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Good Faith as a Compromise between Civil Law and Common Law Jurisdictions in the Legislative History of the CISG

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Abstract: There is a wide recognition that encompassing an obligation of good faith in every commercial contract is one of the most important advances in contract law in the twentieth century [1]. Despite the fact that this concept has been incorporated in the vast majority of national legal systems, its precise scope and application may vary from one to another, depending on the commercial traditions and customs of each legal system [2]. The fact that good faith has been treated differently in different national legal systems has also been reflected on the international level through its inclusion in international legal instruments, one of which is the United Nations Convention on Contracts for the International Sale of Goods (hereafter CISG). In this article, the legislative history of the CISG will be closely examined with the purpose of finding out how a compromise was reached between the common law countries, which expressly objected to the imposition of a duty of good faith, and the civil law countries, which explicitly endorse its incorporation. A logical result flowing from this historical examination, as will be submitted, is that the conceptual ambiguity of good faith is the underlying reasoning behind their fundamentally different attitudes towards the incorporation of this notion in the international commercial context.

Keywords: CISG; International economic law; Commercial law; Good faith

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1. Introduction

Recognizing or applying the principle of good faith in commercial contract law has long been believed to be one of the major differences between civil and common law legal systems around the world. As Michael Bridge noted, "it is a notorious fact that one of the pressure points emerging when the common law and the civil law are set against each other lies in their differing attitudes to the notion of good faith. This was a matter of some significance during the evolution of the CISG" [3]. Before revealing the controversies surrounding the concept of good faith in the legislative history of this Convention, it is pertinent to understand its importance in the international

economic context. Commonly referred to as "…one of the most successful multilateral treaties ever in the field of agreements designed to unify rules traditionally addressed only in domestic legal systems," CISG was adopted in a diplomatic conference held in Vienna in 1980, which was attended by representatives of 62 countries and eight international organizations, after which it was accepted by two-thirds of the participants and came into force in the year 1988 and today includes more than 80 countries [4]. Since the CISG is a sales convention with the objective of providing a uniform and fair regime for the international sale of goods among the members [5], examining its legislative history will lead to a clearer understanding of why the incorporation of good faith is essentially a compromise reached by the representatives of different national legal systems [6].

The central argument advanced in this article is that the inability to precisely define the notion of good faith from a conceptual perspective is the main reason why the route to incorporate it in the CISG has been extremely controversial, which can be vividly demonstrated by its legislative history, particularly with regard to the Article 7(1) which focuses on "the observance of good faith in international trade." As will be shown below, the interpretation rule of the good faith principle in the CISG included in Article 7 is hugely vague and ambiguous, the interpretation of which essentially calls for the application of different national application techniques that are predicated on different national legal systems. In light of the jurisdictional differences between different legal systems towards good faith, reaching a consensus on the incorporation of a standard of such kind on the international level is understandably thorny.

2. An examination of the legislative history of good faith in the CISG

Due to the divergences and inconsistencies of domestic laws, certain matters should be compromised in the legislative history of the CISG, and good faith is undoubtedly one of them, which is considered to be contained in Article 7 and is regarded by some legal scholars as the most significant article in the Convention [7]. As a result, investigating the historical and legislative context of Article 7, albeit briefly, is crucial to discovering and ascertaining the original understanding of the good faith principle and its related interpretation and application in international trade. Honnold summarizes the legislative history of Article 7 in the CISG and groups it into four stages [8], each of which will be analyzed below.

2.1. Stage one: An initial proposed draft consisting of three paragraphs

In the initial stage of drafting Article 7 (stage one), various drafts and proposals were considered by the representative, which constitutes an early foundation for forming the current version. In fact, it was the Hungarian representative who submitted a proposal consisting of two paragraphs and the representative from the German Democratic Republic who proposed the third paragraph, which read as follows:

Paragraph I: In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith. Conduct violating these principles is devoid of any legal protection.

Paragraph II: The exclusion of liability for damage caused intentionally or with gross negligence is void.

Paragraph III: In case a party violates the duties of care customary in the preparation and formation of a contract of sale, the other party may claim compensation for costs borne by it.

Although the inclusion of good faith in the CISG triggered heated debates in the course of the discussion, no consensus was reached except for the first sentence of the first paragraph, which was eventually adopted by the Working Group with mature deliberation. The first sentence in the first paragraph was supported by the represen-

tatives on the grounds that it incorporated a desirable standard of business conduct in the process of the formation of contracts [9], a "good faith" standard which was recognized and codified in many civil legal systems, thus rendering it unreasonable to be excluded from the international trade. The second and third paragraphs above, by contrast, did not receive significant support from the representatives. Even the formulation of the proposed first paragraph was, in fact, deluged with antagonistic voices, mainly concerning the imprecision and vagueness of these terms enunciating the good faith principle [10]. Besides, the dissenting arguments also pointed at the judicial interpretation problems regarding these terms, alleging that the first sentence in the first paragraph would not have much effect until it had been judicially interpreted and applied over a long period of time. Clearly, Article 7 was not as accurate as everyone would have expected after more than 50 years of intensive work, and one may find it unsurprising to see that the compromises among draftsman from different jurisdictions regarding Article 7, albeit less explicitly, indeed dates back to the very starting point of its discussion, which was rightly observed by Andersen who argued that the drafting process of the CISG is "purely diplomatic" [11], combined with the "inequality of bargaining power" and "years of debate and compromise" among the representatives from different legal systems involved in that drafting.

2.2. Stage two: Legal certainty as a core debate

The second round of the debate, which has the strongest bearing on this article, centers on a more fundamental question: whether a more specific article with regard to good faith should be included in the CISG, which caused lengthy and heated discussions during which different views from different national representatives were expressed. Having a brief overview of the different stances taken by different jurisdictions in the drafting process, coupled with a detailed assessment of the good faith principle from a more conceptual perspective that has taken root in each jurisdiction, respectively [12].

Specifically, the supporters and defenders towards the inclusion of good faith principle in the CISG were mainly concerned with two questions: whether there should be a specific article dealing with good faith and if there should be one, and whether the consequence of breaching it should be expressly stipulated, both of which are related to the issue about legal certainty. Regarding the first question, those who supported the inclusion of a specific article on good faith (mainly civilian representatives) argued that many domestic legal systems have already incorporated good faith as an overarching contractual principle, so that it should be generally and universally recognized and accepted by the CISG as well to govern international trade. he opponents, by contrast, contended that adding a specific provision to act in good faith was entirely unnecessary, in the sense that this notion has already become implicit in almost all legal systems dealing with business activities. Similar to the first question, the debate on the second question has the same bearing on the matter on legal certainty: the main justification proposed by the opponents lies with the fact that the draft article did not stipulate the consequences of the failure to observe good faith, while those taking an opposite line believed that the gap regarding the lack of specification about the consequences of the breach of good faith could be filled by the subsequent development of case law in the future application of the CISG.

The second stage of the legislative process essentially reveals that good faith is a concept that might cause uncertainty in the contract. Traditionally, certainty was often regarded as a crucial factor when it comes to evaluating the intention of the contracting parties and boosting confidence in the commercial relationship, which was noted by Lord Browne-Wilkinson in Westdeutsche that:

[judges] have often warned against the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs.

Some scholars argued that legal certainty in commercial transactions is closely linked to legal predictability, in the sense that the contracting parties need to know where they stand by determining the specific terms of their contract and acting accordingly. Another reason these two elements are essentially interchangeable with each other is that only by entering into the contract with certainty can the contracting parties pre-determine their contractual rights and obligations. Without legal certainty and predictability, how could courts respect their agreement, enforce it, and solve any contractual dispute? Insofar as good faith is concerned, the difficulty in merging it with commercial certainty is the absence of a crystal clear definition of its conceptual understanding, which leaves little room for the judge to resort to the conceptual significance of this term to solve the dispute in a principled manner [13].

2.3. Stage three: The acceptance of the proposed draft

Stage three witnessed a significant breakthrough, in that a new article on good faith, going through a process of heated debates, various amendments as well as extensive revisions, was finally proposed by the special Working Group, which reads as follows:

In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and the observation of good faith in international trade.

2.4. Stage four: The codification of the current version of Article 7(1) and (2)

The preparation of the article with reference to good faith mentioned above was finally adopted with some minor changes, which reads exactly the same as the existing Article 7(1) Besides, the current version of Article 7(2) was proposed to solve those problematically unforeseen gaps that might potentially emerge in the future, which reads:

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.

3. Article 7 CISG calls for further interpretations

As mentioned above, Article 7, consisting of two paragraphs, was eventually approved by the Diplomatic Conference. However, as argued by some scholars, gaining a foothold of the principle of good faith in the CISG only represents a 'modest start,' which was open for further signature and ratification in the future. That is to say, including Article 7 in the CISG is far from the end of the story in respect of conceptualizing the notion of good faith at an international level; rather, it signifies the start of seemingly endless debates and discussions, just like a 'war minus the shooting.' Unlike other international instruments such as the Principles of European Contract Law and the Unidroit Principles of International Commercial Contracts that expressly impose a duty of good faith on the contracting parties, Article 7(1) was silent on this issue as this article was, in fact, a compromise reached after a number of common law countries objected to the imposition of a duty of good faith on the contracting parties themselves, which calls for further interpretation with regard being paid to "the observance of good faith in international trade." Michael Bridge noted that Article 7(1) was expressed in the "passive voice" and did not indicate exactly who or what should be paying regard to good faith. He went on to argue that for a contractual duty such as good faith, it must be mediated through the States parties to the CISG. At the risk of oversimplifying the English version of this article in the CISG, he thought Article 7(1) could be interpreted in the following vein:

"Parties derive their rights and duties from the contract in accordance with the CISG; the CISG is to be inter-

preted in accordance with good faith; therefore the parties' rights and duties are subject to good faith."

Similar to Article 7(1), Article 7(2) also calls for further interpretation regarding the precise gap-filling role played by it. Does a reference to the general principles on which the CISG was based when it came to matters that were dealt with in the CISG but not expressly settled by it essentially mean that this formula has opened the door to those who see good faith as an existing, universal norm? If so, how far can we argue that good faith has been recognized as a general principle underlying the CISG? More fundamentally, a harder question: can those unresolved matters be settled by invoking good faith to make a dynamic difference to the outcome? Bundles of questions should be further clarified regarding what Article 7(2) exactly means.

Since the adoption of Article 7, many scholars have attempted to comment on the role played by these two articles respectively, for the purpose of further uncovering different facets and functions of the good faith principle within the CISG. For example, Honold and Fransworth argue that Article 7 should be read literally, which should be applied no more than as guidance for a court in the interpretation of the CISG itself but not as a duty imposed on contracting parties [14]. Schlechtriem, by contrast, is of the view that good faith is applied not only in the interpretation of the CISG according to the strict textual meaning of Article 7(1), but also to the legal relations between the parties, but with regard to the later, it is possible only through Article 7(2), by being regarded as one of the general principles on which the CISG is based [15]. However, the issue that is of great interest and importance to this article with regard to the legislative history of Article 7, is not related to the question whether good faith should be applied only in the interpretation of the CISG itself or be applied both to the interpretation of the CISG and to the relationship between the contracting parties, which have been numerously investigated by many scholars. Rather, for the present purposes, regard has to be primarily made to something that is beyond the ultimate compromise of Article 7 manifested by its legislative history and something that would convincingly justify the differences between the stances taken by different jurisdictions towards the conceptual meaning of good faith. If the notion of good faith cannot be clarified to the fullest extent, how could this notion be expected to be transplanted into the international soil and thus to form an integral part of the international commercial transaction?

Clearly, since the legislative history of the CISG, or more precisely to say, any provisions included in the CISG, are in fact silent on the clarification of the notion of good faith, it is paramount to resort to national laws to achieve this purpose, which indisputably requires a comparative understanding of legal culture behind civil and common law jurisdictions towards this notion, particularly with regard to how it was formed and developed in a particular cultural community and gradually results in a irreconcilable discrepancy over the legal matters on this notion.

4. Conclusion

To sum up, the legislative history of the CISG shows that the concept of good faith is indeed a controversial issue, and opinion is divided between those who support its inclusion and those who are against it. It is not the purpose of this article to determine how to animate the further development of the Convention as regards the issue of good faith. Rather, on the basis of delineating the legislative history of Article 7, the main focus of this article is to demonstrate that a lack of conceptualization of the notion of good faith, including the difficulty of clarifying its conceptual background and synthesizing its core meanings, is the primary reasoning behind the controversy that has been triggered in the legislative history of the Article 7 CISG. Without clarifying the conceptual vagueness of good faith, any further attempt to develop it further in the context of international economic law would be impractical and unsound.

Disclosure statement

The author declares no conflict of interest.

References

[1] Van Alstine M, 1908, The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection (2005) 93 Geo. L.J. 1885.

[2] MacQueen H, 1999, Good Faith in the Scots Law of Contract; An Undisclosed Principle? Hart Publishing Oxford, 5–37.

[3] Bridge M, 2017, Good Faith, the Common Law, and the CISG. Uniform Law Review, 22(1): 98–115.

[4] United Nations Commission on International Trade Law (UNCITRAL), 1980, United Nations Convention on Contracts for the International Sale of Goods (CISG). viewed March 11, 2025, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html

[5] Honnold J, 1999, Uniform Law for International Sales, 3rd edn, Kluwer Law International.

[6] Felemegas J, n.d., The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation, Pace Review of the Convention on Contracts for the International Sale of Goods (CISG), Chapter 3, para 1.

[7] Koneru P, 1997, The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles. Minnesota Journal of Global Trade, 6: 105, 106.

[8] Honnold JO, 1989, Documentary History of the Uniform Law for International Sales, Kluwer Law and Taxation Publishers, 298.

[9] Huang X, Wan H, 2023, Determination and Application of General Principles of the United Nations Convention on Contracts for the International Sale of Goods. People's Justice, (08): 71–74.

[10] Zheng X, Han X, 2023, Research on the Applicable Rules of the United Nations Convention on Contracts for the International Sale of Goods (CISG)—Based on the Analysis of the Applicable Rules in the Chinese Mainland Region. North Economic and Trade, (01): 79–84.

[11] Wang H, Zhang S, 2021, Application of the United Nations Convention on Contracts for the International Sale of Goods in Chinese Courts. People's Justice, (31): 21–25.

[12] Wang L, 2021, Research on the Limitation and Exemption of Seller's Intellectual Property Rights Guarantee Liability in the United Nations Convention on Contracts for the International Sale of Goods. Heilongjiang Human Resources and Social Security, (08): 62–64.

[13] Liu Z, 2021, Research on the Exemption Clause of Article 79 of the United Nations Convention on Contracts for the International Sale of Goods, dissertation, Yunnan University.

[14] Honnold JO, 1999, Uniform Law for International Sales, Kluwer Law International, 3rd ed.

[15] Schlechtriem P, Schwenzer I, (eds), 2005, Commentary on the UN Convention on the International Sale of Goods (CISG), Oxford University Press, 2nd (English) ed, 812.95.