind(lack of notice) such as a requirement for the acquisitions of movable property where the transferor is not the owner of

\textsuperscript{100}O’Connor, supra note 77 at 95 (referring to the French textbook: Planiol et Ripert, 6 Traite Pratigue de Droit Civil Francais 99 (2nd ed.1952)).


\textsuperscript{102}Id. at 554-55
the thing. Later on, this test was developed in such a way as to include also an important objective element. In the new Dutch Code, this results from article 3:11, where it is stated that good faith in this sense not only requires that the party concerned did not know the relevant state of affairs, but also that he should not have known it; this implies that he may be under a duty to investigate.103

Thus, the concept of good faith in Dutch Civil Code, irrespective of whether it is used in objective or subjective sense, demands that the good faith conduct should not be determined just based on the subjective mind of contracting parties or unchecked discretion of judges, but by the objective standards of commercial reasonableness.

D. **The scope of good faith obligation**

The blanket concept of good faith itself does not present clear and certain contour for the good faith obligation that may be imposed on parties. In order to determine the scope of good faith obligation, it is necessary to examine the function that good faith principle performs in civil codes. The following discussion is to be mainly focused on the good faith principle under German Civil Code, which basically reflects the generality of civil law on this issue.

The principle of good faith derived from BGB 242 performs three functions in its application, which includes

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103 Id. at 554.
extension and creation of rights and duties, limitation on the exercise of rights, and transformation and relief of contractual obligations because of changed or unforeseen circumstances. 104 Those functions affect the extent that courts impose good faith obligations on the parties.

The first function of this principle—extension and creation of rights and duties—expands the obligation by creating additional duties for parties which have neither been expressly provided in the contract or in statutory law. 105 The range of those additional duties is expansive. It does not only include those duties that serve to insure the proper execution of the contract and preserve parties' contractual expectations, but also extends to those duties existing before the actual conclusion of a contract, 106 or


105 Id. at 279.

106 On contrast with common law (see discussion infra pp. 61-65, civil law countries generally extend the obligation of good faith to the formation stage of contract. German law imposes parties in negotiation a contractual obligation based on the doctrine of culpa in contrahendo (fault in contractual negotiation). According to this doctrine, a party who commits a breach of the obligation is liable for contractual damages (reliance damages). For discussion of the doctrine of culpa in contrahendo, see generally A. von Mehren & J. Gordley, supra note 85 at 837-40. In France, precontractual liability is imposed not for breach of contractual obligation, but on tort principles; the duty of good faith at negotiation stage is based on a theory of tortuous misrepresentation, which demands that when one makes misrepresentations that cause damage to another, he is obligated to remedy the harm. See generally Ralph B. Lake, Letters of Intent: A Comparative Examination Under English, U.S., French, and West German Law, 18 GEO. WASH. J. INT'L. & ECON. 331, 350-351 (1984). Some other civil law countries even explicitly impose the good faith duty in the formation of contract. For example, s 1337 of Italian Civil Code requires the parties to act in good faith "in the conduct of
even after all contractual duties have been performed.\textsuperscript{107} Two examples given by Professor Diederichsen are illustrative for those extended additional duties. The first example concerns the duty to provide relevant information to the other party in the negotiation of a contract: the seller of a used car which had suffered substantial damage in an accident, may be obliged to inform the buyer of this fact prior to the signing of the contract according to the good faith principle.\textsuperscript{108} The second example is that after the termination of a tenancy, the landlord may have a good faith duty to forward to his former tenant the incoming mail.\textsuperscript{109} Those various additional duties derived from BGB 242 are treated very much like independent obligations by German courts, so that a party even can claim independent remedies, such as specific performance of giving relevant information, for violation of those duties.\textsuperscript{110} Thus with this function, the scope of good faith obligation extends outside the contractual context and the parties may be subject to a good faith obligation which is independent from their contract.

\textsuperscript{107} Id. at 279-280.
\textsuperscript{108} Id. at 280.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 281.
The second function, limitation on the exercise of right, has a restrictive effect on parties' contractual or even statutory rights. Under the principle of good faith, the exercise of those rights has to be confined to the limits dictated by good faith. Any exercise of a right which offends the precept of good faith renders the right void. To decide whether the exercise of a right violates the requirement of good faith, German courts and legal scholars have developed a number of specific rules. For example, a party may not exercise his contractual right in a way which may destroy reasonable expectations of the other party for the contract. A party is also prevented from abusing his right by citing statutory form requirements, where he knew about a form requirement and caused the other party, who was ignorant of such requirement, to conclude the contract which is not in compliance with the form. A more strict limitation of right is that a party who has unreasonably delayed in claiming his right may be deprived of such right even though the statutory period of limitation has not expired. These rules reveal that good faith requirement

111 Id.

112 Id.

113 Id.

114 Id. at 282.

115 Id. at 287.
may in some circumstances override express contract terms that provide for the rights of the parties, and even can modify the direct effect of a statutory rule. So the scope of good faith obligation is further expanded by this restrictive function.

The third function of good faith principle, as applied by German judges in revolation cases, is to adjust or cancel contracts the performance of which has become an unreasonable burden for one of the parties because of unforeseen or changed circumstances.\textsuperscript{117} This function is usually referred to as the doctrine of absence or lapse of the contractual basis.\textsuperscript{118} The basic idea of this doctrine is that where the basis for a contract has disappeared, the contract must be modified or canceled.\textsuperscript{119} A generally accepted definition for the contractual basis was proposed by Professor Paul Oertman in 1921 which reads as follows:

"Contractual basis" is an assumption made by one party that has become obvious to the other during the process of formation of the contract and has received his acquiescence, provided that the assumption refers to the existence, or the coming into existence, of circumstances forming the very basis of the contractual intention. Alternatively, "contractual basis is the common

\textsuperscript{116}Id. at 283.

\textsuperscript{117}Id. at 290.

\textsuperscript{118}Id.

\textsuperscript{119}Dawson, supra note 78, at 468.
assumption on the part of the respective parties of such circumstances.\(^{120}\)

A question with this doctrine is how great the change of these circumstances has to be in order to trigger the application of this doctrine. German courts ruled out some requirements for the application: the doctrine of absence or lapse of the contractual basis is applied only if "the consequences of strict enforcement of the contract would, considering the changed circumstances, cause entirely unreasonable demands on the debtor"\(^{121}\) or in other words "if the further upholding of the original terms of the contract would lead to unbearable consequences indefensible with regard to law and justice."\(^{122}\)

It has been asserted that the language "entirely unreasonable demands" or "unbearable consequences indefensible with regard to law and justice" is so vague that the decision to large extent depends on judges' discretion. There is no doubt that this doctrine provides courts with considerable flexibility to handle the problem of changed or unforeseen circumstances.\(^{123}\) The consequence of applying this doctrine enables the courts to "rewrite contract terms for parties in such a way that it represents arrangements which upright parties would reasonably have

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\(^{120}\) Diederichsen supra note 104, at 290 (quoting Paul Oertmann, Die Geschäftsgrundlage 37 (Leipzig, 1921)).

\(^{121}\) Id. at 291. (Citing O GHZ 1, 62 (68); BGH MDR 1953, 282).

\(^{122}\) Id. (Citing BGH NJW 195, 2203 f.).

\(^{123}\) Id. at 293.
made if they had considered the future prevailing situation at the time of concluding the contract."¹²⁴ Thus by the third function of good faith principle, the scope of good faith obligation has been expanded to the extent that a judge can adjust or even impose obligations to parties considering the changed circumstance.¹²⁵

With the three functions which largely broaden the scope of good faith obligation, it is not surprising that the principle of good faith was described as an "overriding and super- eminent principles" under German Civil Code.¹²⁶ This general principle reflects the intention of the legislator to let equity become positive in the Code and empower judges to adapt the rigidity of the codified law to changing circumstances and pursue equitable result with flexibility.¹²⁷ On the other hand, such extensive interpretation and application of the principle of good faith has been criticized as endangering the certainty and predictability of the law.¹²⁸

¹²⁴Id. at 294.

¹²⁵Common law deals with the problem of changed or unforeseen circumstances by the doctrine of impracticability rather than the general principle of good faith. In fact, the good faith principle in civil law may not necessarily give courts more discretion than common law courts have under the impracticability doctrine. See U.C.C. s 2-615.

¹²⁶GUTTERIDGE, COMPARATIVE LAW -- AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH 94 (2d ed. 1949).

¹²⁷Diederichsen supra note 104, at 277.

¹²⁸Id. at 296.
IV. GOOD FAITH PRINCIPLE IN COMMON LAW SYSTEM

A. Good faith under the U.C.C.

The United States has a relatively well-developed principle of good faith. The national-wide recognition of this principle in the United States was inspired by the adoption of the Uniform Commercial Code’s express obligation of good faith. Section 1-203 of the U.C.C. provides for the general obligation of good faith, which states that “[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.” According to the Official Comment of the U.C.C., Section 1-203 establishes good faith as a basic principle running throughout the Code. This U.C.C.

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129 Farnsworth supra note 31, at 63.

130 Before adoption of the U.C.C., only a few courts, notably those of New York and California, held that a general obligation of good faith was implied in the contract. In Erie La Shelle Co. v. Paul Armstrong Co. 263 N.Y. 79, 188 N.E. 163 (1933), the New York Court of Appeals articulated the obligation of good faith as:

In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.


131 U.C.C. s 1-203.

132 U.C.C. s 1-203 Comment.
principle, with breadth comparable to civilian counterparts,\footnote{It is said that the Chief Reporter for the Code, Karl Llewellyn, "smuggled" the concept of good faith from German Civil Code. Farnsworth \textit{supra} note 31, at 51-52.} specifies that "in commercial transactions good faith is required in the performance and enforcement of all agreements or duties."\footnote{\textsc{U.C.C. s 1-203 Comment}}

Good faith is a key concept in the U.C.C. being expressly mentioned in some fifty of the 400 sections.\footnote{\textsc{Farnsworth, Good faith Performance and Commercial Reasonableness Under the Uniform Commercial Code, 30 U. Chi. L. Rev. 666, 667 (1963).}} The meaning of this concept varies with context. Unlike civil codes, the U.C.C. defines the concept of good faith in its provisions.

1. Article 1 definition

Section 1-201(19) contains a general definition of good faith, which describes good faith as "honesty in fact in the conduct or transaction concerned."\footnote{\textsc{U.C.C. s 1-201(19)}.} "Honest in fact" characterizes good faith as a subjective concept. Under this definition, as Professor Farnsworth explains, good faith is used to describe a state of mind: innocent ignorance or lack of suspicion. This meaning is very close to that of lack of notice.\footnote{\textsc{Farnsworth, supra note 135, at 668.}} As a general definition, this
subjective concept of good faith is applicable to each article of the Code unless otherwise specified.\textsuperscript{138}

It can be seen that the U.C.C.'s general definition of good faith is narrower than the objective good faith concept under civil codes.\textsuperscript{139} To understand why the U.C.C. defines good faith in this narrow subjective sense, it is useful to go back to the 1949 draft of the Code. In the 1949 draft of the Code, the drafters adopted a single definition of good faith to be used throughout the Code that differed significantly from the current section 1-201(19) definition.\textsuperscript{140} The 1949 definition did not only require "honesty in fact", but also included an objective element of observing "the reasonable commercial standards of any business or trade" in which a party was engaged.\textsuperscript{141} The objective standard, however, was removed after it provoked controversy during the hearings of the New York

\textsuperscript{138}U.C.C. s 1-201. The preaced language of s 1-201 states clearly the general applicability of the definitions provided under this section. Currently, some more specific definitions of good faith have already been added to some articles other than article 2. See infra notes 177-181.

\textsuperscript{139}In civil codes there are also numerous references to good faith in the sense of "honesty" or "ignorance of the true facts", but the civil law concept of good faith is not limited to this subjective standard, but also generally includes an objective standard of commercial reasonableness. See discussion supra part C in chapter III.

\textsuperscript{140}U.C.C. s 1-201(18) (May 1949 Draft). This section reads: "Good faith" means honesty in fact in the conduct or transaction concerned. Good faith includes good faith toward all prior parties and observance by a person of the reasonable commercial standards of any business or trade in which he is engaged.

\textsuperscript{141}Id.
Law Revision Commission. The American Bar Association’s Corporation, Banking and Business Law Section agreed that good faith should be equated with only “honesty”. This action left the general definition in Article 1 requiring only honesty in fact.

2. Article 2 definition

Article 2 of the U.C.C., the Vienna Sales Convention’s American counterpart, applies to transactions in goods. This article includes a specific definition of good faith applying to merchants involved in a sale of goods. The objective “reasonable commercial standards”, which was removed from Article 1 definition, survived in this

[142]Robert Braucher, The Legislative History of Uniform Commercial Code, 58 COLUM. L. REV. 798, 812 (1958). New York bankers strongly objected the objective standard because they concerned that an objective standard of good faith, when applying to Article 3, would impose too great a burden on financial institutions to inquire into the status of negotiable instruments in order to qualify as holders in due course. Id. This usage of the good faith concept in the sense of good faith purchase is different from that discussed in this thesis, i.e., good faith in the formation and performance of the contract.

[143]Id. The ABA Section was concerned that an objective standard would freeze commercial practices.


[145]U.C.C. s 2-103(1)(b). This specific definition reads “[g]ood faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” A merchant under U.C.C. is defined in s 2-104(1) as follows:

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transactions or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.
merchant definition. Here, good faith means not only "honesty in fact", but also "the observance of reasonable standards of fair dealing in the trade."\textsuperscript{146} This definition is partially consistent with Farnsworth's description of good faith concept in the sense of good faith performance: "good faith" is not limited to the state of mind--with innocence, or lack of suspicion.\textsuperscript{147} Under Article 2 the inquiry also goes to decency, fairness or reasonableness in performance or enforcement of the contract.\textsuperscript{148}

Good faith performance requires that the behavior of the parties comply with an objective standard tied to commercial reasonableness.\textsuperscript{149} As Farnsworth argues:

Good faith performance has always required the cooperation of one party where it was necessary in order that the other might secure the expected benefits of the contract. And the standard for determining what cooperation was required has always been an objective standard, based on the decency, fairness or reasonableness of the community and not on the individual's own beliefs as to what might be decent, fair or reasonable. Both common sense and tradition dictate an objective standard for good faith performance.\textsuperscript{150}

\textsuperscript{146}Id.

\textsuperscript{147}Farnsworth, \textit{supra} note 135, at 668.

\textsuperscript{148}Id.

\textsuperscript{149}Id. at 671.

\textsuperscript{150}Id. at 672. Professor Farnsworth also found support for the objective standard from Roman law where 'good faith' was used in the same sense as the good faith performance for commercial transactions, including the sale. \textit{Id.} at 669-670.
In the sales context, the U.C.C. uses this objective standard to protect parties' reasonable expectations.\textsuperscript{151} This standard is most commonly employed where a contract contains an open quantity or price term,\textsuperscript{152} or is subject to conditions within one party's control.\textsuperscript{153} In these cases a "honest in fact" subjective standard would not be sufficient to govern one party's discretion to set or control terms as to quantity, price, or to control some contractual conditions.\textsuperscript{154} Courts must look to commercial reasonable standards to interpret the contract rather than allow any demand or price to bind the other party.

\textsuperscript{151}Id. good faith performance requires "cooperation on the part of one party to the contract so that another party will not be deprived of his reasonable expectations."

\textsuperscript{152}Particular applications of this objective definition appear in some provisions in Article 2. See e.g., s 2-306(1) on output and requirements contracts provides "[a] term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirement as may occur in good faith . . . ."; s 2-305(2) on open price terms provides "[a] price to be fixed by the seller or by the buyer means a price for him to fix in good faith." More generally, s 2-311(1) requires that any provision under a sales contract leaving performance to be specified by one of the parties must be made "in good faith and within the limits set by commercial reasonableness."

\textsuperscript{153}A typical example for contracts subject to conditions in the control of one party is the satisfaction contract, which is conditioned on that a party be satisfied with the other party's performance. The U.C.C. does not contain specific provisions dealing with this kind of contracts. Nevertheless, common law cases suggest that the obligation of good faith implied from conditions of one party's satisfaction be governed by Article 2 good faith standard. See e.g., Neumiller Farms, Inc. v. Cornett, 368 So. 2d 272 (Ala. 1979) (engrafting the U.C.C.'s definitions of good faith onto the good faith obligation established by relying on common law precedents); City of Rochester v. Vanderlinde Elec. Corp., 56 A.D.2d 185, 188, 392 N.Y.S.2d 167, 170(1977); Western Hills, Or., Ltd. v. Pfau, 265 Or. 137, 508 P.2d 201 (1973) (en banc).

\textsuperscript{154}Farnsworth Supra note 135, at 671-672.
The application of this objective standard of good faith is well illustrated in *Orange and Rockland Utilities, Inc. v. Amerada Hess Corp.*\(^{155}\) In this case, the plaintiff buyer (O&R) entered a five year contract with the defendant seller (Hess) beginning from 1969 for the supply of its requirements of fuel oil at a price of $2.14 per barrel.\(^{156}\) The quantity clause of the contract included estimates of the requirements for each year, based on expected consumption by the plaintiff, and with the anticipation that gas would be the primary fuel used by O&R for power.\(^{157}\) As the market price for fuel oil rose rapidly to $4.30 per barrel in 1970, O&R substantially increased its use of fuel oil and reduced its use of gas.\(^{158}\) When Hess refused to supply more than the estimated quantity, O&R sued Hess for breach of contract and claimed damages based on alleged requirements that were double the estimated quantity.\(^{159}\) The court rejected the plaintiff’s claim for damage on the ground that its requirements for fuel oil supply were not incurred in good faith.\(^{160}\)

\(^{155}\) A.D. 2d 110(1977)

\(^{156}\) Id. at 111.

\(^{157}\) Id.

\(^{158}\) Id. at 112-113.

\(^{159}\) Id. at 113.

\(^{160}\) Id.
In this case O&R did not represent its requirements dishonestly because its requirement for fuel oil did increase greatly at that time. But the court found that the increase in requirements was due to the great increases in sales of electricity to other utilities by O&R and its net shift in fuels used for generation, from gas to oil. The court inferred that by increasing its reliance on oil for its own power needs, O&R was able to seize "the opportunity to release its reserve commitment of gas" and reap substantial profits; and by increasing its sales of energy to other utilities, O&R in effect transformed its requirements from those of a fuel oil consumer into those of an energy seller. O&R's demand for such increased requirements went beyond the Hess's reasonable expectation-estimates based on the plaintiff's own consumption of fuel oil and the plaintiff's use of gas as the primary fuel for power generation. The court finally concluded that the O&R's use of the requirement contract "to suddenly and dramatically propel itself into the position of a large seller of power to other utilities evidences a lack of good faith dealing".

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161 Id. at 114.
162 Id. at 117.
163 Id. at 120.
164 Id. at 117.
As to the requirement of "good faith" in this case, the court relied on pre-Code case law and established a reasonable commercial standard to measure the buyer’s requirement demand, i.e., a buyer in a rising market cannot use a fixed price in a requirements contract for the purpose of taking advantage of market conditions at the seller’s expense.  

Here it is obvious that a test merely based on the party’s subjective mind make no sense for determining good faith performance of the contract. It is the objective standard of good faith that justified the court in protecting the party’s reasonable commercial expectations.

3. Erosion of the subjective standard

Although an objective standard based on commercial reasonableness is a highly desirable test for good faith performance and enforcement of contract, the U.C.C. at the beginning did not apply this objective standard pervasively. Originally, only Article 2 had an objective definition and good faith was limited to "honesty in fact" outside Article 2.

The U.C.C.’s such formulation of good faith concept met with vigorous criticism. Professor Farnsworth pointed out that the good faith principle under the U.C.C. was much "enfeebled" by the subjective definition in section 1-203(19), and he argued that an objective standard, as

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165 Id. at 114.
reflected in the U.C.C.'s reference to commercial reasonableness, should be more generally adopted to evaluate good faith.  

Professor Summers also criticized that this narrow definition failed to cover many forms of nondishonest bad faith and thereby distorted the principle of good faith under the Code.  

In his influential 1968 article, Summers defined good faith using an "excluder" analysis. According to this analysis, "good faith . . . is best understood as an 'excluder'--it is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith."  

Summers further pointed out that the concept of good faith should be open-ended rather than sealed off in a definition in order to enable courts to deal with any and all forms of contractual bad faith.

Both Farnsworth's and Summers' analysis found their ways into the good faith provision of the Restatement (Second) of Contracts. In the Restatement, good faith has

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166 Farnsworth supra note 135, at 673-74.

167 Id. at 679. Professor Farnsworth indicated that "the Code's concepts of good faith performance and commercial reasonableness await development, even beyond the bounds of the Code, at the hands of resourceful lawyers and creative judges." Id.

168 Summers, supra note 69, at 210-12.

169 Id. at 196.

170 Id. at 215.

171 Restatement (Second) of Contract (1981)[hereinafter Restatement].
been formulated as an open-ended concept.\textsuperscript{172} The standard of
good faith set forth in Section 205 of the Restatement
stands in marked contrast to the subjective standard of
good faith articulated in Section 1-201(19) of the U.C.C..
Section 205 provides an objective standard that goes well
beyond the U.C.C.'s standard: "Every contract imposes upon
each party a duty of good faith and fair dealing in its
performance and its enforcement."\textsuperscript{173} As the comments to
Section 205 explain, in the performance and enforcement of
contracts, good faith "emphasizes faithfulness to an agreed
common purpose and consistency with the justified
expectation of the other party" and it requires contracting
parties' behavior to comply with "community standards of
decency, fairness or reasonableness."\textsuperscript{174} This objective
standard is generally applied by courts to measure a
party's performance in cases arising outside the U.C.C.\textsuperscript{175}

\textsuperscript{172}The drafters of Restatement did not attempt to define the good faith
concept with a general meaning, but adopted a approach which is
actually based on Summers' 'excluder' analysis. The 'excluder'
analysis directly found its way into the commentary to the
Restatement's good faith provision, which explains that
A complete catalogue of types of bad faith is impossible, but the following types are among those which have been
recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful
rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance. (Restatement (Second) of Contracts s 205 Comment d.)

\textsuperscript{173}Restatement s 205 (1981).

\textsuperscript{174}Id. Comment a.

\textsuperscript{175}See e.g., Tollefson v. Roman Catholic Bishop, 268 Cal. Rptr. 550
The Restatement's conceptualization of good faith demonstrates the general recognition of an objective concept of good faith in American contract field.\textsuperscript{176}

The erosion of the subjective standard of good faith has already happened under the U.C.C.. Over years of U.C.C. revision more specific good faith definitions have been added to Article 2A,\textsuperscript{177} Article 3,\textsuperscript{178} Article 4,\textsuperscript{179} Article 5,\textsuperscript{180} and Article 8.\textsuperscript{181} Among those specific definitions, only Article 5(letter of credit) definition continues to apply the subjective standard--"honesty in fact".\textsuperscript{182} All

\textsuperscript{176}See generally Robert S. Summers The General Duty of Good Faith -- Its Recognition and Conceptualization, 67 Cornell L. Rev. 810 (1982). Professor Summers asserted that the formulation of good faith concept in section 205 was "based on numerous judicial opinions imposing a duty of good faith, several major statutory developments[including U.C.C.] and the published writings of professors of law", and thereby "it enjoys full-fledged Restatement legitimacy."

\textsuperscript{177}U.C.C. s 2A-103(2). Article 2A applies the good faith definition same as in Article 2 (s 2-103(1)(b)).

\textsuperscript{178}U.C.C. s 3-103(3)(c).

\textsuperscript{179}U.C.C. s 4-104(c).

\textsuperscript{180}U.C.C. s 5-102(a)(7).

\textsuperscript{181}U.C.C. s 8-102(a)(10).

\textsuperscript{182}This narrower definition in Article 5--which does not include "fair dealing"-- is considered "appropriate to the decision to honor or dishonor a presentation of documents specified in a letter of credit". But the scope of the application of this subjective definition is relatively narrow, which "applies only to the extent that the reimbursement contract [between the applicant and the issuer of letter of credit]is governed by provisions in [Article 5]; for other purposes good faith is defined by other law." U.C.C. s 5-102 Comment 3.
other specific definitions contain an objective standard of good faith—reasonable commercial standards of fair dealing. The April 1997 Draft Revision of Article 9 would also add an objective definition to Article 9 of the U.C.C requiring observance of reasonable commercial standards of fair dealing. 183

It is worth mentioning in particular that the 1990 revision made to article 3 (negotiable instrument) defines good faith as "honesty in fact and observance of reasonable commercial standards of fair dealing." Based on this definition, holders in due course are now subject to a test of good faith that requires them to act according to reasonable commercial standards of fair dealing. That means good faith purchase, traditionally used in a subjective sense, 184 would also include an objective standard. 185 This revision has effectively mooted the base for application of the "honesty in fact" standard in article 1 general definition. 186 Furthermore, according to PEB Commentary


185Early back to 1824, the England case Gill v. Gubitt (3 B. & C. 466, 107 Eng. Rep. 806 (K.B. 1824)) ever introduced an objective test for good faith purchase which required the holder to exercise the prudence and caution of a reasonable man. But this objective test was overruled in Goodman v. Harvey (4 A. & E. 870, 111 Eng. Rep. 1011 (K.B. 1836)).
No. 10, the subjective standard of good faith must also be interpreted in light of the agreement of the parties, and thus a purely subjective test would have less room to play in evaluating good faith in the performance and enforcement of a contract.\textsuperscript{187}

As has been said, despite of the general applicability of the subjective definition in article 1, an objective concept of good faith has already extended to other articles other than article 2. This suggests that the "reasonable commercial standards of fair dealing" is now on its way to code-wide acceptance as a uniform standard for good faith requirement.

4. The scope of good faith obligation under the U.C.C.

The objective good faith definition referred to commercial reasonable standards is much broader than the "honesty in fact" definition. Unlike the "honest in fact" standard, which standing alone is simple and clear, commercial reasonable standards are not fixed and vary with context. With this open-ended definition, judges are

\textsuperscript{186}This revision to Article 3 actually undermined the argument by which New Yorker bankers objected the inclusion of an objective standard into the Article 1 general definition. See supra note 142.

\textsuperscript{187}PEB Commentary No. 10 Section 1-203, reprinted in SELECTED COMMERCIAL STATUTES 912, 912 (ed. 1994) [hereinafter PEB Commentary or Commentary]. According to the Commentary, to ascertain the parties' agreement, courts need to look to their actual commercial background including usage and practices. Thus the inquiry will necessarily involve with an objective standard.
allowed to determine the obligation of good faith by an ad hoc review of facts of each case.

Nevertheless, there is a limitation on courts imposing parties the good faith obligation under the U.C.C.. PEB Commentary No. 10 on section 1-203 provides for an "authoritative" explanation with regard to the nature and scope of the Code's general obligation of good faith.\(^{188}\) According to the Commentary, since the principle of good faith serves to protect contract parties' reasonable expectations and such expectations are the measure of parties' good faith,\(^ {189}\) good faith is considered as "a concept with conceptual content related to that of agreement" and it merely directs attention to the parties' reasonable expectations.\(^ {190}\) To determine whether a party acts in good faith or not, a court should base its decision on the parties' agreement.\(^ {191}\) The court can determine the content of the agreement by examining the commercial

\(^{188}\) Id. at 912-917. As to the persuasive influence of PEB commentaries, see Julian B. McDonnell, Definition and Dialogue in Commercial Law, 89 NW. U. L. REV. 623, 625. (stating "when the P.E.B. speaks, the other participants [including judges] in the dialogue listen.")

\(^{189}\) Id. at 913. (quoting Karl Llewellyn's explanation on the principle of good faith).

\(^{190}\) Id.

\(^{191}\) Id. at 915. The concept "agreement" is defined in s 1-201(3), which reads:

"Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage or trade or course of performance as provided in this Act (Sections 1-205 and 2-208).
context in which the parties have developed their reasonable contractual expectations.\textsuperscript{192} But the court may not go beyond the "agreement" or contractual reasonable expectations to impose parties an independent good faith obligation, because good faith does not exist separately from the underlying agreement.\textsuperscript{193} The Code’s principle of

It should be noted here that the Code defines the closely related concept -- "contract" -- as "the total legal obligation which results from the parties' agreement . . . ." UCC s 1-201(11) (emphasis added).

\textsuperscript{192} According to the definition of agreement, the parties' commercial context may include "usage of trade, course of dealing, course of performance and the surrounding circumstances as effective parts thereof . . . ." UCC s 1-201 Comment 3.

\textsuperscript{193} PEB Commentary supra note 187 at 915-916. Case law remains divided as to whether there exists an independent duty that supports a separate cause of action for its violation. Some courts have rejected claims alleging breach of the duty of good faith. See e.g., Super Glue Corp. v. Avis Rent A Car System, 517 NY Supp. 2d 764, 766, 132 App. Div. 2d 604 (1987) (finding "the Code does not permit recovery of money damages for not acting in good faith where no other basis of recovery is present"); Accord, Kaushal v. State Bank of India, No. 82-C-7414 (ND Ill, February 12, 1988) (dismissing the claim alleging damages for breach of good faith duty); Chandler v. Hunter, 340 So. 2d 818, 821 (Ala. App.1976); Management Assistance, Inc. v. Computer Dimensions, Inc., 546 F.Supp. 666 (N.D. Ga.1982), aff'd 747 F.2d 708 (11th Cir. 1984). Conversely, some other courts have held that a party who violates the duty of good faith commits an actionable breach of contract. See e.g., Sons of Thunder, Inc., v. Borden, Inc., 1997 WL 104592 (N.J.) (requiring the defendant to pay $412,000 for its "breach of the implied covenant of good faith and fair dealing" which is quite apart from a breach-of-contract claim); Colorado Interstate Gas v. Natural Gas Pipeline Co., 661 F.Supp1448, 1474-75 (D Wyo 1987) (recognizing a separate cause of action for breach of the good faith duty); Conoco Inc. v. Inman Oil Company, Inc., 774 F.2d 895 (8th Cir.1985) (holding that Conoco's breach of the good faith duty required a conclusion that it had breached the contract); Best v. U.S. National Bank 714 P.2d 1049, 1056 (Or. App. 1986). Considering the dependence of good faith to parties' contractual expectations and agreement, the Commentary supports the former view and holds that good faith is "not an independent source from which rights and duties evolve." The Commentary further points out that the language "every contract or duty within this Act imposes . . . ." in s 1-203 (emphasis added) makes it clear that the obligation of good faith "extends only to the rights and duties resulting from the parties' contract."
good faith does not allow a court to depart from parties' reasonable expectations and resort to principles of law or equity outside the Code to create an obligation named by good faith.\textsuperscript{194} Thus, the scope of good faith obligation under the U.C.C. is relatively narrower than German judges extended by broadly interpreting BGB 242. The parties' agreement or their reasonable contractual expectations stands as a limit to the U.C.C.'s good faith obligation.

On the other hand, the scope of good faith obligation may be extended beyond written terms of a contract. As mentioned above, the U.C.C. adopted the principle of good faith to protect the reasonable expectations of the contracting parties. For such purpose, as Corbin writes:

\begin{quote}
\ldots then at some point it become necessary for courts to look to the substance rather than to the form of the agreement, and to hold that substance controls over form. What courts are doing here, whether calling the process "implication" of promises, or interpreting the requirements of "good faith," as the current fashion may be, is but a recognition that the
\end{quote}

\textsuperscript{194} Id. at 916. The Commentary amended the Official Comment to s 1-203 by adding the following language:

This section does not support an independent cause of action for failure to perform or enforce in good faith. Rather, this section means that a failure to perform or enforce, in good faith, a specific duty or obligation under the contract, constitutes a breach of that contract or makes unavailable, under the particular circumstances, a remedial right or power. This distinction makes it clear that the doctrine of good faith merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached. \textit{Id.} at 916-917.
parties occasionally have understandings or expectations that were so fundamental that they did not need to negotiate about those expectations. When the court "implies a promise" or holds that "good faith" requires a party not to violate those expectations, it is recognizing that sometimes silence says more than words, and it is understanding its duty to the spirit of the bargain is higher than its duty to the technicalities of the language.\textsuperscript{195}

This explanation has obtained recognition by the PEB Commentary, which makes it clear that the requirement of good faith relative to the agreement of the parties may override the written terms in some circumstances.\textsuperscript{196} In deciding whether a party has acted in good faith, a court must first ascertain the substance of the parties' agreement rather than look to the technicalities of contractual language.\textsuperscript{197} Accordingly, the U.C.C. provides for a broad concept of "agreement",\textsuperscript{198} which covers not only the written terms but also a variety of elements including course of dealing,\textsuperscript{199} usage of trade,\textsuperscript{200} and course of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{195}See A. Corbin, Corbin on Contracts s 570 (West Supp. 1993).
\item \textsuperscript{196}PEB Commentary supra note 187, at 916. This is a controversial issue. Utilitarian judges of the Chicago school dissent that the good faith requirement can override the written terms. See Judge Easterbrook's opinion in Kham & Nate's Shoes No.2, Inc. v. First Bank of Whiting, 908 F.2d 1351 (7th Cir.1990). But on the other hind, the New Jersey Borden case (See supra note 193) shows judicial support for the PEB position.
\item \textsuperscript{197}Id.
\item \textsuperscript{198}See supra note 191.
\item \textsuperscript{199}U.C.C. s 1-205(1).
\item \textsuperscript{200}U.C.C. s 1-205(2).
\end{enumerate}
\end{footnotesize}
performance.²⁰¹ Courts need to synthesize all of those elements to discern the agreement of the parties.²⁰² Thus the explicit contractual language is not always decisive to determine parties' rights and duties; good faith obligation requires parties to perform and enforce a contract in "a way that recognizes that the agreement should be interpreted in a manner consistent with the reasonable expectations of the parties in the light of the commercial conditions existing in the context under scrutiny."²⁰³

The scope of the general obligation of good faith under the U.C.C. is also narrower than that in civil law with respect to whether this general obligation extends to the formation stage of contracts. While civil law countries generally recognize and enforce a duty of good faith negotiation,²⁰⁴ common law imposes no good faith obligation prior to the execution of a contract. The traditional

²⁰¹U.C.C. s 1-205(3).

²⁰²As to how express terms, course of dealing and usage of trade are to be synthesized, s 1-205(3)(4) provides for guidance as follows:
(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.
(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

²⁰³PEB Commentary, supra note 187, at 916.

²⁰⁴See supra note 106.
common law view, sometimes referred to as the "aleatory view" of negotiations, holds that mere participation in precontractual negotiations is not enough to create binding obligations. The underlying policy of this common law view is to preserve the parties' freedom to negotiate and to avoid discouraging parties from entering negotiations. American courts have been reluctant to find a general obligation to negotiate in good faith. This reluctance is supported by the prevailing view that the general obligation of good faith in both the U.C.C. and the

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205 Farnsworth, Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations 87 COLUM. L. REV. 217, 221 (1987). According to the "aleatory view", "a party that enters negotiations in the hope of the gain that will result from ultimate agreement bears the risk of whatever loss results if the other party breaks off the negotiations." One English judge had a good expression as to this view, stating that a party to negotiations "undertakes this work as a gamble, and its cost is part of the overhead expense of his business which he hopes will be met out of the profits of such contracts as are made ..." (citing William Lacey (Hounslow) Ltd. v. Davis, [1957] 1 W.L.R. 932, 934 (Q.B.)). Id.

206 Id. It can be seen that the parties' freedom to negotiate is preserved at the risk that their negotiation efforts will go uncompensated if negotiations fail.

207 Id. at 242-43. As to the negative effect of imposing a general precontractual obligation, Professor Farnsworth has more to say: There is no reason to believe that imposition of a general obligation of fair dealing would improve the regime under which such negotiations take place. The difficulty of determining a point in the negotiations at which the obligation of fair dealing arises would create uncertainty. An obligation of fair dealing might have an undesirable chilling effect, discouraging parties from entering negotiations if chances of success were slight. The obligation might also have an undesirable accelerating effect, increasing the pressure on parties to bring negotiations to a final if hasty conclusion. With no clear advantages to counter these disadvantages there is little reason to abandon the present aleatory view.
Restatement (Second) of Contracts does not extend to the negotiation stage.\textsuperscript{208}

However, this limitation concerning good faith obligation does not necessitate the conclusion that a party who acts in bad faith in negotiation is completely relieved from any liabilities. Instead of using the general obligation of good faith as the liability basis, American courts impose parties the precontractual liability based on more specific common law doctrines.\textsuperscript{209} Courts may police the bargaining process and strike or rewrite unfair agreement by applying common law doctrines such as fraud and duress,\textsuperscript{210} unconscionability,\textsuperscript{211} contract interpretation,\textsuperscript{212}

\textsuperscript{208}Id. at 239.

\textsuperscript{209}According to U.C.C. s 1-103, courts can settle the issue by the importation of outside common law doctrines.

\textsuperscript{210}See Robert A. Hillman, Julian B. McDonnell & Steve H. Nickles, Common Law and Equity Under the Uniform Commercial Code 6.02[2][a][i] (1984). Fraud may be found when there exists a material misrepresentation of fact and reliance on that misrepresentation (citing Obsterberger v. Hites Constr. Co., 599 SW 2d 221, 227 (Mo. Ct. App. 1980)); Duress can be invoked to invalidate a contract where one contracting party commits wrongful conduct which precludes the exercise of free will by the other party (citing Federal Deposit Ins. Corp. v. Balistreri, 470 F. Supp. 752, 758 (ED Wis. 1979)). Id.

\textsuperscript{211}Id. at 6.02[2]. The theory of unconscionability is codified in section 2-302 of U.C.C., which authorizes courts to bar or limit the enforcement of unfair contracts or contract clauses. According to Professor Hillman, unconscionability has two major components: common law doctrines unconscionability that includes common law and equitable doctrines focusing on the issue of assent; and pure unconscionability that merely involves the fairness of the resulting terms of an agreement. When bargaining infirmity exists, courts often resort to common law doctrines focusing on the issue of assent instead of the unconscionability provision of section 2-302 to deal with unconscionability cases.

\textsuperscript{212}Id. at 6.02 [2][a][ii]. Rules of contract interpretation require that ambiguous or conflicting contract terms are construed against the
the duty to disclose. A disappointed party may also claim remedy based on restitution, misrepresentation, or promise reliance theory when the negotiation fails and no contract exists between the parties. Professor Hillman argues in favor of applying those specific common law doctrines to the bargaining process rather than a general principle of good faith on the ground that their application would increase the clarity of decisions. In contrast the good faith principle, which directly employs a fairness standard, could be seen as more obscure and unfocused.

Professor Farnsworth also argues that those specific common

drafter of the contract (citing Williams v. Walker-Thomas Furniture Co. 350 F.2d 445 (DC Cir. 1965). Id.

213 Id. at 6.02[2][a][iii]. Traditionally, parties to business transactions were not required to disclose all material information unknown to the other party before the transactions is consummated. See Laidlaw v. Organ 15 U.S. (2 Wheat.) 178, 195 (1817). But currently some courts employ the duty-to-disclose doctrine to protect parties to standardized agreements when the drafters do not play fairly. For example, the duty to disclose can be imposed "when a party with superior knowledge of facts, 'resulting in an inequality of condition or knowledge between the parties,' fails to disclose important facts regarding the surrounding circumstances of a bargain to the other party." (Smith v. Peterson, 282 NW 2d 761, 767 (Iowa 1980)). However, courts are still less likely to impose such disclosure duty in commercial cases where a party has invested resources or incurred costs to acquire the information. See Anthony Kronman, Mistake, Disclosure, Information and the Law of Contracts, 7 J. of Legal Studies, 1,13,18(1978).

214 See generally Farnsworth, supra note 205, at 229-240. As to imposing precontractual liability based on restitution theory, see e.g., Hill v. Waxberg, 237 F.2d 936 (9th Cir. 1956); Precontractual liability based on misrepresentation theory, see, Markov v. ABC Transfer & Storage Co., 467 P.2d 535 (1966); Precontractual liability based on detrimental reliance theory, see Hoffman v. Red Owl Stores, 133 N.W.2d 267 (1965).

215Hillman, McDonnell & Nickles supra note 210 at 6.02[2][c].
law doctrines are adequate to protect parties from the bad faith behavior in the negotiation stage, thereby the imposition of a general obligation of good faith in the formation of contracts is superfluous.\textsuperscript{216} However, it is not clear at all that the common law doctrines can cover all cases of improper conduct in the formation of a contract.

It is worth noting that the new 1997 draft provision s 2-105, dealing with unconscionable contract or term, includes a new phrase "induced by unconscionable conduct."\textsuperscript{217} This phrase was added and approved at the American Law Institute's Annual Meeting of the Conference in July, 1996.\textsuperscript{218} By this phrase, the codified unconscionability doctrine extends to deal with the negotiation conduct which is unconscionable or induces an unconscionable contract or term. This doctrine, which is formulated more generally than those specific common doctrines, may have the same effect as the general

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\item\textsuperscript{216}Farnsworth, supra note 205, at 285.
\item\textsuperscript{217}The American Law Institute, supra note 53 at 11. The draft provision s 2-105(a) reads as follows:

(a) If a court finds as a matter of law that a contract or a term thereof was unconscionable at the time it was made or was induced by unconscionable conduct, the court may refuse to enforce the contract, enforce the remainder of the contract without the term, or so limit the application of the term to avoid an unconscionable result. (emphasis added)

This draft provision is the same as s 2-302 in the 1996 Official Text, except for the newly added phrase "induced by unconscionable conduct."

\item\textsuperscript{218}Id. at 12.
\end{enumerate}
principle of good faith has in dealing with unconscionable conduct in the contract formation. The new development suggests that the U.C.C. may be moving in the direction of imposing a general obligation on parties at the negotiation stage.

B. Good faith in English Law

In contrast with the development in the United States, good faith has met with a considerable resistance in English law. Although as far as back 1766 Lord Mansfield referred to good faith as "[t]he governing principle . . . applicable to all contracts and dealings," this principle never sprouted roots and grew in England. In the English law of contract, there is no general obligation to observe good faith in performance or enforcement of a contract. As Lord Justice Bingham has said:

"English law has, characteristically, committed itself to no such overriding principle [of good faith] but has developed solutions in response to demonstrated problems of unfairness."

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220 Johan Steyn, The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy, 1991 Denning L.J. 131, 138. Lord Mansfield's view in Carter case was soon rejected and the duty of "utmost good faith" remains attached only to the contract of insurance; thus traditionally, English lawyers have been unreceptive to a general principle of good faith. Id.

221 Powell, supra note 95 at 25. Professor Raphael Powell maintained that there was in English law "no overriding general positive duty of good faith imposed on the parties to a contract."

222 Interfoto Library Ltd. v. Stilleto Ltd. [1975] Q.B. 154
In the absence of a general principle of good faith, English law has to resort to some technical doctrines, such as the implication of contractual terms or promissory estoppel, to deal with those demonstrated problems of unfairness. Under the implication doctrine, for example, by reason of special circumstances of a particular contract, a court may imply a term from local custom or mercantile usage to implement the supposed intention of parties; by reason of the nature of the contract, a court may imply a duty to cooperate where the contract cannot be performed without cooperation. Through such implication, the court actually imposed a standard of "fairness" or "reasonableness" in the performance of a contract.

This technical substitute for a more general principle of good faith, however, is limited to promoting "fairness" or "reasonableness". As Professor Raphel

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223 O'CONNOR, supra note 77, at 19.

224 Id. at 20. The invention of the doctrine of promissory estoppel is considered as a bold example of the courts indirectly imposing a good faith requirement through the device of a technical rule in order to enforce a gratuitous promise without support of consideration. See Foakes v. Beer [1884] 9 App. Cases 605; Central London Property Trust Ltd. v. High Trees House Ltd. [1947] K.B. 130.

225 Id. at 19. citing Hutton v. Warren (1836) 1 M. & W. 466; 150 E.R. 517.

226 Id. citing Laing v. Fidgeon (1815) 6 Taunton, 108;128 E.R. 974.


228 O'CONNOR, supra note 77, at 19.
Powell said, by using a roundabout route, an English court can in many cases reach the same result as a foreign court applying the principle of good faith. But as professor Powell noted, in a number of cases the rule requiring good faith has enabled the foreign court to adjust relations between the parties more equitably than an English court in similar circumstances. For example, under English law, the implication of terms into a contract is subject to the rule that a term cannot generally be implied so as to supersede the written terms of the contract.

Still the English judiciary and lawyers insist on their "jaundiced" view on the general principle of good faith. In 1979, UK delegation fiercely opposed a proposal to introduce a general obligation of good faith into the Vienna Sales Convention. This opposition is consistent with the concept of good faith formulated in the Sale of Goods Act 1979 of England. In the Act "good faith" is essentially limited to "honesty in fact". This concept of

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229 Powell supra note 95, at 25.


231 Steyn, supra note 220, at 133.

232 Eorsi, supra note 5, at pp.2-7.


234 By section 61(3), a thing is deemed to be done "in good faith" within the meaning of the Act when it is in fact done honestly, whether it is done negligently or not.
"good faith" is merely used as a rule to decide whether a
good title is acquired with regard to a sale in market
overt. The Act does not invoke "good faith" to deal with
unfair or unreasonable conduct by seller or buyer. Thus
it fails to support an imposition of a general duties of
good faith to contract.

However, there are signs that English law may become
more receptive to the notion of good faith. Guided by Lord
Reid's dictum that "the common law ought never to produce a
wholly unreasonable result ...", a new generation of
English judges has come to look beyond the traditional
confines of English law and to embrace a more fair and just
solution. When delivering the 1991 Royal Bank of Scotland
Law Lecture at the University of Oxford, Justice Johan
Steyn stated that "[t]he aim of any mature system of
contract law must be to promote the observance of good
faith and fair dealing in the conclusion and performance of
contracts" and urged that "in using the high technique of
common law the closest attention ... [be] paid to the
purpose of the law of contract . . . ."239

235 O'Connor, supra note 77, at 39-41.

236 Id. at 41


238 D. J. Freeman, Burning Question of Unfairness, FINANCIAL TIMES (London),
February 27, 1992, at 20.

239 Steyn, supra note 220, at 131, 141.
C. Good faith in other common law countries

As to the admission of the notion of good faith, other common law countries do not look to England, the traditional fount of common law notions; they cast their eyes on the development of good faith principle in the United States.

Australia is a leading example. In 1989, Professor Paul Finn of the Australian National University pointed out "doctrine of 'good faith' in contract performance is now squarely upon contract's agenda." Judicial recognition of this doctrine is reflected in several recent cases.

*Renard Constructions (ME) v. Minister for Public Works* is a decision issued by Justice L.J. Priestley of the Court of Appeal of New South Wales. This case involved the exercise of powers of termination in a construction contract. Justice Priestley held that such

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244 *Renard Constructions*, N.S.W.L.R. at 234.
contractual powers were to be exercised reasonably and honestly, and the requirement of reasonableness had much in common with the notion of good faith which were regarded in many of the civil law systems of Europe and in the United States.245 After reviewing American and other sources of authorities on good faith,246 Judge Priestly concluded:

People generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contracts which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance.247

It is obvious that here Judge Priestly linked the reasonableness with good faith, and employed an objective standard equivalent to that American judges use in deciding requirements contract cases in the U.C.C. context.

In a more recent case Service Station Ass’n v. Berg Bennett & Associates,248 Gummow J, now a Justice of the High Court of Australia, made three important points on good faith. The first point is that the law on implied terms required for the "business efficacy" of a contract is otiose if the same ground could be covered by an implied

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245 Id. at 263, 264.

246 It is worth mentioning that Judge Priestly made express reference to the good faith principle of CISG Article 7(1) as a precedent to Australian law.

247 Id. at 268.

"good faith" term. Secondly, Gummow J pointed out that the concept of good faith is imprecise, whereas "bad faith" is not; it is easier to identify examples of bad behavior than to postulate a standard of good faith behavior in positive terms. The third point is that Anglo-Australian law has developed differently from American law on implied terms, with greater emphasis on specifics rather than the identification of a principle expressed in wide terms. Gummow J said that equity played a role in determining the quality of performance, but it "require[d] a leap of faith to translate these well-established doctrines and remedies into a new term as to the quality of contractual performance, implied by law."

The principle of good faith can also be seen as emerging in Canadian contract law. In 1979, the Ontario Law Reform Commission’s Report on Sale of Goods suggested the adoption of a good faith standard in the performance and enforcement of contracts. In terms equivalent to section 2-103 of the U.C.C., the report defined good faith

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249 Id. at 96.

250 This formulation is in line with Professor Summer’s conceptualization of good faith. See Summers, supra note 69, at 200-207.

251 Service Station Ass’n, 45 F.C.R. at 96.

252 Id. at 97.


as "honesty in fact and the observance of reasonable standards of fair dealing."\textsuperscript{255} In 1987, the Commission's Report on Amendment of the Law of Contract recommended that legislation recognize a general principle of good faith, and this recommendation formulated the good faith provision in the same way as that in the American Restatement of Contract.\textsuperscript{256}

\textsuperscript{255}Id.

V. GOOD FAITH PRINCIPLE IN UNIDROIT PRINCIPLES

Principles of International Commercial Contracts, drafted by the International Institute for the Unification of Private Law, constitute the latest effort at unifying the substantive law applicable to international commercial contracts. UNIDROIT Principles, in contrast to the Vienna Sales Convention, are not a treaty but merely a set of rules without binding power for either individuals or states. Viewed as an international restatement of contract law, the Principles are intended to enunciate common principles and rules to the existing legal systems and to provide the solutions that are best adapted to the

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257 International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contract (1994) [hereinafter UNIDROIT Principles or the Principles]. The Principles are the outcome of 14 years of intensive effort by a special Working Group set up by the Governing Council of the Institute. The members of the Working Group were leading experts in the field of contract law and international trade law from all parts of the world, representing all major families of law.

258 Michael Joachim Bonell, The UNIDROIT Principles of International Commercial Contracts: Why? What? How?, 69 Tul. L. Rev. 1121, 1122. Because of their nature of lack of binding power, UNIDROIT Principles are not prepared for adoption by national governments or legislatures. They are expected to be applied in practice by reason of their persuasive value only.

259 Maria del Pilar Perales Viscasillas UNIDROIT Principles of International Commercial Contracts: Sphere of Application and General Provisions 13 Ariz. J. Int'l & Comp. L. 381, 387-389. It is found that the Principles closely resemble Restatement Second of Contract of America, by their manner of presentation, their objectives, and their content. Id.
special requirements of international commercial contracts.\textsuperscript{260} The scope of the Principles is not limited, like the Convention, to sales contracts, but cover the whole area of contract law for international commerce.\textsuperscript{261}

Good faith and fair dealing is one of the basic ideas underlying the UNIDROIT Principles.\textsuperscript{262} The Principles deal with this notion in Article 1.7. It states that "[e]ach party must act in accordance with good faith and fair dealing in international trade," and "[t]he parties may not exclude or limit this duty." \textsuperscript{263} Unlike the Convention's good faith provision, Article 1.7 of the Principles clearly imposes a general obligation of good faith and fair dealing on contracting parties. Good faith has been explicitly established as a mandatory standard for the parties to follow.\textsuperscript{264}

\textsuperscript{260}Bonell, supra note 258, at 1129.

\textsuperscript{261}Maria del Pilar Perales Viscasillas, supra note 269 at 390-395. The Preamble of the Principles indicates their scope, stating "set forth general rules for international commercial contracts."

\textsuperscript{262}The comments to Article 1.7 refer to a number of provisions throughout the UNIDROIT Principles, which either directly or indirectly apply the principle of good faith and fair dealing. See, e.g. arts. 2.4(2)(b), 2.15, 2.16, 2.18, 2.20, 3.5, 3.8, 3.10, 4.1(2), 4.2(2), 4.6, 4.8, 5.2, 5.3, 6.1.3, 6.1.5, 6.1.16(2), 6.1.17(1), 6.2.3(3)-(4), 7.1.2, 7.1.6, 7.1.7, 7.2.2(b)-(c), 7.4.8, 7.4.13.

\textsuperscript{263}UNIDROIT Principles, art. 1.7.

\textsuperscript{264}As to good faith as a mandatory standard, the formulation of the second paragraph of art 1.7 is similar to Section 1-102(3) of U.C.C., which provides that the obligation of good faith "may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be
Three features are striking about this provision. First of all, it makes no attempt to define good faith except to the extent that it is coupled with the expression "fair dealing". Nevertheless, the term "fair dealing", which is essentially a synonym for "reasonable commercial standards of fair dealing" referred to elsewhere in the same Principles, makes it clear that good faith is to be understood in an objective sense, but not in a subjective sense as a state of mind or just 'acting honestly'.

The second feature is that the operation of the principle of good faith and fair dealing is not confined to the performance and enforcement of contracts as in common law. The UNIDROIT Principles apply this principle throughout the life of the contract, including the negotiation process. The duty of good faith and fair dealing in the formation of the contract is expressly set forth in Article 2.15, which provides:

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

measured if such standards are not manifestly unreasonable." U.C.C. 1-102(3).

See, e.g. Article 3.5 requires a party to call a mistake of the other party to the latter's attention if it is "contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error." Article 3.10 provides that a court may, upon a request by the party entitled to avoidance, adapt the contract or term to "make it accord with reasonable commercial standards of fair dealing."

Bonell, supra note 258, at 1138.

See discussion supra pp.61-65.

UNIDROIT Principles art. 1.7 cmt.1.
However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party. (3) It is bad faith, in particular, for a party to enter into or continue negotiations intending not to reach an agreement with the other party.\textsuperscript{269}

Here the Principles first recognize the freedom to negotiate, showing deference to common law's "aleatory" view of negotiations.\textsuperscript{270} But subsequently the subsection (2) limits such freedom by negatively imposing parties a duty to negotiate in good faith. This formulation would be more acceptable to civil law.\textsuperscript{271}

The third feature of Article 1.7 is that the inclusion of the language "in international trade" sets forth a context--international trade-- in which the meaning of good faith and fair dealing are construed.\textsuperscript{272} This directs a court to look at the special conditions of international trade to determine what constitutes good faith and fair dealing. The court should not apply the good faith

\textsuperscript{269}Id. art. 2.15.

\textsuperscript{270}See supra note 205.

\textsuperscript{271}Common law commentators note that this formulation follows the civil law approach. See Farnsworth, supra note 31, at 63.

\textsuperscript{272}This formulation is similar to U.C.C. article 2 definition which includes the language "in the trade". These language directs attention to the particulars of the transaction being considered and not to some general concept of fairness. In contrast, the good faith provision in Restatement Second of Contract gives no contextual clarification to the good faith and fair dealing, see Section 205 of Restatement Second of Contract.
principle according to the standards originally adopted within different legal systems.\footnote{UNIDROIT Principles art.1.7 cmt.2.}

As can be seen, the principle of good faith is more effectively incorporated in the UNIDROIT Principles than under the Convention, without containing an awkward compromise between opposing civil law and common law views. This formulation, reflecting to larger extent common approaches applied by national laws, may provide us some guidance to construe the good faith principle under the Convention.
VI. CONSTRUING GOOD FAITH PRINCIPLE UNDER THE CONVENTION

With the foregoing comparative review of issues concerning good faith principle in civil law system, common law system, and the UNIDROIT Principles, we are now on firmer ground to construe the good faith principle in the uniform international sales law.

As argued in the Chapter II, good faith under the Convention should be established as a general principle concerned with parties' contractual behavior.\textsuperscript{274} Through our comparative study, we have found that imposing an affirmative obligation of good faith on contracting parties has been a common approach employed by various legal systems in formulating the principle of good faith.\textsuperscript{275} This common point provides strong support for broadly reading article 7(1) so as to direct good faith requirement not only to interpreting judges but also to parties to international sales contracts.

\textsuperscript{274} See discussion supra part B in Chapter II.

\textsuperscript{275} Among major legal systems, only England has not recognized a general duty of good faith. However, the development of good faith principle in other common law countries and at the international level has not gone unnoticed in England. English judges have been getting increasingly receptive to the general principle of good faith. See supra text accompanying notes 237-239.
In the following discussion, we can also find the "common core" or the shared basis among national law for construing the concept of good faith and the scope of good faith obligation under the Convention.

A. Good faith concept and reasonableness standard

As mentioned before, the concept of good faith remains undefined under the Convention. To construe the undefined concept involves two questions: what method should be taken to treat the Convention's good faith concept, and what meaning should be given to this concept? National approaches discussed before have provided some guidance and common bases to deal with the two questions in the uniform law.

It has been a shared view between civil law and common law that the definition of good faith should be kept open-ended in order to make the principle of good faith do its job. Rather than ascribing any particular meaning to the concept of good faith, both civil law and common law systems only link the good faith with common usage or commercial reasonable standards, at least in the context of good faith performance. This linkage

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276 See discussion supra part A in Chapter III and text accompanying note 170.

277 Although the U.C.C.'s good faith definitions refer to "honest in fact" besides reasonable commercial standards, the former can be actually subsumed under the latter because a behavior that fails to meet "honest in fact" standard can not definitely satisfy a commercial reasonable standard.
characterizes good faith as an objective concept. Using the amorphous objective standard, judges can give good faith specific meanings according to the circumstances of each particular case, all of which can not be completely covered by a single general definition of good faith. Thus as to legislative formulation of good faith concept, it is unnecessary and inappropriate to provide the concept with a fixed meaning. Any defining attempt to go beyond setting forth good faith as an objective concept can only limit or even distort the role of good faith principle.\textsuperscript{278} This consensus has been endorsed by UNIDROIT Principles in their good faith provision.\textsuperscript{279}

The undefined status of good faith under the Convention happens to be consistent with national treatments to the concept. So we need not consider to construct a general definition for good faith under the Convention. The only issue we must ascertain is what standard, objective or subjective, should be used to evaluate the good faith under the Convention.

Good faith under the Convention should be treated as an objective concept. This treatment does not only reflect the common core among national laws,\textsuperscript{280} but is also

\textsuperscript{278}See supra text accompanying notes 166-168.

\textsuperscript{279}See supra text accompanying notes 263-66.

\textsuperscript{280}See discussion supra part C in Chapter III, and Part A in Chapter IV regarding to erosion of the subjective standard.
supported by the pervasive application of the "reasonableness" standard under the Convention.\textsuperscript{281} In the Convention's provisions applying the good faith principle, the "reasonableness" standard such as "reasonable time", "reasonable steps" or "unreasonable expense" is explicitly required to measure the parties' contractual dealing.\textsuperscript{282} To determine what is "reasonable," judges need to ascertain what is "normal and acceptable in the relevant trade."\textsuperscript{283} This demands that they consider all relevant commercial circumstances of the case including usages and practices,\textsuperscript{284} especially the special conditions and requirements of international trade.\textsuperscript{285} Thus to conform with

\textsuperscript{281} Professor Schlechtriem suggests that good faith should be construed in the light of numerous references to the "reasonableness" standard. See SCHLECHTRIEM supra note 10, at 39. As for references to this "reasonableness" standard, Professor Honnold has provided a list: Arts 8(2), 16(b) (Reasonable reliance), Art.18(2) (reasonable time), Art.34 (unreasonable inconvenience or expense), Art.35(2)(b) (unreasonable to rely), Art.37 (unreasonable inconvenience or expense), Art.38(3) (reasonable opportunity for examination), Art.39(1) (reasonable time), Art.48(2) (reasonable time), Art.49(2) (reasonable time), Art.60(a) (acts reasonably expected), Art.63(1) (reasonable time), Art.72 (reasonable time for notice), Art.75(reasonable time and manner), Art.76(2) (reasonable substitute), Art.79(1) (reasonable expectations), Art.79(40) (reasonable time), Art.85 (reasonable steps), Art.86(1) (reasonable steps), Art.86(2) (unreasonable inconvenience or expense), Art.88(1) (unreasonable delay), Art.88(2) (unreasonable expense; reasonable measures to sell). HONNOLD, supra note 9 at 148.

\textsuperscript{282} See supra note 45, particularly art.48, art.85, and art. 88.

\textsuperscript{283} HONNOLD, supra note 9 at 148.

\textsuperscript{284} CISG Art. 8(3). As to interpretation of statements or other conduct of a party, this section demands that "due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, upsurges and any subsequent conduct of the parties."
the Convention's good faith requirement, the parties to a international sales contract must conduct themselves according to the reasonable commercial standards of fair dealing in international trade.\textsuperscript{286}

Since commercial reasonableness is not a fixed standard and may vary with context, it does not freeze the flexibility that the principle of good faith is expected to provide courts to deal with changing circumstances. On the other hand, this objective standard directs judges' attention to outside commercial background of contracting parties, and thus it prevents judges from indulging their subjective whim. Moreover, the vagueness concerning with the good faith concept would be reduced by recognizing the reasonable commercial standards because they distinguish good faith from other ethical norms.\textsuperscript{287} Thus, judges are not allowed to invoke any local ethical system standards to evaluate the behavior of contracting parties.

\textsuperscript{285}Bonell, supra note 16 at 87. It is suggested that "in the context of the Convention the principle of good faith must be construed in the light of the special conditions and requirements of international trade." Id.

\textsuperscript{286}This standard is consistent with that formulated in UNIDROIT Principles. See supra note 265 and accompanying text.

\textsuperscript{287}Max Weber, supra note 6 at 636-637. Weber pointed out that the market community is the most impersonal relationship of practical life into which humans can enter with one another and "[i]n sharp contrast to all other groups which always presuppose some measure of personal fraternization or even blood kinship, the market is fundamentally alien to any type of fraternal relationship." Thus, the reasonable commercial standards, which are developed in the market community as the content of market ethics and follow their own rational legality, should not be confused with fraternal ethics or any other ethical standards. Id.
B. The scope of good faith obligation

National laws remain divided as to the scope of good faith obligation. The principle of good faith in civil law performs expansive functions that impose independent duties and extend the scope of good faith obligation beyond the existing contractual relationship between parties. While in common law, the general obligation of good faith exists depending on the underlying agreement of parties and it does not extend to the formation stage of contract.

The omission of any language under the Convention addressing the legal obligation of good faith was mainly due to the above unsettled division among two systems. But we still can find some clues and common bases from the differing treatments of the two legal systems to define the scope of good faith obligation under the Convention.

1. Good faith in performance and enforcement of contract.

In the context of contract performance and enforcement, both civil law and common law recognize the

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288 See discussion supra part D in Chapter III.

289 See discussion supra part A in Chapter concerning the scope of good faith obligation.

290 See discussion supra part A in Chapter II.
imposition of a general obligation of good faith.291 This obligation is imposed in both systems to protect parties' reasonable contractual expectations.

The protection of reasonable expectation of contracting parties is one of basic values underlying the Convention.292 The application of the principle of good faith in the Convention's numerous provisions serves to preserve this value. For example, the good faith duty in Article 29 precludes a party from relying on a provision in a contract that requires written evidence of modifications if the party's conduct indicates that he has agreed to a contract modification, so as to protect the opposite party's reliance or reasonable expectations based on such conduct.293 Similarly, Article 8 provides that statements and conduct should be interpreted according to the reasonable understanding of the other party.294 Implicit in

291 English law is an exception, see discussion supra part B in Chapter IV.


293 CISG art. 29(2). This section reads as follow:
A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. 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.

294 CISG art. 8(1) ("For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.")
this rule is that a party is subject to the duty to conduct himself with concern of other party's reasonable expectations created by his words and behavior.

The linkage between good faith and reasonable contractual expectations dictates the confines of the good faith obligation under the Convention. In international sales transactions governed by the Convention, parties' contractual obligations are decided by the requirements of the contract and the Convention.295 Besides the contract terms, the Convention provides that parties are also bound by the usages and practices applicable to their contractual dealings.296 All of the contract terms, applicable usages and practices together determine the reasonable expectations of contracting parties. Contracting parties are subject to no obligations that are outside of their reasonable expectations. This is clearly demonstrated in Article 35(3) of the Convention, which provides that "[t]he

295See CISG art. 30. ("The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention." (emphasis added)); CISG Art. 53 ("The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention." (emphasis added)).

296CISG art. 9. This article reads as follows:
(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.
seller is not liable ... for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity." 297 In this case of the provision, since the buyer does not reasonably expect that the seller would provide goods in conformity with the contract, the Convention does not impose the seller any liability that goes beyond the buyers' reasonable expectations concerning the quality or quantity of the goods. Thus the obligations of contracting parties merely exist in the limit of their reasonable expectations. This limitation should also apply to the obligation of good faith imposed on parties.

One may have found that this limitation of good faith obligation is actually in line with the common law approach, which applies the principle of good faith more narrowly than civil law. 298 Interpreting the Convention's good faith obligation in this way is consistent with its aim to promote uniform application. First, civil law agrees with common law in that protecting the reasonable expectations of contracting parties is one of major functions of good faith principle, but beyond contractual expectations both systems can hardly reach an agreement with regard to the imposition of good faith obligation. Thus, only allowing the Convention's good faith principle

297 CISG art.35(3).

298 See supra text accompanying notes 189-194.
to operate in the limit of contractual expectations can assure the uniform application of this principle in both civil and common courts. Secondly, the limitation on good faith obligation directs courts' attention to parties' reasonable expectations and their actual international commercial background to find a just resolution. This will help the Convention's good faith, through international case law development, to develop as a uniform principle that corresponds with the special requirements and conditions of international trade. If following the civil law approach, however, national courts would be left free to impose the good faith obligation without limitation or any uniform guidance. This will necessarily cause more uncertainty and confusion than German judges did in revalorization cases because of the great incongruity among national laws.

2. Good faith and precontractual liability in the formation of contract

The application of good faith principle to the formation of contract is perhaps the most difficult and controversial issue under the Convention. A draft provision of the Convention concerning good faith and fair dealing in contract formation was omitted from the final version. 299 This omission evidences the vigorous division among national laws with regard to the imposition of

299 See supra notes 14, 15 and accompanying text.
precontractual liability. It has been argued that the omission also clearly demonstrates that the drafters of the Convention preferred to leave the issue to the existing non-unified domestic laws.\textsuperscript{300} According to this argument, the principle of good faith under the Convention does not apply to the formation of contract.

This argument is questionable. Even though some countries refuse to impose a general obligation of good faith in contract formation, they do not deny that parties in negotiating a contract may be subject to some precontractual liability.\textsuperscript{301} The precontractual liability is based on various theories in different countries. Under the Convention, the fact that no provision explicitly deals with the precontractual liability of contracting parties does not necessarily mean that this issue should be completely settled by national laws. To analyze this issue in the Convention context, we need to proceed our discussion in two distinct scenarios.

The first scenario involves the precontractual liability when a contract is concluded. A party to a concluded contract may be subject to the precontractual liability if he employs improper means in order to induce the other party to enter into the contract which, under


\textsuperscript{301}See supra text accompanying notes 209-214.
normal circumstance, would not have concluded at all or would have concluded on different terms. National laws base this liability on doctrines of fraud, duress or unconscionability, all of which justify judges to invalidate the contract.\textsuperscript{302} In civil law countries, these doctrines related to contract validity are often subsumed under the single principle of good faith, thus precontractual liability at this scenario can be established by applying the general principle of good faith instead of those specific validity doctrines.\textsuperscript{303} This approach is unacceptable to common law countries where the principle of good faith is not used to deal with the contractual validity issue.\textsuperscript{304} Under the Convention, however, this unsettled division among national laws does not present the problem of uniformity because Article 4 expressly states that the issue of the validity of the contract falls outside the scope of the Convention.\textsuperscript{305}

\textsuperscript{302}See supra notes 210-213.

\textsuperscript{303}In German law, for example, although fraud, duress, and unconscionable conduct are dealt with under specific provisions of the BGB, the wide meaning of justice and fairness given to article 242 have influenced courts to use the "wide and all-embracing" principle of good faith to envelop those doctrines of contractual validity. See O'Connor supra note 77, at 88; see also Farnsworth, supra note 31 at 60-61.

\textsuperscript{304}See Farnsworth, supra note 31 at 60-61.

\textsuperscript{305}CISG art. 4(a). It provides that the Convention is not concerned with "the validity of the contract or of any of its provisions or of any usage." By this provision, the Convention pays deference to the autonomy of individual states with regard to their important policies concerning contractual validity. Although the exact definition of "validity" is not addressed under the Convention, it is recognized
follows that the Convention and its good faith principle do not apply to the parties' negotiating behavior which involves with the validity of a contract. Thus, the precontractual liability at this scenario is a issue subject to applicable national laws.\textsuperscript{306}

The second scenario concerns the precontractual liability when no contract concluded. The common law and civil law have differing views with regard to the basis for imposing the precontractual liability at this scenario. The common law does not accept the civil law approach establishing the general obligation of good faith as the basis for the precontractual liability. Instead, common law only allows the precontractual liability based on some specific doctrines such as restitution, misrepresentation or promise reliance.\textsuperscript{307} The reluctance of common law to impose a general obligation in the precontractual negotiation is due to its concern not to interfere the freedom of negotiation.\textsuperscript{308}

As far as the Convention is concerned at the second scenario, it is necessary to scrutinize two formation


\textsuperscript{306} See Bonell, supra note 230, at 169.

\textsuperscript{307} See supra note 214.

\textsuperscript{308} See supra note 206 and accompanying text.
provisions that the Secretariat Commentary gives as examples for the application of good faith principle under the Convention. Article 16(2)(b) provides that “[an offer cannot be revoked] if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.” The offeror’s precontractual duty not to revoke the offer that has been reasonably relied by the offeree, which is based on the principle of good faith as the Secretary Commentary indicates, may be imposed by common law on the ground of promise reliance. Article 21(2) imposes on the offeror another duty, when an acceptance is late due to abnormal transmission, to promptly inform the offeree of his intent to treat the acceptance as effective or, alternately, as ineffective because the offer has lapsed. The imposition of this duty may also be demanded in common law by its misrepresentation theory. These applications of good faith principle to establish precontractual liability under the Convention demonstrate that they do not produce unacceptable results to common law. Moreover, as one common law scholar observes, the effect that civil law

309 See supra note 45.

310 CISG art.16(2).

311 See supra note 214.

312 CISG art.21(2).

313 See supra note 214.
imposes precontractual liability based on the principle of good faith does not go beyond what common law does on other grounds.\textsuperscript{314} Therefore, imposing a general obligation in the Convention's contract formation at the second scenario will not necessarily do more harm to the common law value of freedom to negotiate.\textsuperscript{315}

Furthermore, imposing the good faith obligation in precontractual negotiation is justified by gap-filling provision Article 7(2).\textsuperscript{316} Since Article 7 is one of the Convention's general provisions that governs all the Convention's substantive provisions, including contract formation provisions. Good faith established as a general principle by Article 7(2) naturally applies to the formation of contract. Thus, at the second scenario, the

\textsuperscript{314} Farnsworth, supra note 205, at 239-240. Professor Farnsworth states that "even in Europe it is difficult to find cases that actually impose precontractual liability where an American court would clearly do so on other grounds."

\textsuperscript{315} The good faith obligation in formation of contract is not intended to completely limit the freedom of negotiation because this obligation does not make the parties liable for failure to conclude a contract once they enter into negotiations. The requirements of the precontractual obligation of good faith depend on the circumstances of each case, including usage's and practices in relevant trade. In imposing such obligation, close attention should also be paid to the balance between promoting fair dealing in the formation of contract and preserving the freedom of negotiation. The formulation of precontractual good faith obligation in UNIDROIT Principles well reflects this balance. See supra notes 268-71 and accompanying text. Actually, common courts have not ignored this balance because they do limit the parties' freedom of negotiation in appropriate cases by applying some specific doctrines to impose precontractual liability. Moreover, there are signs that common law may also impose a general obligation on negotiating parties, see supra notes 217, 218 and accompanying text.

\textsuperscript{316} CISG art.7(2).
negotiating behavior of parties should be subject to the obligation of good faith under the Convention.\textsuperscript{317}

In sum, good faith principle under the Convention applies to the formation of contract as the basis of precontractual liability; but this principle does not deal with parties' negotiating activities concerned with the validity of the contract, which makes its application much narrower than that in civil law. Obviously, this limited application will leave a lot of precontractual bad faith behavior settled by applicable national law rather than the Convention's good faith principle. But due to the sharp division among national laws and the Convention's restriction from dealing with the contractual validity issue, this is perhaps the best resolution we can achieve at present.

C. Applications of good faith principle in the Convention's provisions

As said before, good faith principle has been pervasively applied under the Convention. An examination of

\textsuperscript{317}A question that is much likely to be asked here is what remedies are available for the breach of good faith obligation when no contract is concluded. This question is certainly not easy to answer because all remedy provisions under the Convention deal with the breach of an obligation arising out a contract that has been concluded. However, it has been suggested that this issue could be resolved by applying some of the Convention's provisions on remedies by analogy. For example, an offeree may recover reliance damage if the offeror revokes the offer on which has been reasonably relied by the offeree. For the elaboration on this analogy method, See Bonell supra note 300 at 170-171.
those specific applications can provide us with more clear ideas about the Convention’s good faith requirements. The following illustrations of these applications are grouped under three headings: good faith communication, good faith mitigation, good faith cure and avoidance.

1. Good faith communication

International sales transactions are consummated between business partners who are located usually far away from each other in different countries. It is important to provide the opposite party with essential information for consummation of a sales transaction. The obligation to communicate with another regarding all important aspects of the contract thereby stands as a basic precept of good faith and fair dealing in international trade.\(^{318}\) This requirement of good faith underlies numerous provisions covering all stages of contract dealings.

With regard to communication during the formation of a contract, Article 19(2) requires an offeror to notify the offeree orally or by writing the offeree of his objection to the modifications in the offeree’s acceptance.\(^{319}\) Article 21(2) also imposes the offeror a good faith duty to promptly inform the offeree of whether he will regard the acceptance effective which is delayed in the

\(^{318}\)This communication requirement does not go to background information on the subjective matter of the exchange.

\(^{319}\)CISG art. 19(2).
transmission.\textsuperscript{320} When the parties negotiate a contract covering goods that are then in transit, Article 68 requires the seller to disclose transit damage that has occurred to the goods, otherwise the seller can not take advantage of the risk of loss rules.\textsuperscript{321}

During the performance stage, Article 32(1) requires the seller to give the buyer notice of the consignment specifying the goods which are not clearly identified to the contract.\textsuperscript{322} Article 32(3), in turn, demands that the seller who is not bound to insure the goods for the carriage must nevertheless provide, at the buyer's request, information necessary to enable the buyer to effect the insurance.\textsuperscript{323} Under Article 39(1), the buyer is required to notify the seller of any defects in the goods delivered so that the seller can take steps to cure the defects.\textsuperscript{324} When a contract contains a open term relating to specifications that are allowed to be made by one party; Article 65 requires a buyer, who is required to make specifications, to promptly respond to a request for missing specifications for the goods; if the seller makes the specifications himself, he is obliged to inform the buyer of the details

\textsuperscript{320}Id. art. 21(2).

\textsuperscript{321}Id. art. 68.

\textsuperscript{322}Id. art. 32(1).

\textsuperscript{323}Id. art. 32(3).

\textsuperscript{324}Id. art. 39(1).
of the chosen specifications. In case of the impediment, Article 79 provides that the party who fails to perform must give prompt notice of his inability to perform.

Likewise, parties are also required to inform each other of their intentions or relevant information concerning breach, cure, avoidance of the contract. In all of the aforementioned contexts, good faith communication has been established as an affirmative duty on contracting parties. Obviously, this duty can serve to promote a higher standard of behavior in international trade—dealing in a cooperative manner and with concern for each other's interests to the contract.

2. Good faith mitigation

Good faith mitigation is another important example for applying good faith principle under the Convention. The general rule of good faith mitigation is set forth in Article 77. It provides that a party who relies on a breach of contract must take reasonable measures to mitigate the loss resulting from the breach, and failure to

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325 Id. art. 65.

326 Id. art. 79.

327 See id. art. 26 (notice of avoidance of the contract); art. 46 (request for repair); Art. 48 (communication concerning the seller's right to cure); art. 47, 63 (communication concerning the additional period of time for performance); art. 71 (communication concerning suspension of performance); art. 72 (notice of avoidance of the contract for assurance of performance); art. 88 (notice of resale of perishable goods).

328 Id. art. 77.
mitigate is likely to result in a reduction of the breaching party’s liability for damages.\textsuperscript{329}

Specific applications of this duty are found in provisions with regard to preservation of goods.\textsuperscript{330} Article 85 requires the seller to take reasonable steps to preserve goods when the buyer is late in taking delivery.\textsuperscript{331} Article 86 impose the buyer a similar duty to preserve the defective goods which he intends to reject.\textsuperscript{332} The party in possession of the goods may arrange for storage or resale of the goods.\textsuperscript{333} Article 88(2) demands that the preserving party must take reasonable measures to sell the goods where the goods are perishable or their preservation would involve unreasonable expense.\textsuperscript{334} The preserving party is also required to give reasonable notice to the other party of his intention to sell.\textsuperscript{335}

As can be seen, good faith mitigation has also been established as an affirmative duty, which requires parties to go "out of their way" to protect the interests of their business partners.

\footnotesize{
\textsuperscript{329}Id.

\textsuperscript{330}Id. art.85-89.

\textsuperscript{331}Id. art. 85.

\textsuperscript{332}Id. art. 86.

\textsuperscript{333}Id. art. 87 & 88.

\textsuperscript{334}Id. art. 88(2).

\textsuperscript{335}Id.
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3. Good faith cure and avoidance

To discourage bad faith attempts to frustrate the contract by exploiting minor defects in performance, the Convention grants the breaching party the right to cure the defect and save the contract. For example, Article 34 allows the seller to cure the defects in documents relating to the transactions.\(^{336}\) Under Article 37, the seller can also cure the defects in the goods before the date for delivery.\(^{337}\) Even after the delivery date, the seller may still cure any failure to perform his obligations unless this causes unreasonable inconvenience or expense to the buyer.\(^{338}\) Besides the right to cure, the Convention further provides that the buyer who demands performance within an additional period may not refuse to accept the performance that he requested; or resort to any remedy for breach of contract within that additional period.\(^{339}\) Similarly, Article 46(3) states that any request by buyer for repairing the defective goods must be

\(^{336}\) Id. art. 34.

\(^{337}\) Id. art. 37.

\(^{338}\) Id. art. 48(1).

\(^{339}\) Id. art. 47. See Honnold, supra note 9, at 147. Based on the Convention's good faith principle, a party may not refuse performance that he has invited because the other party can be expected to rely on the invitation. Id. at 372. See also Article 63 where the seller is subject to similar good faith duty as the buyer under Article 47.
reasonable under the circumstances.\textsuperscript{340} These provisions require the aggrieved party, even though he himself has no fault with regard to the breach, to act in good faith allowing the breaching party a reasonable chance to cure the deficiencies in performance.

Likewise, the aggrieved party is also required to exercise his right of avoidance in good faith. The requirement of good faith communication discussed before is demanded in the avoidance context. Article 26 provides that avoidance of a contract must be notified to the other party.\textsuperscript{341} Article 72 further requires the avoiding party to give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.\textsuperscript{342} Moreover, the avoiding party must declare the contract avoided within the reasonable time after he became aware of the late performance or any other breach.\textsuperscript{343} The above notification requirement and the limit on time for avoidance would prevent the avoiding party from taking

\textsuperscript{340}Id. art. 46(3). This provision may discourage demands for repairs which are motivated by a bad faith desire to charge unreasonable costs to the seller.

\textsuperscript{341}Id. art. 26.

\textsuperscript{342}Id. art. 72.

\textsuperscript{343}Id. art. 49(2) (on the loss of the right to declare the contract avoided by seller); Art. 64(2) (on the loss of avoidance right by buyer).
a bad faith "wait and see" posture, which may make the breaching party incur unnecessary expense and risks.\textsuperscript{344}

\textsuperscript{344}For example, assume that a buyer receives the goods and intends to avoid the contract because of non-conformity of the goods. A delay in the buyer's declaration of avoidance will delay the seller's opportunity to repair or redispose of the goods and will increase expense and risk. Such delay is believed to be against the precept of good faith and therefore may deprive the party of the right to declare the contract avoided.
VII. CONCLUSION

As has been proven, the framework provided by the Convention and the "common core" among national laws support a broad interpretation of the Convention's good faith principle. By such interpretation, good faith under the Convention should be understood as an objective concept which refers to the reasonable commercial standards of fair dealing in international trade; its function is not merely limited to an instrument of interpretation, but also serves to impose a general obligation of good faith on the conduct of the parties which extends to the performance and enforcement of the contract, and even to the formation conduct which is not related to the validity of the contract. This broad reading of the Convention's good faith makes it possible to find solution for good faith issue in the uniform law habitat instead of national laws. This would undoubtedly help to achieve the Convention's fundamental goal to promote uniformity.

This broad interpretation recognizes good faith as a general principle under the Convention. But some Commentators are opposed of this general principle on the ground that its generality and ambiguity will bring
uncertainty and unpredictability with the law. They would prefer more specific and focused rules because those rules are clear and certain and would be easier for businessmen and lawyers to get specific answers to specific questions, while a general principle only provides a guide to a range of possible answers and leaves the specific answer to the judicial discretion.

Nevertheless, our society has been in full social, economic and technical development. The methods, the techniques, and the practices of "doing business" have necessarily been in radically unstable and changing status. This is especially true in the international commercial community. Specific rules apparently can not provide new solutions to increasing new problems which often do not fit into the rigidity of specific rules. This situation demands statutory rules to be drafted in a more general and loose way so as to let the law flexibly mirror the constant change of business practice. This legislative technique, which originally found its way in many civil codes, has also obtained increasing acceptance in common law that traditionally lived with more specific and technical rules. Three decades ago when speaking on the

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345 See supra note 16. As to the opposition to formulating good faith as a general and broad principle, see generally Gillette supra note 59.


347 See supra note 42.
common law code--U.C.C., Professor Gilmore pointed out that "codifying statutes which are loose, ambiguous, vague and general are to be preferred to codifying statutes which are tight, precise, detailed and specific."\textsuperscript{348}

Good faith, as a leading general principle, serves to leave a certain leeway for courts to deal with unexpected cases and new commercial practice. The flexibility that results from its open-ended formulation would reduce the rigidity of the law and thereby enable courts to do justice to the circumstances of each particular cases. On the other hand, the objective good faith concept requires courts to consider the reasonable commercial standards, and it thus can avoid the danger that judges may confuse good faith with their judicial morality or simply indulge their subjective whim in decision making. Moreover, with this general principle, international business partners would be more cautious to conduct their contractual dealings in a way that recognizes their behavior might be examined by judges with the reasonable standards found in their international merchant community. This will promote higher standards of good faith and fair dealing in international trade. All of the above values demonstrate that good faith is a highly desirable principle and should be well established and developed in the uniform international sales law.

\textsuperscript{348}Id.at 472.
The development and success of the principle of good faith under the Convention depend in large part on the wisdom of national judges who are granted the freedom to exercise their discretion in applying this principle. It is national judges' task to decide whether good faith can be consequently developed as a uniform principle governing the behavior of contracting parties in international sales transactions. This task can be well fulfilled if national judges remain true to the purpose of the Convention and give consideration to the broad but uniform understanding of this principle in its application.