Abstract: The article seeks to provide a comparative and comprehensive analysis of the concept of good faith according to the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), UNIDROIT Principles and Principles of European Contract Law. The essay attempts to demonstrate that good faith should be observed in negotiation, conclusion and performance of the contract. It is not intended to precisely define the concept of good faith, but a proper understanding and application of the concept in international sales contracts, in order to obtain uniformity and efficiency. The analysis offered by the article is based on the examination of the nature, scope and function of art. 7 of the United Nations Convention on Contracts for the International Sale of Goods, which expressly prescribes the direction that the Convention's interpretation and application should follow. In Vienna Convention good faith must be viewed from a dual perspective. First good faith must be used in interpreting the Convention. Secondly it regulates the behavior of the contractual parties. Good faith therefore has two distinct functions. First good faith is examined as a state of mind (art. 7) and secondly it is looked at as a principle found in various articles (art. 16, 29, 38, 49).

Keywords: good faith; international sales law; UNIDROIT Principles; Principles of European Contract Law.

Introduction

The United Nations Convention on Contracts for the International Sale of Goods, which was concluded at Vienna in 1980, came into force in 1988. At 26 september 2014, United Nations Commission on International Trade Law reported that 83 States have adopted the Convention. The scope of the Vienna Convention is to be universal, bringing the national differences under one umbrella. Good faith is a concept that plays an important role in the interpretation and the application of the Convention. It is a legal notion loaded with meaning and it has provided much of the debate surrounding the Convention in general, as well as art. 7 of Convention in more depth.

Good faith is not a principle with a clear and precise meaning and therefore consideration must be given to the fact that good faith requires interpretation. Good faith is not only a legal term but by its very nature it also has a behavioral function. Courts can only fully understand the intent or parties if they inquire into the objective intent and also explore the subjective intent of parties.

In general, there are two ways of defining good faith: the positive and negative definitions. The positive definitions tend to offer substitutes for the term of good faith rather than explain it. Thus, good faith has been defined as fairness, reasonable standards of fair conduct, honesty. These terms do not highlight the meaning of the good faith and also the interchangeable use of the mentioned terms should not be encouraged as the terms actually refer to related but in the same time different things. The negative definitions are somewhat easier to explain because they define good faith in relation to what is not considered good faith. This approach also has certain disadvantages as a ruling in the spirit of this definition would not be able to create a precedent for further references, as it does not has the objective of defining or clarifying the concept of good faith. The solution would be to leave to the courts discretion but, here the danger of uncertainty and uncleanness appears, therefore, it is natural that, since the meaning is so general, there simply cannot exist a global doctrine of good faith in international sales.


It is universally recognized that the meaning of good faith poses a problem, as a definitive and precise meaning of the term is elusive. Even in Germany where good faith has been recognized for over one hundred years, and an extensive library of relevant cases exists, no actual definition of good faith has been established. In this regard, during the drafting process of the Convention, the proposal from Hungarian representatives stated that in the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith. This proposal was rejected by the UNCITRAL members, reasons given were the following:
- was unnecessary because good faith was adequately dealt with under national laws;
- lacked substance because it failed to provide penalties for its breach;
- was too vague and thus was likely to generate uncertainty and non-uniformity.

The Italian delegate proposed that only internationally accepted aspects of good faith, would apply to the Convention. The representatives of Norway proposed that good faith be restricted to the relation between the parties and not in the Convention's interpretation. The drafters of the Convention feared that a precise definition and application might not be possible. However, despite such misgivings the Convention appears to have managed the inclusion of good faith without too much controversy. Arguably a definition of good faith is not needed in order to understand and apply such a concept if we reflect that the study not of contract law, but rather of contract practice is the key to uniformity [1]. In other words, good faith must be viewed in light of what judges, jurists and legislators have referred to as being examples of good faith. The core principles of good faith can then be easily extracted from the diversity of case law.

In Vienna Convention good faith must be viewed from a dual perspective. First good faith must be used in interpreting the Convention. Secondly it regulates the behavior of the contractual parties. Good faith therefore has two distinct functions. First good faith is examined as a state of mind (art. 7) and secondly it is looked at as a principle found in various articles.

Although we believe that good faith is a concept that we cannot fit into a particular definition, in legal literature there have been various attempts in this regard. Remarkable would be the definition according to whom the duty of good faith represents an expectation and obligation to act honestly and fairly in the performance of one’s contractual duties. A certain amount of reasonableness is expected from the contracting parties [2]. Theoretically this may be true, but how is such a definition to be applied? It should be noted that the definition itself creates a functional problem. The definition covers only the application of good faith to contractual obligations, therefore is included only one function of good faith. This definition does not include a treatment of good faith as applicable to the Convention as a whole. How can good faith impose a requirement to act honestly and fairly if the outcome is not directly applicable? More to the point, good faith is a precondition, a holistic mind-set, which can be applied through concrete examples to the behavior of parties. The concept of good faith should be analysed through approaches rather than definitions. This is especially so as in many cases courts do not rely expressly on good faith. It arises often only through the interpretation of results. Good faith can mean different things depending on the context of the contract.


1.2.1. Interpretation of the United Nations Convention on Contracts for the International Sale of Goods

According to art. 7 of Vienna Convention in the interpretation of 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. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.
From a systematic viewpoint, art. 7 can be divided into three parts:

(a) paragraph 1, first part, which declares that the international character of the Convention and the need to promote uniformity in its application are the basic criteria for the interpretation of the Convention.

(b) paragraph 1, second part, which establishes the relevance to be given to the observance of good faith in international trade.

(c) paragraph 2, which sets out the mechanism with which gaps in the Convention are to be filled.

The first part in this triadic classification is probably the most important one since it not only stresses the character of the Convention and its all-important goal of uniform application, but it also describes the process by which those called upon to apply the Convention to a particular case ascertain the meaning and legal effect to be given to its individual articles. In effect, the first part of art. 7 (1) is the tool that determines the precise scope of the other two parts of art. 7.

Paragraph 1 of art. 7 emphasises that in the interpretation of the Convention, one must pay close attention to three points:

- the international character of the Convention;
- the need to promote uniformity in its application;
- the observance of good faith in international trade.

If the first two of these points are interrelated, the second being a logical consequence of the first, the third point is the one to which our analysis will proceed, concerning that is the only which expressly refers to the principles of good faith.

In drafting the United Nations Convention on contracts for the international sale of goods, UNCITRAL built on the work that had produced the 1964 Hague Conventions. It was mostly by revising the Hague Conventions that the Vienna Convention was constructed. This is why the origin of the art. 7 paragraph 1 on the observance of good faith in international trade must be sought in the mentioned Conventions. In the course of the revision of the Hague Conventions, the UNCITRAL Working Group adopted at its ninth session, in 1978, a new provision (art. 5) not previously contained in the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods - ULF (1964): in the course of the formation of the contract the parties must observe the principle of fair dealing and act in good faith [3]. Thus, the principles of fair dealing and good faith became mandatory on contracting parties. This article was the subject of a lengthy discussion at the eleventh session of the Working Group in 1978 [4]. The debate related to the retention or deletion of the provision of art. 5.

Those who favoured the deletion of the provision acknowledged that good faith is highly desirable principle in international commerce, but emphasised that the way in which art. 5 was formulated has determined good faith to be too vague. They argued that national courts applying the provision of fair dealing and good faith would necessarily be influenced by their own legal and social traditions with the result that different interpretations would be given to the provisions of Convention. Moreover, the draft uniform law did not specify the consequences of failure to observe the principles of good faith and fair dealing. This meant that the consequences of a violation of the principles of good faith and fair dealing would be left to national law, with the result that no uniformity of sanctions would be achieved either.

For supporting of the provision's retention it was argued that because of the world-wide recognition of the principle of good faith, there would be little harm in including it in the Convention. Countering the objection that the proposed provision did not set out the consequences of a violation of the principles of good faith and fair dealing, it was argued that sanctions should be determined by the courts in a flexible manner and according to the particular circumstances of each case. It was further added that, even without sanctions, the existence of the provision would be of benefit because it would draw the attention of the parties and the court to the fact that high standards of behaviour were expected in international trade transactions.

Some possible compromise solutions were suggested to resolve these differences of opinion. One suggestion was to include the substance of the art. 5 in a preamble to the Convention. The supporters of the good faith principle objected that this would deprive it of any effect. Another compromise proposal was to incorporate the requirement of the observance of good faith into the rules for interpreting the conduct of the parties. The argument against this suggestion was based on the point that art. 5 was not concerned with the intent of the parties, but sought to establish a standard of behaviour to which the parties were obliged to conform. A third suggestion was to incorporate the
principle of good faith into the article on the interpretation of the provisions of the Convention. This last suggestion was eventually accepted as a compromise solution and embedded in the final version of the Convention in art. 7 paragraph 1, third part, “in the interpretation of the Convention, regard is to be had to (...) the observance of good faith in international trade”.

Regardless of the content of art. 7 paragraph 1 third part, it should be noted that the placement of the good faith principle in the context of an operative provision dealing with the interpretation of the Convention creates uncertainties as to the principle’s exact nature, scope, and function within the Convention. Scholarly opinion on the issue is divided. Some commentators insist on the literal meaning of the provision and conclude that the principle of good faith is nothing more than an additional criterion to be used by judges and arbitrators in the interpretation of the Convention [5]. Under this approach, good faith is merely a tool of interpretation at the disposal of the judges and arbitrators to neutralise the danger of reaching inequitable results. Even if included in the Convention as a mere instrument of interpretation, good faith can pose problems in achieving the ultimate goal of the Convention - uniformity in its application - because the concept of good faith has different connotations within legal systems. Consequently, it will be difficult for a uniform definition of the concept to be developed. This can lead to differing interpretations of the Convention.

There is academic opinion pointing out that the duty to observe good faith in international trade, as required by art. 7 (1), is also necessarily directed to the parties to each individual contract of sale. This suggestion, in effect, implies that the interpreters of the CISG are not only the judges, or arbitrators, but the contracting parties as well [6]. This point is controversial, thus, if art. 7 (1) is addressed to the parties, then that provision might be excluded by them under art. 6 of Convention, which states that the parties may exclude the application of the Convention or derogate from or vary the effect of any of its provisions. This would be an unwelcome result because, in practice, this would hinder the uniformity of interpretation. Regarded as relevant is the fact that the drafter of the Convention did not include among the provisions of the Convention a basic duty of good faith of contracting parties, because the concept of good faith was too vague and would inevitably lead to divergent interpretations of the Convention by national courts. If the interpretation of the Convention results in imposing on the parties a general obligation to act in good faith, in this situation not the Convention was interpreted, but the contract itself. However, since the parties indirectly, but necessary can interpret the Convention, we cannot dissociate the interpretation of the Convention from the interpretation of the contract. Eventually, if the contracting parties did not apply the provision of art. 6, the Convention has binding force on the parties.

It should be noted that the principle of good faith, as embedded in art. 7 paragraph 1, must be observed in light of the requirements of international trade. Therefore, the principle of good faith may not be applied according to the standards ordinarily adopted within the different national systems. In this respect, two aspects should be highlighted. Firstly, the Convention specifically governs commercial contracts only and all consumer transactions are expressly placed outside the ambit of its operation. Even domestic laws generally make a distinction in the application of the principle of good faith in commercial contracts (contracts between merchants) compared to consumer transactions. Rules applicable to consumer transactions, intended to protect the economically weaker or inexperienced party, are for the most part excluded when both parties contract in their professional capacity [7]. In the case of a transaction between merchants, the general obligation to act in good faith is often understood in the sense of imposing special standards, such as the observance of reasonable commercial standards of fair dealing. Secondly, there is a further distinction that needs to be made, because the Convention deals only with international commercial transactions. Thus, there are substantial differences between commercial transactions of a purely domestic nature and transactions concluded at an international level. It was argued that in the case of a sales contract between an exporter from a highly industrialised country and an importer from a developing country, it may well be that the discrepancy between the bargaining power of the two parties corresponds to that normally to be found in a consumer transaction stipulated at national level [8]. This statement runs the risk of oversimplifying the differences between national and international trade. It attempts to establish that the distinction generally made within domestic laws between consumer transactions and contracts of a commercial nature can be used in order to determine the precise meaning of good faith in international trade. This implies that the interpretation of the Convention could be used to protect the weaker party, but it is doubtful that this would work at the international level [9]. Although it is generally accepted that differences in the bargaining power of parties to an international contract exist, and that these differences are usually related to the parties’ role in the contract (i.e. importing or exporting) and to
their economic environment, to equate such an international commercial relationship to a domestic consumer transaction may be stretching any comparative value of such an analogy beyond its legitimate limits. In contractual relations between industrialised and developing countries, it may not always be the party from the developing country who is the weaker party [10]. Another element that discounts the value of such an analogy is the diversity exhibited in the standards of business in different parts of the world. As has been correctly remarked in legal literature, this lack of uniformity in the domestic or regional standards of business around the world entails that a particular line of conduct, which may reasonably be expected from merchants operating in the same country or region, could hardly be imposed on a party belonging to a country with a different economic and social structure [11]. Though there may be some value in the comparative use of the distinction made between commercial and consumer transactions, in determining the precise meaning of good faith in international trade, such an analogy has inherent limitations that should not be underestimated.

International trade is characterised by economic competition and by polarization and objectivity of commercial transactions, and it is in that context that the Vienna Convention must be interpreted. Observance of good faith in international trade should not be equated with the establishment of material justice between the parties. Good faith should be a normal conduct among tradesmen [12]. The reference in art. 7 (1) to the observance of good faith in international trade carries only descriptive and not normative value. It is addressed to the interpretation of the Convention's provisions and seeks to describe good faith in international trade as it is used, rather than state what the concept itself should mean.

Further indications as to the precise meaning of the observance of good faith, as is embedded in art. 7 paragraph 1, may be found within the Convention itself. In this regard, the Convention preamble states: "the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among states" and "the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade". The observance of good faith in international trade is delineated by the parameters of international commercial transactions. The principle of good faith may not be applied according to the standards ordinarily adopted within the different national systems and must be construed in light of the special requirements of international trade. The reference to "equality" of the Convention preamble should not be equated with the imposition of positive duties upon the parties, as this would be incompatible with the quintessential nature of commercial transactions and the legislative history of the Convention [13]. The duty of good faith must always be subsumed to the principle of contractual freedom.

1.2.2. Revocation of an offer

According to art. 16 subparagraph (b) of paragraph (2) an offer cannot be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

This case of irrevocability is beyond the offeror’s control, but relies on the offeree’s intention. In determining the intent of the offeree or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves and usages according to the Convention.

The purpose of art. 16 subparagraph (b) of paragraph (2), written under the influence of reasonable man theory of common law, is to prevent an abusive and contrary to the principle of good faith offeror’s attitude in using the rule of the revocation of an offer. For instance, an offer should be considered.

1.2.3. Modification and termination by agreement of the contract

According to art. 29 paragraph 2 a contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.
The intent of this article is clear. If a party deliberately contradicts the content of the contract by his conduct and the other party relies on such conduct, this constitutes a breach of good faith in line with art. 7 (1).

Cases dealing with a breach of good faith pursuant to art. 29 (2) are rare and hence the observation has to be made that such breaches are either not taken to court or are not a mischief which needed fixing. However, art. 29 (2) does contribute to the general mood of art. 7 (1) which indicates that dealings between parties must be in good faith. In *Graves Import Co. Ltd. v. Italian Trading Company v. Chilewich International Corp* the court noted that the buyer was precluded from asserting that there was an oral modification as the contract incorporated a no-oral modification clause [14]. The above facts do not correspond to a breach of good faith, rather they are a breach of an express term on which the other party relied. In *Société Camara Agraria Provincial de Guipuzcoa v. Andre Margaron* was noted that conduct required by art. 29 (2) must be a positive act and not just a conclusion gained from the general mood of a meeting [15]. Under certain circumstances silence can be construed as conduct required by art. 29 (2). If the circumstances indicate that a party refrains from action, which the party is entitled to take, such as the insistence on a substitute delivery, the other party can interpret such conduct as a modification or termination of the agreement [16].

1.2.4. Seller’s obligations to examine the goods and to notice lack of conformity

According to provisions of art. 38 the buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

According to art. 39 the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

Since the articles cited are interrelated they will be treated together. Art. 38 obliges the buyer to examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. Pursuant to art. 39, the result of these examinations must be communicated to the seller within a reasonable time after he has discovered or ought to have discovered it. The principle of good faith clearly indicates that a buyer must establish efficient business practices. Goods, which show defects or cause disputes should not be left in a storage because costs should be held to a minimum. The seller must be afforded the opportunity to make a decision as to the fate of the goods in order to minimize unnecessary costs.

The Landgericht Berlin refused the application for damages as the defects of goods were easily discoverable and should have been noted at delivery [17]. The defects were only communicated to the seller after three months. The court indicated that pursuant to art. 38 the goods should have been inspected at delivery or at least within a week and should also been notified to the seller pursuant to art. 39 within a week after discovery of the defects.

The Lower Court of Riedlingen (Amtsgericht) dismissed the buyer’s claim for damages and held that according to principle of good faith in conjuuction with the obligation under art. 38, the buyer was obliged to spot check the goods upon delivery [18]. In this case, the object of the sale contract was Parma ham. The delivery took place during winter holidays, therefore the buyer has inspected the goods after the holiday period. The same court dismissed another buyer’s claim for damages and held that in accordance with good faith and Convention the buyer was obliged to at least visual check the goods. Since the goods were clothing, the defects should have been apparent to the eye and therefore the delay of one week from the time of delivery to inspect the goods was unreasonable. In any case, the buyer is not required to conduct a thorough examination of the goods in order to find all possible defects. Generally, only obvious non-conformity is revealed. The buyer will examine the goods according to his professional skills and to the means of examination available, so that the he will not
be liable for the non-disclosure of a defect, which a trader from another branch of activity could not find it.

Art. 39 poses the problem of notification. If there is a lack of conformity of the goods, the buyer must notify the seller within a reasonable time after he has discovered or ought to have discovered it. In this situation it is proper to ask what would constitute a breach of good faith. In other words, a lack of conformity must be notified immediately not only after it is discovered but also after it ought to have been discovered. It poses an obligation upon the buyer to expeditiously make sure that the goods correspond with the contractual provisions, therefore with his expectations. The seller must be able to rely on the good faith of the buyer in the situation when the buyer decides that the seller has performed or has failed to perform his contractual obligations. The German Bundesgerichtshof found that the important question in relation to conforming to art. 39 was the buyer's state of knowledge at the time of giving notice to the seller specifying the lack of conformity [19]. The problem was not the apparent defects, which are easily observed, but the latent ones. The difficulty was that the lack of conformity which the seller was given notice could have been the fault of the buyer through an error by his workforce. The Bundesgerichtshof allowed one month for the buyer to make a decision as what to do next and for the initiation of necessary measures. It would be an exhibition of bad faith if buyers would be rushed into giving notice to the seller specifying the lack of conformity which given a little time could have been cleared up by an internal or external investigation. This decision has found the balance between the obligation to submit a timely complaint and the necessity to give a reasonable time to the buyer to prepare a reasoned complaint in line with the principle of good faith. However the Bundesgerichtshof in their statement used the term ,,regular period”, which we believe gives rise to concern. Reasonable time is not a question of law but rather a question of fact. Allowing one month for the buyer, the court has created a precedent of one month. In this situation is such a precedent in line with the principle of good faith? The answer would be a negative one because each case must be looked at on particular circumstances involved. The precedent we are talking goes beyond the provisions of the Convention, forcing the contracting parties. When defining reasonable time we should take into consideration the mandate of good faith in order achieve uniformity pursuant to art. 7 paragraph 1 from Convention.

1.2.5. Seller's knowledge of lack of conformity

According to art. 40 the seller is not entitled to rely on the provisions of art. 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer. By this provision, the Convention establishes an obligation of the seller to inform the buyer of the facts that could cause a lack of conformity. There should not be understood that the seller is bound to examine the goods similar to the duty embodied in art. 38. By adopting this provision, the Convention made application of the principle of observance of good faith in international trade (art. 7 paragraph 1) and of the principle nemo auditur propriam turpitudinem allegans.

Beijing Light Automobile Co., Ltd v. Connell Limited Partnership (Beijing Metals) is a leading case for the situation presented [20]. A lock plate broke four years after installation in a machine. Pursuant to art. 39 (2) the buyer loses the right to rely on a lack of conformity of goods after two years. From this perspective art. 40 is a safety valve which allows the buyer to overcome art. 38 and 39 if the reason for his late discovery of non-conformity is based on the seller exhibiting bad faith [21]. Stockholm Chamber of Commerce Arbitration noted that art. 40 is only to be applied in special circumstances. The court must be convinced that a fact of which the seller had knowledge of or ought to have had in its mind resulted in a loss to the buyer. Such conduct can be described as an awareness of bad faith [22].

1.2.6. Buyer’s loss of right to avoid the contract if the seller has delivered the goods

In cases where the seller has delivered the goods, pursuant to art. 49 (2), the buyer loses the right to declare the contract avoided unless he does so:
- in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
- in respect of any breach other than late delivery, within a reasonable time; a) after he knew or ought to have known of the breach; b) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of art. 47, or after the seller has declared that he will not perform his obligations within such an additional period; or c) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of art. 48, or after the buyer has declared that he will not accept performance.

The text is symmetrical with paragraph 2 of art. 64. We will analyse the provision of paragraph 2 of art. 49 and what we will note will be applicable by analogy to paragraph 2 of art. 64.

The provision of art. 49 paragraph 2 applies if the seller has performed his obligation to deliver the goods. Its purpose is to strengthen the exceptional character of the avoidance of the contract if the seller has delivered the goods, this meaning that he has performed his main obligation.

The fact that the buyer loses the right to avoid the contract after delivery is made is an inherent to international contracts, in the tribunal’s gal and practical effects

The provision of art. 49 (2) balances the relation between the seller, who made a late delivery, and the buyer, who may declare the contract avoided within a reasonable time after he has become aware that delivery has been made. This provision is likely to preserve the buyer’s good faith.

Art. 49 (2) poses the problem of understanding the meaning of reasonable time. Establishing reasonable time does not involve a set of general rules, but depends on the particular circumstances of each case. Audiencia de Barcelona ruled that a 48-hour period was sufficient to avoid the contract after the buyer was notified of a late delivery [24]. The reasonableness of this period is assessed according to paragraph 3 of art. 8 of the Convention.

Art. 49 allows the buyer to declare the contract avoided, however, if the seller has delivered the goods the buyer loses that right subject to basically two exceptions:

- in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
- in respect of any breach other than late delivery, within a reasonable time;

The exceptions mirror the view that late delivery when detected early can still be aborted in order to minimize the losses. Other breaches must be communicated within a reasonable time. The Bulgarian Chamber of Commerce and Industry in Arbitration Case 11/1995, 12 February 1998 refused the application of provision of art. 49 (2). The buyer accepted the late delivery and, moreover, he sold 90% of the goods and therefore waived the right to protection under paragraph 2 of art. 49 [25].

2. Good Faith in UNIDROIT Principles 2010

UNIDROIT Principles do not explicitly define the concept of good faith, but several articles embody the concept. The most remarkable is art. 1.7, which states that each party must act in accordance with good faith and fair dealing in international trade. The parties may not exclude or limit this duty. Under UNIDROIT Principles no specific national good faith concept can be applied but only one which fits for international trade relations. Good faith is mandatory for the contracting parties. The parties do not have the possibility to exclude or to limit the duty to act in accordance with good faith. Therefore, unlike Vienna Convention, UNIDROIT Principles impose a general and positive duty of good faith on contracting parties. We cannot accept the view expressed in legal literature according to which the difference between art. 7 paragraph 1 of Convention and art. 1.7 of Principles relates to the wording rather than the substantive content of the duty of good faith [26]. Thus, there are substantive differences and not fromal ones, the Convention being silent regarding the duty embodied in art. 1.7 of Principles.

Art. 1.7 is frequently mentioned in the arbitration awards. In Anderson Consulting Business Unit Member Firms v. Arthur Anderson Business Unit Member Firms, et al., the arbitral tribunal used the Principles to supplement the legal rules applicable to the contract [27]. Although it was ascertained a conduct contrary to the principle of good faith inherent to international contracts, in the tribunal’s view, such conduct was insufficient to rise to the level of a fundamental breach of the contract. Although the arbitral decision has recognised the concept of good faith, the legal and practical effects of the concept have been reduced to nothing. On one hand the arbitral decision can be criticised, and,
on the other hand, the Principles do not contain any provisions relating to what kind of sanctions will be applied when the duty of good faith is breached.

While under the UNIDROIT Principles, good faith has an important role in every contractual phases, Vienna Convention refers to good faith in connection with the interpretation of the Convention and the contract. Art. 2.1.15 addresses the good faith, which is the converse of good faith. Limited to the negotiations, art. 2.1.15 states that a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party. Moreover, paragraph 3 of the same article defines bad faith, thus it is bad faith for a party to enter into or continue negotiations when intending not to reach an agreement with the other party. Unlike art. 1.7, the relative specificity of art. 2.1.15 assists in giving some notice to contractors of what standards of conduct are excluded from the notion of good faith.

Provisions related to good faith also can be found in art. 3.2.5, which describes the circumstances under which a contract can be avoided for fraudulent behavior. With respect to good faith, art. 3.2.5 provides that the significance of any non-disclosure will be judged according to reasonable commercial standards of fair dealing. As with art. 1.7, art. 3.2.5 is capable of myriad interpretations and thus this provision does not assist in determining a precise meaning.

According to art. 3.2.2 a party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known, and the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of good faith to leave the mistaken party in error.

Moreover, art. 4.8 states that where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied. In determining what is an appropriate term regard shall be had to good faith. Similarly, art. 5.1.2 provides that a contractual obligation may be implied by considering good faith.


Regarded good faith in Principles of European Contract Law should be noted that it followed the line imposed by the UNIDROIT Principles. Thus, art. 1.201 states that each party must act in accordance with good faith and fair dealing. The parties may not exclude or limit this duty. It should be noted that the Principles of European Contract Law do not contain such details as the provision of art. 1.7 of UNIDROIT Principles. This can be explained through the fact that Principles of European Contract Law do not cover only commercial relations. Like UNIDROIT Principles, the duty of good faith, as it is embedded in Principles of European Contract Law, is mandatory on the contracting parties.

In contrast to art. 7 (1) of Convention, art. 1.201 of Principles of European Contract Law imposes upon contracting parties a duty of good faith a in exercising their rights and performing their duties under the contract. Pursuant to art. 1.201, good faith is not only a basic principle, but also it is in the formation, performance and enforcement of the contract. The Convention neither contains any provisions that the individual contract has to obey the maxim of good faith nor refers to good faith effects on the parties' rights and obligations under the contract.

Unlike the Vienna Convention, but in accordance with UNIDROIT Principles, Principles of European Contract Law provide stringent rules for pre-contractual negotiations. According to art. 2.301 paragraph 2 a party who has negotiated or broken off negotiations contrary to good faith is liable for the losses caused to the other party. Paragraph 3 of the same article states that it is contrary to good faith for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

The concept of good faith in Principles of European Contract Law manifests itself in the manner that the Principles of European Contract Law deals with issues of validity of the contract. Pursuant to art. 4.109 a party may avoid a contract if, at the time of the conclusion of the contract, the other contracting party had an unfair and excessive advantage. In this situation must be noted that the other party took unfair advantage of the former party's trust, economic distress or urgent needs, or the last one was improvident, inexperienced or lacking in bargaining skill. However, upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith been followed.
It should be noted that such provisions cannot be found in Vienna Convention, since the Convention, according to art. 4, leaves untouched the issue of validity of the contract.

Conclusions

In international trade, the good faith emerges as a concept which inseparably combines both aspects of civil law systems and common law. A strict definition of concept of good faith is not needed. Simply by applying this concept, contracting parties should understand that their mission is to cooperate in order to streamline international sales contracts. Legal reality, however, takes us to another path. Even the United Nations Convention on contracts for the international sale of goods of 1980 does not fill that vacuum created by the different perception of good faith in the common law or civil law systems. However, the scope of Convention was to adopt uniform rules which would govern contracts for the international sale of goods, would take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade. But uniformity does not automatically mean the establishment of uniform rules. Uniformity is a goal difficult to achieve, especially when a convention is in force in different countries, that certainly have social, economic, cultural systems completely different, and most significantly, have a different legal system.

The United Nations Convention on contracts for the international sale of goods of 1980 does not solve all the polarities created around the concept of good faith and does not offer a compromise solution. If we look at the legislative history of the Convention we will be tempted to believe that by its provisions, the Convention adds certainty in the application of the concept of good faith. Strictly analysing the text of Convention, the only article that expressly refers to good faith is art. 7 paragraph. 1 third part. This article refers to the interpretation in good faith of the Convention and not to the application of good faith in negotiation, conclusion and performance of the contract. The principle of good faith is mentioned in various articles of Convention, which indirectly relate to good faith.

In Vienna Convention good faith is neither a general principle, nor a general obligation, being more a specific obligation. If we were to consider good faith as a general obligation, it would mean that a positive duty is imposed on contracting parties in order to be observed in performance of the contract. The Convention does not contain any provisions relating to what kind of sanctions will be applied when good faith is breached. If a contracting party is not acting in good faith, but does not commit a fundamental breach of contract, art. 7 paragraph. 1 of the Convention does not allow courts to develop remedies or sanction for a given situation. We do not pretend to create a whole theory of liability for breach of good faith, but, at least, establishing some standards of conduct, with appropriate sanctions, will lead to a safer and more effective performance of international sales contract.

However, good faith is, after all, a state of mind, and therefore concrete results can not be reached. Applying the concept of good faith requires a holistic approach. In an abstract way, good faith will never be fully outlined. It depends both on the interpretation and application of the concept of good faith by the courts or arbitration that good faith would have a positive role in contractual relations.

Recognising good faith as a legal principle, as a duty to be observed in contractual relations, with the appropriate sanctions when such a duty is breached, will streamline contractual relations and, especially, will guarantee the security of any business relationship.

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