

SHOULD THE COURTS PRESERVE, STRENGTHEN OR WEAKEN THE APPLICATION OF PAROLE EVIDENCE RULE FROM ENGLISH CONTRACT LAW PERSPECTIVE?

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ABSTRACT

Parol evidence is written or oral evidence not contained in the contract, used to vary the terms of the contract. The parol evidence rule maintains that parol evidence cannot be admitted to assist in interpreting the contract if the contract itself forms the full agreement, or if the contract is unambiguous or clear. But since a contract reflects the intention of the parties and the element of good faith, this can be regarded as an exception to the rule. To prove the parties' intentions and above all the element of good faith can be quite ambiguous.

In jurisdictions like France, Australia, the United States and many others, the duty of good faith is considered to be a crucial factor in Contract and Business Law. If you treat others the way you want to be treated, this could potentially avoid the risk of litigation. By contrast to the above mentioned countries, English Law differs and does not recognise a universal implied duty on contracting parties to perform their obligations in good faith. This paper focussed on the comparison between the English and French Jurisdictions with regards to the duty of good faith and how the Convention on Contracts for the International Sale of Goods 1980 referred to as the CISG tries to set a balance between but with diverse views and opinions.

Keywords: Parol evidence rule, Contract Law, Good faith, Article 7 of the CISG, obligations

INTRODUCTION

What is good faith?

A literal meaning of good faith would be to act in an honest way and to keep one's words without taking an unfair advantage of others. It emanates from the Latin word *Bona Fides* and it is widely used and accepted around the world as the modern day translation of *good faith*.¹The courts still make use of both terms interchangeably. English law does not currently recognise a universal implied duty on contracting parties to perform their obligations in good faith.² This position differs from other jurisdictions like France, Australia, the United States

¹ J Garger, 'Translating Arguendo and Bona Fide from Latin to English' [2012] BHE

² M Brown, 'Good faith – is there a new implied duty in English contract law?' [2013] LU 1, 1

and many others. Under the jurisdictions of the above mentioned countries, parties should act in good faith in the performance of their agreed contracts.

Under the French Jurisdiction, Good faith is defined in paragraph 3 of Article 1134 of the Civil Code whereby “contracts must be carried out with good faith”³ and Article 1135 of the same Code provide on the basis of equity that “contractual agreements are binding not only for what they state but also with regard to all the consequences that fairness, custom or law give to the obligation according to its nature”.⁴

Designed to correct certain behaviour, good faith keeps the contract in line with morality. Good faith thus is becoming more like a behavioural guide than a simple contractual obligation giving rise to liability in torts in accordance with Article 1382 of the Civil Code.⁵ Thus not respecting the principle of good faith would not affect the contract but will definitely give rise to liability in Torts.

So we can clearly see from the above analysis that the principle of good faith is viewed differently in different jurisdictions and there is a notable difference between French Law and English upon how good faith is perceived. There are other interpretations of *good faith* in other jurisdictions but for the sake of this essay we shall keep the comparison between only the French legal system and the English legal system and focus more on the theory of good faith as per the Convention on Contracts for the International Sale of Goods 1980 referred to as the CISG.

One of the biggest challenges faced by drafters of the United Nations Convention on Contracts for the International Sales of Goods (CISG) was attempting to resolve the existing divisions between Civil law and Common law jurisdictions on the principle of good faith.⁶

The proposals were presented by both Civil law and Common law delegates with Civil law delegates favouring the provision of a duty of good faith on parties of the CISG whereas the Common Law delegates were totally against such provision. This diversion in views regarding the parameters of good faith represented a challenging problem to the drafters of the CISG. Finally a compromise was reached which subsequently became Article 7 of the CISG.

Article 7(1) of the CISG provides that: “*In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*”⁷

³ G Robin, 'The principle of good faith in international contracts' [2005] IBLJ 1, 1

⁴ G Robin, 'The principle of good faith in international contracts' [2005] IBLJ 1, 1

⁵ G Robin, 'The principle of good faith in international contracts' [2005] IBLJ 1, 1

⁶ EC Zaccaria, 'The Dilemma of Good Faith in International Commercial Trade' [2004] MJBL 101, 104

⁷ D Sim, 'The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods' (ciscg.law.pace.edu 2001) < <http://www.ciscg.law.pace.edu/ciscg/biblio/sim1.html> > accessed 17 January 2017

It is to be noted that the Hungarian delegate did submit an earlier draft requiring the contracting parties to '*observe the principles of fair dealing and to act in good faith*'⁸

This was submitted during the formation phase of the CISG, it was later altered due to vagueness of the concept of good faith and subsequently it would result in a uniform interpretation.⁹ It could mean "*different things to different people in different moods at different times and in different places*".¹⁰

It was discarded as such vagueness could bring an element of uncertainty in International Trade and another argument why such proposal was rejected was that the obligation of good faith on parties would not be necessary as this principle is already well settled in every legal system.¹¹ By contrast, the Civil law delegates supported the Hungarian proposal as according to them the principle of good faith has already got universal recognition and including it in the CISG would not do so much harm.

Eventually after a heated and animated debate, the working group accepted what is qualified as a '*strange arrangement*', '*an awkward compromise*' or '*a rather peculiar provision*', incorporating the principle of good faith in Article 7.¹²

After we've had a look at some of the main arguments for and against the drafting of Article 7, let's now analyse the concept of good under the CISG and whether it is regarded as a mere interpretative tool for the convention or is it regarded as standard of behaviour for contracting parties?¹³

Commentators and academics support the belief that Article 7(1) of the CISG should be narrowly construed, and good faith should not be considered only as a mere instrument for the interpretation of the Convention.¹⁴ According to Professor Honnold, good faith in the CISG is only used for the interpretation of the Convention itself. He accepted that good faith works in line with the other articles of the CISG, but more in the interpretation part than in practice or in the performance of the contract.¹⁵

His point of view was shared by many other commentators, Professor Farnsworth's view on this issue is that "this provision does no more than instruct a court interpreting the

⁸ PJ Powers, 'Defining the Undefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods' [1999] JLC 333, 342

⁹ PJ Powers, 'Defining the Undefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods' [1999] JLC 333, 343

¹⁰ EC Zaccaria, 'The Dilemma of Good Faith in International Commercial Trade' [2004] MJBL 101, 105

¹¹ EC Zaccaria, 'The Dilemma of Good Faith in International Commercial Trade' [2004] MJBL 101, 105

¹² EC Zaccaria, 'The Dilemma of Good Faith in International Commercial Trade' [2004] MJBL 101, 106

¹³ EC Zaccaria, 'The Dilemma of Good Faith in International Commercial Trade' [2004] MJBL 101, 106

¹⁴ EC Zaccaria, 'The Dilemma of Good Faith in International Commercial Trade' [2004] MJBL 101, 106

¹⁵ PJ Powers, 'Defining the Undefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods' [1999] JLC 333, 344

Convention's provisions to consider the importance of the listed factors”,¹⁶ these factors are mainly (i) the international character of the convention should be taken into consideration, (ii) uniformity should be promoted in its application and (iii) good faith should be observed.

If read in a literal way, it does no more than advising the court who is interpreting the provision found in the convention to go through and consider the importance of the listed factors.¹⁷

A contrary view does exist on this issue, Professor Peter Schlechtriem finds that the concept of good faith "should amount to a general principle, such as section 242 of the German BGB", although it is open to interpretation.¹⁸ He prefers to interpret Article 7(1) in a broader way.

But most commentators would agree on the fact that good faith is an important criteria which aid judges and arbitrators in the interpretation of the Convention. This position was acknowledged by the ICC Court of Arbitration Case No. 8611 of 1997, where the court stated that "*[s]ince the provisions of Art. 7(1) CISG concerns only the interpretation of the Convention, no collateral obligation may be derived from the 'promotion of good faith'*"¹⁹

Even though it has been accepted that article 7(1) does not impose an obligation of good faith on contracting parties, but only requires provisions of the CISG to be interpreted using good faith, there exists a problem. The CISG provides for the obligations and rights of contracting parties to an international sale of goods. Since article 7(1) provides that the principle of good faith should be respected when interpreting these provisions, it is definitely not possible to interpret the CISG in good faith without indirectly affecting the conduct of parties.²⁰

A Hungarian case also known as the mushroom's case also "*considered a good faith obligation. In that case, a Hungarian supplier of mushrooms demanded a guarantee from an Austrian buyer. Where the buyer provided an outdated guarantee, the court held that to do so was a breach of the duty of Good Faith. The court specifically stated that in its view, Good Faith is not only an interpretive tool to be applied to the CISG itself, but a standard of behaviour to be observed by the parties too*".²¹

Many delegates were in favour for the imposition of a duty to apply the doctrine of good faith on the contracting parties, while others mainly from Common law countries feared that this

¹⁶ EC Zaccaria, 'The Dilemma of Good Faith in International Commercial Trade' [2004] MJBL 101, 106

¹⁷ A Farnsworth, ' Duties of Good Faith and Fair Dealing Under The Unidroit Principles, Relevant International Conventions, and National Laws' [1994] TJICL 47, 55

¹⁸ PJ Powers, ' Defining the Undefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods' [1999] JLC 333, 345

¹⁹ T Keily, ' Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (cisgw3.law.pace.edu 1999) < <http://cisgw3.law.pace.edu/cisg/biblio/keily.html>> accessed 17 January 2017

²⁰ T Keily, ' Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (cisgw3.law.pace.edu 1999) < <http://cisgw3.law.pace.edu/cisg/biblio/keily.html>> accessed 17 January 2017

²¹ Hungary 17 November 1995 Budapest Arbitration proceeding Vb 94124
<http://cisgw3.law.pace.edu/cases/951117h1.html>

could be too unrestricted for judges in an international setting and they therefore opposed to the use of the general principle of good faith.²²

So when assessing the result and the impact of the compromise, it can be noted that in countries where the convention applies, it only serves as a substitute for the comparable domestic when the subject matter of the dispute deals with an international sale of goods.²³

Thus, we can notice that there is no such uniform commercial code that can deal with all the circumstances within the scope of its application. To overcome the problem of filling those 'gaps' within the CISG, article 7(2) was introduced.²⁴

Article 7(2) provides that:

*"Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."*²⁵

Consequently, to assess whether a duty of good faith exists in a commercial transaction between an American seller and a Dutch buyer will depend on which of following three possible interpretations of the Convention is used.²⁶

Firstly, there shall be a literal reading of the convention, so as not to expressly settle the question. Sometimes, it might be possible that a duty of good faith cannot be found from the general principles of the Convention. In such a case, either Dutch or American domestic law would apply.²⁷ Secondly, the Convention could be read literally, but this time a duty of good faith might be obtained from the general principles of the convention. In that event, the parties would be bound by that duty, and the court is deemed to be warranted by the Convention.²⁸ Thirdly, there might not a literal reading of the convention. The provision that requires the interpreting court to consider the observance of good faith might instead be read to in a

²² A Farnsworth, 'Duties of Good Faith and Fair Dealing Under The Unidroit Principles, Relevant International Conventions, and National Laws' [1994] TJICL 47, 57

²³ A Farnsworth, 'Duties of Good Faith and Fair Dealing Under The Unidroit Principles, Relevant International Conventions, and National Laws' [1994] TJICL 47, 55

²⁴ T Keily, 'Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (cisgw3.law.pace.edu 1999) <<http://cisgw3.law.pace.edu/cisg/biblio/keily.html>> accessed 18 January 2017

²⁵ D Sim, 'The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods' (cisg.law.pace.edu 2001) <<http://www.cisg.law.pace.edu/cisg/biblio/sim1.html>> accessed 18 January 2017

²⁶ A Farnsworth, 'Duties of Good Faith and Fair Dealing Under The Unidroit Principles, Relevant International Conventions, and National Laws' [1994] TJICL 47, 56

²⁷ A Farnsworth, 'Duties of Good Faith and Fair Dealing Under The Unidroit Principles, Relevant International Conventions, and National Laws' [1994] TJICL 47, 56

²⁸ A Farnsworth, 'Duties of Good Faith and Fair Dealing Under The Unidroit Principles, Relevant International Conventions, and National Laws' [1994] TJICL 47, 56

particular way to impose that same duty on the parties. In that event, the parties would be bound to that duty in all cases.²⁹

Allan Farnsworth as being one of the delegates who against any reference to the concept of good faith strongly believes that the first solution remains the best option, but according to Professor Joachim Bonell the second interpretation is more favorable as he thinks that a number of articles that make specific reference to good faith “*constitute a particular application of this principle, thus confirming that good faith is also one of the 'general principles' underlying the Convention as a whole.*”³⁰

After a deep analysis of the situation, it can be deduced that there are indeed many arguments in favour but also against the good faith requirement in the CISG. It is obvious that there is a good faith requirement that is present when the provisions of the CISG are interpreted, and the courts should take this into consideration.

However, we personally think that the arguments against the inclusion of vague and moral term which was already rejected at the drafting stage make sense. But the main question is whether the duty of good faith can be extended to contract performance, as held by some courts, and also is there a pre-contractual duty of good faith?

After going through all these conflicting and competing arguments, it can be concluded that the CISG does lack uniformity with respect to the obligation of good faith. Article 7 requires parties to act in good faith while performing the contractual obligations, but defining good faith is often seen as complex. Good faith is a way of acting known to everybody but putting this behavior in words is difficult. Finally in order to have a uniform practice, the duty of good faith should be recognized by all contracting states. Also when interpreting the duty of good faith, the courts must come up with the same definition in order to achieve uniform results. The CISG is a very essential tool that commands much respect and adherence to it will certainly guarantee a uniform body of International trade.

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