

**DUTIES OF GOOD FAITH AND FAIR DEALING
UNDER THE UNIDROIT PRINCIPLES,
RELEVANT INTERNATIONAL CONVENTIONS,
AND NATIONAL LAWS**

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I. INTRODUCTION

I have been asked for a comparative analysis of the doctrines of *good faith and fair dealing* in the performance of contracts. I shall confine my remarks to the UNIDROIT Principles for International Commercial Contracts (Principles),¹ the Vienna Convention on International Sales Contracts (Vienna Sales Convention),² and a few representative national legal systems. My credentials, such as they are,

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1. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994) [hereinafter UNIDROIT PRINCIPLES].

2. Final Act of the United Nations Conference on Contracts for the International Sale of Goods, U.N. Doc. A/Conf. 97/18, Annex I (1981) [hereinafter Vienna Sales Convention]. For another comparative discussion of the Vienna Convention, see Mitchell Stocks, *Risk of Loss Under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods: A Comparative Analysis and Proposed Revision of the U.C.C. Sections 2-509 and 2-510*, 87 NW. U. L. REV. 1415 (1993). As of February 25, 1993, the United States and thirty-two other governmental units had become parties to the Convention. *Id.* at 1418 n.12.

as a comparatist derive from my representation of the United States at the United Nations Commission on International Trade Law (UNCITRAL) during the drafting of the Vienna Sales Convention in the 1970s. Recently, I also worked with the drafting group for the Principles. In these activities I have had frequent exposure to the thinking of many of the world's renowned comparatists, and one can at least hope that there has been some osmotic effect. I shall try not to disabuse you of this hope.

I feel on firmer ground with *good faith*. Three decades ago, I wrote a major law review article on the topic.³ Seven years ago, I wrote another dealing with good faith in precontractual negotiations.⁴ More recently, I have revisited such matters in my treatise⁵ and in a pair of lectures.⁶

My remarks on the doctrine of good faith that follow are organized under four headings. First, I shall set out the provisions of the Principles that bear on good faith. Secondly, I shall survey other sources of the doctrine, both domestic and international. Thirdly, I shall address some unresolved questions involving the doctrine. Finally, I shall offer some conclusions.

II. THE UNIDROIT PRINCIPLES

The Preamble of the Principles announces that they "set forth general rules for international commercial contracts."⁷ However, because the Vienna Sales Convention is rapidly occupying the field of international commercial contracts with respect to the international sale of goods,⁸ the Principles are therefore more likely to have their impact in connection with international contracts for services.

3. E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963).

4. E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987).

5. 1 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* §§ 3.26, 3.26a-3.26c (1990).

6. E. ALLAN FARNSWORTH, *GOOD FAITH IN CONTRACT PERFORMANCE* (forthcoming 1994); E. Allan Farnsworth, *The Concept of Good Faith in American Law*, in 10 SAGGI, CONFERENZE E SEMINARI (Centro di studie e di ricerche di diritto comparato e straniero 1993) [TEN ESSAYS, CONFERENCES, AND SEMINARS (Center for the Study and Research of International Law ed., 1993)].

7. UNIDROIT PRINCIPLES, *supra* note 1, pmb1.

8. *See* Stocks, *supra* note 2, at 1418.

The Principles' main provisions on good faith are found in Articles 1.7 and 2.15. Article 1.7 states that "[e]ach party must act in accordance with good faith and fair dealing in international trade," and "[t]he parties may not exclude or limit this duty."⁹ Article 2.15 provides:

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

(2) However, a party who negotiates or breaks off negotiations in *bad faith* is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations intending not to reach an agreement with the other party.¹⁰

In addition, several other articles incorporate the concepts of good faith, fair dealing, or some variation thereof. Article 4.8 states that good faith and fair dealing should be considered when an otherwise omitted contractual term must be supplied.¹¹ Article 3.5 requires a party to call a mistake of the other party to the latter's attention if it is "contrary to *reasonable commercial standards of fair dealing* to leave the mistaken party in error."¹² Moreover, in a case involving gross disparity between the parties, Article 3.10 provides that a court may, upon a request by the party entitled to avoidance, adapt the contract or term to "make it accord with reasonable commercial standards of fair dealing."¹³ Similarly, Article 7.1.6 delineates circumstances in which an exemption clause excluding a party's liability for either nonperformance or substantially different performance "may not be invoked if it would be *grossly unfair* to do so."¹⁴

Neither the articles nor their comments contain an explanation of these differences in terminology.¹⁵ Inevitably, the variations in the

9. UNIDROIT PRINCIPLES, *supra* note 1, art. 1.7.

10. *Id.* art. 2.15 (emphasis added).

11. *Id.* art. 4.8(2)(c) (emphasis added). Other factors for consideration are the parties' intent, the contract's nature and purpose, and reasonableness. *Id.* art. 4.8(2)(a), (b), (d).

12. *Id.* art. 3.5(1)(a) (emphasis added).

13. *Id.* art. 3.10(2). A party is entitled to avoidance of the contract or a term thereof if the contract or term gives one party an excessive advantage at the time of the contract's conclusion. *Id.* art. 3.10(1).

14. UNIDROIT PRINCIPLES, *supra* note 1, art. 7.1.6. (emphasis added).

15. The comments to the articles contain discrepancies in the use of *good faith*. Sometimes good faith is used as a shorthand for *good faith and fair dealing*, while other

language of these formulations raise questions. Is bad faith simply the absence of good faith? Does an absence of fair dealing also amount to bad faith? Does the addition of reasonable commercial standards result in a more demanding requirement than that of fair dealing alone? Moreover, does the addition of the word commercial confine the standard to what is done by others in commerce, to the exclusion of a course of dealing observed by the parties but not by others? In view of the pervasiveness of the concepts of good faith and fair dealing, it was perhaps inevitable that some inconsistencies would appear in the language concerning them. One must hope that those who have occasion to apply the Principles will find the means by which to reach rational solutions in the face of what seem to be irrational variations.

III. OTHER SOURCES

A. *Civil Law Systems*

The most famous legislative disposition dealing with good faith performance is that found in Section 242 of the German Civil Code—the *Treu und Glauben* (Faith and Credit) provision.¹⁶ It states, “The debtor is obliged to perform in such a manner, as faith and credit with regard to custom requires.”¹⁷ This brief passage has spawned a mass of case law, resulting in an annotation, the sheer volume of which has come to dwarf the provision itself.¹⁸

The most recent legislative treatment of good faith is that of the new Dutch Civil Code.¹⁹ As noted by Arthur Hartkamp, “The concept of good faith permeates all branches of the Dutch law of obligations and contract law”²⁰ in which it has three functions:

times it is not. Compare UNIDROIT PRINCIPLES art. 5.2 cmt., illus. 3 (suggesting that good faith calls for an implied duty of fair behavior) and art. 6.2.3 cmt. 5 (listing the conditions of contractual renegotiation as an honest belief in the necessity of hardship and *constructive participation* by the parties) with art. 2.15 cmt. 2 (limiting the rights afforded by freedom of contract with requirements of good faith and fair dealing) and art. 5.2 cmt. (expressly identifying good faith and fair dealing as a source of implied contractual terms).

16. BÜRGERLICHES GESETZBUCH [BGB] § 242, translated in THE CIVIL CODE OF THE GERMAN EMPIRE (Walter Lowey trans., 1975). See also Farnsworth, *supra* note 3, at 678-79.

17. BGB § 242.

18. See Farnsworth, *supra* note 3, at 678-79.

19. NIEUW BURGERLIJK WETBOEK [NBW] (P.P.C. Haanappel trans., 1990).

20. Arthur S. Hartkamp, *Judicial Discretion Under the New Civil Code of the Netherlands*, 40 AM. J. COMP. L. 554 (1992).

First, all contracts must be interpreted according to good faith. Second, good faith has a “supplementing function”: supplementary rights and duties, not expressly provided for in the agreement or in statute law, may arise between the parties. Third, it has a “derogating” or “restrictive” function, . . . [in] that a rule binding upon the parties does not apply to the extent that, in the given circumstances, this would be unacceptable according to criteria of reasonableness and equity.²¹

Hartkamp further explains that the Dutch legislature has differentiated good faith in the sense of observance of reasonable commercial standards of fair dealing from good faith in the sense of honesty in fact. To prevent any possible confusion, the Dutch legislature uses the term good faith only in the latter sense and characterizes the term in the former sense as *reasonableness and equity*.²² I shall return to the Dutch Civil Code and turn now to the concept of good faith in common law systems.

B. *Common Law Systems*

The recognition of the doctrine of good faith in common law countries was surprisingly not inspired by England, the traditional font of common law notions, but by the United States. Although as far back as 1766 Lord Mansfield referred to good faith as “[t]he governing principle . . . applicable to all contracts and dealings,”²³ this principle never took root in England.²⁴ Credit for the contemporary recognition of the doctrine of good faith instead goes to Professor Karl Llewellyn, Chief Reporter for the Uniform Commercial Code (UCC or Code).²⁵

21. *Id.* at 554-55.

22. *Id.* at 554-55 n.6.

23. *Carter v. Boehm*, 97 Eng. Rep. 1162, 1164 (K.B. 1766).

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

25. See Farnsworth, *supra* note 3, at 667-68 (“[F]or over a decade it has been the custom for each member of the outgoing class at the University of Chicago Law School to take Karl Llewellyn’s pledge that he will ‘work always with care and with a whole heart and with good faith.’”) (footnote omitted); Robert S. Summers, “*Good Faith*” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 208 n.53 (1968).

Llewellyn, who had taught at Leipzig,²⁶ was inspired not by Mansfield, but by the *Treu und Glauben* provision of the German Civil Code.²⁷ Although the common law doctrine of a few states—notably, New York and California—mentioned good faith before the adoption of the UCC,²⁸ it was not until good faith was included in the Code that the doctrine reached national prominence.

Over fifty Code sections specifically mention good faith.²⁹ Section 1-203 of the UCC provides for a general obligation of good faith. It states that “[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”³⁰ Section 1-201(19) contains the Code’s general definition of good faith. It describes good faith as “honesty in fact in the conduct or transaction concerned.”³¹ Some of the Code’s substantive articles, however, contain variant definitions.³² Article 2 provides that in the case of a merchant involved in a sale of goods, good faith means not only “honesty in fact,” but also “the observance of reasonable standards of fair dealing in the trade.”³³ A recent revision of Article 3 regarding negotiable instruments adopts this two-pronged definition.³⁴

Under the influence of the UCC, the drafters of the *Restatement (Second) of Contracts (Restatement)* added a provision stating that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”³⁵ Like the Principles, the *Restatement* does not have the binding force of legislation. Nevertheless, the *Restatement*, again like the Principles, has special importance to contracts other than those for the sale of goods.

These American developments have not gone unnoticed in other common law countries; Australia is a leading example. In 1987,

26. See generally Arthur L. Corbin, *A Tribute to Karl Llewellyn*, 71 YALE L.J. 805 (1962) (describing Llewellyn’s life and work).

27. BGB § 242.

28. See Farnsworth, *supra* note 3, at 667 & n.6.

29. UNIFORM COMMERCIAL CODE [U.C.C.] § 1-203 (1990), U.L.A. U.C.C. app. II, cmt. See also U.C.C. § 1-203 (“This section sets forth a basic principle running throughout this act.”).

30. *Id.* § 1-203.

31. *Id.* § 1-201(19).

32. *Id.* cmt. (“In certain Articles, by specific provision, additional requirements are made applicable.”).

33. *Id.* § 2-103(1)(b).

34. U.C.C. § 3-103(a)(4).

35. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

Professor H.K. Lucke of the University of Adelaide wrote that it was “not unreasonable to hope that good faith would ultimately make a significant and beneficial impact upon [Australian] private law.”³⁶ In the same year, Professor Paul Finn of the Australian National University noted that equity “has no exclusive proprietorship of ‘good faith,’”³⁷ and, in 1989, he added that the “doctrine of ‘good faith’ in contract performance is now squarely upon contract’s agenda.”³⁸ In 1989, Justice L.J. Priestley of the Court of Appeal of New South Wales published an article in which he described the doctrine of good faith as a “feature . . . of much United States contract law” and wondered whether “Australian law has reached the point where terms may readily be implied into contracts, having substantially the same effect as the good faith formulation in the United States.”³⁹ He expanded on this in a 1992 case involving a government agency’s power to terminate a construction contract.⁴⁰ There, the contract gave the agency the power of termination upon default by the contractor if the contractor did not “show cause to the satisfaction” of the agency why the contract should not be terminated.⁴¹ After reviewing American and other common law authorities on good faith, Priestley concluded:

People generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contracts which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance.⁴²

The doctrine of good faith has also provoked interest in Canada, where two Ontario studies have advocated rules incorporating good faith. In 1979, the Ontario Law Reform Commission’s *Report on Sale*

36. H.K. Lucke, *Good Faith and Contractual Performance*, in *ESSAYS ON CONTRACT* 155, 182 (Paul D. Finn ed., 1986).

37. Paul D. Finn, *Equity and Contract*, in *ESSAYS ON CONTRACT*, *supra* note 36, at 104, 106.

38. Paul D. Finn, *Commerce, the Common Law and Morality*, 17 *MELB. U.L. REV.* 87, 89 (1989).

39. L.J. Priestley, *A Guide to Comparison of Australian and United States Contract Law*, 12 *U.N.S.W. L.J.* 4, 17, 23 (1989).

40. *Renard Constructions (ME) Pty Ltd v. Minister for Public Works*, 26 *N.S.W. L.R.* 234 (Ct. App. 1989).

41. *Id.* at 239.

42. *Id.* at 268.

of Goods recommended the adoption of a good faith standard for performance of contracts of sale.⁴³ The recommendation defined good faith as “honesty in fact and the observance of reasonable standards of fair dealing.”⁴⁴ In 1987, in the *Report on Amendment of the Law of Contract*, the Commission recommended that legislation recognize the doctrine of good faith in the general performance of contracts, that this statutory obligation should not be disclaimable, and that the provision should take the form of that in the *American Restatement*.⁴⁵

Even England has recently demonstrated some interest in the doctrine. Justice Johan Steyn explained in a 1991 lecture that because of the lack of a doctrine of good faith, “English law has to resort to the implication of terms.”⁴⁶ Instead, he urged that “in using the high technique of common law the closest attention . . . [be] paid to the purpose of the law of contract, i.e., to promote good faith and fair dealing.”⁴⁷

Thus, in the international community, the United States plays a dual role with respect to good faith and fair dealing. In the first place, it is a leader among common law countries. In the second, it occupies the intermediate and moderate position between the English and the civilians.

C. *The Vienna Sales Convention*

The Vienna Sales Convention was approved at a diplomatic conference in Vienna, Austria, in 1980 and has now been adopted by over thirty nations, including the United States.⁴⁸ The Convention, as adopted by the United States, applies to “contracts for the sale of goods between parties whose places of business are in different [ratifying] States.”⁴⁹ For example, the Convention would therefore apply to a contract for the sale of goods between an American seller and a Dutch buyer.

43. ONTARIO LAW REFORM COMMISSION, 1 REPORT ON SALE OF GOODS 103-61 (1979).

44. *Id.*

45. ONTARIO LAW REFORM COMMISSION, REPORT ON AMENDMENT OF THE LAW OF CONTRACT 165, 176 (1987).

46. Steyn, *supra* note 24, at 133.

47. *Id.* at 141.

48. See Vienna Sales Convention, *supra* note 2 and accompanying text.

49. See *id.* art. 1(1).

The Convention contains no explicit provision that imposes a duty of good faith on the parties to international contracts. Article 7(1), however, provides that “[i]n 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.”⁵⁰ Taken literally, this provision does no more than instruct a court interpreting the Convention’s provision to *consider* the importance of the listed factors. Sometimes described as a “strange arrangement,”⁵¹ “an awkward compromise,”⁵² “a rather peculiar provision,”⁵³ and, perhaps ironically, “a statesmanlike compromise,”⁵⁴ Article 7.1 falls short of imposing a duty of good faith on the parties.

The troubled history of the Convention warrants attention, for it demonstrates that the provision is a “hard-won compromise” between two opposing views.⁵⁵ Some delegates advocated a provision imposing a duty to observe the doctrine of good faith upon the parties.⁵⁶ Others, including delegates from common law countries, feared that this would be too unrestricted a mandate to judges in an international setting and therefore opposed any reference to a general principle of good faith.⁵⁷

In assessing the impact of the resulting compromise, it is important to realize that in the countries in which the Convention applies, it serves as a substitute for the comparable domestic law only when a dispute involves the international sale of goods.⁵⁸ Accordingly, Article 7(2) of the Convention provides that

50. *See id.* art. 7(1).

51. Gyula Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 354 (1983).

52. Thomas E. Carbonneau & Marc S. Firestone, *Transnational Law-Making: Assessing the Impact of the Vienna Convention and the Viability of National Adjudication*, 1 EMORY J. INT’L DISP. RESOL. 51, 74 (1986).

53. M.J. Bonell, *Interpretation of Convention*, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION, art. 7 § 2.4 (Dott. A. Guiffre ed., 1987).

54. E. ALLAN FARNSWORTH, *Problems of Unification of Sales Law from the Standpoint of the Common Law Countries*, in PROBLEMS OF UNIFICATION OF INTERNATIONAL SALES LAW 19 (1980).

55. Bonell, *supra* note 53, art. 7 § 2.4.

56. *Id.* art. 7 § 2.4.1.

57. *Id.* art. 7 § 2.4.2.

58. *See, e.g.*, Peter Winship, *Domesticating International Commercial Law: Revisiting U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 LOY. L. REV. 43, 46 (1991). Some countries have adopted the Convention for use in the domestic sphere. “Norway has enacted the Convention text as its domestic law. Finland and Sweden have also

[q]uestions 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.⁵⁹

Consequently, whether a duty of good faith exists in a transaction between an American seller and a Dutch buyer depends on which one of three possible interpretations of the Convention is used.⁶⁰

First, the Convention might be read literally, so as not to expressly settle the question. In addition, it might be found that a duty of good faith cannot be extracted from the general principles on which the Convention is based. In that event, an answer must be sought in the rules of private international law, such as conflicts laws. Therefore, either Dutch or American domestic law would apply. Secondly, the Convention might be read literally, so as not to expressly to settle the question, but a duty of good faith might be extracted from the general principles on which the Convention is based. In that event, the parties would be held to that duty, within whatever contours a court deems to be warranted by the Convention. Thirdly, the Convention might not be read literally. The provision that requires the interpreting court to consider the observance of good faith⁶¹ might instead be read to impose that same duty on the parties. In that event, the parties would be held to that duty, whatever its contours might be.

My own strong preference is for the first solution. As one of the delegates who opposed any reference to good faith, it strikes me as a perversion of the compromise to let a general principle of good faith in by the back door. Joachim Bonell favors the second interpretation, arguing that a number of articles that make specific reference to good faith "constitute a particular application of this principle, thus

revised their domestic sales law in light of the Convention." *Id.* In the United States, the relevant domestic law would be the Uniform Commercial Code. U.C.C. § 1-102.

59. Vienna Sales Convention, *supra* note 2, art. 7(2).

60. Bonell, *supra* note 53, art. 7 § 2.4.1. See also Winship, *supra* note 58, at 59; Fritz Enderlein, *Rights and Obligations of the Seller Under the UN Convention on Contracts for the International Sale of Goods*, in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 133, 136-37 (Petar Sarcevic & Paul Volken eds., 1986); Peter Winship, *Commentary on Professor Kastely's RHETORICAL ANALYSIS*, 8 NW. J. INT'L L. & BUS 623, 634 (1988) [hereinafter Winship, *Commentary*].

61. Vienna Sales Convention, *supra* note 2, art. 7(2).

confirming that good faith is also one of the ‘general principles’ underlying the Convention as a whole.”⁶² Some commentators even favor the third view.⁶³ As one observer has complained, “While on its face this language does not impose a general obligation on the parties to act in good faith, commentators persist in asserting that there is such an obligation.”⁶⁴ In contrast, under the Principles, it is at least clear that the parties themselves are under a duty to “act in accordance with good faith and fair dealing,”⁶⁵ regardless of whether courts may use the doctrine in the interpretation of international sales contracts.

IV. SOME UNRESOLVED QUESTIONS

A. *Application to Precontractual Relations*

May the doctrine of good faith impose liability on a party to negotiations who is responsible for a failure to arrive at a contract? Although liability is occasionally imposed in cases of failed negotiations on theories of misrepresentation, promissory estoppel, or restitution,⁶⁶ the answer of the common law is generally *no*. Common law judges have always taken what I have called an aleatory view of negotiations; a party that enters negotiations hoping to gain from a resulting contract bears the risk of any loss that would be incurred if the other party breaks off the negotiations.⁶⁷

Civil law systems, however, have been more willing to impose liability in such cases. Civil law notions of precontractual liability go back to 1861, when Jhering formulated a doctrine of *culpa in contrahendo* (fault in negotiating).⁶⁸ Under this doctrine, liability was

62. Bonell, *supra* note 53, art. 2.4.1.

63. See, e.g., Enderlein, *supra* note 60, at 136-37; Winship, *supra* note 58, at 63-65 (“Over time a general obligation on contracting parties to act in good faith will be accepted.”).

64. Winship, *supra* note 58, at 71.

65. UNIDROIT PRINCIPLES, *supra* note 1, art. 1.7(1).

66. FARNSWORTH, *supra* note 5, § 3.26a.

67. *Id.* § 3.26a.

68. Rudolf von Jhering, *Culpa in Contrahendo, oder Schadenersatz bei nichtigen oder nicht zur Perfektion gelangten Verträgen* [*Culpa in Contrahendo, or Damages for Void or Imperfected Contracts*], in 4 JAHRBÜCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS [YEARBOOKS OF THE DOGMATICS OF THE MODERN ROMAN AND GERMAN PRIVATE LAW] 1 (1861). Freidrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401, 401-09 (1964) (discussing von Jhering’s article on fault in negotiating in invalid or imperfected negotiations).

imposed on a party to contract negotiations who caused the contract to be invalid or prevented its perfection.⁶⁹ Even though Jhering did not focus on the problem of failed negotiations, most civil law systems have resolved this problem by viewing it through the lens of the doctrine of good faith.⁷⁰

Rather than attempt an encyclopedic treatment of civil law solutions,⁷¹ I will present an extreme example from Dutch law. The Dutch Supreme Court has held that parties must act in accord with “reasonableness and equity” in negotiating a contract.⁷² As such, each party must take into account the reasonable interests of the other.⁷³ In forcing this duty, a court may order a party to either proceed with or resume the negotiations or pay damages for breaking off negotiations.⁷⁴ Most surprisingly, damages may be based on the injured party’s expectation interest. If a contract was sufficiently close to conclusion, a party’s expectation interest may include profits that would have been made had the envisaged contract been performed.⁷⁵ No common law judge could conceive of such a result.

What do the Principles have to say about such a situation? Under Article 2.15(2), one who “breaks off negotiations in bad faith is liable for the losses caused to the other party.”⁷⁶ May *losses* include lost expectation? Although the Principles do not define the word *loss*, Article 7.4.1 speaks of compensable *harm* as including “both any *loss* which it suffered and any *gain* of which it was deprived,” suggesting that expectations would count only as gains and not as losses.⁷⁷ Would a Dutch arbitrator still be able to reach the same result under the Principles as under Dutch domestic law? If the Principles’ provisions for failed negotiations⁷⁸ become applicable only as a result of express

69. Kessler & Fine, *supra* note 68, at 401-09. According to the doctrine, a party who by lack of diligence causes negotiations to fail should be held liable for any damages the other party suffered in reliance on a belief that the contract would be concluded. Therefore, the innocent party could receive restitution, but not expectation interest. *Id.* at 402.

70. *Id.* at 412-19.

71. See, e.g., Farnsworth, *supra* note 4, at 239-43 (discussing the French and German law of precontractual liability).

72. Hartkamp, *supra* note 20, at 557.

73. *Id.*

74. *Id.*

75. *Id.*

76. UNIDROIT PRINCIPLES, *supra* note 1, art. 2.15(2).

77. *Id.* art. 7.4.1. (emphasis added).

78. *Id.* art. 2.15.

reference,⁷⁹ then the answer is *no*. Clearly, where no contract has resulted from the negotiations, there simply can be no express reference available to trigger the failed negotiation provisions.

B. Meaning of Good Faith

Even where the doctrine of good faith is accepted, there are wide differences of opinion over the meaning of the term good faith. For example, U.S. courts, in order to justify their decisions based on the good faith doctrine, have typically applied one of three different definitions of good faith. The most restrictive view of good faith, as embraced by Justice Antonin Scalia, is that good faith is “simply a rechristening of fundamental principles of contract law.”⁸⁰ Referring to my article of three decades ago, he went on to endorse “the perception of Professor Farnsworth that the significance of the doctrine is ‘in implying terms in the agreement.’”⁸¹

A second meaning of good faith is that as put forward in Robert Summers’ 1968 influential article in which he defined good faith using an “excluder” analysis.⁸² According to Summers, “[G]ood faith . . . is best understood as an ‘excluder’—it is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith.”⁸³ This analysis found its way into the commentary to the *Restatement’s* good faith provision, which explains that

[a] complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.⁸⁴

79. *Id.* pmb1.

80. *Tymeshare v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984).

81. *Id.*

82. Summers, *supra* note 25, at 195 (footnote omitted).

83. *Id.* at 196.

84. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d.

In 1980, Steven Burton introduced a third good faith definition with his “foregone opportunity” analysis.⁸⁵ “Good faith,” Burton argued, “limits the exercise of discretion in performance conferred on one party by the contract.”⁸⁶ Therefore, it is bad faith to use discretion “to recapture opportunities foregone on contracting,” as determined by the other party’s expectations or, in other words, to refuse “to pay the expected cost of performing.”⁸⁷

American courts have looked to all three of these views for support, often without recognizing a conflict among them.⁸⁸ This is not surprising because the meaning of good faith varies according to the context, and the appropriateness of each of the three views will depend on the function the doctrine is called on to serve. The Principles, because they fail to provide definitions of good faith or fair dealing, cast no light on the merits of these three views. Although the Principles are not entirely consistent in their coupling of good faith and fair dealing, one may assume, however, that the inclusion of fair dealing imposes an objective standard⁸⁹ as established by relevant trade practices. At the same time, however, circumstances unique to the particular parties involved should not be ignored.

Civil law lawyers demonstrate an unsettling tendency to use the doctrine of good faith as a cloak with which to envelop other doctrines. While a common law lawyer would not combine the doctrine of good faith with that of unconscionability, it is not unheard of for a civil law lawyer to argue that a party who seeks performance of an unconscionable contract does not act in good faith. While a common law lawyer also would not confuse the doctrine of good faith with that of frustration of purpose, it is not unheard of for a civil law lawyer to state that a party who seeks performance of a contract after its purpose

85. Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980).

86. *Id.* at 372-73.

87. *Id.* at 373.

88. *See, e.g.*, *Bank of China v. Chan*, 937 F.2d 780, 789 (2d Cir. 1991) (defining good faith as a lack of bad faith); *Market St. Assocs. Ltd. Partnership v. Frey*, 941 F.2d 588, 593-96 (7th Cir. 1991) (seeking bad faith acts to determine presence of good faith); *Kham & Nate’s Shoes No. 2 v. First Bank of Whiting*, 908 F.2d 1351, 1358 (7th Cir. 1990) (circumscribing bad faith to attempts to recapture foregone opportunities); *Tymeshare*, 727 F.2d at 1152 (equating good faith with adherence to principles of ordinary contract law).

89. *See* UNIDROIT PRINCIPLES, *supra* note 1. *See also* notes 10-21 and accompanying text.

has been frustrated also does not act in good faith.⁹⁰ In this fashion, many contract doctrines can be subsumed under a single amorphous doctrine of good faith. One can only hope that this will not happen under the Principles.

C. *Disclaimability*

Can the duties imposed by the doctrine of good faith be disclaimed or excluded by agreement? Under American law, the answer turns on whether one is talking about the *Restatement*, the UCC, or the Vienna Sales Convention. Because of the non-binding nature of the *Restatement*, courts are not required to adhere to its provisions. Even though the American Law Institute (ALI), in drafting the *Restatement*, had the ability to include the prevailing view among American courts—of relevance here, that a disclaimer of the duty of good faith violates public policy—the ALI failed to do so.

In contrast, the UCC explicitly provides in Section 1-102(3) that, while the effect of its provisions may be varied by agreement, the obligation of good faith “may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.”⁹¹ To the extent that one function of Section 1-102(3) is to assist in the incorporation of implied terms into the agreement, this provision is problematic. According to this section and others, implied terms (or, default rules) should be disclaimable. Consider, for example, UCC Section 2-309(3) which requires reasonable notification for termination of a contract of indefinite duration.⁹² The Official Comment to Section 2-309(3) starts with the premise that this requirement is based on principles of good faith—an implied term that is present in all agreements—and goes on to say that

90. See Hartkamp, *supra* note 20, at 556. The Dutch Civil Code provides in Book, 6, Article 258, that

upon the demand of one of the parties, the judge may modify the effects of a contract, or he may set it aside in whole or in part on the basis of unforeseen circumstances which are of such a nature that the co-contracting party, *according to criteria of reasonableness and equity*, may not expect that the contract be maintained in an unmodified form.

NBW, book 6, art. 258 (emphasis added).

91. U.C.C. § 1-102(3).

92. *Id.* § 2-309(3).

an agreement “dispensing with notification . . . is of course, valid . . . unless . . . unconscionable.”⁹³ Furthermore, many courts have held that even if the parties cannot disclaim the duty of good faith, they can specifically describe their obligations in such a way as to effectively eliminate that duty. As a federal court of appeals has stated, “When the contract is silent, principles of good faith . . . fill the gap, they do not block use of terms that actually appear in the contract.”⁹⁴ This tension under UCC Section 1-102(3) has yet to be resolved.

Under the Vienna Sales Convention, the question is apparently resolved by Article 6, pursuant to which parties generally “may exclude the application of [the] Convention or . . . derogate from or vary the effect of any of its provisions.”⁹⁵ Joachim Bonell has taken the contrary position, however, that a general obligation of good faith has been incorporated into the Convention. With respect to Article 7, Bonell has argued that

to permit the parties to derogate . . . by agreeing on rules of interpretation used with respect to ordinary domestic legislation would be inconsistent with the international character of the Convention and would necessarily seriously jeopardize the Convention’s ultimate aim, which is to achieve worldwide uniformity in the law of international contracts of sale and to promote the observance of good faith in international trade.⁹⁶

Such an interpretation, if widely accepted, would come as a double surprise to those who, opposed to the inclusion of a provision imposing on the parties a general duty of good faith, consented to the compromise contained in Article 7. By approving Article 7, such opponents intended neither that a duty of good faith would nevertheless creep in as a general principle nor that the parties would be powerless to do anything about it.

Disclaimability under the Principles likewise remains unclear. As quoted earlier, Article 1.7(2) of the Principles clearly states that the parties “may not exclude or limit” the duty to act in accordance with

93. *Id.* § 2-309(3) cmt. 8.

94. *Kham & Nate’s Shoes No. 2*, 908 F.2d at 1357.

95. Vienna Sales Convention, *supra* note 2, art. 6.

96. Bonell, *supra* note 53, art. 7 § 3.3.

good faith and fair dealing.⁹⁷ However, the Principles, like the *Restatement*, lack legislative authority. As such, the impact of Article 1.7(2) and its power to prevent the parties from overriding default rules by means of explicit provisions are equally questionable.

V. CONCLUSION

Civil law lawyers regard the concepts of good faith and fair dealing as essential components of their legal systems. On the other hand, common law lawyers, generally regard these concepts as fairly recent innovations to their legal systems. Of all the common law systems, only the United States has a relatively well-developed doctrine of good faith and fair dealing with regard to the performance of contracts. On an international level, the Vienna Sales Convention failed in its attempt to aptly and effectively incorporate the good faith doctrine. Instead, it reached an awkward and inviable compromise between opposing civil law and common law views. By way of contrast, the UNIDROIT Principles, reflecting the civil law view, impose a general duty of good faith and fair dealing not only in the performance of contracts but also in their negotiation. It will be interesting to see how civil law and common law arbitrators apply this duty in concrete cases. But that, of course, is for the future to determine.

97. UNIDROIT PRINCIPLES, *supra* note 1, art. 1.7(2).