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**The Role of Good Faith in International
Sales Contracts: A Comparative Analysis of
CISG and European Union Law**

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Editors: Siegfried Fina and Roland Vogl

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Abstract

The thesis provides a comparative analysis of good faith in international sales contracts under the United Nations Convention on Contracts for the International Sale of Goods (CISG) and European Union law. While EU law establishes good faith as a mandatory, substantive obligation with specific remedies and comprehensive consumer protections, the CISG, which represents a balance between Civil and Common Law traditions, textually restricts it to an interpretive guideline under Article 7(1). The research defines a serious “dual-regime problem” that creates uncertainty for international traders, as various legal systems enforce distinct norms of behavior and enforcement methods. The study concludes by providing practical compliance strategies – such as particular contract drafting and arbitration selection – to reduce legal risks in cross-border transactions after presenting a trend toward convergence in judicial practice through an analysis of case law, soft law instruments, and doctrinal debates.

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CHAPTER 1

Introduction

1.1. Introduction, Research Background, and Problem Definition

Good faith has long been acknowledged as a fundamental element regulating contractual relationships throughout various legal systems worldwide.¹ The concept serves as a normative force that requires honesty, fairness, and reasonableness from contracting parties, going beyond mere mechanical enforcement of contract obligations.² For centuries, good faith (*Treu und Glauben*, *bonne foi*) has been an essential component of contract law in civil law jurisdictions such as Germany, France, and Switzerland. It ensures fair treatment and restricts contractual freedom.³ This commitment is demonstrated by Article 242 of the German Civil Code (Bürgerliches Gesetzbuch, BGB), which requires contracting parties to fulfill their obligations “in accordance with good faith with regard to customary practice” (*Treu und Glauben with Rücksicht auf die Verkehrssitte*),⁴ while according to Article 1104 of the French Civil Code, agreements must be performed in good faith.⁵ In contrast, common law systems have historically rejected a cohesive definition of good faith in favor of an inconsistent approach grounded in the implied obligation of good faith and fair dealing, as well as in unequal bargaining power.⁶

¹ Peter Schlechtriem and Ingeborg Schwenzer (eds), ‘Commentary on the UN Convention on the International Sale of Goods (CISG)’ (3rd edn, Oxford University Press 2010) Art. 7 paras 15-25; John O. Honnold, ‘Uniform Law for International Sales under the 1980 United Nations Convention’ (3rd edn, Kluwer Law International 1999) 1-15.

² Bruno Zeller, ‘Good Faith—Is it a Contractual Obligation?’ (2003) 15 *Bond Law Review* 215, 225-235; Steven D Walt, ‘The Modest Role of Good Faith in Uniform Sales Law’ (2015) 33 *Boston University Law Journal* 37

³ ‘Treu und Glauben’ [German Language Wikipedia], < https://de.wikipedia.org/wiki/Treu_und_Glauben > accessed 10 December 2025.

⁴ German Civil Code (Bürgerliches Gesetzbuch) § 242 (Leistung nach Treu und Glauben).

⁵ French Civil Code (Code Civil) Art 1104.

⁶ Paul J. Powers, ‘Defining the Undefined: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods’ (1999) 18 *Journal of Law and Commerce* 333, 350-365; Nadia E Nedzel, ‘A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability’ (1997) 12 *Tul Eur & Civ LF* 97.

However, the importance of good faith in transnational law has been reevaluated amid the growth of international trade and the need for consistency in cross-border transactions.⁷

In international sales law, the concept of good faith has a unique and contentious place. On the one hand, it is generally accepted that fair dealing and the development of trust in business depend on it.⁸ However, there is still much scholarly and judicial disagreement over its exact legal position, scope, and enforceability. This issue becomes more obvious in the United Nations Convention on Contracts for the International Sale of Goods (CISG). With contracting states representing various political, legal, and economic systems from every continent, the CISG offers a single framework for international commercial transactions that goes across national borders and legal traditions. This is a tremendous accomplishment in legal harmonization.⁹ However, the Convention's treatment of good faith highlights the fundamental difficulties of integrating multiple legal cultures into a single document.¹⁰

The central ambiguity arises in Article 7 (1) of the CISG, which provides: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."¹¹ The contracting parties are not expressly required to act in good faith by this clause. Instead, it refers to good faith when interpreting the Convention and encourages consistency in its implementation.¹² This phrasing, which reflects essentially different opinions between common law and civil law nations on whether good faith should constitute a substantive, enforceable duty or only serve as an interpretive guide, was a purposeful compromise achieved during the CISG's drafting process.¹³

⁷ Walt (n 2) 42-56; Schlechtriem and Schwenger (n 1) Art. 7 paras 1-14.

⁸ Schlechtriem and Schwenger (n 1) Art. 7 paras 20-25.

⁹ United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 (CISG).

¹⁰ Schlechtriem and Schwenger (n 1) Art. 7 paras 15-35; Powers (n 6) 333-370.

¹¹ CISG (n 9) Art. 7(1).

¹² Camilla Baasch Andersen, 'Good Faith? Good Grief!' (2014) 17 International Trade and Business Law Review 310-320.

¹³ Schlechtriem and Schwenger (n 1) Art. 7 paras 20-35.

Moreover, scholarly debate and subsequent case law demonstrate ongoing disagreement over the interpretation of good faith under the CISG. Some commentators and arbitrators claim that the Convention's basic principles, which can be applied for gap-filling purposes under Article 7(2), implicitly impose a substantive duty of good faith on the parties under Article 7(1).¹⁴ Others argue that good faith is not a direct obligation enforceable against parties, but rather serves only as a guide for judges and arbitrators and an aid to interpretation.¹⁵ The Convention's primary goal, to achieve uniformity in the application of international sales law, is undermined by this diversity.

Various interpretations of the goals of good faith are the source of the doctrine's ambiguity.¹⁶ Several primary methods are described by contemporary legal scholars. One believes that moral values like honesty and unity are the foundation of good faith. Another emphasizes maintaining an equitable balance between each party's obligations and rights. A third strategy protects appropriate dependence on the behavior of the parties.¹⁷ The CISG only briefly addresses good faith, making it difficult to determine which interpretive framework to apply. EU law directives, on the other hand, use several frameworks simultaneously. For instance, the reliance framework is demonstrated by transparency standards, proportionality is represented by substantive fairness analyses, and moral and justice considerations are presented by the prohibition on manipulation.¹⁸

Conversely, the European Union has adopted a distinctly different attitude on good faith in contract law. The EU has clearly integrated the concepts of good faith and fairness into a comprehensive set of rules and regulations that govern both consumer and business relationships, rather than

¹⁴ Thomas Neumann, 'The Roots and Fruits of Good Faith in Domestic Court Practice' (2018) 31 *Pace International Law Review* 59, 65-85; Schlechtriem and Schwenzer (n 1) Art. 7 paras 25-35.

¹⁵ Zeller (n 2) 225-235; Walt (n 2) 42-61.

¹⁶ Jori Munukka, 'Harmonisation of Contract Law: In Search of a Solution to the Good Faith Problem' (2005) 48 *Scandinavian Studies in Law* 230, 245-250.

¹⁷ *ibid.*

¹⁸ Ingeborg Schwenzer, 'Interpretation and Gap-Filling Under the CISG' in Ingeborg Schwenzer, Yeşim M Atamer and Petra Butler (eds), *Current Issues in the CISG and Arbitration* (2014) 109; Ulrich Magnus, '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' (1998) 10 *Pace International Law Review* 89, 90-91.

leaving good faith ambiguous.¹⁹ Contractual terms are regarded as unfair when they are “contrary to the requirement of good faith,” according to the Unfair Contract Terms Directive (93/13/EEC). As a result, good faith becomes a significant, legally binding requirement for contract validity.²⁰ The EU’s commitment to transparency, fairness, and good faith as fundamental elements of contract law has been reinforced and expanded by subsequent directives, including the Unfair Commercial Practices Directive (2005/29/EC), the Consumer Rights Directive (2011/83/EU), and the Digital Content and Digital Services Directive (2019/770/EU).²¹ Instead of being flexible, the EU’s approach is directive. It establishes a uniform framework that prioritizes stakeholder and consumer protection over party autonomy, requiring all Member States to implement the same protections and transparency requirements.

The fundamental difference between the CISG and the EU law’s interpretation and application of good faith creates a major obstacle to international trade.²² Numerous companies, especially those operating in the European Union and concurrently engaged in cross-border transactions with non-EU entities, must operate under both systems simultaneously. When a producer in State A sells products to a buyer in State B that falls under the CISG, Article 7(1)’s ambiguous good faith clause is applicable. When that same producer sells to a customer in the EU, EU consumer directives apply, imposing obligatory good-faith and transparency standards. The arbitrator or court resolving the dispute may interpret the good-faith standard differently depending on the applicable regime. This leads to uncertainty, potential

¹⁹ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29; Directive 2005/29/EC of the European Parliament and of the Council of 12 December 2005 concerning unfair business-to-consumer commercial practices [2005] OJ L149/22; Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L304/64; Directive 2019/770/EU of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L136/1.

²⁰ Directive 93/13/EEC (n 19) Art. 3(1).

²¹ Directive 2005/29/EC (n 19) Arts 5-9; Directive 2011/83/EU (n 19) Arts 5-8; Directive (EU) 2019/770 (n 19) Arts 7-8.

²² Powers (n 6) 365-380.

liability issues, and the risk that parties may unintentionally breach obligations they don't fully understand.²³

The objective is to assess the importance of good faith in international sales agreements by comparing CISG with EU law. The objectives of this thesis are to evaluate how good faith affects contract practice and dispute resolution, identify the extent and purpose of good faith in each of these regimes, and contribute to the ongoing conversations about the harmonization of international and European contract law. A comparison of various regimes helps clarify how good faith is applied in practice, reduce uncertainty, and promote academic debates about contract law harmonization. The central research question asks: *To what extent does the CISG impose a duty of good faith on contracting parties, and how does this compare with the function of good faith in EU Law?*

The thesis will demonstrate how CISG and EU law differ in their conceptualizations and applications. While the CISG's vagueness allows for diverse national interpretations, EU rules take a more prescriptive approach. The comparison will highlight areas of complementarity and conflict, and provide suggestions on how CISG interpretation might change in light of developments in EU law to improve clarity and uniformity.

1.2. Objectives and Methodology

This thesis's primary goal is to compare how good faith is treated under EU law and under the CISG, with a view to critically evaluating its significance in international sales transactions. In particular, the thesis seeks to clarify whether and to what extent contracting parties are subject to a substantive duty of good faith under Article 7(1) CISG, and to compare this with the more explicit and prescriptive role of

²³ *ibid.*

good faith and fairness in EU directives on unfair terms, consumer rights, commercial practices, and digital content.

Finding similarities and contrasts between these regimes as well as assessing their practical implications for contract formulation, risk allocation, dispute resolution, and legal certainty in cross-border trade are additional goals. Based on this, the thesis aims to develop well-reasoned suggestions for interpretation and practice as well as to contribute to current discussions regarding the viability and desirability of a more uniform understanding of good faith in international and EU law.

Moreover, the thesis adopts a doctrinal legal research methodology along with a comparative approach. The CISG (especially Articles 1, 7, and related provisions such as Articles 35-39, 45-49 governing conformity, examination, notice, and remedies) along with relevant EU law instruments, such as the Unfair Contract Terms Directive, the Unfair Commercial Practices Directive, the Consumer Rights Directive, and the Digital Content and Digital Services Directive, as well as crucial soft-law instruments, such as the Principles of European Contract Law, the Draft Common Frame of Reference (DCFR) and the UNIDROIT Principles, are first thoroughly and methodically examined. When available, preparatory studies and legislative materials are examined alongside this analysis to shed light on the goals and policy decisions that underpin the various regimes.

Second, the thesis provides a comparative framework for examining good faith from several perspectives. These include its foundational ideas and theories, its use across various legal systems, its enforcement, and its impact on risk management, contract formation, and international business dispute resolution. Third, it provides jurisprudential analysis, such as CISG case law and arbitral decisions that highlight regional variations, particularly between common law and German approaches and the “homeward trend.” It additionally takes into account soft law commentary that clarifies interpretive concepts and strategies for filling in gaps, as well as CJEU rulings that influence EU law on good faith and fairness. Finally, the thesis uses hypothetical situations to relate doctrinal results to practical

application. These scenarios illustrate how different interpretations can affect contract drafting, risk allocation, dispute resolution, and the predictability of a company's operations for global traders. This method provides a strong, empirically supported foundation for suggestions on harmonization through interpretation, soft law, and best practices for contract writing by identifying both areas where doctrines diverge and where practices coincide.

CHAPTER 2

Good Faith in International Sales Law: Foundational Concepts and Historical Context

2.1. Defining Good Faith: Conceptual Framework

It has been extremely challenging to precisely define good faith as a legal concept across various legal contexts and systems.²⁴ It is a crucial legal concept, frequently referred to as a “fundamental principle,” that underpins international law.²⁵ Despite its widespread recognition, it lacks a universal definition; depending on the jurisdiction, it frequently serves as a “state of mind” or a behavioral standard.²⁶ Good faith, in its broadest sense, refers to the fulfillment of contractual obligations with honesty, reasonableness, and fair dealing; however, these terms themselves require further clarification and interpretation.²⁷

²⁴ Emanuela Ifimie, ‘Good Faith in International Sales Law’ (2014) 3(2) Acta Universitatis George Bacovia. Juridica 1, 1; Munukka (n 16) 230; Joseph F O’Connor, ‘Good Faith in International Law’ (Dartmouth 1991) 1-30.

²⁵ O’Connor (n 24) 4.

²⁶ Ifimie (n 24) 1.

²⁷ Magnus (n 18) 91.

Conceptually, good faith is frequently examined using a contrast between subjective and objective criteria. Subjective good faith is a state of mind- honesty in fact- that is commonly linked to the defense of a party that acts without being aware of a defect or improper behavior.²⁸ On the other hand, objective good faith, which is frequently combined with “fair dealing,” refers to an external norm of conduct.²⁹ Regardless of their objectives, parties must uphold acceptable commercial norms and maintain fairness.

There are two primary approaches to defining good faith: positive and negative definitions. Positive definitions aim to use synonyms such as “fairness,” “honesty,” or “reasonableness” in place of the term.³⁰ This terminology is helpful, but it frequently doesn’t fully convey the legal complexity of the idea. Negative definitions, on the other hand, define good faith by what it does not include—that is, by pointing out actions that are considered “bad faith,” including fraud or the violation of someone’s rights.³¹ Although this “excluder” role permits courts to regulate behavior without requiring a strict, affirmative definition, it risks creating ambiguity in international trade, where different legal traditions differ on what qualifies as “abuse.”³²

The complexity increases when good faith is seen as both a psychological phenomenon and a legal standard. In psychology, good faith implies honest intention, a lack of malice, and a subjective belief that one’s actions are morally correct.³³ However, the law expects objective standards that can be evaluated by third parties and applied uniformly in all situations, not just subjective mental states.³⁴ As a result, good faith is increasingly understood in contemporary contract law as an objective standard: behavior that complies with what a reasonable person in the contracting party’s position, possessing ordinary diligence and commercial sense, would consider fair and honest under the specific

²⁸ Munukka (n 16) 238-240.

²⁹ *ibid.*

³⁰ Ifimie (n 24) 1.

³¹ *ibid.*

³² *ibid.*

³³ O’Connor (n 24) 30-45.

³⁴ Magnus (n 18) 91.

circumstances.³⁵ This objective framing expands judicial power in evaluating what reasonableness requires in particular situations. Still, it also permits good faith to operate as a legal norm that restricts behavior regardless of subjective mental state.

2.2. Good Faith in Civil Law vs. Common Law Traditions

The historical differences between Civil Law and Common Law traditions are the main cause of the conflict over good faith in international agreements such as the CISG. Good faith (*Treu und Glauben*) is a fundamental concept that underlies the entire legal system in civil law jurisdictions, especially those impacted by the Germanic legal family.³⁶ It serves as a source of secondary obligations, including a duty to collaborate, a duty to inform, and a prohibition on the abuse of rights, in addition to functioning as a rule of interpretation.³⁷ The origins of this norm can be found in Roman law, which permitted *bona fides* to give remedies based on justice rather than the specific letter of the law (*stricti iuris*).³⁸ In systems such as those of Germany, Switzerland, and France, the acceptance of good faith under modern civil law is so deeply embedded that it is often seen as an obligatory standard that parties cannot reject. Moreover, French law recognizes *bonne foi*, or good faith, as a fundamental principle. Contracts must “be executed in good faith,” according to Article 1104 of the French Civil Code.³⁹ This requirement has been acknowledged as a fundamental principle that extends beyond specific contractual arrangements. In both the French and German legal systems, good faith is used as a judicial tool to enforce implied duties of cooperation that arise even when parties have not explicitly agreed to them, to prevent the abuse of contractual rights, and to enforce transparency in negotiation and performance.⁴⁰

³⁵ Schwenger (n 18).

³⁶ Munukka (n 16) 241.

³⁷ Schwenger (n 18) 112.

³⁸ O’Connor (n 24) 19-20.

³⁹ Code Civil (n 5).

⁴⁰ Munukka (n 16) 240-250.

On the other hand, general obligations related to good faith have always been considered with skepticism, if not plain hostility, by the Common Law tradition, especially English law.⁴¹ In English commercial law, predictability and certainty are valued more highly than the ambiguous notion of justice.⁴² Common Law systems typically reject a wide, implicit duty of good faith in commercial transactions because they believe it would compromise the parties' freedom of contract, even while they acknowledge certain concepts that reflect good faith, such as estoppel or misrepresentation.⁴³ This opposition stems from the idea that enforcing an ambiguous responsibility of "fairness" would give judges the power to alter contracts, making them unpredictable for commercial actors.⁴⁴ As a result, while formulating the CISG, representatives from Common Law jurisdictions strongly opposed the addition of a substantive obligation of good faith, claiming it would lead to arbitrary and inconsistent interpretations by national courts.⁴⁵

2.3. Historical Evolution of Good Faith

The earliest principle of good faith is *pacta sunt servanda*, which states that agreements must be honored. This rule, essential to the survival of early human communities, was first upheld through religious oaths.⁴⁶ Because the oath required a higher force to witness the commitment, breaking an agreement is not only illegal but also a religious offense.⁴⁷ This religious basis gave the early notion of "faith" (*fides*) a sense of moral obligation that went beyond simple legal formalities.⁴⁸

⁴¹ *ibid* 231.

⁴² Schwenger (n 18) 111.

⁴³ Munukka (n 16) 233-235.

⁴⁴ *ibid* 235.

⁴⁵ Peter J Mazzacano, 'From an Interpretive Tool to Substantive Law: The Apotheosis of Good Faith in CISG Jurisprudence' (2024) 42 *JL & Com* 1, 4.

⁴⁶ O'Connor (n 24) 6-7.

⁴⁷ *ibid* 7.

⁴⁸ *ibid* 8.

The concept of *fides* was made functional by Roman jurisprudence. To symbolize public loyalty and faith in international agreements, the Romans idealized *Fides* as a goddess.⁴⁹ Rome's jurists created the *ius gentium*, or law of nations, to regulate trade with foreigners as the city grew. Because foreign businessmen were unable to use Rome's formalistic civil law, the *ius gentium* relied on *bona fides*, which are universal criteria of justice and natural reason.⁵⁰ As a result, rather than strictly adhering to form, Roman magistrates were able to uphold informal contracts based on what a "fair and honest" person would do.⁵¹

Furthermore, good faith evolved during the medieval and early modern periods thanks to natural law theory and canon law. By combining Roman legal ideas with Christian values of charity and honesty, medieval canon law developed notions of good faith applicable to a range of transactions.⁵² Good faith was incorporated into more comprehensive frameworks of justice and the law of nations by natural law theorists of the sixteenth and seventeenth centuries, especially Francisco Suárez and Hugo Grotius.⁵³ They treated good faith as a fundamental principle that must regulate both domestic agreements and international relations between sovereign countries. In his seminal work *De Jure Belli ac Pacis* (On the Law of War and Peace), Grotius concluded with "Admonitions on behalf of Good Faith and Peace," making clear to his readers that the mere existence of an international society of states depended on good faith.⁵⁴

Good faith became an essential component of continental European legal systems during the 19th- and 20th-century codification movements. It was included as a general principle in the Napoleonic Code, the German BGB, the Swiss Civil Code, and other significant civilian codifications, but with different

⁴⁹ *ibid* 17.

⁵⁰ *ibid* 22.

⁵¹ *ibid* 19.

⁵² *ibid* 120-122.

⁵³ *ibid* 27-30.

⁵⁴ *ibid* 56-64.

textual formulations and recognized scopes.⁵⁵ Moreover, in mixed jurisdictions such as South Africa and Scotland, as well as in Scandinavian legal systems, good faith has become important as an implied term in contracts and a guiding principle for contractual interpretation.⁵⁶ These developments demonstrated that many European legal systems recognized that strictly enforcing contract terms without regard to fairness or what the parties reasonably expected could result in unfair outcomes and endanger the social order that commercial law protects.⁵⁷

As worldwide efforts to harmonize contract law principles increased throughout the twentieth century, the issue of good faith inevitably arose. Although good faith was covered by the 1964 Hague Conventions on International Sales Law (ULIS and ULF), the problem of how to balance diverse legal traditions remained unanswered.⁵⁸ The difference between common law and civil law approaches had become a significant and divisive issue by the time drafters gathered to negotiate the CISG in 1980, with good faith emerging as the most challenging point of agreement throughout the negotiation process.⁵⁹

2.4. Theoretical Frameworks for Understanding Good Faith

Several theoretical frameworks for understanding the foundation and purpose of good faith as a legal norm have been developed by contemporary legal scholars.⁶⁰ These frameworks aim to uncover the underlying concept that enables harmonization despite apparent distinctions in formulation and application, and to explain why good faith demands acknowledgment across many legal systems.

⁵⁵ Code Civil (n 5); German Civil Code (n 4); Schweizerisches Zivilgesetzbuch (ZGB) 1907, Art 2; Martijn W Hesselink, 'The Concept of Good Faith' in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer Law International 2011) 619.

⁵⁶ Contracts Act (Avtalslagen), section 36; Jan M Smits, 'Hector L MacQueen and Reinhard Zimmermann (eds), *European Contract Law: Scots and South African Perspectives*' (2007) 11 *Edinburgh Law Review* 289.

⁵⁷ Reinhard Zimmermann, 'The Law of Obligations: Roman Foundations of the Civilian Tradition' (OUP 1996) 667.

⁵⁸ Ifimie (n 24) 3-4; Mazzacano (n 45) 4-5.

⁵⁹ Mazzacano (n 45) 4-9; Ifimie (n 24) 3-5.

⁶⁰ Munukka (n 16) 245-250.

Within the **morality and justice framework**, honesty, justice, and solidarity are ethical principles that can inform contract law reasoning through the concept of good faith.⁶¹ It serves as a corrective mechanism, stepping in when applying contract provisions strictly would result in unfair outcomes.⁶² This strategy, however, is critiqued for being too ambiguous; “justice” is a cultural idea that is subjective, making it a challenging foundation for harmonized international law.⁶³

According to the **contractual proportionality framework**, upholding a proportionate balance between the parties’ mutual obligations, risks, and levels of knowledge is at the core of good faith. According to this perspective, the equitable distribution of contractual obligations and benefits is ensured by the norm of good faith.⁶⁴ It prevents one party from exercising its rights in a manner that disproportionately harms the other, such as terminating a long-term contract for a minor violation.⁶⁵ This framework enables an understanding of the function of good faith in mandating the disclosure of material facts, preventing the abuse of contractual rights, and invalidating unfair terms. Also, it emphasizes the acceptable balancing of interests over abstract morality and enables a more objective application of good faith.⁶⁶

Furthermore, the **reliance and expectations framework** focuses on protecting reasonable and justifiable reliance. According to this method, a party’s reasonable expectations are protected when the party relied on the statements, actions, or explicit promises of another.⁶⁷ This theory has considerable power to explain some good-faith applications, especially those involving deception, the concealment of material information, or inconsistent behavior that contradicts prior promises.⁶⁸ The prohibition on *venire*

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *ibid.*

contra factum proprium (acting opposite one's previous conduct) comes from this framework, stopping parties from acting inconsistently to the harm of their counterparty.⁶⁹

2.5. The Function of Good Faith: Interpretation vs. Substantive Obligation

The most critical distinction in international sales law, and the primary conflict under the CISG, is the functional contrast between good faith as a **substantive obligation** and as a tool for **interpretation**.⁷⁰ This distinction has significant practical implications: if good faith is substantive, it imposes affirmative obligations and restrictions that exist independently of the parties' express agreement; if good faith is merely interpretative, it provides guidance to courts and arbitrators without directly binding the parties to carry out what they have not explicitly agreed upon.⁷¹

When a court or arbitrator must decide between conflicting interpretations of unclear contract language or unclear legal meaning, good faith serves as a guideline for interpretation.⁷² In addition, according to Article 7(1) of the CISG, good faith must be observed "in the interpretation of this Convention."⁷³ It does not impose a duty of good faith on the parties themselves. Instead, it directs courts and arbitrators to interpret the Convention's provisions in a manner that encourages good faith.⁷⁴ According to this perspective, good faith serves as a command to the adjudicator, guaranteeing that the uniform legislation isn't implemented in a bureaucratic or mechanical manner that undermines its primary purpose.⁷⁵

⁶⁹ Mazzacano (n 45) 10.

⁷⁰ Magnus (n 18) 89-95; Mazzacano (n 45) 1-3; Schwenger (n 18) 109-118.

⁷¹ Mazzacano (n 45) 1-3.

⁷² Schwenger (n 18) 109-118.

⁷³ CISG (n 9) Art 7(1).

⁷⁴ Mazzacano (n 45) 1-3; 7.

⁷⁵ Magnus (n 18) 89-95.

On the other hand, a substantive obligation of good faith requires the contracting parties to treat each other fairly and honestly.⁷⁶ A substantive good faith obligation requires a party to perform specific affirmative duties, such as disclosing information, cooperating in performance, or mitigating damages, and to avoid certain conduct, such as misrepresenting material facts or acting inconsistently with prior conduct.⁷⁷ Even if the parties may have implicitly anticipated them, these obligations arise from the good-faith concept itself rather than from the parties' agreement.⁷⁸ The substantive definition of good faith is considered a default rule that regulates contractual agreements unless the parties specifically contract out of it.⁷⁹ Moreover, this approach is taken by the UNIDROIT Principles. Article 1.7 of the UNIDROIT Principles states that "Each party must act in accordance with good faith and fair dealing in international trade".⁸⁰ In this case, the parties' conduct during the contract's duration—from negotiation through performance and enforcement—is governed by good faith.⁸¹

Furthermore, despite the drafters' aim to restrict good faith in the CISG to interpretation, judicial practice has witnessed a "apotheosis" of the idea—its elevation from a mere interpretative tool to a substantive rule of law.⁸² Despite theoretical differences, courts and tribunals have regularly used Article 7(1) as a basis for establishing behavioral requirements on parties, such as the duty to cooperate or to reduce damages, thereby integrating the CISG with the more general UNIDROIT approach.⁸³ This change indicates a "dynamic interpretation" that closes the gap between the CISG language and the reality of international trade; however, it remains a topic of doctrinal debate.⁸⁴

⁷⁶ Magnus (n 18) 91-95.

⁷⁷ *ibid.*

⁷⁸ Schwenger (n 18) 109-118.

⁷⁹ Munukka (n 16) 238-245.

⁸⁰ International Institute for the Unification of Private Law (UNIDROIT), UNIDROIT, *Principles of International Commercial Contracts* (2016 edn, UNIDROIT 2016), Art 1.7; Magnus (n 18) 90.

⁸¹ Magnus (n 18) 91; Iftimie (n 24) 8-9.

⁸² Mazzacano (n 45) 1.

⁸³ Mazzacano (n 45) 2; 17-18.

⁸⁴ Mazzacano (n 45) 14; Schwenger (n 18) 111-112.

2.6. Why Good Faith Matters in International Sales

International sales contracts place a greater emphasis on good faith for both practical and philosophical reasons. In a practical sense, good faith plays a crucial role in filling the parties' lack of a day-to-day legal and cultural basis in international sales contracts.⁸⁵ As these transactions include a variety of legal systems, cultures, and languages, they are particularly vulnerable to misunderstandings and opportunism that are less common in domestic contexts. To reduce these risks, good faith serves as a crucial "bridging principle" enabling judges and arbitrators to uphold fair conduct standards and safeguard reasonable expectations in a manner understandable across legal cultures.⁸⁶

At the philosophical level, international sales law aims to provide a unified framework for global trade that parties with diverse legal traditions can rely on with confidence.⁸⁷ Parties operating under the CISG would run the risk that courts in various nations would interpret similar contract language and legal standards differently in the absence of a general concept of fairness and reasonable conduct, undermining the Convention's primary objective of achieving uniformity.⁸⁸ Consequently, when properly interpreted, good faith serves as a stabilizing and unifying element that helps courts in reaching uniform interpretations and implementations across diverse legal systems.⁸⁹

In conclusion, good faith fosters cooperation and trust, both of which are critical for stable international markets. It fills the gap between strict legal regulations and what businesses might reasonably expect.⁹⁰ Its ultimate purpose is to prevent the misuse of legal formalities and to ensure that

⁸⁵ Magnus (n 18) 90-91; Schwenger (n 18) 109-118.

⁸⁶ Schwenger (n 18) 109-118; Iftimie (n 24) 5.

⁸⁷ Magnus (n 18) 90-91.

⁸⁸ Schwenger (n 18) 109-118.

⁸⁹ *ibid.*

⁹⁰ O'Connor (n 24) 107.

the agreement's purpose takes precedence over its text, whether it is seen as a tool for the judge or a responsibility of the merchant.⁹¹

CHAPTER 3

The Role of Good Faith under CISG

3.1. Article 7(1) CISG: Text, Interpretative Function, and Historical Development

Article 7(1) of the CISG lays out a fundamental interpretative concept and states: “In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.”⁹² Together with other fundamental guidelines controlling the evolution of CISG law, this clause functions within the general provisions of the Convention (Chapter II of Part I). This article outlines three different interpretative criteria, each of considerable importance: 1) attention to the international character of the Convention; 2) dedication to achieving uniformity in application; and 3) observance of good faith in international trade. These instructions serve as substantive goals that should govern interpretation and application in addition to functioning as methodological recommendations.⁹³

The inclusion of good faith in Article 7(1) is a hard-won compromise, the result of complex diplomatic negotiations. The drafting history shows a significant disagreement. Civil law delegations sought broad good-faith obligations that matched their own legal traditions. In contrast, common law representatives worried that such broad principles would reduce certainty and predictability in

⁹¹ *ibid* 109.

⁹² CISG (n 9) Art 7(1).

⁹³ Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (5th edn, OUP 2022) art 7, para 7.

international contracts.⁹⁴ As early as the 1964 Hague Diplomatic Conference, Belgian delegates suggested that good faith should be recognized as a general principle for the interpretation and performance of contracts. The French opposition responded quickly and forcefully, arguing that any ambiguous reference to good faith could lead national courts to apply their own notions of good faith, thereby undermining the consistency that international sales law requires.⁹⁵ During the 1977 UNCITRAL Working Group meetings, the dispute intensified. During the ninth session, Hungarian delegates proposed a provision stating, “in the course of the formation of the contract, the parties must observe the principles of fair dealing and act in good faith.”⁹⁶ This approach would have imposed a legally obligatory substantive responsibility on the contracting parties themselves, rather than merely offering a framework for judicial interpretation. However, there was considerable dispute, particularly among common law delegations from the United States and the United Kingdom.⁹⁷ American delegates emphasized that in the US, good faith applies only to the implementation and enforcement of contracts, not to their creation or negotiation before signing. They also pointed out that there isn’t a single, universally accepted definition of good faith across American jurisdictions.⁹⁸

Moreover, English representatives argued that good faith did not fit with the common law tradition, which focuses on clear contract terms, formal rules, and the freedom to make agreements without vague ideas of fairness.⁹⁹ Common law delegates also warned that “good faith” is a concept without a fixed meaning- it is interpreted differently across legal systems, which can lead to unpredictable litigation outcomes and may allow judges to exercise their own discretion rather than follow clear contract terms.¹⁰⁰ Conversely, delegates from Germany, France, and other civil law countries argued that

⁹⁴ Mazzacano (n 45) 4-9.

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ UNCITRAL, ‘Report of the Working Group on the International Sale of Goods on the Work of its Ninth Session (9th session, 19-30 September 1977, Geneva)’ (1978) UN Doc A/CN.9/142, para 70.

⁹⁸ Mazzacano (n 45) 4-9.

⁹⁹ *ibid.*

¹⁰⁰ Walt (n 2) 41-43.

the widespread acceptance of good faith across many legal systems demonstrates its legitimacy and universality.¹⁰¹ They argued that giving up good faith would be an unacceptable move toward formalism and would not set strong moral and ethical standards for international traders.¹⁰² Also, they further underlined that the inclusion of good faith would harmonize the CISG with existing continental legal practice, as it is already embedded in significant civilian codifications (the French Civil Code, the Swiss Civil Code, and the German BGB).¹⁰³

The discussion intensified even further during the UNCITRAL Working Group's tenth session. According to a recent proposal, good faith should apply only to the interpretation of the CISG, not to the parties' performance under their contracts.¹⁰⁴ According to the English delegate, "Article 7(1) was directed towards the courts in the interpretation of the Convention, and not towards the parties to a contract."¹⁰⁵ The crucial compromise that allowed the Convention to be approved was the primary change in the application of good faith from an obligation for the parties to a guide for judges.¹⁰⁶ According to Schlechtriem and Schwenger, this agreement had a limited view of good faith and aimed to preserve business confidence while permitting civil law views through flexible interpretation.¹⁰⁷

3.2. The Doctrinal Debate: Good Faith as Obligation vs. Interpretation

Changing good faith in Article 7(1) from a party obligation to an interpretative tool has not cleared up the underlying doctrinal ambiguity. Instead, it has simply shifted the debate to another area. Even after four decades of CISG case law and academic study, significant disagreement persists. Some see

¹⁰¹ Mazzacano (n 45) 4-9; Ifimie (n 24) 2-5.

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ Mazzacano (n 45) 4-9.

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*

¹⁰⁷ Schwenger and Schroeter (n 93) art 7, paras 19-25.

Article 7(1) as offering only guidance on interpretation, while others believe it also creates indirect obligations for the parties.

3.2.1. The Narrow Interpretation: Good Faith as an Interpretative Tool

Proponents of the **narrow or restrictive interpretation** point out that Article 7(1) appears in the Convention's chapter on interpretation and uses clear language that limits good faith to the interpretation of the Convention; this suggests that good faith applies only to adjudication and does not directly affect party conduct.¹⁰⁸ Steven Walt has given the most thorough modern explanation of this view. He argues that the CISG does not contain a binding good-faith principle governing parties' conduct. Instead, he states the main principle of the CISG is cost reduction, meaning it aims to minimize transaction costs during negotiation and performance.¹⁰⁹ Walt also claims that case law treating good faith as a substantive obligation is "suspect" and lacks a strong doctrinal basis. Walt argues that conflating interpretative guidance with substantive obligations leads to the same uncertainty and unpredictability that the CISG drafters sought to prevent.¹¹⁰

Similarly, Mazzacano has argued that raising good faith from its original, modest role as an interpretative tool to a substantive law principle is an "apotheosis." This religious metaphor suggests an unjustified canonization of what was intended as a limited compromise.¹¹¹ Mazzacano points out that the drafting history clearly rejected any substantive good faith obligation. He notes that courts have had difficulty determining what good faith actually entails because the CISG does not define it.¹¹² Relying on good faith has therefore resulted in uncertainty rather than clarification of the law. He also points out

¹⁰⁸ Walt (n 2) 38-49.

¹⁰⁹ Walt (n 2) 38-49; 55-65.

¹¹⁰ *ibid.*

¹¹¹ Mazzacano (n 45) 1-10.

¹¹² *ibid* 10-30.

that, unlike the UNIDROIT Principles and the Principles of European Contract Law, which clearly state that “each party must act in accordance with good faith and fair dealing,” the CISG does not include a similar rule for the parties.¹¹³

This narrow interpretation is also supported by Article 7(2) of the CISG, which deals with gap-filling. According to Article 7(2), the general principles underlying the CISG should be used to fill any gaps in subjects covered by the Convention that are not explicitly resolved.¹¹⁴ It would make sense to apply good faith under Article 7(2) to close gaps if it were a general principle of the CISG capable of creating substantive responsibilities. However, courts frequently rely on specific CISG clauses or broader principles rather than on good faith for gap-filling. This pattern suggests that judges implicitly recognize the limited scope of good faith.¹¹⁵ The narrow interpretation is further supported by the rule of autonomous interpretation in Article 7(1). This rule requires that CISG provisions be understood without relying on national law concepts. As a result, courts cannot apply their own good-faith doctrines, such as the German *Treu und Glauben* under Article 242 BGB, to CISG cases without violating the autonomy principle.¹¹⁶

3.2.2. The Expansive Interpretation: Good Faith as General Principle and Substantive Obligation

Proponents of a **broad or expansive interpretation** argue that, in practice, there is no real difference between interpretative guidance and substantive obligation. They argue that interpreting the CISG in good faith limits how parties view their legal obligations; as a result, separating ‘interpretation

¹¹³ *ibid* 1-5.

¹¹⁴ CISG (n 9) Art 7(2).

¹¹⁵ Schwenger and Schroeter (n 93) art 7(2), paras 27-44.

¹¹⁶ Schwenger (n 18) 116-117; Walt (n 2) 43-55.

for courts' from 'obligations for parties' is a false and unworkable distinction.¹¹⁷ According to this view, when a court interprets a CISG provision using good faith, it may decide that the parties must meet specific fairness standards. In this way, good faith can place fundamental limits on behavior, even if the provision's wording only covers interpretation.¹¹⁸

Furthermore, German legal scholars, in line with continental jurisprudence, view good faith as a general principle underlying the CISG, claiming this principle can be found in the Convention's main rules and goals.¹¹⁹ Schwenger and other leading CISG commentators argue that many CISG provisions, such as Articles 35 (conformity of goods), 38 (examination and notice), and 46 (buyer's remedies), already include fairness and reasonableness standards, working alongside the broader good-faith principle, allowing courts to ensure fair outcomes when strictly following the rules would be unjust.¹²⁰ According to this view, good faith is not an independent duty under Article 7(1); instead, it is a means of interpreting and applying other CISG rules.¹²¹

This expansive approach is supported by the wording of Article 7(1) itself. The article tells interpreters to consider "the observance of good faith in international trade."¹²² The mention of "observance" in international trade suggests that good faith should be practiced by those involved in international commercial transactions, not merely used as guidance for interpreters.¹²³ Furthermore, proponents note that good-faith principles have been applied by civil law systems to regulate party behavior for more than a century without any problems. As a result, this principle has enough power and substance to effectively enforce action.¹²⁴ They further note that the goal of the CISG is to prevent misuse

¹¹⁷ Zeller (n 2) 230-235; Hesselink (n 55) 630-640.

¹¹⁸ *ibid.*

¹¹⁹ Schwenger and Schroeter (n 93) art 7, paras 25-35; Magnus (n 18) 91-95.

¹²⁰ Schwenger (n 18).

¹²¹ *ibid.*

¹²² CISG (n 9) Art 7(1).

¹²³ Magnus (n 18) 90-92.

¹²⁴ Hesselink (n 55) 625-635.

in international trade and promote fairness. It helps prevent parties from exploiting unfair technical advantages or acting arbitrarily by enabling courts to apply the good-faith principle.¹²⁵

Further, this disagreement in the interpretation has led to a real-world problem; national courts apply good faith in very different ways, which runs counter to Article 7(1)'s goal of "promoting uniformity in its application."¹²⁶ German courts, following their civil law tradition, interpret good faith broadly to prevent unfair or harsh results, even if the CISG technically permits a party's actions.¹²⁷ Conversely, in common law countries such as the United States, England, Australia, and Canada, courts use the concept of good faith more narrowly; they generally view it as a limit on contract interpretation rather than a separate duty for the parties.¹²⁸ This homeward trend, the tendency of courts to interpret the CISG in line with their domestic legal traditions, shows an apparent failure to achieve autonomous and uniform interpretation; still, it continues even though scholars and the CISG Advisory Council have warned against it.¹²⁹

3.3. Article 7(2) and Gap-Filling: Good Faith as General Principle

Another related question is whether good faith is a "general principle" of the CISG that can be used to fill gaps under Article 7(2). Article 7(2) provides a two-step procedure for filling in the Convention's deficiencies. First, determine whether the CISG applies to this issue. If there are any gaps, fill them in accordance with the general principles of the CISG.¹³⁰ Article 7(2) states: "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in

¹²⁵ Schwenger (n 18).

¹²⁶ Mirco Sedki, 'A Case Study on the Application of Good Faith in the CISG' (University of Cape Town 2018); Andreas Ehlers, 'Establishing a Uniform Interpretation of the CISG' (2013) 20 *Nordic Journal of Commercial Law* 1, 1-10.

¹²⁷ Sedki (n 126); Schwenger and Schroeter (n 93) art 7, para 24.

¹²⁸ Sedki (n 126).

¹²⁹ Bruno Zeller, 'Analysis of the Cultural Homeward Trend in International Sales Law' (2021) 10 *Victoria University Law and Justice Journal* 131.

¹³⁰ Schwenger (n 18).

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.”¹³¹

Whether good faith is considered a general principle is still debated. According to Schwenger, good faith is crucial for interpreting the CISG, but it is not a separate general principle for addressing issues like reciprocal obligation, justice, or reasonableness.¹³² Nonetheless, some academics and arbitrators claim that Article 7(2) precisely refers to a broad concept of good faith. It demonstrates that legal systems generally agree that parties to a contract should act honorably, have good intentions, and respect one another’s legitimate interests.¹³³ The Convention’s good-faith principle can help guide decisions when the CISG lacks explicit standards on matters such as precontractual liability.¹³⁴

Furthermore, the most challenging application of this gap-filling method is in the context of precontractual good-faith requirements.¹³⁵ The CISG makes it clear that it does not cover contract formation; this exclusion is stated explicitly in Article 2 and elsewhere.¹³⁶ Yet parties are increasingly using good faith to create duties during negotiations; these include negotiating in good faith, sharing important information, and not undermining the other party’s interests once preliminary talks have led to reasonable reliance.¹³⁷ Some courts have used Article 7(2) to fill gaps by relying on the Convention’s principles; they have found that precontractual good-faith obligations should exist, even though the CISG does not expressly address contract formation.¹³⁸ This broad use of Article 7(2) goes beyond addressing technical gaps; it actually extends the scope of the CISG in a significant way.¹³⁹ Some courts have

¹³¹ CISG (n 9) Art 7(2).

¹³² Schwenger (n 18).

¹³³ Magnus (n 18).

¹³⁴ *ibid.*

¹³⁵ Anne Rossen, Marie Hummelshøj Pedersen and Thomas Neumann, ‘How Far Does the Dynamic Doctrine Go? Looking for the Basis of Precontractual Liability in the CISG’ (2020) 1 *Nordic Journal of Commercial Law*, 3-21.

¹³⁶ CISG (n 9) Art 4.

¹³⁷ Rossen, Pedersen and Neumann (n 135).

¹³⁸ *ibid.*

¹³⁹ Schwenger and Schroeter (n 93) art 7, paras 27-36.

disagreed with this view and held that precontractual liability should be determined by domestic law rather than the CISG, because the Convention does not govern contract formation.¹⁴⁰

3.4. Case Law and Arbitral Awards: Demonstrating Good Faith's Application

The debate over legal doctrine affects real cases, as shown by differences in case law. Tribunals often use the “Broad View” to punish behavior they see as commercially immoral. Here are some cases that involve the principle of good faith:

- a) **Good Faith in Pre-Contractual Dealings and “Venire Contra Factum Proprium”:** A clear example of good faith preventing inconsistent behavior, known as *venire contra factum proprium*, is the **Dulces Luisi Case** from Mexico.¹⁴¹
 - **Case Facts:** In *Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd.*, a Mexican candy seller sued a Korean customer. After verbally requesting some labeling adjustments, the buyer later refused to pay, arguing that the products did not meet the terms of the Letter of Credit. The buyer had promised to change these terms, but never did.¹⁴²
 - **Ruling:** The Compromex Commission in Mexico ruled against the buyer. Referring to Article 7(1), the tribunal found that the buyer’s actions were “contrary to the basic principle of good faith.” Although the letter of credit did not fully comply with the requirements, the buyer had led the seller to rely on it. The tribunal applied the principle of good faith not only to interpret the law but also to prevent the buyer from asserting strict contractual rights after engaging in deceptive conduct.¹⁴³ Also, Compromex stated that this principle should guide parties in their

¹⁴⁰ Rossen, Pedersen and Neumann (n 135).

¹⁴¹ *Dulces Luisi, SA de CV v Seoul International Co Ltd*, Compromex Arbitration Award (30 November 1998) CLOUT Case 1184.

¹⁴² *ibid.*

¹⁴³ *ibid.*

commercial relations and should be understood in its international sense, not as defined by national laws.

- b) Good Faith in Contract Interpretation and Hardship:** The distinction between strict national laws and the CISG is highlighted by the intersection of good faith and “hardship” (unforeseen economic problems).
- **Case Facts:** In *Scaфом International v. Lorraine Tubes*, a case in Belgium, the price of steel suddenly rose by 70 percent, affecting a steel tube contract. The seller asked to renegotiate the price, but the buyer refused, pointing to the fixed-price agreement.¹⁴⁴
 - **Ruling:** The Belgian Court of Cassation found a “gap” in the CISG regarding hardship. Referring to Articles 7(1) and 7(2), the Court relied on the UNIDROIT Principles to support the proposition that good faith requires parties to renegotiate if the economic balance changes significantly. This approach to good faith was unusual because it went beyond interpreting the contract and changed the parties’ obligations, requiring renegotiation even when the contract had a fixed price.¹⁴⁵
- c) A Counterexample: The “Plain Meaning” Approach:** In contrast, US courts are less willing to use good faith to override clear contract terms. In *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*, the court examined how the contract was formed and whether it was valid. Although the CISG applied, the court focused on traditional contract certainty, seeking definite quantity and price as required by Article 14, rather than relying on good faith to support a vague agreement. This shows the Common Law tendency to avoid using “good faith” to fix unclear contract terms.¹⁴⁶

¹⁴⁴ *Scaфом International BV v Lorraine Tubes SAS*, Hof van Cassatie (Belgium), 19 June 2009, C.07.0289.N, CISG-online 1963.

¹⁴⁵ *ibid.*

¹⁴⁶ *Geneva Pharmaceuticals Tech Corp v Barr Labs Inc.*, U.S. District Court (SDNY), 10 May 2002, CLOUT Case 579.

3.5. Jurisprudence and Case Law: Regional Divergence and the Homeward Trend

Furthermore, a review of published CISG case law indicates that the good-faith standard is applied differently in various regions.¹⁴⁷ This implies that achieving the uniformity goal of Article 7(1) has been challenging. This variation results in judges often applying Article 7(1) with a “homeward trend,” meaning they interpret the CISG in light of their own country’s legal background.¹⁴⁸

a) German Court Jurisprudence

German courts have regularly taken the broadest view of good faith, drawing on Article 242 of the BGB (*Treu und Glauben*) in interpreting the CISG.¹⁴⁹ In case 7 U 1720/94, the German Provincial Court of Appeal applied the principle of good faith and held that a buyer who commenced a lawsuit while clearly in breach had not acted in good faith, even though the CISG permitted the lawsuit.¹⁵⁰ Instead of using good faith as a guide to understanding contract terms, the court’s reasoning treated it as a substantive restriction on parties’ behavior.¹⁵¹ Studies of German CISG cases show that German courts refer to good faith much more often than courts in other countries. They also use it as a separate reason to impose duties not clearly listed in the CISG.¹⁵² German courts apply the principle of good faith to require parties to share information, to cooperate, to avoid taking unfair advantage, and to apply CISG rules fairly and consistently.¹⁵³

This broad approach shows how German law sees good faith as a “highest norm” that shapes all of contract law; it adds fairness to the rules and allows for flexibility in unexpected situations.¹⁵⁴ Still, this method also highlights the issue of the homeward trend; German courts draw on their own law without

¹⁴⁷ Zeller (n 129).

¹⁴⁸ *ibid.*

¹⁴⁹ German Civil Code (n 4); Sedki (n 126).

¹⁵⁰ *R Motor snc v M Auto Vertriebs GmbH*, Oberlandesgericht München (Germany), 8 February 1995, 7 U 1720/94, CLOUT Case 133.

¹⁵¹ *ibid.*

¹⁵² Sedki (n 126).

¹⁵³ *ibid.*

¹⁵⁴ Hesselink (n 55) 623-639.

recognizing that doing so may conflict with the autonomy principle and may not align with the international view of good faith.¹⁵⁵

b) French Court Jurisprudence

French courts have also applied good faith broadly, but they do so less often than German courts and place greater emphasis on its use in interpreting the law.¹⁵⁶ French jurisprudence reflects Article 1104 of the French Civil Code, which states that “contracts must be negotiated, formed, and performed in good faith.”¹⁵⁷ French courts apply the principle of good faith to impose extra duties, such as cooperation, information sharing, and fair dealing, that go beyond what contracts or CISG rules specifically state.¹⁵⁸ This approach is not as forceful as German jurisprudence in applying good faith to override specific regulations, but it also shows how domestic law ideas are incorporated.¹⁵⁹

c) Common Law Court Jurisprudence

Courts in common law countries have been more cautious in their approach to good faith. When American courts apply the CISG, they rarely use Article 7(1) to create specific obligations for the parties; instead, they usually see good faith as a general principle that helps interpret unclear contract terms.¹⁶⁰ English and Australian courts have also been careful to uphold good faith, reflecting their legal traditions’ usual skepticism toward broad good-faith principles.¹⁶¹ In common law court decisions, good faith is mentioned occasionally, but courts rarely analyze its scope or implications in detail. This suggests that courts view it as a minor or supporting principle, rather than a primary limit on behavior.

¹⁵⁵ *ibid.*

¹⁵⁶ Hesselink (n 55) 641-645.

¹⁵⁷ French Civil Code (n 5).

¹⁵⁸ John Bell, Sophie Boyron and Simon Whittaker, ‘Principles of French Law’ (2nd edn, OUP 2008) 296-325.

¹⁵⁹ Hesselink (n 55) 623-639.

¹⁶⁰ Sedki (n 126) 17-24.

¹⁶¹ *ibid.*

To sum up, the differences between German and Common Law systems regarding the concept of “good faith” reveal a fundamental conflict that undermines the uniformity Article 7(1) aims to achieve. German courts see good faith as a broad principle that shapes all contracts, while Common Law courts use it only in rare cases of serious misconduct when no specific rule applies. This difference is not just theoretical; it shows how each system views the purpose of contract law, making it harder to achieve consistency in international law.

3.6. The CISG Advisory Council and Contemporary Guidance on Good Faith

The CISG Advisory Council was established in 2001 as a non-governmental body to help ensure the Convention is interpreted consistently. So far, it has given only limited direct guidance about what good faith means under Article 7(1).¹⁶² The Advisory Council has not given a full opinion on whether Article 7(1) requires parties to act in good faith or if good faith is only meant to help interpret the article.¹⁶³

However, the Advisory Council has issued opinions on how good-faith principles apply in certain situations. These opinions focus more on interpreting the rules than on setting specific duties.¹⁶⁴ The Council has suggested that good faith can help interpret implied terms and guide gap-filling under Article 7(2). However, it has not made clear whether good faith is a general principle or just a guideline for interpreters.¹⁶⁵ The Advisory Council has noted that “an international standard of good faith may already exist” when established international trade practices set clear expectations. However, if no such standard

¹⁶² CISG Advisory Council, ‘Home’ < <https://cisgac.com/> > accessed 24 December 2025.

¹⁶³ CISG Advisory Council, ‘Opinions’ < <https://cisgac.com/opinions/> > accessed 24 December 2025.

¹⁶⁴ CISG-AC Opinion No. 20, ‘Hardship under the CISG’ (Rapporteur: Edgardo Muñoz, 2–5 February 2020) paras 0.10, 11.9.

¹⁶⁵ Ingeborg Schwenzer, ‘The CISG Advisory Council’ in Ingeborg Schwenzer (ed), *The CISG Advisory Council Opinions* (Eleven International Publishing 2017) 1; CISG-AC Opinion No. 7, ‘Exemption of Liability for Damages under Article 79 of the CISG’ (Rapporteur: Prof. Alejandro M. Garro, 12 October 2007) Comments paras 26–35.

is present, it must be “developed by business circles, arbitrators, and courts” through ongoing practice and discussion.¹⁶⁶

Advisory Council adopts a cautious, methodical approach because it recognizes that generalizing without regard for national legal traditions will not lead to consistency.¹⁶⁷ Rather, the Council routinely reviews case law and arbitral decisions to develop a common understanding of good faith. In this way, rather than adhering to strict regulations, they gradually promote consensus.¹⁶⁸ Rapporteurs chosen by the Advisory Council draft their opinions. These drafts are discussed and revised during Council meetings, then adopted by consensus after further review of comments.¹⁶⁹ The Rules and Comments are intended to help courts and arbitrators interpret the CISG consistently when handling cases under the Convention.¹⁷⁰ Depending on the jurisdiction and the judge’s openness to international legal advice, the Advisory Council’s effect on national courts varies widely, and its authority is persuasive rather than binding.¹⁷¹

3.7. Precontractual Good Faith and the Boundaries of the CISG’s Scope

One challenging question is how much good faith can be used to support precontractual liability claims under the CISG. Article 4 of the Convention states that “this Convention governs only the formation of contracts of sale” and specifically excludes “validity of the contract or of any of its provisions or of any usage.”¹⁷² This view holds that the CISG does not apply to precontractual discussions, preliminary agreements, or questions of contract validity.

¹⁶⁶ CISG-AC Opinion No. 17, ‘Limitation and Exclusion Clauses in CISG Contracts’ (Rapporteur: Prof. Lauro Gama Jr., 16 October 2015) paras 4.12-4.28.

¹⁶⁷ Kristel Steensgaard, ‘Boundaries for Expansive Interpretations of the CISG?’ in 35 Years of CISG: Present Experiences and Future Challenges (Faculty of Law, University of Zagreb 2017) 37.

¹⁶⁸ Joshua D. H. Karton & Lorraine de Germiny, ‘Has the CISG Advisory Council Come of Age’ (2009) 27 Berkeley J Int’l Law 448, 452-478.

¹⁶⁹ CISG Advisory Council, ‘Opinions’ (n 163).

¹⁷⁰ *ibid.*

¹⁷¹ Schwenzler (n 165).

¹⁷² CISG (n 9) Art 4.

Scholars are still debating whether CISG principles can be applied to the precontractual stage, particularly with respect to the good-faith concept used for gap-filling under Article 7(2). According to some scholars and arbitrators, the CISG should cover the precontractual stage in order to promote justice and clarity in international trade. This is because parties frequently engage in lengthy negotiations prior to signing a contract, during which they can acquire reliance interests.¹⁷³ According to this perspective, before a contract is concluded, the parties should act in accordance with the standards of good faith, grounded in the CISG's primary objectives. This is especially true when one party's behavior during negotiations causes the other to reasonably rely on them.¹⁷⁴ Some arbitral awards support this approach by applying good-faith principles; they require parties to negotiate in good faith, share important information, and avoid dragging out negotiations just to gain an advantage.¹⁷⁵

However, this extension has been rejected by other courts. They contend that since the CISG expressly excludes formation-related issues, the forum's domestic law or the law selected by the parties should determine precontractual liability rather than the CISG.¹⁷⁶ Schlechtriem and Schwenger argue that the CISG was not meant to cover precontractual liability. They argue that applying good-faith principles at this point would violate the Convention's stated limitations and amount to judicial activism.¹⁷⁷ They further point out that the drafters most likely did not intend to incorporate this type of obligation, as the CISG does not address precontractual remedies or impose penalties or damages for bad faith prior to contract formation.¹⁷⁸

In conclusion, this ongoing issue underscores the difficulty of defining the CISG's scope, given the ambiguity of the concept of good faith. Foreign parties often do not know if precontractual

¹⁷³ Rossen, Pedersen and Neumann (n 135) 13-28.

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid.*

¹⁷⁷ Schwenger and Schroeter (n 93) art 4, paras 18, 30-35.

¹⁷⁸ *ibid.*

negotiations are covered by the CISG and its good-faith rules or by domestic law. Courts have also reached different conclusions in similar cases.

3.8. Remedies for Breach of Good Faith: An Unsettled Question

Which CISG remedies are possible for a breach of good faith is another unanswered topic. According to the Convention, buyers may demand specific performance under Article 28, claim damages under Articles 74-77, or terminate the contract under Article 49 in the event of a fundamental violation.¹⁷⁹ Nevertheless, the remedy for a breach of a good-faith requirement is not specified under the CISG.

Can the other party terminate the agreement if one side violates it in good faith? Does this type of violation qualify as a “fundamental breach” under Article 25, which grants the right to terminate the agreement?¹⁸⁰ Are damages for breaching good faith calculated differently from damages for breaking clear contract terms? The Convention does not provide solutions, so adjudicators have to determine the best approach themselves. Some courts use the concept of good faith to deny remedies to parties who have acted in bad faith, relying on the principles of equity and estoppel.¹⁸¹ Although some courts have awarded damages for good-faith violations, it’s not always clear why they issued those rulings.¹⁸² Others avoided the remedial question by reinterpreting certain CISG clauses to obtain what they believed to be an equitable result rather than expressly finding a good-faith breach.¹⁸³

Both parties and adjudicators face considerable practical uncertainty due to this remedial ambiguity. It is difficult to predict what remedy the court will select when a party is hurt by a good-faith breach, whether damages will make up for the loss, or whether the party that violated the contract will

¹⁷⁹ CISG (n 9) Arts 28, 49, 74-77.

¹⁸⁰ CISG (n 9) Art 25.

¹⁸¹ Christopher Kee and Elisabeth Opie, ‘The Principle of Remediation’ in *Sharing International Commercial* (2008) 239-246.

¹⁸² Mazzacano (n 45) 13-25.

¹⁸³ *ibid.*

still be able to keep it. One of the main objectives of the CISG, which is to give international sales transactions a predictable and uniform legal framework, is directly undermined by this unpredictability.¹⁸⁴

3.9. Persistent Ambiguities and Unresolved Questions

Important issues regarding good faith remain unresolved and continue to be the subject of legal conflicts and scholarly discussion, despite forty-five years of CISG practice and extensive research.¹⁸⁵ These unanswered questions indicate that the concept of good faith has complicated the application of the CISG.

First, there is an ongoing debate about the scope of good faith. Some ask whether it applies to precontractual phases or only to the performance and enforcement of contracts. Others question whether its function is only interpretive or whether it might be used for gap-filling under Article 7(2).¹⁸⁶ There is unpredictability, as courts have reached diverse judgments.

Second, there is no definition of what constitutes good faith: What constitutes good faith in certain commercial circumstances is not specified by any reliable source.¹⁸⁷ One industry's international trade norms (such as commodity trading) may differ significantly from those of other industries (such as manufacturing or services).¹⁸⁸ There is no method in the CISG for determining which standard applies.

Third, it's still unclear how certain CISG regulations relate to good faith: What further restriction does invoking good faith offer if fairness and reasonableness standards are already established by CISG Articles 35 (conformity), 38 (examination), 46 (remedies), and others?¹⁸⁹ On the other hand, may good

¹⁸⁴ CISG (n 9) Preamble.

¹⁸⁵ Schwenzer and Schroeter (n 93) art 7, paras 35-40.

¹⁸⁶ Lisa Spagnolo, 'Opening Pandora's Box: Good Faith and Precontractual Liability in the CISG' (2007) 21 Temp Int'l & Comp LJ 261, 275-280.

¹⁸⁷ Walt (n 2) 41-66.

¹⁸⁸ Zeller (n 2) 219-220.

¹⁸⁹ Bruno Zeller, 'Good Faith--The Scarlet Pimpernel of the CISG' (2001) 6 Int'l Trade & Bus L Ann 227, 234-239.

faith take precedence over certain clauses when their implementation would result in unfair outcomes according to a court? Different courts have given varying responses.

Fourth, the Convention does not define the remedies for a breach of good faith. This raises issues about whether a breach of good faith qualifies as a "fundamental breach" that permits a party to terminate the contract, what remedies are available, and how to determine damages.¹⁹⁰ As a result, adjudicators must develop their own solutions.

Lastly, there is still uncertainty regarding the relationship between good faith and domestic law. Although the autonomy principle seems to prohibit the importation of national good-faith doctrines, practical interpretation appears impossible without implicitly relying on such beliefs.¹⁹¹ It's unclear how courts should resolve this conflict.

These unanswered problems demonstrate that good faith has led to ongoing ambiguity and discussion rather than strengthening the CISG. The primary question under the current CISG is whether this ambiguity is a drawback or a benefit, and whether the flexibility of good faith justifies the unpredictability it entails.

CHAPTER 4

Good Faith in European Union Law and Soft Law Instruments

¹⁹⁰ Yasutoshi Ishida, 'Identifying Fundamental Breach of Articles 25 and 49 of the CISG: The Good Faith Duty of Collaborative Efforts to Cure Defects - Make the Parties Draw a Line in the Sand of Substantiality' (2020) 41 Mich J Int'l L 63, 84-98.

¹⁹¹ Benedict Sheehy, 'Good Faith in the CISG: The Interpretation Problems of Article 7' (2004) 10 UC Davis J Int'l L & Pol'y 1, 6-14.

4.1. EU's Approach to Good Faith and Fair Dealing

The international framework created by the CISG is further strengthened by the European Union's unique approach to good faith and fair dealing in contract law. The CISG treats good faith mainly as a guideline for interpreting and regulating parties' conduct in international sales. In contrast, EU law includes good faith as a direct requirement in its binding directives and regulations for contracts across Member States. The EU demonstrates its dedication to protecting consumers, promoting market integration, and creating uniform contract standards across legal systems by grounding legally binding regulations in good faith rather than treating them only as a guiding concept or interpretive tool.¹⁹²

Good faith is established in EU regulations at several levels.¹⁹³ First, the core principles of good faith and fair dealing serve as the foundation for the main regulations governing consumer protection and unfair business practices.¹⁹⁴ Second, several directives implement good-faith standards in specific contract types, particularly those related to consumers, digital services, and consumer rights.¹⁹⁵ Third, the CJEU has developed a substantial body of case law interpreting and applying the good-faith standards, thereby making the concept a well-defined legal rule.¹⁹⁶ The CISG's more straightforward approach to good faith, which offers guidance on understanding the concept rather than establishing strict standards, differs from this multi-layered method.¹⁹⁷

This issue is significant because it affects the direct application and enforcement of good-faith standards in EU law. "Regard is to be had to...the observance of good faith in international trade," according to CISG Article 7(1), establishes a standard for interpreting the law but does not always impose direct obligations on the parties. EU regulations, on the other hand, typically mandate that contracts be

¹⁹² Directive 93/13/EEC (n 19).

¹⁹³ Hesselink (n 55) 619-628.

¹⁹⁴ Directive 93/13/EEC (n 19) Art 3 (1); Directive 2005/29/EC (n 19).

¹⁹⁵ Directive 93/13/EEC (n 19) Art 3 (1); Directive 2005/29/EC (n 19); Directive 2011/83/EU (n 19); Directive 2019/770/EU (n 19).

¹⁹⁶ Case C-237/02 *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* [2004] ECR I-3412, ECLI:EU:C:2004:209.

¹⁹⁷ Zeller (n 2) 217-220.

established and executed “in accordance with good faith,” meaning market participants must comply with this regulation.¹⁹⁸ This significant change from an interpretive principle to a real obligation shows how EU law aims to protect weaker parties in contracts and address information gaps in consumer markets.¹⁹⁹

Hesselink notes that in European legal systems, objective good faith serves as “the highest norm of contract law, or of the law of obligations or even of all private law,” with numerous clauses being described as “special applications of good faith.”²⁰⁰ This is quite distinct from common law jurisdictions, where, according to Lord Steyn, the objective interpretation method presents England “a somewhat infertile soil for the development of a generalized duty of good faith in the performance of contracts.”²⁰¹

4.2. Directive 93/13/EEC on Unfair Contract Terms: The Good Faith Requirement in Consumer Protection

4.2.1. The Framework of Directive 93/13/EEC

The Unfair Terms Directive, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, is the first major EU law to establish good faith as a standard for contract fairness.²⁰² The Directive regulates “any term of a contract concluded between a seller or supplier and a consumer” which “has not been individually negotiated.”²⁰³ Only standard terms, those not individually negotiated, are covered by the Directive. Consequently, the Directive’s good-faith assessment does not include provisions negotiated.

¹⁹⁸ Directive 93/13/EEC (n 19) Art 3(1); CISG (n 9) Art 7(1).

¹⁹⁹ Hesselink (n 55) 620-625.

²⁰⁰ Hesselink (n 55) 620.

²⁰¹ Zeller (n 2) 215-216, quoting Lord Steyn, “The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?” (1991) *Denning Law Journal* 131, 132.

²⁰² Directive 93/13/EEC (n 19) Preamble; Art 3(1).

²⁰³ *ibid*; Art 3(1).

The fundamental good faith requirement is outlined in Article 3(1) of the Directive: “A term shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.” This definition states that a phrase is unfair if it both (1) creates a substantial imbalance and (2) breaches the good faith criteria. According to the Directive, a seller or supplier must deal with a customer “in good faith,” referring to the “legitimate expectations of the consumer.”²⁰⁴

4.2.2. The Substantive Meaning of Good Faith Under Directive

Directive 93/13/EEC’s definition of good faith and fair dealing generated significant scholarly discussion and evolving case law.²⁰⁵ A precise definition of good faith is not provided in the Directive. Rather, it leaves this to the CJEU and the courts of Member States for interpretation. This method demonstrates thoughtful policy decision-making. The Directive’s drafters acknowledged that the definition of good faith varies among European legal systems. They aimed to create a flexible standard that could handle these differences while still protecting the main goals.²⁰⁶

When implementing the Directive, different Member States used translations that reflected their own legal traditions.²⁰⁷ The German approach used *Treu und Glauben*, meaning good faith and loyalty; this idea encompasses a broader sense of loyalty and protection than the more limited economic meaning of good faith in common law systems.²⁰⁸ The French approach relied on the concept of *bonne foi*, grounded in well-established civil law principles of good faith.²⁰⁹ Terms like “*god tro*” (good belief) and “*god sed*” (good usage) are examples of Nordic translations that illustrate various perspectives on these

²⁰⁴ Directive 93/13/EEC (n 19) Preamble; Art 3(2).

²⁰⁵ Munukka (n 16) 238-245; Hesselink (n 55) 625-635.

²⁰⁶ Hesselink (n 55) 625-626.

²⁰⁷ Munukka (n 16) 240.

²⁰⁸ Munukka (n 16) 240-242.

²⁰⁹ *ibid.*

concepts.²¹⁰ These translation differences made it difficult to apply the law consistently across the EU. This supports Munukka's point that the biggest obstacle to harmonizing contract law is the "War of the Worlds" between civil law and common law ideas of good faith.²¹¹

Moreover, the concept of good faith under the Directive not only prohibits dishonest conduct but also imposes positive obligations to ensure fairness in the substantive terms of consumer contracts.²¹² If a term of the agreement significantly deviates from industry standards, imposes significantly greater duties than normal, or permits one party to make decisions without conforming to reasonable business standards, it could be considered to violate good faith.²¹³ The evaluation is objective rather than subjective. It examines whether the term, as written and used, would violate rules of fair dealing in the given circumstance rather than taking the supplier's intent into account.²¹⁴

4.2.3 CJEU Jurisprudence on Unfairness and Good Faith Under Directive

93/13/EEC

The definition of the good-faith duty under Directive 93/13/EEC has been clarified by a substantial body of case law published by the European Court of Justice. The Court's application of the good-faith standard is demonstrated in several significant cases.

Case C-237/02 Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter

A key CJEU decision on good faith under the Unfair Terms Directive is *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* (Case C-237/02), decided on 1 April

²¹⁰ *ibid.*

²¹¹ Munukka (n 16) 230-231.

²¹² Hesselink (n 55) 635-640.

²¹³ *ibid.*

²¹⁴ *ibid.*

2004.²¹⁵ This case was a dispute over the purchase of a parking space in a multi-story parking lot between Mr. and Mrs. Hofstetter, consumers, and Freiburger Kommunalbauten, a municipal construction business.²¹⁶ The contract was notarized on 5 May 1998; Freiburger Kommunalbauten agreed to sell the parking space to the Hofstatters, with the understanding that they would also build the car park.²¹⁷ The main question was whether a contract clause requiring full payment upon issuance of a bank guarantee, rather than upon completion of construction, violated the good faith rule under the Unfair Terms Directive.²¹⁸

According to the CJEU, when evaluating good faith violations, the court must take into account “the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract.”²¹⁹ The Court established that a good-faith assessment necessitates evaluating the consequences of the term under the relevant national law. Furthermore, the determination of unfairness is ultimately the responsibility of the national court, which must apply Community law principles to the specific circumstances.²²⁰

The Court’s reasoning outlined several crucial guidelines for evaluating good faith. First, evaluating good faith should take into account the whole contract and all the circumstances, not just individual terms.²²¹ Second, the assessment should consider any benefits for consumers that offset the disadvantages. In this case, the bank guarantee reduced the consumer’s risk if the other party did not perform as promised.²²² Third, a good-faith assessment distinguishes between terms that benefit only the seller and offer no real advantage to the consumer, which may be unfair, and terms that involve mutual

²¹⁵ *Freiburger Kommunalbauten* (n 196).

²¹⁶ *Freiburger Kommunalbauten* (n 196) paras 2,9.

²¹⁷ *Freiburger Kommunalbauten* (n 196) para 9.

²¹⁸ *Freiburger Kommunalbauten* (n 196) para 14.

²¹⁹ *Freiburger Kommunalbauten* (n 196) para 21.

²²⁰ *Freiburger Kommunalbauten* (n 196) paras 22,25.

²²¹ *Freiburger Kommunalbauten* (n 196) para 21.

²²² *Freiburger Kommunalbauten* (n 196) para 16.

trade-offs and should be evaluated in context.²²³ The Court stated that it may establish general interpretive criteria for good faith; however, it cannot assess the fairness of specific contractual terms without evaluating all relevant circumstances.²²⁴

Case C-415/11 Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)

The CJEU considered whether national courts must, of their own motion, assess unjust terms and grant interim relief in mortgage enforcement proceedings in Aziz (Case C-415/11, March 14, 2013).²²⁵ The case concerned an acceleration clause that permitted the lender to demand the full loan amount upon default.²²⁶ The Court determined that national courts are obligated to assess contractual terms on their own initiative. Furthermore, the principle of good faith requires evaluating whether the supplier could reasonably have assumed that the consumer would have consented to the term during individual negotiations.²²⁷ According to the CJEU's ruling, courts must evaluate acceleration clauses by taking into account the following factors: whether the right is contingent upon non-compliance with an essential obligation; whether non-compliance is sufficiently severe given the loan term and amount; whether the right deviates from common law rules; and whether national law offers sufficient remedies for consumers.²²⁸

Case C-26/13 Kásler v OTP Jelzálogbank Zrt

The CJEU interpreted Article 4(2) of Directive 93/13/EEC in Kásler (Case C-26/13, 30 April 2014), which exempts terms characterizing the “main subject-matter of the contract” from unfairness

²²³ *Freiburger Kommunalbauten* (n 196) para 23.

²²⁴ *Freiburger Kommunalbauten* (n 196) paras 22,25.

²²⁵ Case C-415/11 *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] ECLI:EU:C:2013:164.

²²⁶ *Aziz* (n 225) paras 20-22.

²²⁷ *Aziz* (n 225) paras 46,76.

²²⁸ *Aziz* (n 225) para 73.

evaluation if they are written in plain, understandable language.²²⁹ The case included an exchange rate clause in a foreign currency loan agreement.²³⁰

The Court decided that a strict interpretation of Article 4(2) exception is necessary.²³¹ The “main subject-matter” of the contract must consist of key obligations; supplementary clauses are not eligible.²³² An exchange rate term is not considered part of the “main subject-matter” if the consumer both receives and repays the loan in the national currency.²³³ In addition, “plain intelligible language” means that consumers should understand both the exact wording and the economic reasons for the term, as well as how it relates to other parts of the contract.²³⁴

Case C-421/14 Banco Primus SA v Gutiérrez García

The CJEU discussed standards for evaluating acceleration and ordinary interest calculation clauses in mortgage contracts in Banco Primus (Case C-421/14, January 26, 2017).²³⁵ In this case, a defaulting borrower faced foreclosure and eviction.²³⁶

The Court found that a good-faith assessment must take into account applicable national legislation, the consumer remedies available, the nature of the contract, and other surrounding circumstances to determine whether provisions create a major imbalance to the detriment of the consumer.²³⁷ When interest clauses are not written in clear language, courts determine whether they are unfair by comparing how the interest is calculated and the final amount to common methods, legal rates, and market rates at the time the contract was made.²³⁸ The same standards set forth in Aziz must be

²²⁹ Case C-26/13 *Kásler v OTP Jelzálogbank Zrt* [2014] ECLI:EU:C:2014:282, paras 1-2.

²³⁰ *Kásler* (n 229) paras 20-25.

²³¹ *Kásler* (n 229) para 42.

²³² *Kásler* (n 229) paras 49-50.

²³³ *Kásler* (n 229) para 50.

²³⁴ *Kásler* (n 229) paras 47-50.

²³⁵ Case C-421/14 *Banco Primus SA v Gutiérrez García* [2017] ECLI:EU:C:2017:60, paras 1-2.

²³⁶ *Banco Primus* (n 235) paras 18-23.

²³⁷ *Banco Primus* (n 235) para 67.

²³⁸ *Banco Primus* (n 235) paras 64-65.

applied to acceleration clauses: whether the right is contingent on non-compliance with fundamental duties, whether non-compliance is sufficiently serious, whether the right deviates from common law principles, and whether sufficient consumer remedies are available.²³⁹

4.3. Directive 2011/83/EU on Consumer Rights: Transparency and Fair

Commercial Practices

4.3.1 The Scope and Structure of Directive 2011/83/EU

The EU's fundamental basis for protecting consumers in distant and off-premises transactions is Directive 2011/83/EU of October 25, 2011, on consumer rights, also known as the Consumer Rights Directive.²⁴⁰ Compared to Directive 93/13/EEC, this Directive has broader application. It establishes guidelines for every phase of a consumer transaction, from pre-contract information to performance and remedies, and it involves both consumer sales and services.²⁴¹

The Consumer Rights Directive establishes criteria for transparency that implement good-faith principles at the pre-contractual and contractual information stages.²⁴² According to Article 5 of the Directive, suppliers must “provide the consumer with information in a clear and comprehensible manner” about key terms of the contract, such as “the main characteristics of the goods or services,” “the identity of the supplier,” “the total price,” and “the terms of supply and execution.” The good faith concept serves as the foundation for the transparency requirement. Consumer rights depend not just on the contents of the contract but also on whether the consumer actually understands them.²⁴³

²³⁹ *Banco Primus* (n 235) para 66.

²⁴⁰ Directive 2011/83/EU (n 19).

²⁴¹ *ibid.*

²⁴² Directive 2011/83/EU (n 19) Art 5.

²⁴³ *ibid.*

Furthermore, the Unfair Commercial Practices Directive (2005/29/EC) contains good-faith standards, as set out in Article 7, which create a duty of “fair commercial practices.”²⁴⁴ A commercial practice is unfair if it “materially distorts the economic behavior of the average consumer” and “contravenes the requirements of professional diligence.”²⁴⁵ Professional diligence is the level of “skill and care which a trader may reasonably be expected to exercise towards consumers.”²⁴⁶ This standard establishes a good-faith obligation requiring traders to treat customers fairly and honestly in both pre-contractual and contractual transactions.

4.3.2. Good Faith as a Principle Operationalizing Transparency Requirements

The Consumer Rights Directive implements the good-faith principle by imposing strict transparency requirements.²⁴⁷ The Directive explicitly sets out the specific requirements of good faith, rather than leaving ambiguous good-faith responsibilities for the courts to define.²⁴⁸ If a provider does not disclose the information needed by the Directive or if the information is provided in a way that obscures important terms, the supplier has violated good faith.²⁴⁹

According to Article 8 of the Directive, consumer contracts must “be presented on a durable medium” and include all relevant provisions “in plain, intelligible language.”²⁵⁰ The “plain, intelligible language” requirement for contracts focuses on good faith; it implies that suppliers shouldn’t exploit customers by hiding negative terms, employing unclear language, or creating complex designs.

²⁴⁴ Directive 2011/83/EU (n 19) Art 7; Directive 2005/29/EC (n 19).

²⁴⁵ Directive 2005/29/EC (n 19) Art 5(2).

²⁴⁶ Directive 2005/29/EC (n 19) Art 2(h).

²⁴⁷ Directive 2011/83/EU (n 19) Arts 5-8.

²⁴⁸ *ibid.*

²⁴⁹ *ibid.*

²⁵⁰ Directive 2011/83/EU (n 19) Art 8.

According to the CJEU, this demand for transparency underscores the fundamental principle of good faith, meaning that consumers have the right to fully understand the obligations they enter into.²⁵¹

Furthermore, clients can terminate off-premises and distance contracts after 14 calendar days without incurring fines under the Consumer Rights Directive's unique cooling-off rights (Articles 9-16).²⁵² The foundation of cooling-off rights is the concept of good faith. It would be unfair to demand an instant, legally binding decision without giving customers enough time to consider their options. This means consumers should have time to consider contracts.²⁵³ Thus, the notion that consumer consent should be free, informed, and reflect good faith is expressed in the right of withdrawal.

4.4. Directive 2019/770/EU on Digital Content and Services: Modern Applications of Good Faith

4.4.1 Overview and Scope

The EU's good faith framework is extended to transactions involving digital products and services by Directive 2019/770/EU of May 20, 2019, on certain elements governing contracts for the sale of digital content and digital services to consumers (the "Digital Content Directive").²⁵⁴ Software, apps, digital games, streaming services, and cloud computing services are all covered under "contracts for the supply of digital content or digital services" under the Directive.

Furthermore, suppliers must provide digital content and services "that are of a kind which the consumer is entitled to expect, taking account of the nature of the digital content or digital services, any statements made about them by the trader, the degree of personalization and the expectations of an

²⁵¹ Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Roció Murciano Quintero and Salvat Editores SA v José M. Sánchez Alcón Prades and Others* [2000] ECR I-4963, paras 25-28.

²⁵² Directive 2011/83/EU (n 19) Arts 9-16.

²⁵³ *ibid.*

²⁵⁴ Directive 2019/770/EU (n 19).

average consumer,” according to the Digital Content Directive.²⁵⁵ This method puts the good-faith concept into practice; suppliers’ responsibilities for performance quality are determined not only by the contract’s wording but also by the expectations of a reasonable consumer, taking into account the product, the supplier’s representations, and prevailing industry standards.

4.4.2. Conformity and Good Faith in Digital Transactions

Conformity principles are applied to digital content and services under the Digital Content Directive, which mandates that suppliers provide digital products that meet contractual requirements and reasonable customer expectations.²⁵⁶ Digital content and services must be “provided in conformity with the contract,” including any clauses regarding functionality, compatibility, interoperability, and supply continuity, according to Article 7 of the Directive.²⁵⁷ Conformity is determined not only by the explicit terms of the contract but also by what consumers may reasonably expect based on prevailing industry standards and the supplier’s representations.

4.5. CJEU Jurisprudence on Good Faith and Fairness

The CJEU has adopted a unique approach to good faith that goes beyond specific directives and establishes it as a general principle of EU law.²⁵⁸ In addition to preventing the abuse of information asymmetries and market power inequalities between suppliers and customers, the Court’s approach safeguards consumer expectations.²⁵⁹

²⁵⁵ Directive 2019/770/EU (n 19) Arts 6-8.

²⁵⁶ Directive 2019/770/EU (n 19) Art 7.

²⁵⁷ Directive 2019/770/EU (n 19) Art 7(a).

²⁵⁸ *Aziz* (n 225) paras 43-76; *Kásler* (n 229) paras 40-50.

²⁵⁹ *Aziz* (n 225) para 44; Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECLI:EU:C:2013:180, paras 42-48.

According to CJEU case law, good faith includes four main dimensions. First, transparency and information provision: suppliers must provide consumers with accurate information about key contract terms so they can understand the financial implications of these requirements and their economic justifications.²⁶⁰ Second, substantive fairness: good-faith protections shield customers from unfair terms by assessing whether the provider might reasonably assume that the customer would assent to the term in particular conversations.²⁶¹ Third, procedural justice requires that, when exercising contractual rights in a fair and reasonable manner, the other party's interests be considered.²⁶² Fourth, cooperation and loyalty require both sides to focus on fulfilling the partnership's objectives rather than exploiting technicalities or ambiguous language. The method offers both substantive fairness, which concerns the allocation of rights and obligations, and procedural fairness, which concerns the exercise of contractual rights. These measures help reduce the information and bargaining power disparities that often work against consumers.²⁶³

4.6. Soft Law Frameworks: PECL, DCFR, and UNIDROIT Principles

4.6.1. Principles of European Contract Law (PECL)

The Principles of European Contract Law, established by the Commission on European Contract Law and revised in 2000, state that good faith is a fundamental element of European contract law.²⁶⁴ Article 1:201 states that “each party must act in accordance with good faith and fair dealing. The parties

²⁶⁰ *Kásler* (n 229) paras 47-50.

²⁶¹ *Aziz* (n 225) para 76.

²⁶² *Aziz* (n 225) paras 62-73.

²⁶³ *Aziz* (n 225) paras 44-76; *RWE Vertrieb* (n 259) para 42.

²⁶⁴ Ole Lando and Hugh Beale (eds), *Principles of European Contract Law: Parts I and II* (Kluwer Law International 2000) (PECL).

may not exclude or limit this duty.”²⁶⁵ This rule sets out important principles that apply to all areas of European contract law, not just to consumer contracts.

Firstly, the provision defines good faith as a requirement that cannot be waived. In contrast to provisions that allow parties to contract out of certain default rules, PECL Article 1:201(2) expressly prohibits the exclusion or limitation of good faith duties.²⁶⁶ This demonstrates that good faith is a fundamental principle of contract law that parties cannot contractually exclude.

Secondly, PECL takes a comparative approach to good faith, aiming to connect civil law and common law traditions.²⁶⁷ According to the Article 1:201 Commentary, “good faith means honesty and fairness in mind” (reflecting subjective good-faith traditions); it also requires “fair dealing,” which is described as an “objective test” that reflects civil law traditions focused on substantive fairness.²⁶⁸ This approach seeks to balance civil law, which emphasizes objective fairness, with common law, which values subjective honesty.²⁶⁹ Munukka explains that the Commentary defines good faith in terms of two ideas: subjective honesty, which the PECL calls “honesty in fact,” and objective fair dealing, meaning “observance of fairness in fact.” This approach avoids limiting good faith to mere bans on dishonesty and instead offers broader protection for reasonable commercial expectations.²⁷⁰

Thirdly, PECL requires good faith at every stage of a contract. Good faith obligations in precontractual negotiations are outlined in Article 2:301, which mandates that parties negotiate in good faith and provides liability for “bad faith” termination of negotiations when the other party relied on the negotiation process.²⁷¹ Moreover, the good faith concept is complemented by a duty to collaborate

²⁶⁵ PECL (n 264) Art 1:201.

²⁶⁶ PECL (n 264) Art 1:201(2).

²⁶⁷ Munukka (n 16) 231-234.

²⁶⁸ *ibid.*

²⁶⁹ PECL (n 264); Munukka (n 16) 231-234.

²⁷⁰ Munukka (n 16) 232-234.

²⁷¹ PECL (n 264) Art 2:301.

established by PECL Article 1:202.²⁷² Parties may remedy non-performance when it is consistent with fair dealing and good faith, as provided in PECL Article 8:104.²⁷³

4.6.2. The Draft Common Frame of Reference (DCFR)

The Draft Common Frame of Reference was created by a large academic team at the request of the European Commission. It aims to provide a complete framework for European contract law that could guide future EU laws.²⁷⁴ Regarding good faith, Article III-1:103 of the DCFR mandates that parties “perform any obligation arising from a contract in accordance with the requirements of good faith.”²⁷⁵

The DCFR extends the concept of good faith beyond the scope established by the PECL in several key respects. Firstly, the DCFR explicitly addresses the principle of good faith in the performance of contracts, rather than limiting its application to contract formation.²⁷⁶ Secondly, the DCFR provides more specific guidance on the application of good faith in contract interpretation. According to Article II-8:102(1)(g), good faith and fair dealing are interpretive criteria that, together with the contract’s nature and purpose and the parties’ actions, determine its meaning.²⁷⁷ Thirdly, the DCFR describes how other principles relate to good faith. Mandatory protections established by particular regulations cannot be overridden by good faith. Instead, it fills gaps in contracts and helps prevent abuse of rights.²⁷⁸ Article III-1:103(3) underlines that “breach of the duty does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have.”²⁷⁹

²⁷² PECL (n 264) Art 1:202.

²⁷³ PECL (n 264) Art 8:104.

²⁷⁴ Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Full edn, Sellier 2009).

²⁷⁵ DCFR (n 274) Art III-1:103.

²⁷⁶ *ibid.*

²⁷⁷ DCFR (n 274) Art II-8:102(1)(g).

²⁷⁸ DCFR (n 274) Introduction para 32.

²⁷⁹ DCFR (n 274) Art III-1:103(3).

4.6.3. UNIDROIT Principles of International Commercial Contracts

According to the UNIDROIT Principles of International Commercial Contracts, good faith is an essential principle that governs international business contracts.²⁸⁰ Article 1.7 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.” This provision is similar to the wording in the PECL, but it is intended for international commerce rather than European domestic transactions.

Even in common law nations, the UNIDROIT Principles demonstrate an increasing acceptance of good-faith protections.²⁸¹ According to Zeller, Section 1-203 (now Section 1-304) of the United States Uniform Commercial Code states that “every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.” Section 205 of the Restatement of Contracts (Second) imposes a comparable duty of good faith and fair dealing on parties in their performance and enforcement.

4.7. The Interplay Between Soft Law Instruments and EU Binding Law and Conclusion on Good Faith

4.7.1. Soft Law Instruments as Interpretive Guidance

The PECL, DCFR, and UNIDROIT Principles are examples of soft law instruments that provide uniform standards among various legal systems. These guidelines aid in harmonizing good-faith norms within international business law and among Member States.²⁸² Although these instruments are not legally binding, they aid courts in Member States and EU organizations in developing a shared understanding of how good faith operates across many aspects of a contract, including its formation,

²⁸⁰ UNIDROIT Principles (n 80) Art 1.7.

²⁸¹ Zeller (n 2) 215-216.

²⁸² Munukka (n 16) 240-245; PECL (n 264) Art 1:102; DCFR (n 274) Art II-1:102; UNIDROIT Principles (n 80) Art 1.1.

interpretation, performance, and potential remedies. EU consumer law and international sales law are linked by soft law instruments. While EU law offers more specific good-faith guidelines in consumer protection laws, the CISG sets fundamental good-faith norms for interpretation and business transactions.²⁸³

Furthermore, resources for the progressive interpretation of EU law are provided by soft law instruments.²⁸⁴ As business practices change and new contract types emerge, soft law helps courts interpret and apply general EU legal terms.²⁸⁵ Munukka suggests that good faith is “built on a principle of contractual proportionality,” providing a framework for understanding how good faith operates across different contract situations, from the formation of agreements to their execution and the handling of remedies.²⁸⁶

4.7.2. Conclusion: EU Good Faith as a Comprehensive Protective System

Good faith is now a real obligation grounded in binding directives and applied in numerous CJEU rulings, rather than merely an interpretive principle as under the CISG. Fair contract terms, reasonable consumer expectations, transparency, and the proper exercise of contractual rights are all part of the European Union's good-faith concept. This principle applies to many types of contracts, such as long-term corporate agreements, digital services, and consumer transactions, and cannot be waived. The EU prioritizes protecting consumers and maintaining justice over giving parties complete contractual flexibility. While EU law limits this freedom through statutory good-faith criteria that cannot be waived

²⁸³ CISG (n 9) Art. 7(1); Directive 93/13/EEC (n 19).

²⁸⁴ Verena Rošic Feguš, ‘EU Soft Law: Validity, Normativity and “Bindingness” Reviewed’ (REALaw.blog, 6 October 2023), < <https://realaw.blog/2023/10/06/eu-soft-law-validity-normativity-and-bindingness-reviewed-by-verena-rosic-vegus/>> accessed 6 January 2026.

²⁸⁵ Case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4416, ECLI:EU:C:1989:646.

²⁸⁶ Munukka (n 16) 249-250.

and are subject to judicial review by the CJEU, the CISG permits parties to form their contractual relationships solely subject to good-faith rules of interpretation.²⁸⁷

CHAPTER 5

Comparative Analysis: Good Faith under CISG and EU Law

5.1. Introduction to the Comparative Framework

Previous chapters have demonstrated that the concept of good faith functions within fundamentally distinct legal frameworks in the CISG and EU law. The CISG primarily views good faith as a guideline for courts and arbitrators in interpreting contracts. This approach shows the common law system's reluctance to accept broad or unclear fairness requirements. In contrast, EU law makes good faith a substantive duty in its binding directives. This approach follows civil law traditions, which hold that good faith is a basic principle that limits contractual freedom.²⁸⁸ This chapter provides a comparative analysis of the two regimes, highlighting differences in their structure, scope, application, and practical effects.

5.2. Structural and Legal Status Differences

5.2.1. CISG: Good Faith as Interpretive Guideline

The way the CISG addresses good faith is mainly restricted by where it appears in the text and by compromises made during drafting. Article 7(1) says that “regard is to be had to...the observance of

²⁸⁷ CISG (n 9) Art 6; Directive 93/13/EEC (n 19) Art 6(1).

²⁸⁸ Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (CUP 2000), 8-48.

good faith in international trade,” but this rule is found in the Convention’s chapter on interpretation, not in the sections that set out the parties’ main obligations.

A narrow reading of Article 7(1) limits good faith to helping courts and arbitrators interpret the Convention’s rules. In this view, good faith does not require parties to share information, to cooperate, or to avoid taking advantage of situations, unless the Convention clearly states these duties elsewhere. This way of interpreting the Convention keeps things predictable and certain, which was important to common law countries during the CISG’s negotiation. However, it can also allow parties to act in ways that civil law systems might consider clearly unfair if those actions are not specifically banned.²⁸⁹

However, the broader interpretation, supported by significant CISG jurisprudence, treats good faith as creating substantive obligations either directly under Article 7(1) or, under Article 7(2), to fill gaps. According to this view, when courts interpret the CISG in good faith, they should also interpret the parties’ obligations to include standards of fairness and reasonableness. This method brings the CISG closer to civil law principles while remaining faithful to the wording of Article 7(1).

5.2.2. EU Law: Good Faith as Substantive Obligation

EU law takes a completely different approach. Directive 93/13/EEC provides that a term “shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations.” This rule makes good faith a real and non-negotiable duty that traders owe to consumers. The EU system allows courts to assess whether contract terms meet good-faith and fairness standards, even if neither party raises them.²⁹⁰

The CJEU has repeatedly stated that good faith cannot be waived and applies to all types of consumer contracts, such as sales, credit, digital services, and commercial practices. Good faith is judged

²⁸⁹ Munukka (n 16) 240-245.

²⁹⁰ *Aziz* (n 225).

by an objective standard; it depends on whether the term's content and presentation are clear to the consumer, not on what the trader intended. If a term does not clearly explain important obligations, it automatically breaks the rule of good faith, no matter what the trader meant to do.²⁹¹

Furthermore, this structural difference highlights a deeper divide in legal thinking. The CISG reflects a balance between the common law and civil law systems. However, the EU granted precedence to fairness and consumer protection over contractual freedom, as the preamble to Directive 93/13/EEC illustrates. This distinction affects how each system assigns responsibility for fairness. Under the CISG's narrow interpretation, adjudicators bear primary responsibility. In contrast, EU law assigns this responsibility jointly to the parties, who must comply, and to the courts, which must enforce fairness.

5.3. Scope of Application and Excluded Domains

5.3.1. CISG's Limited Scope

The CISG expressly restricts its scope to the "formation of contracts of sale" and to the rights and obligations "arising from such a contract."²⁹² Accordingly, the CISG does not govern precontractual negotiations, contract validity, or the contract's legal form. Consequently, actions undertaken by parties during preliminary negotiations, including making false statements, hiding material information, or issuing relied-upon promises, are not governed by the CISG's good faith provisions unless filled by applicable domestic law.²⁹³

Moreover, consumer contracts are completely excluded from the CISG when buyers make purchases for "personal, family, or household use," and the supplier knew or should have known this.²⁹⁴ Because of this exclusion, a consumer buying goods from a seller in another CISG country is not

²⁹¹ Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Győrfi* [2009] ECR I-4716, ECLI:EU:C:2009:350.

²⁹² CISG (n 9) Art 4.

²⁹³ Zeller (n 2) 215-233.

²⁹⁴ CISG (n 9) Art 2(a).

protected by the CISG's good faith rules. Instead, the consumer's rights depend on the law chosen by the parties or on the law that applies under private international law.

The CISG also does not cover some types of contracts, such as auctions, securities, negotiable instruments, ships, aircraft, and electricity sales.²⁹⁵ For these contracts, good-faith obligations are set by national law or by special rules. The exclusion of precontractual matters has real effects. There is still disagreement among courts and arbitrators using the CISG regarding whether good faith applies to precontractual negotiations under Article 7(2). Precontractual good-faith obligations, such as avoiding sham discussions and disclosing crucial information, have been acknowledged by some arbitrators. Others have rejected these duties, seeing the precontractual exclusion as complete.

5.3.2. EU Law's Expansive Scope

The scope of European Union law extends significantly beyond the boundaries established by the CISG. Directive 93/13/EEC applies to all consumer contracts, except for certain regulated financial products. In all sales of goods and services, consumers are protected by Directive 2011/83/EU. Unfair commercial practices in all consumer transactions are covered under Directive 2005/29/EC. Moreover, the precontractual stage is expressly covered by EU legislation, which mandates transparency and information exchange. Before entering into contracts, traders are required under Directives 2011/83/EU and 2005/29/EC to provide customers with timely and explicit information.²⁹⁶ Good-faith responsibilities also apply prior to the conclusion of a contract, according to the CJEU. This stops traders from using misleading advertising or hiding important information during negotiations.²⁹⁷

²⁹⁵ CISG (n 9) Art 2(a)-(f).

²⁹⁶ Directive 2011/83/EU (n 19), Arts 5-7; Directive 2005/29/EC (n 19), Arts 5-7.

²⁹⁷ Case C-30/14 *Ryanair Ltd v PR Aviation BV* [2015] ECLI:EU:C:2015:10.

EU law's good-faith framework applies vertically between traders and consumers and, in some cases, horizontally between commercial parties. The rules cover the whole contract process, including precontractual information, contract formation, interpretation, performance, and enforcement. Because of this broad coverage, EU law imposes good-faith obligations at every stage where a trader could take advantage of information gaps or act opportunistically.

The difference in scope leads to a protection gap for consumers in international transactions. If someone in an EU Member State buys from a CISG seller, they only get EU consumer protections if EU law applies under conflict-of-laws rules. The consumer is not protected by the EU if the CISG is applicable instead. Because of this difference, several scholars have proposed either removing consumer contracts from the CISG or amending the CISG to establish minimal protections for consumers. Because neither plan received sufficient support to change the CISG, the gap persists.

5.4. Content, Meaning, and Enforceability

5.4.1. CISG's Ambiguous Content and Regional Divergence

Scholars and judges continue to disagree over the meaning and application of the CISG's good-faith clause. The narrow perspective holds that good faith has no direct impact on parties' conduct and serves only to aid judges in interpreting the law. The broader interpretation considers good faith as a basic principle that creates real obligations for the parties, especially when courts use Article 7(2) to fill gaps in the law.

This ambiguity leads to uncertainty in practice. Courts in different countries often reach different conclusions. German courts, which follow the civil law tradition, interpret good faith broadly to prevent unfair results, even if the CISG's text technically allows certain actions. German courts have applied good faith to require sellers to disclose known defects, prevent buyers from using technical notice rules to avoid performance, and create duties of cooperation that go beyond what the Convention expressly

provides. Common law courts in the US, UK, Australia, and Canada take a narrow view of good faith. They mostly see it as a limit on how the law is interpreted, not on how parties act. These courts are also reluctant to use Article 7(2) to fill gaps for good faith reasons.

The CISG Advisory Council has recognized this difference but has not settled it completely. Instead, they suggest building agreement over time through practical experience. This cautious strategy enables states to maintain flexibility; however, it creates uncertainty for contracting parties. Identical conduct may be interpreted as good faith in one jurisdiction but as a breach in another.

The CISG does not explain what good faith means in specific situations. What counts as “good faith” can vary in commodity trading, manufacturing contracts with detailed requirements, and services that depend on specialized knowledge. The Convention does not offer advice on which standard to use or how to consider context when interpreting good faith.

5.4.2. EU Law’s Clear, Objective Standards

EU directives set clear standards for judging good faith. Directive 93/13/EEC explains its good-faith rule in Annex, which lists examples of terms that are usually considered unfair if they cause a significant imbalance.²⁹⁸ These include terms that exclude or limit the trader’s liability, allow changes or cancellations by one party without good reason, or place all risks and obligations on the consumer.

CJEU has clarified that good faith is assessed objectively. The evaluation focuses on whether the term is clear and transparent to the consumer, rather than the trader’s intentions.²⁹⁹ If a contractual term fails to clearly specify significant obligations, it violates the good faith requirement, regardless of whether the trader intended to mislead.³⁰⁰ This objective standard provides greater predictability compared to the less clearly defined rules of CISG.

²⁹⁸ Directive 93/13/EEC (n 19), Annex.

²⁹⁹ *Aziz* (n 225).

³⁰⁰ *Pannon GSM* (n 291).

EU directives also outline who is responsible for guaranteeing good-faith compliance. Before customers make judgments, traders must provide clear information, ensure contract terms are easy to understand, and refrain from deceptive advertising or negotiating tactics. Directive 2005/29/EC establishes explicit guidelines for behavior and defines what constitutes deceptive behavior or the absence of crucial information.

Furthermore, EU law uses several overlapping standards to assess good faith. These include the misleadingness test in Directive 2005/29/EC, the transparency requirements in Directives 2011/83/EU and 2005/29/EC, and the unfair terms test in Directive 93/13/EEC, which focuses on serious imbalance and a breach of good faith. These distinct criteria give judges precise direction on how good faith functions in different circumstances. This reduces the amount of interpretation needed, unlike the CISG, which only makes a single, vague reference to good faith.

5.5. Remedies and Enforcement Mechanisms

5.5.1. CISG's Remedial Ambiguity

One main weakness of the CISG's good faith framework is that it does not provide clear remedies for violations of good faith. The Convention lists remedies for breaches of express contractual obligations, including damages (Articles 74-77), specific performance (Article 28), and avoidance for a fundamental breach (Article 49). However, the CISG does not explain which remedy applies if a party breaches good faith obligations.

This leads to real uncertainty. If someone breaches good faith, does that constitute a fundamental breach that allows the injured party to terminate the contract? Can the injured party claim damages, and if so, how are they measured? Courts have not always reached a consensus. They occasionally treat a breach of good faith as a component of other violations. In other cases, they refuse to accept any remedies since there isn't a clear regulatory framework that permits them.

In *Dulces Luisi*, the Mexican tribunal applied the principle of good faith to prevent a buyer from insisting on strict contractual rights after the buyer had encouraged reliance on promised changes. Nevertheless, the 10,000 francs given as a remedy didn't seem to be connected to any actual harm. This implies that, rather than following the standard CISG guidelines, the tribunal was devising a solution on the spot.³⁰¹ In *Bonaventure*, the French court found that the buyer violated good faith by misdirecting the goods contrary to the seller's assurances, but it applied French domestic law rather than CISG remedies to award damages.³⁰² This pattern, in which courts find good-faith violations but then apply domestic remedial law, suggests that the CISG does not provide sufficient guidance on remedies.

5.5.2. EU Law's Comprehensive Remedial Framework

For abuses of good faith, EU law offers definite, substantial remedies. According to Article 6 of Directive 93/13/EEC, unfair terms, those that violate good faith and result in a significant imbalance, "shall not be binding on the consumer."³⁰³ This rule is strict: the consumer cannot be required to comply with an unfair term, nor can they waive this protection, even if they agree to it in writing.

Furthermore, unfair terms still apply to the trader. The customer can decline to act if a contract has an unfair clause that exempts the trader from their obligations, but the trader is still required to do their part. This uneven remedy helps protect the weaker party.

EU directives not only void unfair terms but also provide individuals with mechanisms to claim damages. According to the CJEU, consumers have the right to seek damages for losses incurred if a trader breaches the obligations of good faith or transparency. Directive 2005/29/EC provides people the right to take legal action against unfair business practices, allowing anyone who has been damaged by deceptive behavior to pursue suitable remedies.

³⁰¹ *Dulces Luisi* (n 141).

³⁰² *SARL Bri Production Bonaventure v Société Pan African Export*, CA Grenoble, 22 February 1995, CLOUT Case 154.

³⁰³ Directive 93/13/EEC (n 19) Art 6(1).

Administrative fines, contract revocation, reimbursement of unearned payments, and injunctions to stop future infringement are among the other remedies available under Member State legislation. To ensure that parties comply in good faith, the CJEU has emphasized that remedies must be both effective and sufficiently deterrent. The Court directed Member States, in cases like *Aziz and Kašler*, to ensure that consumers can challenge unfair conditions in court.³⁰⁴ This principle of effective enforcement shows that EU law's good-faith protections are not merely goals; they require real, accessible remedies.

5.5.3. Enforcement and Burden of Proof Differences

A key distinction concerns the allocation of the burden of proof for good faith compliance. A party alleging a good-faith violation under the CISG must normally demonstrate both the existence of a good-faith obligation and the other party's violation of it.³⁰⁵ A significant hardship may result from the CISG's ambiguity about the existence of good-faith obligations.

Under EU law, traders must act honestly. The trader bears the burden of complying with these regulations; failing to do so may result in a violation of the law. Instead of expecting customers to prove unfairness, the burden of proof in situations involving unreasonable conditions is on traders to demonstrate the fairness of their terms. Traders are subject to stricter accountability under Directive 2005/29/EC. A trader must prove that their acts were fair and honest if they are accused of acting in an aggressive or dishonest manner.

How disagreements are resolved is greatly affected by the allocation of the burden of proof. Before addressing possible violations, parties in CISG disputes usually discuss whether good-faith requirements apply. EU disputes, on the other hand, focus mainly on whether a violation has occurred

³⁰⁴ *Aziz* (n 225); *Kášler* (n 229).

³⁰⁵ CISG (n 9) Arts 7, 79(1).

and assume the presence of good-faith obligations. Improved results and more effective decision-making are usually the outcomes of this EU method.

5.6. Practical Consequences: The Dual-Regime Problem

International traders who operate under both the CISG and EU rules often encounter a real issue. The same trader might have to follow different legal standards depending on who they are dealing with and which law applies.

Imagine a manufacturer, Trader A, in State X, selling goods in two situations. First, if Buyer B is in State Y and both States are parties to the CISG, the CISG applies. The rules regarding good faith are unclear. Whether good faith means sharing information before the contract, reducing damages, or working together during the contract depends on the court or arbitration rules in that place. The consequences for breaking good faith are also uncertain. Second, if Buyer C is in an EU Member State Z and is a consumer, then EU consumer protection law applies. In this case, good faith is a strong requirement that cannot be waived. The seller must be transparent before the contract, and the law clearly states what happens if these rules are broken.

This leads to real problems. For example, Trader A may not know whether its actions meet the good-faith requirements, since these are unclear under CISG but clearly defined in EU law. A marketing practice that complies with CISG's narrow good-faith rules could still breach the EU's stricter standard, which requires clear information before any commitment.

Secondly, there are differences in how risk is allocated. Under the CISG, Trader A could limit liability through contract terms that would not be permitted under EU law because they violate good faith and create a significant imbalance. This makes drafting contracts more challenging.

Thirdly, remedies for breaches are inconsistent. A breach of good faith that may not be addressed under the CISG, due to the absence of a clear remedy, could result in significant damages or the cancellation of the contract under EU law. This discrepancy creates unequal litigation risks.

Because of the dual-regime problem, international traders have to consider both legal systems when drafting contracts. This often results in overly cautious clauses that meet the strictest requirements, such as those under EU law, even if the other party is covered by the CISG. This approach increases transaction costs and limits contract flexibility. Some traders try to avoid this by choosing domestic law rather than the CISG in their contracts, but this means giving up the advantages of a uniform international sales law in exchange for clearer rules on good faith and remedies.

5.7. Comparative Assessment and Evidence of Convergence

5.7.1. Conceptual Foundations of the Divergence

The differences between the CISG and the EU on good faith show deeper legal and policy disagreements. The CISG is a middle ground between civil law's focus on good faith and common law's doubts about the fairness of unclear rules. This compromise accepted some ambiguity by using good faith as a guide to interpretation, which was the only way to reach agreement across different legal systems.

EU law is based on a clear policy decision by EU Member States, most of which follow the civil law tradition. This background enabled EU law to adopt civil law principles, such as substantive good faith, without the broad consensus that influenced the CISG. In the EU, consumer protection is more important than contractual freedom, and good faith is seen as a way to address power imbalances between traders and consumers.

In practice, different perspectives on philosophy have diverse outcomes. Although the CISG's ambiguity protects state sovereignty and legal diversity, it can also make situations less predictable and

equitable. In contrast, EU law is more specific, which brings certainty and shares power more fairly between traders and consumers.

5.7.2. Convergence in Practice

Although there are differences in theory, case law shows some practical agreement. German CISG decisions are becoming more similar to EU law by treating good faith as a substantive and non-waivable principle. Common law courts are also increasingly recognizing that good faith applies during contract performance, even if not at the formation stage, thereby reducing the gap between legal systems. The CISG Advisory Council has constantly supported interpretations that bring the CISG into conformity with civil law conceptions of good faith.

Despite the text not changing, this indicates that CISG practice is becoming more similar to the context of EU law. By interpreting and filling legal gaps, courts and arbitrators are extending good-faith requirements, recognising that the CISG's limited protection does not meet the standards of contemporary international trade. While this does not eliminate all differences between CISG and EU law, it narrows the practical gap.

5.8. Conclusion

From their theoretical foundations to their practical application, this analysis shows significant differences between EU legislation and the CISG across every area covered. EU law treats good faith as a clear and mandatory legal duty that applies to many types of interactions. In contrast, the CISG views good faith mainly as a flexible interpretive guideline, and its scope is narrower, as it does not cover consumer contracts or precontractual negotiations. This difference also affects the consequences. EU legislation offers a clear framework with detailed remedial laws, official review processes, and specific

rules for breaches. The CISG, on the other hand, does not set out specific remedies and mostly leaves enforcement to the discretion of judges.

These distinctions show deeper legal traditions: civil law emphasizes justice, while common law is more critical. As a result, foreign traders face more difficulties. When the idea of good faith is unclear under the CISG but well-defined under EU law, legal issues may become unpredictable. They must draft contracts that comply with the standards of both legal systems.

Achieving complete harmonization would require either lowering EU consumer safeguards, which would be against EU policy, or modifying the CISG to include explicit good-faith responsibilities, which is unlikely given common law objections. However, the dual-regime difficulties faced by international traders can be lessened by taking practical measures, such as adding explicit contract clauses on good faith and remedies, and changing CISG interpretations.

CHAPTER 6

Practical Implications for International Sales Contracts

6.1. Introduction: Bridging Theory and Practice

The CISG and EU law take different approaches to good faith in international sales contracts, with important consequences for international traders. Instead of focusing solely on theory, this chapter examines practical steps parties can take to address these differences. To assist traders in bridging the gap between CISG and EU law, it includes strategies such as contract drafting, risk allocation, dispute resolution, and compliance.

6.2. Contract Drafting Implications and Good Faith Clauses

6.2.1. Explicit Good Faith and Transparency Clauses

International traders should incorporate clear good-faith clauses into their contracts, as the CISG does not define good faith precisely. Instead of relying solely on the general language of Article 7(1), this method allows both parties to develop a shared understanding of good faith in their transaction.³⁰⁶

A well-written good faith provision should outline: (1) each party's specific obligations with regard to information disclosure; (2) the circumstances that trigger disclosure obligations; and (3) the remedies that are available in the event that good faith duties are violated.³⁰⁷ For example, a contractual provision might provide: "Each party shall disclose all material facts affecting the goods' quality, transaction conditions, or the other party's legitimate expectations." "Material facts" include conditions that affect the goods' quality for their intended use, known defects, and problems with regulatory compliance." Such clear phrasing makes it clear that precontractual behavior and the disclosure of relevant data are both included in the duty of good faith.

Parties should go above the CISG's minimal transparency obligations in transactions involving consumers or EU Member States. Written agreements should use clear language, provide all necessary terms and expenses, explain when information will be disclosed, especially before a contract is formed, and offer a method for the buyer to confirm that they understand.³⁰⁸ This lowers the risk of litigation under both regimes by bringing contractual provisions into compliance with the transparency requirements of EU Directive 2011/83/EU.

³⁰⁶ Troy Keily, 'Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (1999), 1 *Vindobona Journal of International Commercial Law and Arbitration*, 15-40.

³⁰⁷ Magnus (n 18) 91-95.

³⁰⁸ Directive 2011/83/EU (n 19) Arts 5-7.

6.2.2 Choice of Law and Choice of Forum Considerations

The criteria for excluding the CISG have been clarified by the CISG Advisory Council. Since the CISG is part of the legal system of a Contracting State, choosing its law does not, by itself, exclude it.³⁰⁹ To exclude the CISG, parties must show clear intent, typically by using clear wording such as: “This contract shall be governed by [State] law, excluding the UN Convention on Contracts for the International Sale of Goods (CISG).”

However, there are significant barriers to completely excluding the CISG. Traders must navigate multiple national legal systems and decline the benefits of a uniform international sales legislation. A more balanced approach is provided by selective derogation, which excludes only some CISG provisions while keeping the rest of the Convention. For instance, this contract is governed by the CISG with the following exceptions: (1) the buyer must notify the seller of any non-conformity within (specify: 10, 15, or 20 business days) of discovering the defect (modifying Article 39); (2) remedies for non-conformity must involve (specify remedies); and (3) good faith obligations include (provide a specific definition of material fact disclosure).³¹⁰

Furthermore, for transactions involving multiple countries, it is recommended that the parties choose a neutral arbitration location, such as Vienna, Geneva, or Singapore. Additionally, it is beneficial to select arbitrators with expertise in both the CISG and international commercial law.³¹¹ Arbitration reduces the risk of the “homeward trend,” in which courts in different countries interpret good faith differently based on their own legal traditions. Experienced CISG arbitrators usually provide more consistent interpretations than national courts.

³⁰⁹ CISG-AC Opinion No. 16, ‘Exclusion of the CISG under Article 6’ (Rapporteur: Lisa Spagnolo, 30 May 2014) Comments, para 4.2.

³¹⁰ CISG-AC Opinion No. 16 (n 309) Comments, Section 2.

³¹¹ Ulrich Magnus, ‘CISG and Arbitration Agreements’ in Susan Emmenegger and others (eds), *Brücken bauen: Festschrift für Thomas Koller* (Stämpfli 2018) 513, 514-535.

6.2.3. Warranty and Liability Limitation Clauses

The CISG Advisory Council Opinion No. 17 explains that parties can generally limit or exclude liability in their contracts, provided they do not remove all possible remedies or breach basic fairness principles.³¹² However, under EU law, these limitations are invalid if they breach good faith or create a significant imbalance between the parties' rights and obligations.³¹³

Traders should avoid using absolute liability exclusions in order to resolve this problem. Instead, they should establish reasonable and unambiguous boundaries that clarify what is and is not covered, the duration of warranties, the process for filing a claim, and the potential remedies, such as replacement, repair, or a price reduction.³¹⁴ For example, the seller guarantees that the goods will meet the specifications specified in the purchase order. The seller's responsibility for non-conformity will be restricted to replacing or repairing the non-conforming products, at the seller's choice, if the buyer notifies the seller of the non-conformity within a reasonable period. The seller will not be responsible for indirect, consequential, or special damages unless the seller commits intentional misconduct.

This version is more likely to comply with EU and CISG regulations. It specifies exactly what is covered, establishes reasonable restrictions on remedies, and holds parties responsible for intentional wrongdoing.

6.3. Risk Allocation: Seller and Buyer Due Diligence

6.3.1. Seller's Information and Disclosure Obligations

Sellers have limited precontractual disclosure requirements under a narrow interpretation of the CISG. Unless disclosure is required by clear legal rules, withholding information does not constitute a

³¹² CISG-AC Opinion No. 17 (n 166), paras 1.7, 1.17.

³¹³ Directive 93/13/EEC (n 19) Art 3(1).

³¹⁴ CMS, 'CMS Expert Guide to Warranties in Supply Contracts' (CMS Law, 2015) <<https://cms.law/en/int/expert-guides/cms-expert-guide-to-warranties-in-supply-contracts>> accessed 10 January 2026.

violation of good faith.³¹⁵ However, before a contract is formed, traders must provide necessary information in accordance with EU Directive 2005/29/EC (Unfair Commercial Practices) or risk breaking rules against misleading activities.³¹⁶

Whether or not the CISG is applicable, international sellers should implement uniform disclosure procedures in line with EU regulations. The following information should be disclosed by sellers before a contract is formed: (1) exact product features and quality details; (2) compliance with regulations status; (3) any known defects or restrictions; (4) the range and exclusions of warranties; (5) unit and total pricing; (6) payment terms; and (7) delivery conditions and schedules.³¹⁷

This strategy benefits sellers in several ways. By ensuring that purchasers understand the terms, demonstrating that sellers are acting in good faith in accordance with both CISG and EU regulations, and providing transparent documentation in the event of conflicts over the information provided, it reduces the risk of problems.³¹⁸

6.3.2. Buyer's Examination and Notice Obligations

Buyers are required under CISG Articles 38 and 39 to inspect products as soon as possible and report any problems. CISG Advisory Council Opinion No. 2 states that the definition of a “reasonable time” changes based on the circumstances. There is no further penalty for missing the deadline if the test is postponed, but the notice period starts at that time.³¹⁹

³¹⁵ Mazzacano (n 45); analyzing CISG's narrow good faith interpretation.

³¹⁶ Directive 2005/29/EC (n 19) Arts 5-9.

³¹⁷ Mariscal Abogados, 'International Contracts: Examining and Claiming Defective Products' (Mariscal Abogados) <<https://www.mariscal-abogados.com/the-international-sale-of-goods-examining-and-declaring-defective-goods/#more-691>> accessed 11 January 2026.

³¹⁸ John P McMahon, 'Guide for Managers and Counsel: Drafting CISG Contracts and Documents' (Institute of International Commercial Law, Pace University 2004) <<https://iicl.law.pace.edu/cisg/page/guide-managers-and-counsel-drafting-cisg-contracts-and-documents>> accessed 11 January 2026.

³¹⁹ CISG-AC Opinion No. 2, 'Examination of the Goods and Notice of Non-Conformity Articles 38 and 39' (Rapporteur: Eric E. Bergsten, 7 June 2004).

Buyers should set clear timelines in their contracts rather than using general phrases like “reasonable time.” For example, the buyer must inspect the items within (specify: 5, 10, or 15 business days) of receipt, as specified in the contract. The buyer is required to notify the seller of any non-conformity within (specify: 5, or 10 business days) of its discovery or when it should have been discovered.³²⁰ Also, buyers should keep written records of every examination, including discussions with the seller, expert reports, and images of defects. These records help in proving that the inspection was conducted on time and that defects were found within the contract’s notice period.³²¹

According to academic research, if consumers don’t inspect the products in a timely manner and give sufficient notice of any non-conformity, they can no longer rely on the non-conformity provision. As a result, they cannot seek remedies under CISG Article 45, such as avoidance, price reduction, or damages.³²²

6.4. Dispute Resolution: Arbitration and Good Faith Interpretation

6.4.1. Arbitration as a Dispute Resolution Strategy

Selecting arbitration over national courts for CISG issues minimizes the risk of differing interpretations arising from judges’ local legal backgrounds. The New York Convention’s international enforceability of awards, the capacity for parties to choose arbitrators with CISG knowledge, the ability

³²⁰ Mohammed Zaheeruddin, ‘Examination of Goods by Buyers Under International Sales Contracts’ (2021) 27 *Academy of Entrepreneurship Journal* 1 <<https://www.abacademies.org/articles/examination-of-goods-by-buyers-under-international-sales-contracts-10228.html>> accessed 12 January 2026.

³²¹ IDI Project, ‘When is the buyer entitled to avoid the sales contract and how can the seller prevent it? An overview of case law under the CISG’ (IDI Project, 2025) <<https://www.idiproject.com/news/when-is-the-buyer-entitled-to-avoid-the-sales-contract-and-how-can-the-seller-prevent-it-an-overview-of-case-law-under-the-cisg/>> accessed 12 January 2026.

³²² Ndubuisi Nwafor, ‘Analysis of Buyer’s Obligations under Articles 38 and 39 of the United Nations Convention on Contracts for the International Sale of Goods (CISG)’ (2012) *SSRN Electronic Journal* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2194101> accessed 12 January 2026; Zaheeruddin (n 320).

to choose neutral places for hearings, and the ability to keep procedures private to safeguard business reputations are just a few advantages of international arbitration.³²³

The CISG is usually interpreted more consistently by arbitrators with expertise than by national courts, particularly with respect to good faith. The CISG Advisory Council observes that common law arbitrators typically interpret good faith more narrowly, whereas civil law arbitrators are more likely to interpret it as a substantive obligation. However, experienced arbitrators under the CISG frequently reach a compromise, considering the context while interpreting good faith as substantive.³²⁴

Mandatory arbitration clauses stating that “any dispute arising from this contract shall be resolved by arbitration under the (ICC Rules / UNCITRAL Arbitration Rules / LCIA Rules) in (neutral seat, e.g., Vienna). There will be (specify: three) arbitrators on the tribunal. Each party will designate one arbitrator with expertise in both CISG jurisprudence and international sales law; these two arbitrators will select the presiding arbitrator, who must have significant experience with CISG issues,” should be included by the parties.³²⁵

6.4.2. Dispute Resolution Under EU Consumer Law

According to Directive 2013/11/EU, consumers in EU Member States must have access to alternative dispute resolution (ADR) processes for consumer disputes.³²⁶ Consumers can resolve conflicts in several ways, including litigation, consumer courts with simpler processes, or out-of-court techniques such as conciliation or mediation.

³²³ Magnus (n 311).

³²⁴ *ibid*; CISG-AC Opinion No. 15, ‘Reservations under Articles 95 and 96 CISG’ (Rapporteur: Ulrich G. Schroeter, 21 and 22 October 2013).

³²⁵ McMahon (n 318); Magnus (n 311).

³²⁶ Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes [2013] OJ L165/63, Article 1.

Establishing an internal alternative dispute resolution procedure, such as a customer complaint process with court mediation, can help reduce expenses and risks if the business offers goods or services to EU customers. EU rules cover consumer complaints about sales or services, both within the EU and across borders.³²⁷ Additionally, in consumer contracts, traders should also include the following clause for EU consumers: You have the right to file this issue through national consumer courts, an EU-approved dispute resolution organization, or our internal ADR system (specify).³²⁸

The latest EU amendments, which take effect in 2025, are intended to be incorporated into ADR frameworks. These changes make processes easier to access and understand and offer clients free or inexpensive, more straightforward mediation and ombudsman services.³²⁹

6.5. Practical Case Example: Consumer Protection Scenario

Facts: A German seller sells a dishwasher to an Austrian buyer via an internet platform. “Silent operation” is advertised on the seller’s website. After three months, the dishwasher starts to make a loud mechanical noise. The buyer requests a repair or replacement, but the seller refuses. The seller refers to a fine-print warranty clause stating that it offers no warranties other than those required by law. The seller is not liable for any defects that are discovered more than 30 days after the purchase.

EU Law Analysis: The buyer has a 24-month legal right to replace or repair any item that does not comply with the contract’s conditions under Directive (EU) 2019/771 (the Sale of Goods

³²⁷ Elizabeth Pouget and Caroline Brown, ‘Strengthening Consumer Rights: new EU rules proposed to promote out-of-court dispute resolution’ (*Burges Salmon*, 12 September 2025) <<https://www.burges-salmon.com/articles/102krpw/strengthening-consumer-rights-new-eu-rules-proposed-to-promote-out-of-court-disp/>> accessed 13 January 2026.

³²⁸ Directive 2013/11/EU (n 326) Arts 8-14.

³²⁹ Alexia Kaztaridou, ‘EU modernises consumer dispute resolution: An overview of the new ADR Directive’ (*ConflictOfLaws.net*, 6 October 2025) <<https://conflictoflaws.net/2025/eu-modernises-consumer-dispute-resolution-an-overview-of-the-new-adr-directive/>> accessed 13 January 2026.

Directive).³³⁰ According to EU Directive 93/13/EEC (Unfair Terms in Consumer Contracts), the warranty exclusion clause most likely breaches the good-faith requirement. There is a significant imbalance when the buyer is required to pay the full amount, while the seller is released from liability for defects found after 30 days.³³¹

The “silent operation” advertisement is a material representation. The dishwasher fails to meet what the buyer can reasonably expect under EU law if it does not fulfill this claim. Even if the seller tries to exclude the warranty, the buyer can still request repair, replacement, or a price reduction.

Recommended Contractual Strategy: In consumer sales, the seller should always offer fair warranty periods in compliance with EU law rather than attempting to exclude warranties. For example, “for 24 months following delivery, the seller guarantees that the items will meet specifications and advertising representations. If the buyer notifies the seller of the non-conformity within a reasonable time frame and gives the seller a reasonable chance to fix the products before demanding a replacement, the seller will replace or repair the non-conforming goods at the seller’s expense.”

6.6. Legal Certainty and Business Predictability: Remaining Ambiguities

Even with careful contract drafting, important ambiguities remain. These make it harder for traders to accurately predict business outcomes. Firstly, under the CISG, precontractual liability is still unclear. Courts and arbitrators disagree on whether CISG imposes good-faith requirements in the absence of an explicit agreement, but parties may agree to such obligations during negotiations. Because of this, traders cannot be certain of their liability for claims, failures, or misrepresentations that cause others to

³³⁰ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods [2019] OJ L136/28, Articles 10,13.

³³¹ Directive 93/13/EEC (n 19) Art. 3(1); Annex.

rely on them in the early stages of negotiations. According to scholarly research, this remains one of the most controversial issues in CISG law.³³²

Secondly, it's still unclear how to determine remedies for good-faith violations. The CISG fails to clarify whether damages should be based on restitution, reliance interests, or lost profits in cases of these violations.³³³ Because of this, courts and arbitrators frequently reach different conclusions.

Thirdly, it's unclear who is responsible for showing good faith in disagreements. Who must demonstrate that their actions were motivated by good faith? Under EU law, traders must prove they complied with the requirements.³³⁴ On the other side, the claimant must demonstrate that there was a breach under the CISG. Parties' attitudes toward settlements and litigation strategies may change as a result of this distinction.

These issues show that without legislative amendments, complete legal certainty under the CISG cannot be achieved. However, predictability problems can be reduced with the proper use of arbitration and explicit contract structuring.

6.7. Compliance Strategies for Multinational Traders

6.7.1. Tiered Compliance Framework

A tiered compliance structure that meets the needs of many transaction types can be beneficial to international traders:

Tier 1 (CISG-Only Transactions): Businesses operating in non-EU CISG countries can apply the CISG to sales contracts under normal circumstances, provided they include explicit good-faith clauses.

³³² Mazzacano (n 45).

³³³ CISG (n 9) Arts 74-77; CMS (n 314).

³³⁴ Directive 2005/29/EC (n 19) Arts 5-9.

These clauses should include information about warranty details, notification and inspection dates, data exchange prior to the contract, and legal remedies. To avoid bias toward either party's home country, it is also essential to choose an arbitration venue in a neutral location.³³⁵

Tier 2 (CISG with EU Consumer Elements): When traders sell to consumers or buyers in an EU Member State, they must add EU-compliant clauses in their contracts. This involves implementing suitable liability restrictions, a 24-month consumer products guarantee, and clear transparency laws.³³⁶ Additionally, traders should make it clear that EU consumer protection laws may still apply even if the sales contract is governed by the CISG.

Tier 3 (EU-Only Transactions): Traders should avoid using CISG when selling to clients in EU member states. Instead, they must comply with EU regulations, such as Directives 93/13/EEC (Unfair Terms), 2005/29/EC (Unfair Commercial Practices), and 2011/83/EU (Consumer Rights). Any dispute should be settled via the ADR processes specified in Directive 2013/11/EU rather than going to court.

6.7.2. Documentation and Internal Controls

At every stage of a transaction, traders should maintain consistent records to demonstrate good faith and protect themselves in the event of a dispute. This involves obtaining client acknowledgments before contract signing and maintaining comprehensive records of product disclosures.³³⁷ Traders should also use standard contract formats with clear terms on liability and dispute resolution that comply with

³³⁵ Magnus (n 311); McMahon (n 318).

³³⁶ Directive 93/13/EEC (n 19) Art 3(1); Directive 2011/83/EU (n 19) Arts 5-12; Directive (EU) 2019/771 (n 330) Arts 10,13.

³³⁷ Ahlam Mekkaoui and Hasnae El Kamel, 'Understanding and negotiating key clauses in international contracts' (*ICC Academy*, 24 June 2024) <<https://academy.iccwbo.org/international-trade/article/understanding-and-negotiating-key-clauses-in-international-contracts/>> accessed 15 January 2026; Mariscal Abogados (n 317).

EU and CISG rules. They must carefully document all post-contractual processes, such as buyer inspections, defect reports, and any repairs or solutions.³³⁸

6.7.3. Training and Expertise Development

Traders operating under both EU and CISG regulations should expand their internal expertise. In accordance with both CISG and EU law, this involves providing sales and customer service staff with legal training on good-faith obligations, examination guidelines, and notice requirements. Additionally, they should develop procedures and checklists for compliance that are compatible with both systems. It is advisable to consult external attorneys knowledgeable in EU consumer law and CISG for large-value contracts and disputes.

Furthermore, Traders can stay up to date with CISG case law by reading publications on international commercial law and the CISG Advisory Council's opinions. These sources offer reliable guidance on interpretation issues.

6.7.4. ADR and Settlement Strategies

Traders should consider alternative dispute resolution (ADR) before proceeding with arbitration or litigation. Mediation or conciliation is usually quicker and less expensive than arbitration, and it also helps to maintain relationships with companies.³³⁹

When negotiating a settlement, it is essential to discuss good-faith standards, possible remedies, and whether CISG or EU law applies to the transaction. For instance, under the CISG, a buyer who

³³⁸ IDI Project (n 321).

³³⁹ Kaztaridou (n 329).

alleges non-conformity may be entitled to damages, but if the notice is given late, this right may be waived. Both parties are more likely to benefit from a settlement that accounts for this risk.

CHAPTER 7

Conclusion

This thesis examines a comparative analysis between EU law and the CISG regarding good faith. The primary question was: *To what extent does the CISG impose a duty of good faith on contracting parties, and how does this compare with the function of good faith in EU Law?* The results show that the CISG does not expressly require parties to act in good faith. Rather, good faith serves as a standard for interpreting the Convention under Article 7(1). However, courts and arbitrators have recognized good faith as a fundamental obligation in CISG disputes, particularly in civil law countries. In contrast, the directives of EU legislation explicitly state that good faith is a necessary, mandatory obligation. Directive 93/13/EEC, for instance, states that consumers are not bound by contract provisions that violate good faith. Directives 2005/29/EC and 2011/83/EU enforce good faith by prohibiting deceptive activities and enforcing transparency. While the CISG seeks a balance between common law and civil law traditions and allows greater freedom for national interpretation, the EU focuses on protecting consumers and ensuring justice.

This thesis highlights four key distinctions between EU law and CISG regarding good faith. First, it is unclear whether parties must act in good faith, as the CISG views good faith as an interpretative norm. Some academics, such as Steven Walt and Peter Mazzacano, argue that while good faith influences interpretation, it doesn't require cooperation or information sharing between parties unless expressly stated in the contract. Others believe that the CISG's good-faith concept places real obligations on the

parties, including German courts and well-known CISG specialists. After 45 years, this issue remains unsettled, making it difficult to achieve the consistency that Article 7(1) demands. On the other hand, EU law is considerably more transparent. Good faith is a substantive, non-waivable obligation under Article 3(1) of Directive 93/13/EEC, and courts may independently assess compliance with it. Second, the CISG's scope demonstrates that it does not apply to consumer contracts, precontractual agreements, or specific types of transactions. For international customers, this creates a significant protection gap. EU legislation, on the other hand, regulates unfair commercial practices at every stage of a transaction, requires transparency before contract conclusion, and covers all consumer interactions. Due to these distinctions, unless EU law is applied under conflict-of-laws principles, an EU customer purchasing from a CISG seller does not have enough protection under the CISG. Third, whereas EU law establishes objective norms, the CISG does not define good faith in particular commercial situations. The CISG's definition of good faith varies across industries and jurisdictions. For example, common law courts tend to adopt a more restrictive interpretation of good faith than German courts. Some examples of terms that may be regarded as unfair are listed in Annex of the EU Directive 93/13/EEC, and the European Court of Justice has ruled that good faith should be assessed objectively, emphasizing transparency above the trader's aim. Fourth, the remedies are significantly different. Courts must make their own decisions because the CISG does not provide specific remedies for good-faith violations. EU law, on the other hand, provides explicit remedies, including the automatic cancellation of unfair conditions, the possibility of damages, and the application of administrative penalties.

This analysis focuses on what this theory refers to as the "dual-regime problem." Both EU legislation and the CISG, which have different requirements for good faith, must be complied with by international traders. When a producer sells to a buyer in a CISG country, for instance, their obligations differ from those when they sell to a consumer in the EU. Unless otherwise prohibited, withholding information during precontractual negotiations is not considered a breach of good faith under the CISG.

Directive 2005/29/EC, on the other hand, prohibits deceptive disclosures and requires that sellers disclose necessary data. Therefore, the same precontractual conduct can give rise to distinct legal risks. Even for CISG transactions, traders frequently use EU-compliant contract templates, which makes contract drafting more difficult and expensive.

The availability of remedies varies significantly across legal systems, which affects the value of settlements and litigation costs. Depending on the type of transaction, compliance procedures must address these various standards. In response, some traders choose to completely exclude the CISG to ensure clarity. Others adopt a more selective strategy, adding precise definitions of good faith and removing specific CISG clauses from their contracts. More experienced parties may choose arbitration in neutral venues with arbitrators experienced in the CISG. The final two strategies are the subject of the suggestions in Chapter 6 of this thesis. While maintaining some of the advantages of the CISG, thorough contract drafting and the strategic use of arbitration can help minimize issues arising from having two legal regimes.

There is currently significant evidence that the CISG and EU law are becoming increasingly similar in practice. Despite the ambiguity of Article 7(1) of the CISG, German courts are increasingly applying good faith in a substantive meaning when interpreting the CISG, bringing their approach closer to EU law. Good-faith requirements during contract performance are also increasingly recognized by courts in common law nations. Interpretations that consider good faith as a substantive element are consistently supported by the CISG Advisory Council. Recent arbitration judgments have also used proportionality-based fairness evaluations and considered good faith as imposing real obligations.

This trend toward convergence is motivated by practical needs as well as by the influence of soft law sources such as the PECL, DCFR, and UNIDROIT Principles, which outline substantive good-faith obligations that shape judges' interpretation of the law. EU court rulings are persuasive when interpreting the CISG. Due to the increasing globalization of legal practice, judges today frequently go beyond their

own national traditions. These achievements show that the gap between theory and practice is narrowing as courts continue to refine their procedures, even in the absence of explicit changes to the CISG. Nonetheless, there are important differences, especially in how remedies are handled and the emphasis placed on consumer protection.

This thesis highlights several significant conflicts in good-faith law. Political disagreement has left the CISG unclear, resulting in decades of ambiguity and reduced uniformity. EU law, on the other hand, is more explicit and nevertheless restricts party autonomy. Several concepts, including morality and justice, contractual fairness, and reliance on expectations, are used to define good faith. Different jurisdictions approach these principles variously. Moreover, although the dual-regime problem is quite difficult, it can be resolved by carefully crafting contracts and choosing impartial arbitration locations. Most significantly, the thesis demonstrates that as courts and arbitrators learn from one another and adopt more advanced methods, they are increasingly arriving at similar understandings of good faith.

Beyond its scholarly importance, this comparative analysis will have practical implications for the development of international business law. The research demonstrates how difficult it is to achieve uniform interpretation across various legal systems in the absence of explicit regulations or enforcement mechanisms. The CISG has demonstrated over the past 45 years that ambiguous interpretation creates constant uncertainty for traders, who must then fill in the gaps in their contracts. This means that rather than focusing on general concepts that can be interpreted in various ways, future initiatives to integrate international law should focus on precise standards and plain terminology. Furthermore, the study demonstrates that soft law tools can achieve objectives that formal amendments cannot. Although they are not legally enforceable, the PECL, DCFR, and UNIDROIT Principles have reached widespread agreement on the substantive idea of good faith across various legal systems. Formal codification should be supported by the development of soft law since these instruments help courts and arbitrators, particularly when hard law is ambiguous. Finally, this thesis demonstrates that harmonization can be

accomplished in practice through court decisions, even in the absence of express changes. Courts and arbitrators have more frequently determined substantive good faith in CISG cases without altering the law itself. This indicates how they modify their judgments to preserve justice when the law is not sufficiently clear. Harmonization can eventually be achieved without difficult discussions through methodical monitoring and recording of these activities.

A number of policy choices should be considered in the future. This thesis recommends that CISG experts adopt a broad interpretation of Article 7(1) to better promote global trade, create explicit remedies for violations of good faith, and establish good-faith standards consistent with international business practices. The current good-faith framework should be preserved and strengthened, Member States' application of remedies should be harmonized, and soft-law concepts should be extended to business-to-business interactions. International traders should use a tiered compliance strategy: for CISG-only transactions, incorporate explicit good-faith provisions and take them into account when choosing out of CISG regulations; for transactions involving EU consumers, include EU-compliant conditions; and for EU-only consumer transactions, guarantee complete compliance with EU laws. Choosing arbitration in impartial settings with knowledgeable arbitrators under the CISG can reduce disputes. Also, UNCITRAL should focus on defining good faith, outlining possible remedies, and, if it assesses the CISG, expanding it to cover precontractual issues. These modifications would preserve the Convention's flexibility while addressing essential ambiguities.

This thesis concludes that good faith in EU and CISG legislation is grounded in distinct legal philosophies and has practical implications. The Convention's uniformity has been undermined, and 45 years of confusion have resulted from the CISG's ambiguous approach to good faith. The precise and comprehensive good-faith regulations of EU law, on the other hand, provide predictability but constrain party autonomy. It is possible to gradually harmonize the law without changing its wording, in light of recent court rulings and soft law. In an ideal world, two strategies would be combined. CISG good faith

would be governed by the EU's explicit norms and remedies, while also providing sufficient flexibility for other legal systems and for parties to make their own decisions.

Fundamentally, good faith was meant to serve as the CISG's bridge principle, bridging diverse legal traditions and promoting uniform application. To some extent, it has protected reliance and prevented opportunism. However, the concept remained incomplete because political compromise resulted in good faith being defined as an interpretive principle rather than a fundamental duty. Regardless of future developments, court decisions, or new laws, good faith will always be crucial to international sales law. Rather than remaining a vague idea, the primary task is to guarantee that good faith actually connects legal traditions, preserves reasonable expectations, and avoids opportunism.

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