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Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts

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REMARKS ON GOOD FAITH: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

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I. GOOD FAITH IN THE CISG¹ AND THE UNIDROIT PRINCIPLES²

Although there are obvious differences between the CISG and the UNIDROIT Principles regarding the wording of good faith, the text of both are, in essence, in agreement. The principle of good faith is mentioned in Article 7(1) of the CISG. Article 7(1) emphasizes that the CISG should be interpreted as a uniform international law text. According to article 7, the CISG is to be interpreted as promoting "the observance of good faith in international trade." The CISG, however, does not contain an express provision providing that individual contracts must obey the maxim of good faith. It is common ground that under the CISG the good faith principle, in addition to the parties' contractual relationship, applies to the interpretation of the individual contract.³

Unlike the CISG, the UNIDROIT Principles address good faith as a principle directed to the parties of international contracts: "Each party must act in accordance with good faith and fair dealing in international trade."⁴ Specifically, article 4.8(2)(c) of the UNIDROIT Principles considers good faith and fair dealing as a determining element in contract interpretation. If good faith is not expressly incorporated into a contract, it will be implied. Although article 1.6, which addresses the interpretation of the UNIDROIT Principles, does not mention the maxim of good faith, the commentary to the Principles acknowledges that the good faith principle "may also be seen as an expression of the underlying purpose of the Principles" and may be used in interpreting the UNIDROIT Principles.⁵

¹ United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18, Annex I, reprinted in 19 I.L.M. 668 [hereinafter CISG].

² International Institute for the Unification of Private Law, Principles of International Commercial Contracts (Rome 1994) [hereinafter UNIDROIT Principles].

³ See, e.g., Joachim M. Bonell, Article 7, annotation no. 2.4.1, in COMMENTARY ON THE INTERNATIONAL SALES LAW (Massimo C. Bianca & Joachim M. Bonell et al. eds., 1987); Rolf Herber, Article 7, annotation no. 7, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT (Ernst Von Caemmerer & Peter Schlechtriem et al. eds., 2nd ed. 1995); Ulrich Magnus, Article 7, annotation no. 10, in KOMMENTAR SUM BURGERLICHEN GESETZBUCH (CISG) (J. Von Staudinger ed., 13th ed. 1994).

⁴ UNIDROIT Principles, *supra* note 3, art. 1.7(1).

⁵ *Id.* art. 1.6 cmt. at 15.

Thus, good faith guides the interpretation of unified law texts, the interpretation of individual contracts, and the interpretation of the entire contractual relationship. Under both the CISG and the UNIDROIT Principles, this maxim governs the meaning of the abstract rule of law as well as the individual contract. There is only a slight gradual difference in weight that the CISG and the Principles grant to good faith.

II. THE CONTENTS OF THE GOOD FAITH PRINCIPLE

Under both the CISG and the UNIDROIT Principles, the applicable concept of good faith is not based on any specific national good faith concept, but rather it is based on an international trade standard. Both texts expressly stress this idea.⁶ An international standard of good faith may already exist, and may clearly be defined, at least in business branches where there is a long-standing tradition. Should an international standard not exist, it remains to be developed by business circles, arbitrators, and courts, and, for instance, in new and modern trade branches like telesales.

Under the UNIDROIT Principles, the behavior of the contract parties is the object of the maxim of good faith and fair dealing. The parties conduct is regulated because they shall act in accordance with the maxim. Under the CISG, the object of good faith is not as clear. Nonetheless, the CISG intends to secure that sales contracts between parties from different countries are governed by the good faith principle.⁷ Thus, the UNIDROIT Principles can help clarify the actual object of the good faith principle contained in the CISG.

III. SPECIFIC RULES OF GOOD FAITH

Both the CISG and the UNIDROIT Principles provide a number of rules specifying the meaning of good faith in certain situations. Although the CISG constitutes the more specific regulation concentrating on a single type of contract, it is the UNIDROIT Principles' general character that contains more provisions and more detailed provisions on good and bad faith.

⁶ See UNIDROIT Principles, *supra* note 3, art. 1.6 cmt. at 18; JOACHIM M. BONNELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW 81 (1994).

⁷ See BONNELL, *supra* note 6, Article 7, annotation no. 2.4.2; Herber, *supra* note 3, Article 7 annotation no. 15.

1. *Pre-Contractual Obligations in the Negotiation Process*

The CISG addresses the pre-contractual phase indirectly in article 16(2)(b). Article 16(2)(b) provides that an offer is irrevocable, if the offeror created a situation where the offeree reasonably relied and acted on the offer as irrevocable.⁸ Article 2.4(2)(b) of the UNIDROIT Principles, with identical wording, adopted the same rule. The binding effect of such conduct, that is, where conduct is relied and acted upon, emanates from the good faith principle that no one should take advantage of acts or situations which are irreconcilable with his prior conduct (prohibition of *venire contra factum proprium*).

Unlike the CISG, the UNIDROIT Principles establish a further duty not to continue or break off pre-contractual negotiations in bad faith.⁹ According to article 2.15(3) of the Principles, it is bad faith when a party starts or continues negotiations while "intending not to reach an agreement with the other party."¹⁰ The good faith principle thus demands fair negotiations with an intent to reach agreement. Misuse of the negotiation process to the detriment of the other party offends the standard of good faith declared in the UNIDROIT Principles.¹¹ Although the CISG does not govern the pre-contractual phase, the regulations in the Principles will be helpful for cases where the parties negotiate on a modification or termination of an existing CISG contract. The solution envisaged by article 2.15 of the UNIDROIT Principles is similarly appropriate in CISG cases.

2. *Contract Formation and Modification*

Under both the CISG and the UNIDROIT Principles, a contract and its alteration need no form in order to be valid.¹² Unless the written contract contains a 'no oral modification' clause, any modification must be in writing or as agreed upon by the

⁸ See CISG, *supra* note 2, art. 16(2)(b).

⁹ See UNIDROIT Principles, *supra* note 3, art. 2.15 (2).

¹⁰ See UNIDROIT Principles, *supra* note 3, art. 2.15(3).

¹¹ For examples of bad faith see, e.g., UNIDROIT Principles, *supra* note 3, arts. 5.1-5.5.

¹² See CISG, *supra* note 2, art. 11; UNIDROIT Principles, *supra* note 3, art. 1.2.

parties.¹³ To this exception, the CISG, as well as the Principles, allow an identical sub-exception grounded on the good faith principle: “a party may be precluded by its conduct from asserting such a clause to the extent that the other party has acted in reliance on that conduct.”¹⁴ Where a party creates a situation of reliance and the other party acts upon it, strict adherence to the rules of formality does not take place.

3. *Material Validity*

Unlike the UNIDROIT Principles, the CISG does not govern the validity of a contract.¹⁵ The UNIDROIT Principles do, however, apply the concept of good faith to questions of material validity of a contract.¹⁶

4. *Contract Interpretation*

The UNIDROIT Principles expressly provide that contract interpretation must be guided by good faith and fair dealing.¹⁷ Under the CISG, the same solution should prevail. In the interpretation of the CISG, the application of the UNIDROIT Principles should be consulted.

5. *Express Contractual Obligations*

Several provisions of the CISG that deal with the parties' statutory obligations contain good faith elements. For example, Article 35(2)(b) obligates the seller to supply goods which are fit for a particular purpose expressly made known to the seller, except where the buyer could not have reasonably relied upon the seller's skill.¹⁸ Article 42(2)(b) provides that a seller is not in breach of his obligations if he delivers goods not free from third-party rights, when these rights resulted from the seller's compliance with buyer's particular wishes as to the manufacture,

¹³ See CISG, *supra* note 2, art. 29(2)(1); UNIDROIT Principles, *supra* note 3, art. 2.18(1).

¹⁴ UNIDROIT Principles, *supra* note 3, art. 2.18(2). See also CISG, *supra* note 2, art. 29(2)(2).

¹⁵ See CISG, *supra* note 2, art. 4(a).

¹⁶ See UNIDROIT Principles, *supra* note 3, art. 3.1-3.20. See also art. 3.5(1)(a): if “it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error.” *Id.*

¹⁷ See UNIDROIT Principles, *supra* note 3, arts. 1.7, 4.8.

¹⁸ See CISG *supra* note 2, art. 35(2)(b).

design, etc. of the goods. The UNIDROIT Principles, as a general regulation for all kinds of contracts, contain no comparable specific obligations.

6. *Implied Obligations*

The UNIDROIT Principles expressly state that contractual obligations may be implied under the maxim of good faith.¹⁹ The CISG does not contain a comparable rule. Nevertheless, it is widely accepted that under the CISG, additional obligations can be implied, and in particular, a general duty to cooperate.²⁰ Article 5.3 of the UNIDROIT Principles expressly provides for the same principle: "Each party shall co-operate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations." The rule can be understood as an expression of the general principle, based on good faith, that neither party may hinder performance nor otherwise militate against the contractual purpose.²¹ The UNIDROIT Principles' rule prominently assists the mentioned CISG interpretation.

7. *Non-Performance Caused by Creditor*

The CISG states that a "party may not rely on a failure of the other party to perform, to the extent that such failure [that] was caused by the first party's act or omission."²² In addition to the "non-performance . . . caused by the first party's act or omission," the UNIDROIT Principles provide another qualification - "by another event as to which the first party bears the risk."²³ This provision can be traced back to the sub-principle of good faith, that is, no one should profit from his own unlawful or forbidden acts. This addition in the UNIDROIT Principles seems to be a helpful rule for a situation not explicitly regulated by the CISG.

¹⁹ See UNIDROIT Principles, *supra* note 3, art. 5.2. For examples of implied duties see *id.* commentary at 102.

²⁰ See Bonell, *supra* note 6, Article 7, annotation no. 2.3.2.2; JOHN O. HONOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (2nd ed. 1991).

²¹ See Ulrich Magnus, 3 INT'L TRADE & BUS. L. ANN., 33, 46 (1997).

²² CISG, *supra* note 2, art. 80.

²³ UNIDROIT Principles, *supra* note 3, art 7.1.2.

8. *Mitigation of Damages*

An aggrieved party cannot claim damages for losses that could have been avoided. The aggrieved party should not profit from its own omissions. Although worded differently, both the CISG and the UNIDROIT Principles contain mitigation rules.²⁴ Under the UNIDROIT Principles, an aggrieved party's damages claim is reduced where the aggrieved party failed to mitigate and that failure was casually connected with the loss. The CISG mitigation formulation is discretionary, allowing damages to be reduced "in the amount by which the loss should have been mitigated."²⁵

IV. CONCLUSION

The differences between the CISG and the UNIDROIT Principles regarding the general concept of good faith in international contracts can be disregarded. The differences are in form not in substance. The CISG and the Principles acknowledge that good faith plays an important role in international contracts. Furthermore, both texts do not exclusively rely on a single abstract and general rule of good faith. Instead, they attempt to specify the concept by more specific rules which elaborate the good faith principle in detail. In several situations, the UNIDROIT Principles prove to be of great assistance for good faith interpretation in the CISG. Combining the CISG and the UNIDROIT Principles, a comprehensive understanding of good faith in international commercial relations is formulated.

²⁴ See CISG, *supra* note 2, art. 77 CISG; UNIDROIT Principles, *supra* note 3, art. 7.4.8.

²⁵ CISG, *supra* note 2, art. 77.