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INTERPRETATION RULES AND GOOD FAITH AS OBSTACLES TO THE UK'S RATIFICATION OF THE CISG AND TO THE HARMONIZATION OF CONTRACT LAW IN EUROPE

Nathalie Hofmann*

ABSTRACT:

This essay examines Article 7 of the CISG, the provision on the Convention's interpretation, through the lenses of both German and English law in order to shed light on interpretative issues in which there are divergent views in common law and civil law systems. The essay further provides possible reasons for the non-ratification of the CISG by the UK in contrast to its broad acceptance in Germany. The author more closely examines the issue of good faith as a principle of contract law, its vagueness being one of the possible reasons for the reluctance to ratify the CISG in England. The essay will conclude with an outlook on current and future efforts to harmonize contract law in Europe, notably with regards to the new (Draft) Common Frame of Reference. The question raised is whether the Common Frame of Reference has a chance of being accepted by the European civil law countries as well as by England and Wales as common law jurisdictions.

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INTRODUCTION

“Companies doing business in Europe presently have to deal with 25 different jurisdictions.”¹ In the German newspaper *Handelsblatt*, Germany’s former chancellor Gerhard Schröder explained in an article that legal diversity in Europe is one of the obstacles to the efficient functioning of the European Union’s single market in particular and to economic growth generally in Europe. While this observation is fairly accurate, it should be kept in mind that a small part of contract law: the law of sales, is close to being harmonized not only in Europe, but also worldwide.

The harmonization of international sales law is largely due to the United Nations Convention on Contracts for the International Sale of Goods (“CISG”),² which today is the most successful and noteworthy result of the process of unification of international contract law.³ It has gained worldwide acceptance⁴ and has been adopted by seventy-two states,⁵ including most major trading nations. However, in Europe there is still a flaw in the idea of a uniform sales law; not all European Union (“EU”) states have ratified the CISG. The most important European non-member is the United Kingdom (“UK”).⁶ Other EU states that have not yet ratified the CISG are Ireland, Portugal, and Malta. The non-

¹ Gerhard Schröder, *Sieben Chancen für mehr Wachstum in Europa* [Seven Chances for More Growth in Europe], *HANDELSBLATT* (F.R.G.), Oct. 26, 2005, at 5 (emphasis added), official text available at <http://www.handelsblatt.com/politik/deutschland/sieben-chancen-fuer-mehr-wachstum-in-europa;809371>.

² United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, available at <http://cisgw3.law.pace.edu> [hereinafter “CISG” or “the Convention”].

³ See Peter Huber, *Comparative Sales Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 937, 939 (Reinhard Zimmermann & Mathias Reimann eds., 2006).

⁴ See Peter Schlechtriem, *Introduction to COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 1* (Peter Schlechtriem & Ingeborg Schwenzer eds., 2006).

⁵ See Status 1980: United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (the most recent accessions are of Japan, July 1, 2008, and Lebanon, Nov. 21, 2008).

⁶ See Ulrich Magnus, Action Plan for a European Contract Law-European Contract Law and CISG, pt. I, § 2, at 1 n.8, available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/stakeholders/5-35.pdf.

ratification of the CISG by the UK is of great significance to the EU because the contracting states of the CISG within the EU include some of the UK's major trading partners⁷ such as Germany, France, the Netherlands, Belgium, Spain, and Italy.

Part I of this essay focuses on the UK's non-ratification of the CISG and tries to identify and analyze some general differences between the common law system of England and Wales and civil law, the latter of which⁸ reigns in most other EU countries. The German civil law is used as a convenient point of comparison to the common law system of the UK. The comparative approach of this essay concentrates on issues of interpretation. Part II addresses whether these issues of interpretation are obstacles to the Common Frame of Reference which is a current project of contract law harmonization in Europe.

I. WHAT, IF ANYTHING, HINDERS THE UK FROM ADOPTING THE CISG?

Although the UK played a very active part in the drafting and negotiating of the CISG,⁹ the country has not ratified the CISG and, to date, no serious legislative steps have been taken towards its ratification.¹⁰ After the Convention was promulgated, the UK awaited the reaction of its trading partners. In a lecture in Rome, Oxford Professor Barry Nicholas described this as a "policy of wait and see."¹¹ After some of the UK's major trading partners, notably the United States and Australia, and most EU states adopted the Convention, the UK should have been more inclined to ratify as well.

⁷ A.G. GUEST ET AL., *BENJAMIN'S SALE OF GOODS* 24-26 (7th ed. 2006).

⁸ It is common, and to some extent justified, to further differentiate between Roman legal systems and Germanic legal systems. See, e.g., Thomas Kadner Graziano, *La methode comparative internationale*, in *LE CONTRAT EN DROIT PRIVÉ EUROPÉEN - EXERCICES DE COMPARAISON ET D'HARMONISATION* 317, 332 (2006).

⁹ Bruno Zeller, *The Development of Uniform Laws – A Historical Perspective*, 14 *PACE INT'L L. REV.* 163, 168 (2002).

¹⁰ Sally Moss, *Why the UK has not yet Ratified the CISG*, 25 *J.L. & COM.* 483, 483 (2005).

¹¹ Barry Nicholas, *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?*, Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Centre for Comparative and Foreign Law Studies] (Mar. 1993) (Austria), available at <http://servizi.iit.cnr.it/~crdcs/crdcs/frames9.htm>.

The first steps were taken in 1989 and in 1997¹² when the Department of Trade and Industry issued consultation documents asking the business community for opinions on an eventual ratification of the CISG. While there was a majority in favor of ratification, the number of responses received were disappointing and not representative, both in 1989 (55 responses, 28 in favor, 17 against, 10 neutral)¹³ and in 1997 (36 responses, 26 in favor, 7 against, 3 neutral).¹⁴ Nevertheless, one must dispense with the idea that the UK will eventually adopt the Convention as soon as there is time available in the legislative program.¹⁵ Apparently, it is mainly the delay of the legislative process that prevents the UK from becoming a contracting state of the CISG.¹⁶ In fact, most English books on the sale of goods seem to take an eventual ratification for granted. There appears to be consent in the English doctrine that the predecessors of the CISG, the Uniform Laws on International Sales, which the UK has adopted, have been superseded by the Convention.¹⁷ Moreover, the growing importance of trading partners in Asia is likely to be another factor for the UK to take into account when it reconsiders its position regarding the adoption of the CISG. In 1988, China ratified the CISG,¹⁸ and recently in 2008, Japan, another top five exporter and importer,¹⁹

¹² DEPARTMENT OF TRADE AND INDUSTRY, UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (VIENNA SALES CONVENTION): A CONSULTATION DOCUMENT (1997) [hereinafter DTI CONSULTATION DOCUMENT], available at <http://bis.ecgroup.net/Search.aspx>.

¹³ *Id.* ¶ 21.

¹⁴ Moss, *supra* note 10, at 483.

¹⁵ 669 PARL. DEB., H.L. (5th ser.) (2005) WA86; Alison E. Williams, *Forecasting the Potential Impact of the Vienna Sales Convention on International Sales Law in the UK*, in 12 REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 9-57 (2000-01), available at <http://cisgw3.law.pace.edu/cisg/biblio/williams.html#3>.

¹⁶ Moss, *supra* note 10, at 483.

¹⁷ See CAROLE MURRAY, SCHMITTHOFF 'S EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE 853 (Leo D'Arcy & Barbara Cleave eds., 11th ed. 2007); A. G. GUEST ET AL., *supra* note 7, at 24-26; but see JOSEPH CHITTY, 2 CHITTY ON CONTRACTS 1291 (Hugh Beale et al. eds., 29th ed. 2004) [hereinafter CHITTY] (stating a little more reluctantly whether "the UK [should] adopt the Convention").

¹⁸ See Status 1980 - United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3, available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

¹⁹ In 2007, Japan was the world's fourth biggest exporter and importer.

ratified the Convention.

Section A will explain why and how the UK initially ratified the Uniform Laws on International Sales, but not the CISG. The following section will consider some of the possible reasons for the UK's long-time reluctance to adopt the CISG by analyzing Article 7 of the CISG, which is the Convention's provision on statutory interpretation.

A. The Uniform Laws - Why the UK Adopted the "Wrong" International Sales Law

The history of the unification of international sales law dates back to the 1920s, when scholars of Western European countries, first and foremost Ernst Rabel in his "Blue Report,"²⁰ began formulating ideas about a uniform law of international sales and, in 1926, founded the International Institute for the Unification of International Private Law ("UNIDROIT").²¹ The CISG was therefore not the first attempt to unify international sales law. After World War II interrupted the work of UNIDROIT, two conventions were adopted at a UNIDROIT conference in The Hague in 1964. These conventions were the Uniform Law on the International Sale of Goods ("ULIS") and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULFIS").

However, these conventions were not very successful.²² They were only implemented by nine states: Belgium, the Gambia, Germany, Israel, Italy, Luxembourg, the Netherlands, San Marino, and the UK. Gambia and the UK are the only surviving contracting states.²³ While the Uniform Laws have achieved consi-

WTO Report, *International Trade Statistics 2008*, 12, tbl. 1.8 (2008), available at http://www.wto.org/english/res_e/statis_e/its2008_e/its2008_e.pdf.

²⁰ ERNST RABEL, RAPPORT SUR LE DROIT COMPARÉ DE VENTE PAR LE "INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALS PRIVATRECHT" DE BERLIN (1938), reprinted in 3 ERNST RABEL, GESAMMELTE AUFSÄTZE (Hans G. Leser ed., 1967) (F.R.G.).

²¹ See Schlechtriem, *supra* note 4, at 1; Henning Lutz, *The CISG and Common Law Courts: Is There Really a Problem?*, 35 VICT. U. WELLINGTON L. REV. 711, 713 (2004).

²² See Ole Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 53 AM. J. COMP. L. 379, 379 (2005).

²³ See Status of the UNIDROIT conventions, <http://www.unidroit.org/english/implement/i-64ulis.pdf>, for the status of ULIS.

derable importance in the practice of German, Benelux and Italian courts,²⁴ they practically remained as a dead letter in the UK.²⁵ The reason for this lies in the reservation under which the UK adopted the Uniform Laws²⁶ as permitted by Article V of ULIS stating that the UK "will apply the Uniform Law only to contracts in which the parties thereto have . . . chosen that Law as the law of the contract."

The courts in the UK would therefore only apply ULIS as well as ULFIS²⁷ if the parties have chosen these laws to apply and when the parties to the contract have their places of business in different contracting states.²⁸ To date, there are no reports of a single case in the UK where the parties have chosen the Uniform Laws to apply.²⁹ In fact, it can hardly be concealed that the UK could not decide whether to implement the Uniform Laws,³⁰ which probably reflects its later reluctance to implement the CISG. It is doubtful whether ratification under the reservation of Article V of ULIS has any purpose whatsoever. Even without the ratification, party autonomy would probably allow the choice of the Uniform Laws anywhere in the world as long as mandatory provisions remain unaffected.³¹

²⁴ See Schlechtriem, *supra* note 4, at 1; see also INTERNATIONALE RECHTSPRECHUNG ZU EKG UND EAG - EINE SAMMLUNG BELGISCHER, DEUTSCHER, ITALIENISCHER, ISRAELISCHER UND NIEDERLÄNDISCHER ENTSCHEIDUNGEN ZU DEN HAAGER EINHEITLICHEN KAUFGESETZEN (Peter Schlechtriem & Ulrich Magnus eds., 1987) (F.R.G.) (provides collection of case law from Belgium, Germany, Italy, Israel and the Netherlands on ULIS and ULFIS in German).

²⁵ Magnus, *supra* note 6, at 2.

²⁶ See Uniform Laws on International Sales Act 1967 § 1(iii). The Uniform Laws on International Sales Act of 1967 incorporates ULIS and ULFIS into English law. *Id.*

²⁷ ULFIS has only ancillary character and applies only to contracts to which ULIS is applied. *Id.*

²⁸ Unlike the CISG, ULIS and ULFIS do not restrict their application to contracts between parties of contracting states. *Cf.* Art. 1(1)(a). However, the UK made another reservation to that effect as permitted by Art. III ULIS and ULFIS. See Uniform Laws on International Sales Act 1967 § 1(i).

²⁹ Magnus, *supra* note 6, at 2.

³⁰ HANS-JOACHIM MERTENS & ECKARD REHBINDER, INTERNATIONALES KAUFRECHT - KOMMENTAR ZU DEN EINHEITLICHEN KAUFGESETZEN [INTERNATIONAL SALES LAW - COMMENTARY ON THE UNIFORM SALES LAWS], arts. 1-2 EKG [ULIS] ¶ 16 (1995) (F.R.G.).

³¹ Hans-Georg Landfermann, *Neues Recht für den Internationalen Kauf* [*New Law for International Sales*], in NEUE JURISTISCHE WOCHENZEITSCHRIFT [NJW] 385, 387 (1974) (F.R.G.).

The implementation of the Uniform Laws in the UK cannot be seen as a sign of the UK's general willingness to move towards a unification of sales law,³² since it was implemented in a very restrictive way. Unlike the Uniform Laws, the CISG cannot be adopted with a reservation limiting its application to cases of parties' choice,³³ and its adoption would therefore have a much greater influence on UK law than the reserved adoption of the Uniform Laws. If the parties did not want the UK courts to apply the CISG they would have to opt out of it.³⁴ In fact, the ULIS and ULFIS could safely be implemented without making a significant difference, while the adoption of the CISG on the other hand would bring a real change in the law applicable to international contracts. As a result, the UK was less reluctant to adopt the Uniform Laws than it is to adopt the CISG. This was probably the wrong decision since international support for the Uniform Laws, which were perceived as Western European creations that were not adapted to the needs of modern trade,³⁵ was disappointing, especially because the CISG has clearly superseded the Uniform Laws.

B. Why Not Adopt the CISG? - A Comparison of English and German Laws

As stated, the resistance against adopting the CISG in the UK appears to have decreased. Upon a question by Lord Lester of Herne Hill in the House of Lords on February 7, 2005 regarding why the CISG has not yet been ratified, Lord Sainsbury of Turville from the Department of Trade and Industry³⁶ answered that, "[t]he UK intends to ratify the convention, subject to the availability of parliamentary time. There have been delays in the past for a number of reasons, but we propose to issue a consultation

³² See Ahmad Azzouni, *The Adoption of the 1980 Convention on the International Sale of Goods by the UK* (2002), <http://www.cisg.law.pace.edu/cisg/biblio/azzouni.html> (last visited Nov. 5, 2009). In his introduction, Azzouni calls the UK's ratification "more a form of gesture than a real commitment." *Id.*

³³ A.G. GUEST ET AL., *supra* note 7, at 24; CHITTY, *supra* note 17, at 1291.

³⁴ CHITTY, *supra* note 17, at 1291.

³⁵ Lando, *supra* note 22, at 379.

³⁶ Now called the United Kingdom Department for Business, Innovation and Skills (BIS), previously referred to as Department for Business, Enterprise and Regulatory Reform (BERR).

document in the course of the next few months to examine the available options.”³⁷

However, more than three years later, in fall of 2008, no consultation document had yet been issued and the statement that there have been “delays” in the adoption of the Convention may be slightly understated. In fact, there has been considerable opposition to the ratification of the Convention in the UK,³⁸ and the supporters of the CISG are still awaiting the examination of the “available options” formulated by Lord Sainsbury of Turville,³⁹ and eventually any governmental and parliamentary steps towards ratification.⁴⁰

There are several reasons why the UK is so reluctant to adopt the Convention. A commonly raised concern⁴¹ is that the CISG is less suitable to commodity sales⁴² than the English Sale of Goods Act due, in part, to the CISG’s stricter provisions on contract avoidance in case of non-conforming goods and documents.⁴³ For example, Articles 25 and 49 of the CISG indicate that a fundamental breach is a precondition for avoidance of contract, whereas according to the English Sale of Goods Act, any non-conformity would be considered as a breach of condition (the so-called perfect tender rule) and thus a ground for termination of the contract. Furthermore, critics allege an incompatibility of the CISG’s provi-

³⁷ 669 PARL. DEB., H.L. (5th ser.) (2005) WA86.

³⁸ See The Hon. Justice James Douglas, *Arbitration of the International Sale of Goods Disputes Under the Vienna Convention*, Paper delivered at the Institute of Arbitrators and Mediators Australia National Conference 2006, available at <http://cisgw3.law.pace.edu/cisg/biblio/douglas.html>.

³⁹ 669 PARL. DEB., H.L. (5th ser.) (2005) WA86.

⁴⁰ The CISG can only be implemented through primary legislation in the UK. This basically means that a member of parliament (Private Member’s bill) or the Government department concerned would have to make a proposal upon which a bill would have to be drafted which would then have to pass several stages (readings, amendments, votes) in both the House of Commons and House of Lords. For details, see House of Commons Information Office, *Parliamentary Stages of a Government Bill*, Factsheet L1 (2007), <http://www.parliament.uk/documents/upload/l01.pdf>.

⁴¹ Michael Bridge, *A Law for International Sales*, 37 H.K. L.J. 17, 40 (2007).

⁴² A commodity sale is a sale of basic resources or agricultural products (e.g., crude oil, salt, rice, aluminum etc.), often traded while in transit. See also Bruno Zeller, *Commodity Sales and the CISG*, in SHARING INTERNATIONAL LAW ACROSS NATIONAL BOUNDARIES: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday 627, 628 (Camilla B. Andersen & Ulrich G. Schroeder eds., 2008).

⁴³ Bridge, *supra* note 41, at 22-23.

sions on passing of risk (CISG Articles 66-70) with the International Commercial Terms (“INCOTERMS”) FOB (Free on Board) and CIF (Coast, Insurance and Freight).⁴⁴ However, under CISG Article 6, party autonomy is an underlying principle of the CISG. If the contract stipulates that non-conforming goods or documents shall be a ground for avoidance or if it contains an INCOTERM such as FOB or CIF, like most commodity sales contracts,⁴⁵ courts give effect to such terms.⁴⁶ The CISG, if used in conjunction with INCOTERMS and the stipulations of the parties, only plays a supplementary role, “which may even prove palatable to the United Kingdom – one day!”⁴⁷

Another possible criticism is the vagueness of some of the Convention’s provisions, such as Article 7 on statutory interpretation and good faith. Given the initial lack of English case law regarding these provisions in contrast to the large number of cases decided under the Sale of Goods Act, English lawyers are cautious about favoring the Convention without knowing how English courts would apply and interpret it.⁴⁸

In the following analysis, the focus will lie on the reconcilability of English views on (a) statutory interpretation and (b) on the principle of good faith with respect to Article 7 of the CISG. Similarly, it is instructive to examine a civil law perspective as a point of comparison when determining UK’s apprehension in ratifying the CISG. More specifically, the German perspective with regard to statutory interpretation and good faith is dispositive since contrary to the UK, Germany more readily welcomed the ratification of the CISG.⁴⁹ This analysis may be useful to give an outlook on

⁴⁴ *Id.* at 37-38.

⁴⁵ See Guide to CISG Article 67, Text of Secretariat Commentary on Article 79 of the 1978 Draft [draft counterpart of CISG art. 67], <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-67.html> (last visited Oct. 29, 2009).

⁴⁶ Lachmi Singh & Benjamin Leisinger, *A Law for International Sale of Goods: A Reply to Michael Bridge*, 20 PACE INT’L L. REV. 161, 188 (2008).

⁴⁷ Ingeborg Schwenzer, *The Danger of Domestic Pre-Conceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Non-Conforming Goods and Document*, 36 VICT. U. WELLINGTON L. REV. 795, 807 (2005).

⁴⁸ However, there is a growing caseload on the CISG by courts of other countries, including common law countries such as Australia, New Zealand or the United States, to refer to. *Cf.* Pace CISG Database, Country Case Schedule, <http://cisgw3.law.pace.edu/cisg/text/casecit.html>.

⁴⁹ As shown by the relatively early entry into force (Jan. 1, 1991), the large

possible consequences for both English law and jurisprudence and for the interpretation of the CISG, should the UK eventually ratify the CISG. At the very least, examining the German approach as a point of reference might shed light on some obstacles that other projects directed at the harmonization of European contract law currently face.⁵⁰

1. Article 7 and Statutory Interpretation: Literal vs. Purposive Approach

Article 7(1) of the CISG states that “[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.” In order to promote uniformity in the CISG’s application, it is necessary that courts in different legal systems apply similar rules when interpreting the Convention’s provisions in order to avoid divergent results. However, the traditional approach of statutory interpretation applied by English courts is different from the approach used in civil law jurisdictions. In fact, to a German lawyer, the English rules of interpretation might even appear strange and irritating.⁵¹

a. Traditional English Approach to Statutory Interpretation

Originating at different stages in legal history, three rules of statutory interpretation have been identified in the UK, namely the *literal*, *golden* and *mischief* rules. According to the *literal rule*, words must be given their ordinary and natural meaning. The *golden rule* allows a departure from the ordinary meaning only if there is ambiguity or an absurd result, while the *mischief rule* looks at the mischief the statute was supposed to cure in or-

amount of scholarly writing on the CISG in German and the large number of reported cases from Germany. See Pace CISG Database, Bibliography of CISG Materials in German, <http://cisgw3.law.pace.edu/cisg/biblio/biblio-ger.html> (last visited Dec. 27, 2009); Pace CISG Database, Country Case Schedule, Germany, <http://cisgw3.law.pace.edu/cisg/text/casecit.html#germany> (last visited Dec. 27, 2009).

⁵⁰ See *infra* Part II.

⁵¹ Kurt Haertel & Dieter Stauder, *Zur Auslegung Von Internationalem Einheitsrecht* [On the Interpretation of International Uniform Law], 2 GRUR INT'L 85, 86 (1982) (F.R.G.).

der to interpret the statute.⁵²

While those rules seem to allow for some flexibility, especially since in practice judges may choose their preferred rule or apply all three,⁵³ the rules were often applied in a rather restrictive manner. As matter of principle, Parliament's intention had to appear directly from the text of the statute and neither the legislative history (*travaux préparatoires*)⁵⁴ nor a doctrine⁵⁵ was regularly considered as an appropriate aid for statutory interpretation.⁵⁶

b. German Approach to Statutory Interpretation

Under German law it is generally accepted that the court, when interpreting statutes, takes into account the literal meaning of the words, the grammatical structure of the sentence, the legislative history, and the systematic context of a legal rule.⁵⁷ German courts regularly cite parliamentary materials⁵⁸ as well as different opinions in legal textbooks. When it comes to interpreting provisions of the CISG, German courts also look at the legislative history of provisions⁵⁹ as well as at international scholarly writing.⁶⁰

The most flexible approach to interpret statutes accepted under German law is the so-called teleological approach (*teleologische Auslegung*), which allows the judge to look for what he considers to be the purpose (*telos*) of a statute in order to reduce or

⁵² S.H. BAILEY ET AL., *THE MODERN ENGLISH LEGAL SYSTEM* (5th ed. 2007).

⁵³ *Id.*

⁵⁴ *Cf., e.g.*, *Davis v. Johnson*, [1978] 1 All E.R. 1132 (Eng.) (where the use of parliamentary minutes was not permitted by the House of Lords).

⁵⁵ It used to be convention that works of living authors could not be cited in court, since they might change their minds. However, this convention is no longer observed (*see* SMITH, BAILEY & GUNN, *supra* note 52, ¶ 7-033).

⁵⁶ Haertel & Stauder, *supra* note 51, at 86-87.

⁵⁷ Reinhard Zimmermann, *Characteristic Aspects of German Legal Culture*, in *INTRODUCTION TO GERMAN LAW* 1, 24 (Mathias Reimann & Joachim Zekoll eds., 2005).

⁵⁸ In Germany parliamentary materials are published as "Bundestagsdrucksachen" (BT-Drs.).

⁵⁹ *E.g.*, Oberlandesgericht Frankfurt am Main [OLG] [Provincial Court of Appeal], Apr. 20, 1994, 13 U 51/93, <http://www.unilex.info/case.cfm?pid=1&do=case&id=47&step=FullText> (making reference to a rejected Canadian proposal to include a criterion of "satisfactory quality" into Article 35 of CISG).

⁶⁰ Close to all German decisions refer to legal doctrine.

extend its application, departing thereby from its wording. This is a rather wide approach and might even be criticized for going far beyond what can be called interpretation, constituting in fact a form of judicial law making.⁶¹

c. Modern English Approach to Interpreting International Conventions

If the UK were to ratify the CISG, there is danger that English judges will interpret its provisions too literally without taking into account the history of the Convention at the Vienna Conference and the aim to achieve uniformity. There is a concern that English courts tend to regard legislation adopting international conventions “as a step in the development of English law, . . . inclined to apply to such legislation canons of construction developed by English municipal law [and] to construe such legislation in the light of previous English authorities.”⁶²

However, given the recent developments in English jurisprudence, this concern must be considered minimal. Today, even with regard to the interpretation of English statutes, the attitude of English courts is considerably more relaxed. External aids of interpretation such as modern textbooks,⁶³ and since the House of Lords decision *Pepper v. Hart*,⁶⁴ parliamentary materials are admitted. In fact, English courts now seem to prefer the so-called purposive approach to statutory construction. This approach calls for the statute to be interpreted in light of its purpose, which, of course, needs to first be discovered with the help of interpretative aids. Lord Scarman, in a lecture held in Australia, described this evolution rather ironically. He emphasized that “[i]n London no one would now dare to choose the literal rather than a purposive construction.”⁶⁵

⁶¹ CLAUS-WILHELM CANARIS & KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 187 (3d ed. 1995) (F.R.G.).

⁶² Francis A. Mann, *The Interpretation of Uniform Statute*, 62 L.Q. REV. 278, 284 (1946).

⁶³ RICHARD WARD ET. AL., *WALKER & WALKER'S ENGLISH LEGAL SYSTEM* 11 (9th ed. 2005); see also *Bettinson v. Langton*, [1999] 2 All E.R. 367, 375 (Eng.) (Robert Walker LJ referring to various textbooks as “valuable assistance”).

⁶⁴ *Pepper (Inspector of Taxes) v. Hart*, [1992] 3 W.L.R 1032 (Eng.) (setting several conditions in which parliamentary materials may be referred to).

⁶⁵ Lord Scarman, *The Common Law Judge and the Twentieth Century - Happy Marriage or Irretrievable Breakdown?*, 7 MONASH U. L. REV. 1, 6 (1980).

When it comes to the interpretation of international conventions, two English House of Lords decisions, *James Buchanan & Co. v. Babco Forwarding & Shipping*⁶⁶ and *Fothergill v. Monarch Airlines*,⁶⁷ show that English courts thoughtfully chose their interpretation methods and interpret provisions in light of the aim of the Convention. In *James Buchanan*, Lord Wilberforce clarified that interpreting statutes is different from interpreting international conventions when stating that, “[t]he assumed and often repeated generalization that English methods are narrow, technical and literal, whereas continental methods are broad, generous and sensible, seems to me insecure at least as regards interpretation of international conventions.”⁶⁸

After considering both the English and the French texts⁶⁹ of the Convention on the Contract for the International Carriage of Goods by Road as well as interpretative decisions from different jurisdictions, the Lords found the French text no more precise than the English text, and the foreign court decisions too diverging to be of much help.⁷⁰ Nevertheless, it was held by the majority⁷¹ that any interpretation should be “unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance.”⁷² This demonstrates that English courts are able to interpret a convention’s provision with regards to its international character. This notion is in accord with Article 7 of the CISG and would be instructive if the CISG were ever adopted in the UK.

⁶⁶ *James Buchanan & Co. v. Babco Forwarding & Shipping, Ltd.*, [1978] 1 Lloyd’s Rep. 119 (Eng.).

⁶⁷ *Fothergill v. Monarch Airlines, Ltd.*, [1980] 2 Lloyd’s Rep. 295, [1980] All E.R. 696 (Eng.), available at <http://www.jus.uio.no/lm/england.fothergill.v.monarch.airlines.hl.1980>.

⁶⁸ *James Buchanan & Co.*, 1 Lloyd’s Rep. at 123.

⁶⁹ Although, Viscount Dilhorne expressed some doubts about this approach. See *id.* at 126.

⁷⁰ *Id.* at 123, 128 for Lord Wilberforce’s and Lord Salmon’s opinions.

⁷¹ The two dissenting members of the Court, Lord Edmund-Davies and Lord Fraser of Tullybelton, did not agree with this approach and applied the English rule “*eiusdem generis*.” *Eiusdem generis* means that general words which follow specific ones are taken to include only things of the same kind. See CATHERINE ELLIOTT & FRANCES QUINN, *ENGLISH LEGAL SYSTEM* 50 (8th ed. 2007).

⁷² *James Buchanan & Co.*, 1 Lloyd’s Rep. at 122 (discussing Lord Wilberforce’s opinion).

In *Fothergill v. Monarch Airlines*,⁷³ the House of Lords not only applied a purposive approach to construction but even went so far as to reference the legislative history of an international convention, the Warsaw Convention on International Carriage by Air. As Lord Wilberforce opined:

“[I]n the Federal Republics of Germany, France, Italy, Luxembourg, The Netherlands and Belgium both “administrative “ and other courts have recourse in varying degrees, but generally with prudence and caution, to preparatory work of the laws of the legislature [and] there may be cases where such travaux préparatoires can profitably be used.”⁷⁴

Furthermore, the 1969 Vienna Convention on the Law of Treaties⁷⁵ (“VC”), which entered into force in the UK in 1980, provides for methods concerning the interpretation of international conventions in Articles 31. Similar to Article 7 of the CISG, the relevant provisions of the VC stipulate as follows:

VC Article 31(1): “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

VC Article 32(2): “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion”

Lord Diplock, another judge in the case of *Fothergill v. Monarch Airlines*, acknowledged that these rules of the VC “codify already existing public international law.”⁷⁶ Since English courts are prepared to follow the rules of the VC, there seems to be no reason to assume that they would not be willing to interpret the CISG in light of its international character and with the aim to achieve uniformity as provided by Article 7.

Finally, it is fair to say that English courts have their own method of interpreting statutes - a method which has its benefits

⁷³ *Fothergill*, 2 Lloyd’s Rep. at 295.

⁷⁴ *Id.* at 301-02.

⁷⁵ Vienna Convention on the Law of Treaties, May 23, 1969, UN Doc. A/Conf.39/27, available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

⁷⁶ *Fothergill*, 2 Lloyd’s Rep. at 304.

- but they are also prepared to look at the practice of courts in other jurisdictions in order to not reach a result inconsistent with international jurisprudence. If the UK ratifies the CISG, jurisprudence by English courts might be very valuable, especially since other common law states such as Australia, New Zealand or the United States might be more willing to apply the CISG under emerging precedents from the UK as the “cradle of common law.”⁷⁷

2. Article 7 and Good Faith: A Rule of Interpretation or More?

When the Roman philosopher, politician and lawyer Marcus Tullius Cicero, explained to his son Marcus that the “foundation of justice [was] good faith,” he referred to “truth and fidelity to promises and agreements.”⁷⁸ Truth, fidelity, fairness, and reasonableness are concepts most people would associate with good faith as a moral obligation. Nevertheless, good faith is admittedly very vague as a legal concept. While this essay does not attempt to define good faith, one has to consider that the definition of good faith in contract law might turn out quite differently depending on whether it is written from a civil or common law perspective.

a. The Principle of Good Faith in German Law

Section 242 of the German Civil Code⁷⁹ states that: “The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage.”⁸⁰ This general principle originated in Roman law (*bona fides*) where it was the basis for claims based on otherwise non-defined contracts.⁸¹

⁷⁷ Monica Kilian, *CISG and the Problem with Common Law Jurisdictions*, 10 J. TRANSNAT'L L. & POL'Y 217, 233 (2001), available at <http://www.law.fsu.edu/journals/transnational/vol102/kilian.pdf>.

⁷⁸ MARCUS TULLIUS CICERO, DE OFFICIIS 23 (Loeb Classical Library ed., Walter Miller trans., Harvard Univ. Press 1913), translation available at http://www.constitution.org/rom/de_officiis.htm.

⁷⁹ Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18. 1896, § 242.

⁸⁰ “*Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*” translated in JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 94 (3d ed. 1999).

⁸¹ DIETER MEDICUS, SCHULDRECHT I - ALLGEMEINER TEIL ¶ 124 (16th ed. 2005) (F.R.G.).

In today's German law, the good faith principle is the basis, or rather the crown, of all obligations arising out of contract or tort.⁸² Nowadays, the principle not only applies to contract law and tort law but also to the law of property, public law, and procedural law.⁸³ It contains the idea that reasonable reliance⁸⁴ and the interests of the parties⁸⁵ should be protected in every legal relation.

German courts applied the good faith principle, *inter alia*, as a bar against claims⁸⁶ or as a basis for ancillary contractual obligations.⁸⁷ The parties are, for example, obliged to refrain from every act, which could harm the purpose of the contract.⁸⁸ Furthermore, the concept of a pre-contractual relationship, *culpa in contrahendo*, giving rise to liability has first been developed by the jurisprudence based on the principle of good faith. Now *culpa in contrahendo* has a statutory basis in section 311 II of BGB (German Civil Code). Nevertheless, the principle of good faith is still employed to determine the obligations arising from such a pre-contractual relationship.⁸⁹ Until the reform of the German Law of Obligations in 2002, section 242 of BGB was also the basis for the modification of contract in cases comparable to hardship or frustration of purpose (now BGB Section 313)⁹⁰ and for the cancel-

⁸² *Id.* ¶ 125.

⁸³ HANS BROX & WOLF-DIETRICH WALKER, ALLGEMEINES SCHULDRECHT § 7, ¶ 1 (32d ed. 2007) (F.R.G.).

⁸⁴ See Bundesgerichtshof [BGH] [Supreme Court], May 22, 1985 (F.R.G.), 94 Entscheidungen des Bundesgerichtshof in Zivilsachen [BGHZ], 344 (351) (F.R.G.); OTTO PALANDT ET AL., BÜRGERLICHES GESETZBUCH (BGB), KOMMENTAR § 242, ¶ 3 (67th ed. 2008).

⁸⁵ PALANDT, *supra* note 84, § 242, ¶ 5.

⁸⁶ So called "*unzulässige Rechtsausübung*" (improper exercise of a right). See, e.g., Entscheidungen des Bundesgerichtshof in Zivilsachen [BGHZ] [Supreme Court] 10, 75 (F.R.G.); BGHZ 79, 204; BGHZ 94, 246. This bar applies for example if someone claims a sum he is bound to repay shortly afterwards or in cases of *venire contra factum proprium* (contradictory behavior).

⁸⁷ See, e.g., Bundesgerichtshof [BGH] [Supreme Court], Mar 10, 1983, III ZR 169/81, published in NEUE JURISTISCHE WOCHENZEITSCHRIFT [NJW] 2814 (1983); PALANDT, *supra* note 84, § 242, ¶¶ 23-25.

⁸⁸ See, e.g., Bundesgerichtshof [BGH] [Supreme Court], VIII ZR 99/94, Mar 13, 1996, VIII ZR 99/94 (F.R.G.), published in Neue JURISTISCHE WOCHENZEITSCHRIFT-RECHTSPRECHUNGSREPORT [NJW-RR] 949 (1996); Bundesgerichtshof [BGH] [Supreme Court], Oct. 15, 2004, V ZR. 100/04 (F.R.G.), published in ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 2345 (2004).

⁸⁹ BROX & WALKER, *supra* note 83, § 7, ¶ 12.

⁹⁰ So called "*Wegfall der Geschäftsgrundlage*," based on the Roman concept *clausula rebus sic stantibus*.

lation of long term contracts for just cause (now BGB Section 314).⁹¹ In turn, the principle of good faith has to be respected in the interpretation of contracts. Section 157 of BGB states this expressly: “Contracts shall be interpreted according to the requirements of good faith, taking into account common usage.”

In addition, section 242 of BGB is often criticized for being too imprecise and giving rise to judicial law making based on equity.⁹² The German Federal Supreme Court held in an important decision that the courts should not substitute the consequences imposed by the contract or by law with consequences which they consider more equitable under the circumstances.⁹³ Section 242 of BGB should only be applied to set groups of cases which have been defined by 100 years of jurisprudence.⁹⁴

As seen in Germany, the concept of good faith applies not only to the interpretation of statutory provisions, but it has further functions. For example, good faith concretizes the manner in which obligations are to be fulfilled, supplements contracts by being a basis for ancillary obligations, serves as a bar to claims and may correct unjust results of the law or clauses of a contract.⁹⁵

Although the notion has been clarified by the German jurisprudence, the broadness of the term “*Treu und Glauben*” (good faith) still gives rise to uncertainty. Probably every first year law student in Germany is warned to apply section 242 of BGB only very cautiously, its unjustified application being a common mistake in civil law examinations. This does not only seem to be a phenomenon among law students but even courts and scholars because they tend to abandon concrete legal provisions by applying the general section 242. As Professor Schlechtriem remarked in a 1997 publication of the *Centro di studi e ricerche di diritto comparato e straniero* in Rome: “[O]ne can find a court decision or a scholarly theory applying the [good faith] provision to almost every situation governed by the Civil Code, and in addition very

⁹¹ PALANDT, *supra* note 84, § 242, ¶ 2.

⁹² BROX & WALKER, *supra* note 83, § 7, ¶¶ 2-3.

⁹³ See Bundesgerichtshof [BGH] [Supreme Court], VIII ZR 119/84, May 06, 1985 VIII ZR 119/84 (F.R.G.), *published in* NEUE JURISTISCHE WOCHENZEITSCHRIFT [NJW] 2579, 2580 (1985) (F.R.G.).

⁹⁴ PALANDT, *supra* note 84, § 242, ¶ 3.

⁹⁵ Cf. PALANDT, *supra* note 84, § 242, ¶¶ 13-14a (explaining these four functions of good faith).

often overriding the text and the meaning of special provisions.”⁹⁶

In sum, the German good faith principle, as codified in section 242, gives courts the flexibility that is necessary when dealing with imprecise, incomplete or unjust contracts or legal provisions. However, the preference is to follow more detailed and precise provisions of the BGB rather than the vague concept of “*Treu und Glauben*.” One has to admit that any excessive use of a general good faith principle leads to uncertainty and unpredictability of the law. Fortunately, the risk of uncertainty is limited in Germany, since many valuable results of the application of the good faith principle have been codified. With regard to those possible applications, which lack specific statutory basis, there is enough case law specifying detailed criteria for the application of the good faith provision found in section 242 of BGB.

b. Is There a Principle of Good Faith Under English Law?

Some common law jurisdictions have taken up or at least considered the concept of good faith.⁹⁷ The American Uniform Commercial Code (“UCC”), for example, defines good faith in Article 2 Section 2-103 (1)(b): “Good faith’ in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” However, the UCC’s good faith concept does not go as far as the German good faith concept which also applies to pre-contractual obligations. Good faith is made specifically applicable to the UCC only to the extent set forth in UCC Article 1 Section 1-203; namely, “[e]very contract or duty within this Act imposes an obligation of good faith *in its performance or enforcement*.”

In *Bobux Marketing v. Raynor Marketing*, decided on October 3, 2001, the Court of Appeal of Wellington in New Zealand examined the development of the concept of good faith in common law with obiter reference to the CISG and the UNIDROIT principles. The presiding Judge Thomas found that good faith is per-

⁹⁶ Peter Schlechtriem, *Good Faith in German Law and in International Uniform Laws*, Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Centre for Comparative and Foreign Law Studies] (Mar. 3, 1997), translation available at <http://servizi.iit.cnr.it/~crdcs/crdcs/frames24.htm>.

⁹⁷ CHITTY, *supra* note 17, at 1291.

ceived “as loyalty to a promise”⁹⁸ and that there should be an obligation to perform in good faith, at least in long-term contracts.⁹⁹ On the other hand, under English law, good faith is not a general requirement concerning the exercise of legal rights.¹⁰⁰ Some scholars even consider the notion of good faith as basically unknown to English law; a British attorney would “rarely comprehend”¹⁰¹ the concept of good faith or “not know quite what it means.”¹⁰² While this could also be said of most German lawyers, English courts are certainly, or perhaps justifiably, more reluctant to assume duties arising out of such a broad concept.

In the leading English House of Lord’s case *Walford v. Miles*, a pre-contractual duty to negotiate in good faith was denied on the ground that this would be inconceivable with the nature of negotiations in which each party pursues its own interests.¹⁰³ Traditionally, an English judge is more concerned with “preserving the parties’ freedom to contract” and ensuring that contracts are “performed accurately according to their precise wording” and less concerned “with providing means for ensuring the fairness in the relationship between the parties.”¹⁰⁴

There is no general principle of good faith established in English law. However, this has not always been the case. In 1766, Lord Mansfield considered good faith as the “governing principle [which] is applicable to all contracts and dealings.”¹⁰⁵ Further-

⁹⁸ *Bobux Marketing, Ltd. v. Raynor Marketing, Ltd.*, [2002] 1 N.Z.L.R. 506, 2001 NZLR LEXIS 66 (H.C.), available at [http://www.ipsfactoj.com/international/2002/Part02/int2002\(2\)-008.htm](http://www.ipsfactoj.com/international/2002/Part02/int2002(2)-008.htm).

⁹⁹ However, the other two judges did not comment on the issue of good faith and dismissed the appeal on different grounds. *Id.* ¶ 81.

¹⁰⁰ Azzouni, *supra* note 32, pt. I, subdiv. B.

¹⁰¹ Christopher Sheaffer, *The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Uniform Global Code in International Sales Law*, 15 CARDOZO J. INT’L & COMP. L. 461, 465 (2007).

¹⁰² Roy Goode, *The Concept of “Good Faith” in English Law*, Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Centre for Comparative and Foreign Law Studies] (1992), translation available at <http://servizi.iit.cnr.it/~crdcs/crdcs/frames2.htm>.

¹⁰³ *Walford v. Miles* [1992] 2 A.C. 128.

¹⁰⁴ Giuditta Cordero Moss, *Contracts between Consumer Protection and Trade Usages: Some Observations on the Importance of State Contract Law*, in COMMON FRAME OF REFERENCE AND EXISTING EC CONTRACT LAW 64, 68 (Reiner Schulze ed., 2008).

¹⁰⁵ *Carter v. Boehm*, (1766) 97 Eng. Rep. 1164 (K.B.).

more, even though English law may not acknowledge a general principle of good faith, comparable considerations such as fairness and reasonableness are considered in various situations.¹⁰⁶ When interpreting contracts, English judges seek to reach a reasonable result,¹⁰⁷ since the courts sometimes include *implied terms* into contracts for reasons of fairness.¹⁰⁸ Certain contract types, such as agency contracts and mortgages, impose a duty on the parties to act other than in their own interest.¹⁰⁹ Finally, equitable concepts, such as promissory estoppel,¹¹⁰ or equitable remedies,¹¹¹ which the Courts grant at their discretion, are solely based on fairness.¹¹²

In fact, the civil law idea of good faith is, in its broadest sense, probably related to the English concept of equity.¹¹³ In England, equity developed around the 15th century to balance out the harsh rules of the common law.¹¹⁴ Equitable remedies are different from common law remedies, and equity used to be administered by different courts.¹¹⁵ Since 1873, equity has been administered by the same courts as the common law;¹¹⁶ where there is conflict between common law and equity, equity prevails.¹¹⁷ Of course, equity is entirely a system of justice while good faith finds its main application only in contract law. Nevertheless, both are based on the idea of natural justice and fairness which cannot always be achieved by strict rules of law.

To conclude, English law does not have a general principle of

¹⁰⁶ CHITTY, *supra* note 17, at 1291.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; Johan Steyn, *The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?*, DENNING L.J. 131, 133 (1991).

¹⁰⁹ CHITTY, *supra* note 17, at 1291.

¹¹⁰ *Cf.* Cent. London Prop. Trust, Ltd. v. High Trees House, Ltd., [1947] K.B. 130 (the leading case on promissory estoppel).

¹¹¹ For example, specific performance is an equitable remedy under English law.

¹¹² CHITTY, *supra* note 17, at 1291.

¹¹³ See generally 5 J.F. O'CONNOR, GOOD FAITH IN ENGLISH LAW (1990).

¹¹⁴ ELLIOTT & QUINN, *supra* note 71, at 108-09.

¹¹⁵ First, equity was administered by the Chancellor, a member of the clergy and chief minister of the King.

¹¹⁶ The Judicature Acts 1873-75 established the English court structure of today.

¹¹⁷ This was first held in the *Earl of Oxford's Case* decided in 1615. ELLIOTT & QUINN, *supra* note 71, at 109.

good faith. Certainly, pre-contractual duties cannot arise from this principle under English law. In contrast, under German law, a *culpa in contrahendo* liability has been developed from the good faith concept. However, English lawyers are familiar with concepts such as fairness, reasonableness and equity. In many cases, English lawyers achieve the same results by way of detailed rules and duties established by precedents in the same way civil lawyers would achieve a similar result by assuming a duty of good faith.¹¹⁸

Nevertheless, one has to admit that English lawyers will have a problem with accepting a duty of good faith as far reaching as provided by German law. This result is predictable given the defensible criticism of the broadness and uncertainty of the German notion of good faith.¹¹⁹

c. Good Faith Under the CISG

Article 7 of the CISG provides that in interpreting the Convention there shall be regard for promoting “the observance of good faith in international trade.” This language was adopted as a compromise between two divergent views.¹²⁰ The first, mostly expressed by civil law delegates, was that there should be a general rule that the parties must act in good faith; the other view was that such a rule would lead to uncertainty. The comparison between German and English laws illustrates the broad sweep of such divergent views. Under German law, the good faith principle was and may still be “*Mädchen für Alles*,”¹²¹ meaning a solution of last resort to any legal problem. In contrast, English law does not acknowledge a general good faith principle, but only specific applications of it.

Of course, during the deliberations to Article 7 of the CISG at the Vienna Conference, the UK representative was opposed to the introduction of a separate provision calling for the respect of good

¹¹⁸ See Goode, *supra* note 102.

¹¹⁹ See Schlechtriem, *supra* note 96.

¹²⁰ See HONNOLD, *supra* note 80, § 94.

¹²¹ “*Mädchen für Alles*” is a colloquial German expression meaning utility man / girl Friday. See Gyula Eörsi, *General Provisions*, in *INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 2-6 (Matthew Bender ed., 1984), available at <http://www.cisg.law.pace.edu/cisg/biblio/eorsi1.html#203>.

faith and fair dealing.¹²² This view was respected by the majority of the other delegates and an express reference to the good faith principle is to be found solely in Article 7 relating to the Convention's interpretation. However, there are numerous applications of the good faith principle throughout the Convention. For example, Article 16(2)(b) addresses the irrevocability of an offer in cases where there is reasonable act of reliance on such irrevocability; Article 21(2) addresses the status of an acceptance which was received late although it was dispatched timely or Article 40, which bars the seller from relying on a failure of timely notice of non-conformity by the buyer if the seller knew or could not have been unaware of the non-conformity.¹²³ All these articles are premised on the good faith principle. Moreover, the reasonable person standard found in Article 8(2) of the CISG, concerning the interpretation of statements and conduct of the parties, can also serve a similar purpose to that of an obligation of good faith and fair dealing.

While the good faith principle in Article 7 of the CISG is very restrictive, its meaning is still unclear¹²⁴ when compared to the German Law of Obligations' section 242 of BGB.¹²⁵ The problem that arises is how to find the relevant standards of good faith, given that those standards differ considerably in the world and that the principle of autonomous interpretation does not allow for transfer of domestic good faith concepts into the Convention. At the same time, good faith should not be used as a "*super-tool*" to override more specific rules of the CISG.¹²⁶

¹²² Legislative History, 1980 Vienna Diplomatic Conference, Summary Records of Meetings of the First Committee, 5th meeting (Mar. 13, 1980), <http://www.cisg.law.pace.edu/cisg/firstcommittee/Meeting5.html>.

¹²³ Cf. Secretariat Commentary on Article 6 of the 1978 Draft [draft counterpart of CISG art. 7(1)], <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm7.html>, for further examples.

¹²⁴ Cf. Benedict C. Sheehy, *Good Faith in the CISG: The Interpretation Problems of Article 7* (Berkeley College, Working Paper No. 339, 2004), in THE BERKELEY ELECTRONIC PRESS (BEPRESS) LEGAL SERIES, <http://law.bepress.com/cgi/viewcontent.cgi?article=1815&context=expresso> (providing an extensive paper on the CISG's good faith principle).

¹²⁵ PETER SCHLECHTRIEM, UNIFORM SALES LAW - THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 39 (1986), available at <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html>.

¹²⁶ Peter Huber, *Some Introductory Remarks on the CISG*, in 6 INTERNATIONALES HANDELSRECHT 228, 228-29 (2006), available at <http://www.cisg.law.pace.edu/cisg/biblio/huber.html>.

In practice, there appears to be a consensus that good faith in Article 7 is a principle of interpretation and not a duty. However, prior case law has applied Article 7's principle of good faith rather broadly. In the French case, *BRI Production "Bonaventure" v. Pan African Export*,¹²⁷ the court referred to Article 7 of the CISG and awarded 10,000 francs in damages for abuse of process constituting a breach of the good faith principle. In Hungary, an arbitral tribunal explicitly stated that it considered good faith not merely as an interpretive tool but as a standard of behavior which must be respected.¹²⁸ Decisions like these use Article 7 to impose substantive obligations of good faith and fair dealing on the parties, an approach highly criticized because it perverts the fact that Article 7 of the CISG is clearly a compromise between the far reaching notion of good faith in civil law and the skepticism towards this notion in common law,¹²⁹ as revealed by its negotiating history.¹³⁰

While from a civil law point of view it might be beneficial and desirable to introduce a duty of good faith in international trade,¹³¹ the legislative history of the CISG Article 7 shows that good faith under the CISG is not supposed to go so far as to impose duties. Still, one should not call the CISG's notion of good faith "dead" or consigned to a "ghetto."¹³² The principle of good faith, as embodied not only in Article 7 but also in the more spe-

¹²⁷ Cour d'Appel [CA][regional court of appeal] Grenoble, No. 93/3275, Feb. 22, 1995, in *JOURNAL DU DROIT INTERNATIONAL [J.D.I.]* 632 (1995), translated in *PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)* 379 (1998), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950222f1.html>.

¹²⁸ Hungarian Chamber of Commerce and Industry Court of Arbitration, Arbitral Award, No. VB/94124, Nov. 17, 1995, pt. IV, ¶ 6, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=FullText> (in German).

¹²⁹ E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 *TUL. J. INT'L & COMP. L.* 47, 56 (1994); see also Disa Sim, *The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods*, *PACE L. SCH. INST. INT'L COM. L.* (2001), <http://www.cisg.law.pace.edu/cisg/biblio/sim1.html> (last updated Sept. 25, 2001).

¹³⁰ Cf. Legislative History, *supra* note 122, ¶¶ 45, 54, 62 (regarding two proposals of Norway and Italy to change the text of the provision which found little support because the text as-is already presented a "delicately-balanced compromise").

¹³¹ See Eörsi, *supra* note 121, § 2.03.

¹³² *Id.*

cific provisions such as Articles 16 (2)(b), 21(2) and 40 of the CISG, is acknowledged as one of the general principles on which the Convention is based.¹³³ It can therefore be referred to as a gap-filling principle for matters governed by, but not expressly settled in the CISG.

If correctly applied in line with its drafting history, the CISG's good faith principle is very restrictive. It does not extend nearly as far as the German notion of good faith found in section 242 of BGB. If England were to adopt the CISG, good faith notion found in Article 7 should not materially alter or introduce major changes into English law. However, given the different understandings of the concept drawing from the prior decided cases, there is some truth in the criticism often brought forward that good faith in Article 7 of the CISG would give rise to uncertainty and diverging decisions.¹³⁴

C. Conclusion to Part I: Can the CISG Harmonize European Contract Law?

Overall, the CISG can be considered a success because on a global scale the CISG has been ratified by both common law and civil law countries. However, case law from common law jurisdictions is still scarce.¹³⁵ With the exception of Part II on the formation of contracts¹³⁶ (as authorized by the Convention, compared to the provisions of Part IV), the reservations made by several states when adopting the Convention considerably limit the CISG's effect on the unification of Sales law.¹³⁷

¹³³ Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL ENCYCLOPEDIA OF LAWS - CONTRACTS 1, 50 (J. Herbots & R. Blanpain eds., 2000), available at <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky.html>.

¹³⁴ Cf. P.J. Powers, *Defining the Undefinable: Good Faith and the United Nations Sale of Goods*, 18 J.L. & COM. 333, 347-48 (1999), available at <http://www.cisg.law.pace.edu/cisg/biblio/powers.html> (stating, "the uniformity sought by the CISG is definitely lacking with respect to . . . good faith"); see also Nicholas, *supra* note 11; DTI CONSULTATION DOCUMENT, *supra* note 12 (reflecting similar criticism); cf. also Derek Wheatley, *Why I Oppose the Wind of Change*, TIMES (U.K.), Mar. 27, 1990, at 31 (addressing a general concern about the danger of diverging decisions if the CISG was to be ratified in the UK).

¹³⁵ Kilian, *supra* note 77, at 218.

¹³⁶ This reservation, in accordance with Article 92 (1) of the CISG, was made by the Scandinavian countries Denmark, Finland, Norway and Sweden.

¹³⁷ For alternative analysis, compare DTI CONSULTATION DOCUMENT, *supra*

Moreover, not only did some states limit the applicability of the CISG by way of reservations, many parties to contracts of sale also chose to explicitly exclude the application of the CISG by virtue of Article 6. True to the motto “what the peasant does not know, he does not eat,”¹³⁸ business entities often prefer their familiar national law as opposed to the unfamiliar CISG notwithstanding that the CISG’s provisions might be more appropriate to international contracts of sale.

Apropos of international contracts of sale, the CISG can only unify a small part of contract law because according to CISG Article 1(1), its application is restricted to contracts for the international sale of goods. Outside sale contracts, the CISG does not cover various other areas of law including non-contract law, transfer of property law or unjust enrichment. The attempt for a comprehensive and global unification of contract law is perhaps too ambitious¹³⁹ but, at least within the EU, it is desirable for the projects of harmonization to not be limited to contracts of sale. Instead, these projects must aim to ensure the functioning of all sectors of the EU’s single market, including the free movement of capital, labor, goods and services as named in Article 26 of the

note 12.

¹³⁸ Translation of the German proverb, “Was der Bauer nicht kennt, das frisst er nicht.” Cf. Eckart Brödermann, *The Practice of Excluding the CISG: Time for Change?*, Address at the Modern Law for Global Commerce: Congress to Celebrate the Fortieth Annual Session of UNCITRAL (July 9-12, 2007) (humorously describing that the main reason to exclude the CISG is a lack of knowledge, and expressing hope that this will change soon), available at <http://www.uncitral.org/pdf/english/congress/Broedermann-rev.pdf>. See also Martin F. Koehler & Guo Yujun, *The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems: an International Comparison of Three Surveys on the Exclusion of the CISG’s Application Conducted in the United States, Germany and China*, 20 PACE INTL. L. REV. 45, 60 (2008) (reciting the analogous proverb “the devil you know is better than the devil you don’t know”), available at <http://cisgw3.law.pace.edu/cisg/biblio/koehler-yujun.html>

¹³⁹ However, with regard to commercial contracts, the UNIDROIT Principles are a successful step in that direction. See Int’l Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts* (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversion/principles2004-e.pdf>. But compared to the CISG, the UNIDROIT principles are not autonomous directly applicable laws. Their application depends on the parties’ choice, or at least an arbitrator’s preference. Cf. Hans Van Houtte, *The UNIDROIT Principles of International Commercial Contracts*, 11 ARB. INT’L. 373, 378 (1995).

Treaty on the Functioning of the European Union (“TFEU”).¹⁴⁰

The UK’s ratification of the CISG, currently long overdue, will eventually take effect and constitute a step towards the process of harmonization of European contract law. The above analysis shows that neither the general rules on statutory interpretation set out in Article 7 of the CISG, nor Article 7’s fairly restrictive reference to good faith, should deter the UK from ratifying the Convention. To the contrary, once the UK ratifies the CISG, jurisprudence thereon by the highly regarded English courts might increase the CISG’s acceptance within the international business community. As stated by the CISG opponent, Derek Whitley (Queen’s Counsel), English judges “are so highly regarded that of cases heard in the Commercial Court . . . nearly 30 per cent of all the cases had no English litigant at all.”¹⁴¹ Hopefully, once the UK adopts the CISG, the remaining non-contracting states within the EU¹⁴² will follow.

II. LESSONS LEARNED: HURDLES ON THE WAY TO SUCCESS FOR THE COMMON FRAME OF REFERENCE

Recalling the article on legal diversity being one of the obstacles to economic growth within the European Union by Germany’s former chancellor, Gerhard Schröder, cited in the introduction,¹⁴³ one should not forget that transnational transactions within the EU take place within a single market. In fact, “[w]ithin the European single market, people, goods, services and money move around as freely as within one country Although we now take it for granted, the single market is one of the

¹⁴⁰ Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. (C115) 47 [hereinafter TFEU]. On December 1 2009, the Treaty of Lisbon, 2007 O.J. (C 307) 01, entered into force, amending the Treaty establishing the European Community and the Treaty on European Union. The changes are reflected in the TFEU and the Consolidated Version of the Treaty on European Union, 2008 O.J. (C115) 13 [hereinafter TEU].

¹⁴¹ Wheatley, *supra* note 134, at 31, for whom the high number of cases with foreign litigants heard by the English Commercial Court proves the high reputation of English judges. Different from the author of this article, Derek Wheatley fears that a ratification of the CISG by the UK would imperil the “tremendous accolade for English law and English justice.” *Id.*

¹⁴² Ireland, Portugal and Malta.

¹⁴³ See generally Schröder, *supra* note 1.

EU's greatest achievements."¹⁴⁴

This single market, enabled by the Single European Act of 1986 and launched in 1993,¹⁴⁵ is certainly a great achievement because it has undoubtedly brought major benefits to businesses, consumers and employees alike.¹⁴⁶ Nevertheless, the single market cannot by itself be considered complete. There are remaining obstacles that continue to prevent people, goods, services and money from moving around "as freely as . . . within one country"¹⁴⁷ due to the lack of harmonized contract law in the EU. As more Europeans living in different countries engage in cross-border purchases and transactions, the legal diversity in Europe appears increasingly antiquated.¹⁴⁸ This alone was enough for Gerhard Schröder and the former German government "to support and actively assist the Commission with its Action Plan on 'A More Coherent European Contract Law.'"¹⁴⁹ By "Action Plan" Gerhard Schröder refers to the communication by the EU Commission from 2003,¹⁵⁰ which encourages discussion and research on European contract law in order to prepare a "Common Frame of Reference."¹⁵¹ This Common Frame of Reference ("CFR") is not completed yet. Currently there is only an academic draft, referred to as the Draft Common Frame of Reference ("DCFR" or "the Draft"). Following the Commission's Action Plan, several study and research groups¹⁵² have joined forces and prepared the

¹⁴⁴ See EUROPA: Activities of the European Union: Internal Market, http://europa.eu/pol/singl/index_en.htm (last visited Feb. 17, 2010) [hereinafter EUROPA].

¹⁴⁵ See EUROPA, European Commission, The EU Single Market: Historical Overview, http://ec.europa.eu/internal_market/top_layer/index_2_en.htm (last visited Feb. 17, 2010).

¹⁴⁶ Department for Business, Innovation and Skills (BIS), EU Single Market – Introduction, <http://www.berr.gov.uk/whatwedo/europeandtrade/europe/single-market/page45642.html> (last visited Feb. 17, 2010).

¹⁴⁷ EUROPA, *supra* note 144.

¹⁴⁸ See Jochen Zenthöfer, *Brauchen wir ein europäisches Zivilgesetzbuch? [Do we need a European Civil Code?]*, in HUMBOLDT FORUM RECHT 40, 43 (1999), available at <http://www.humboldt-forum-recht.de/deutsch/4-1999/beitrag.html>.

¹⁴⁹ Schröder, *supra* note 1, at 5.

¹⁵⁰ COMMISSION OF THE EUROPEAN COMMUNITIES, A MORE COHERENT EUROPEAN CONTRACT LAW: AN ACTION PLAN (2003), available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com_2003_68_en.pdf.

¹⁵¹ See *id.* at 16.

¹⁵² Participating study and research groups: Study Group on a European Civ-

DCFR, which at this stage, contains only legal rules which are later to be supplemented by explanations, comparative analyses and examples.¹⁵³ An interim edition of the DCFR, available only in English,¹⁵⁴ has been communicated to the Commission and was published in 2008.¹⁵⁵

The DCFR is partly based on the Principles of European Contract Law¹⁵⁶ (“PECL”) which were prepared by the Commission on European Contract Law (also known as “Lando Commission,” named after its founder Ole Lando), whose successor is the Study Group.¹⁵⁷ In contrast to PECL, the coverage of the DCFR is much wider. Specifically, the PECL contains rules “on the formation, validity, interpretation and contents of contracts” as well as “on the performance of obligations.” PECL further provides for remedies for the non-performance of contractual obligations. However, the DCFR also covers so-called “specific contracts,”¹⁵⁸ as well as non-contractual obligations arising as the result of unjustified enrichment.¹⁵⁹ The final edition of the DCFR, as opposed to the interim edition of 2008, will even cover some matters of movable

il Code (Study Group), Research Group on the Existing EC Private Law (Acquis Group), Project Group on the Restatement of European Insurance Contract Law (Insurance Group), Association Henri Capitant, Société des Législation Comparée, Conseil supérieur du Notariat, Common Core Group, Research Group on the Economic Assessment of Contract Law Rules (Economic Impact Group), Data Base Group, Europäische Rechtsakademie (ERA).

¹⁵³ See Stefan Leible, *Europäisches Privatrecht am Scheideweg*, 35 NEUE JURISTISCHE WOCHENZEITSCHRIFT 2558, 2560 (2008) (F.R.G.).

¹⁵⁴ Although translations are desirable to encourage an early involvement of the public in the discussion, the Commission is apparently not willing to arrange for translations at this stage. This is because the academic DCFR is considerably longer than what the Commission intends to publish as the final CFR. See Remarks of Ms. Kuneva, EUR. PARL. DEB. (O-0072/2008) (Sept. 1, 2008), <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20080901&secondRef=ITEM-022&language=EN>.

¹⁵⁵ Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR) Interim Outline Edition (Christian von Bar et al. eds., 2008) [hereinafter DCFR], available at <http://webh01.ua.ac.be/storme/DCFRInterim.pdf>. All references made herein to articles of the DCFR refer to this interim edition, being the most current available version of the Draft.

¹⁵⁶ *Id.* at 24.

¹⁵⁷ Study Group on a European Civil Code, SCOPE, <http://www.sgecc.net/pages/en/introduction/101.scope.htm> (last visited Oct. 22, 2009).

¹⁵⁸ DCFR, *supra* note 154, at 18-19.

¹⁵⁹ *Id.* at 19.

property law.¹⁶⁰

While intended to serve as an independent document, the DCFR is larger than what will be the final CFR as envisaged by the European Commission.¹⁶¹ The final CFR is supposed to have two main purposes. First, it shall operate as a *toolbox* for European legislators (Commission, Council and European Parliament) for the revision and preparation of EU legislation (regulations, directives) in the area of contract law.¹⁶² The same holds true for the European Court of Justice (ECJ) and national courts faced with the task to interpret such legislation or national law based on European legislation.¹⁶³ Second, the CFR might operate as an *optional instrument* - a set of legal rules which the parties may choose to govern their contractual relations.

The final part of this essay concerns the CFR as a *toolbox* to help interpret European legislation in the area of contract law and as the basis for the so-called *optional instrument*. Some aspects of the analysis conducted in Part I of this essay, notably concerning the UK's position on the principle of good faith, will help to identify possible shortcomings of the CFR in its current draft version. Suffice it to note that if the CFR is intended to serve as an optional instrument, its content needs to be accepted by both civil and common law parties. Therefore, if one of the parties to the CFR has an English legal background, the question presented is whether or not the CFR can be a viable option.

A. Demands on Interpretation of European Uniform Law – the CFR as a Toolbox

An increasing proportion of the law applicable in the EU member states is harmonized by European Community Private Law, which is based on regulations and directives.¹⁶⁴ However, only some aspects of contract law are covered by European directives and regulations. “Islands of European law within a sea of

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See EUROPA, Consumer Affairs, *European Contract Law*, http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm (last visited Oct. 22, 2009) (summarizing the purpose of the CFR).

¹⁶³ See Leible, *supra* note 153, at 2561.

¹⁶⁴ 5 FRANZ-JÜRGEN SÄCKER, MÜNCHENER KOMMENTAR ZUM BGB, para.196 (Kurt Rebmann, Roland Rixecker & Franz-Jürgen Säcker eds., 2006) (F.R.G.).

national legal rules”¹⁶⁵ is a popular metaphor to describe the fragmentary character of European Community Private Law.¹⁶⁶ For instance, the following European directives already harmonized some areas of contract law in Europe: the Package Travel Directive,¹⁶⁷ the Distance Selling Directive,¹⁶⁸ the Unfair Contracts Terms Directive,¹⁶⁹ and the Timeshare Directive.¹⁷⁰ As this enumeration shows, harmonized European Community Private Law mainly covers questions of consumer protection while business to business contracts are to a great extent unaffected by these directives.

Due to the fragmentary character of directives and regulations in the field of European Community Private Law, there are numerous interactions between national laws governing the largest part of contract law in Europe, and European directives and regulations. These interactions pose certain difficulties to national courts and to the ECJ when ruling on the interpretation and application of the directives and regulations in different national contexts.

When interpreting Article 7 of the CISG, it is required that regard be given to its international character along with the need

¹⁶⁵ See Hans-Werner Eckert, *Europäisierung des Privatrechts – Die Bedeutung der Richtlinien der Europäischen Union für die Schaffung einer einheitlichen Rechtsordnung* [Europeanization of Private Law – The Importance of European Union Directives for the Creation of a Uniform Legal System], in *FESTSCHRIFT FÜR ALFRED SÖLLNER ZUM 70. GEBURTSTAG - EUROPAS UNIVERSALE RECHTSORDNUNGSPOLITISCHE AUFGABE IM RECHT DES DRITTEN JAHRTAUSENDS* 240 (Gerhard Köbler, Meinhard Heinze & Wolfgang Hromadka eds., 2000) (F.R.G.).

¹⁶⁶ See Säcker, *supra* note 164, paras. 196, 212.

¹⁶⁷ Council Directive 90/314/EEC, On Package Travel, Package Holidays and Package Tours, 1990 O.J. (L 158) 59, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31990L0314:EN:NOT>.

¹⁶⁸ European Parliament and Council Directive 97/7/EC, On the Protection of Consumers in Respect of Distance Contracts, 1997 O.J. (L 144) 19, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0007:EN:NOT>.

¹⁶⁹ Council Directive 93/13/EEC, On Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:NOT>.

¹⁷⁰ Council Directive 94/47/EC, On the Protection of Purchasers in Respect of Certain Aspects of Contracts Relating to the Purchase of the Right to Use Immoveable Properties on a Timeshare Basis, 1994 O.J. (L 280) 83, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994L0047:EN:NOT>.

to promote uniformity in its application.¹⁷¹ The European Community Private Law, or national law based thereon, requires quite similarly that the Law is interpreted by retaining its European character and the need for a uniform application within the EU. Therefore, any interpretation of European directives and regulations in the area of contract law should not be constrained by the national legal background in which they are applied. Instead, the interpretation should be based on the *acquis* of contract law within the EU, meaning the existing EU private law in other directives and regulations.¹⁷² Furthermore, the interpretation may also be based on what can be described as the “*common core*” of the national contract laws of the member states.¹⁷³

The CFR, which is based on the academic DCFR, collects, consolidates, and presents the *acquis* (the existing EU private law) and the common principles of the member states’ contract laws in one single publication. It can, therefore, serve as a very valuable tool in assisting national and European courts to interpret and apply European directives and regulations. However, the academic DCFR is not restricted to issues on which there is common ground within the EU. Many rules contained therein constitute either a compromise or reflect simply what has been considered as the most appropriate or desirable rule by the scholars who participated in the Draft. Judges who base an interpretation of EU legislation on such rules might face criticism from lawyers from jurisdictions that do not agree with the “compromise” or “most appropriate rule” of the DCFR. Many controversial rules in the DCFR will certainly be subject to further discussions within the legal and business community, including the various rules referencing the principle of good faith,¹⁷⁴ a principle which, according to the European common law jurisdictions of England and

¹⁷¹ See *supra* Part I.B.1.

¹⁷² Research conducted by the Acquis Group has greatly influenced the DCFR. See Acquis Group, European Research Group on Existing EC Private Law, <http://www.acquis-group.org> (last visited Nov. 12, 2009).

¹⁷³ The Common Core Group’s research focuses on finding the similarities between the contract laws of different EU jurisdictions. International University College of Turin, The Common Core of European Private Law, The Project, Approach, <http://www.common-core.org> (last visited Oct. 29, 2009).

¹⁷⁴ See *infra* Part II.B.

Wales, is not likely to be accepted without objection.¹⁷⁵

To ensure that the rules contained in the final CFR have sufficient authority to serve as an accepted tool of interpretation, it is desirable that a representative number of lawyers, interest groups, and business people of *all* jurisdictions within the EU become actively involved in the discussion and preparation of the CFR. The academic DCFR should serve as the basis and the starting point of such discussion. However, it is unclear whether such broad participation will be achieved because the task of raising enough interest for the process of harmonizing European contract law seems far from being accomplished. Even in the presence of sufficient interest within all member states, language impediment serves as one obstacle because the lack of translated DCFR versions will likely hinder involvement by some of the concerned or interested parties.¹⁷⁶

B. Good Faith in the CFR - The Optional Instrument a Real Option?

If the CFR was to serve not only as a tool box but also as an optional instrument, meaning a set of contract law rules which the parties may choose to govern their contractual relations, there is an even greater need for early participation of all groups concerned. Notably, involvement by business entities is particularly important for the CFR to be successful as an optional instrument. Unlike the CISG, the success of the CFR as an optional instrument depends entirely on the acceptance and awareness of the business community. If businesses are not familiar with the CISG or convinced by its provisions, then this may cause the fairly common practice of opting-out by excluding the CISG's applicability by virtue of the CISG Article 6.¹⁷⁷ Nevertheless, the CISG is still of relative importance because it is autonomously applicable to international sales contracts whenever the parties fail to exclude it.

In contrast, if the CFR is to serve as an optional instrument, it will not apply autonomously but only if the parties "opt in." At least in the near future the "opt-in model" seems to be the only

¹⁷⁵ See *supra* Part I.B.2.b.

¹⁷⁶ Kuneva, *supra* note 154.

¹⁷⁷ See *supra* Part I.C.

feasible choice. In contrast, an “opt-out model” would mean that the CFR would replace national law if the parties do not expressly opt out of it in the choice of law provisions included in their contracts. First, this would raise difficult questions of competence by the European Community as it relates to the principles of subsidiarity and proportionality¹⁷⁸ outlined in Article 5 of the new Treaty on European Union (“TEU”).¹⁷⁹ While harmonized or common contract law may be practical and desirable to facilitate the common market, it is not particularly necessary because thus far individual member states were capable of resolving their contract law issues. Second, the CFR would, if applicable on an opt-out basis, overlap with the CISG. Finally, an “opt-out model” comes very close to the idea of a European civil law code which currently has too many opponents.¹⁸⁰ As it currently stands, there are better arguments to support the “opt-in model,” which respects party autonomy to the greatest extent.¹⁸¹ However, the “opt-in model” means that the application of the CFR would be restricted to cases of the parties’ choice and the CFR would not apply autonomously without a choice-of-law clause. Therefore the “opt-in model” would result in the CFR having a similar legal status as the Uniform Laws in the UK.¹⁸² Any lack of familiarity of the business community with the CFR would entirely diminish its impact, since the parties are not likely to make an active choice for an instrument the parties are unfamiliar with.

The European business community not only needs to be familiar with the CFR for it to be a success, but the provisions of the CFR also need to be acceptable for parties of different legal backgrounds. This is doubtful, because if the DCFR’s provisions on good faith were included in the final CFR they might be subject to a lot of controversy. Due to the diverging opinions on the benefits of a codified good faith principle, the CISG is restricted

¹⁷⁸ See Karen Battersby, *Opt In? Opt Out?* Presentation at Nottingham Law School, http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/stakeholders/5-10.pdf.

¹⁷⁹ See sources cited *supra* note 140.

¹⁸⁰ Joachim Jahn, *Rettet das BGB vor Brüssel* [Save the German Civil Code from Brussels], *FRANKFURTER ALLGEMEINE ZEITUNG*, Oct. 10, 2006 (F.R.G.).

¹⁸¹ Stefan Leible, *Was tun mit dem Gemeinsamen Referenzrahmen für das Europäische Vertragsrecht? - Plädoyer für ein optionales Instrument*, 28 *BETRIEBS BERATER* 1469, 1473 (2008) (F.R.G.).

¹⁸² See *supra* Part I.A.

by its single reference to good faith found in Article 7 on interpretation of the Convention. By contrast, the DCFR contains approximately forty references to good faith and fair dealing scattered throughout its provisions.

Similar to Article 7 of the CISG, Article I.-1:102 of the DCFR provides that in the interpretation and development of its provisions, “*regard should be had to the need to promote: (a) uniformity of application; (b) good faith and fair dealing; and (c) legal certainty.*” As analyzed, a reference to good faith in a provision concerning statutory interpretation is not generally problematic if it is correctly applied to interpretation questions.¹⁸³ On the other hand, considering that Article 7 of the CISG has given rise to some diverging decisions,¹⁸⁴ the same might be the fate of the similar Article I.-1:102 of the DCFR. Foreseeing the risk of diverging decisions, the drafters of the DCFR included the principle of “*legal certainty*” in letter c of the Article. Still, the question of what shall prevail, “good faith and fair dealing” or “legal certainty,” remains open.

Moreover, the DCFR’s good faith principle is far more extensive than that of the CISG. For example, good faith is supposed to be respected when it comes to the parties’ autonomy to conclude contracts (Article II.-1:102 (1) DCFR), it applies to pre-contractual negotiations and creates pre-contractual duties (Article II.-3.301 DCFR), it is part of the DCFR’s concepts of mistake (Article II.-7.201 (1)(b)(ii) DCFR) and fraud (Article II.-7:205(1) DCFR). Furthermore, courts may adapt contracts according to the requirements of good faith and fair dealing (Article II.-7:207(2) DCFR), and contracts have to be interpreted in light of the good faith principle (Article II.-8:102 (1)(g) DCFR), which allows courts to include additional implied terms.

There is also a general duty for the contracting parties to act in good faith in almost every situation stipulated by Article III. – 1:103 (1) of the DCFR. Under this provision, “[a] person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship.”

¹⁸³ See *supra* Part I.B.2.c.

¹⁸⁴ See *supra* Part I.B.2.c.; see cases cited *supra* notes 127-28.

According to subsection (2) of this provision, the contracting parties may not exclude or limit the duty of good faith and fair dealing. In case of breach, the party not acting in good faith is barred under subsection (3) from exercising its rights.

While most of these applications of the good faith principle are familiar to a German lawyer,¹⁸⁵ they are very likely to be an obstacle to the acceptance of the DCFR by English lawyers.¹⁸⁶ Moreover, English lawyers would understandably inquire about the necessity of including vague terms such as “good faith and fair dealing”. Most applications of the good faith principle could be described more precisely without referencing the term “good faith” given the term’s unclear meaning.

Even providing a “definition” of good faith and fair dealing does not eliminate the uncertainty arising from the vast overuse of the term “good faith.” For instance, Annex 1 to the DCFR provides: “Good faith and fair dealing refers to an objective standard of conduct. ‘Good faith’ on its own may refer to a subjective mental attitude, often characterized by an absence of knowledge of something which, if known, would adversely affect the morality of what is done.”¹⁸⁷

Most lawyers would agree that it is not only difficult but perhaps impossible to define “good faith.” Even though the drafters of the DCFR made a good effort in their attempt to define this vague term, the definition remains somewhat incomplete. To help define “good faith,” the definition in Annex 1 to the DCFR just cited includes yet more vague terms such as “morality.” To help illustrate the dilemma with the attempts to define “good faith,” it is instructive to quote the German author, Johann Wolfgang von Goethe, who wrote: “*And here I stand, with all my lore, Poor fool, no wiser than before.*”¹⁸⁸

¹⁸⁵ See *supra* Part I.B.2.a.

¹⁸⁶ See *supra* Part I.B.2.b.

¹⁸⁷ DCFR, *supra* note 155, at 338.

¹⁸⁸ Translated from the original German text: “*Da steh’ ich nun, ich armer Thor! Und bin so klug als wie zuvor.*” JOHANN WOLFGANG VON GOETHE, FAUST, EINE TRAGÖDIE [FAUST, THE FIRST PART OF THE TRAGEDY], ch. 1 Nacht [Night] (K. H. Hücke ed., Aschendorff 2008) (1808), available at <http://www.gutenberg.org/etext/21000> (e-book to download), translation available at <http://www.gutenberg.org/etext/14591> (e-book to download, Bayard Taylor trans.).

CONCLUSION

The greatest difficulty that projects from contract law harmonization is finding the balance between the need for legal clarity and the need for flexible solutions where precise rules lead to unjust results. Discussions about the benefits of the good faith principle usually attempt to resolve this difficulty. While most lawyers of civil law jurisdictions, particularly lawyers from German legal systems, are more familiar with and open towards the good faith principle, lawyers from common law countries, especially English lawyers, tend to prefer clear rules over any vague good faith provisions. By including a principle of good faith in Article 7, the CISG's attempt was to find compromise between these varying views, while at the same time, restricting its application to matters of construction of the Convention's provisions. The DCFR on the other hand does not contain a similar compromise but instead contains a clear choice for the good faith principle with all its possible applications. This choice is not surprising when considering that the majority of the DCFR drafters are from civil law jurisdictions. The importance of good faith and fair dealing as emphasized in the DCFR is nearly equivalent to the importance of the principle of good faith (*Treu und Glauben*) under German law.

With such a far reaching notion of good faith, the final CFR could not be successful as an optional instrument. It is difficult to imagine that businesses or lawyers from the UK would be choosing the CFR as the law governing individual contracts if the CFR contained the DCFR's extensive references to good faith and fair dealing. Moreover, under the DCFR, courts have a large discretionary authority while party autonomy is to a great extent limited by the principle of good faith and fair dealing. Limiting party autonomy appears problematic within the context of international business contracts.¹⁸⁹

Lastly, the CISG's tendency to compromise has also caused interpretative problems and diverging decisions. Nevertheless,

¹⁸⁹ Horst Eidenmüller, Florian Faust, Hans Christoph Grigoleit, Nils Jansen, Gerhard Wagner & Reinhard Zimmermann, *Der Gemeinsame Referenzrahmen für das Europäische Privatrecht: Wertungsfragen und Kodifikationsprobleme* [*The Common Frame of Reference for European Private Law: Policy Choices and Codification Problems*], 63 JURISTEN ZEITUNG (No. 11) 529 (2008), translated in 28 OXFORD J. OF LEGAL STUD. (No. 4) 659 (2008).

given that worldwide legal systems, including the European Union differ remarkably, compromises are often the only building blocks for projects of contract law harmonization. Although the DCFR has not been sufficiently discussed by European lawyers and businesses, it is already anticipated that additional compromises will have to be made before the final CFR can become a successful optional instrument. Under the current state of flux encapsulating the DCFR, it is unlikely that its various references to good faith and fair dealing will survive in its finalized form.