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Masters Dissertation

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Comparative Analysis of the Danish  
Principle of Loyalty and the CISG  
Principle of Good Faith



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*Author: Stephan Margaard Svendsen*

*Supervisor: Thomas Neumann*

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## Abstract

Dette speciale har til formål at undersøge lighederne mellem den danske loyalitetspligt og CISG-princippet ”Good Faith”. Specialet søger at vurdere hvor sammenlignelige principperne er, ved at gennemgå princippernes anvendelsesområde, hjemmel, retspraksis og deraf afledte forpligtelser. Specialet gør brug af den retsdogmatiske metode, samt den juridisk komparative metode. Herigennem forsøges at findes svar på, hvorledes domstolene benytter sig af samme fremgangsmåde og vurderingskriterier, til at udlede til deres konklusion. En problematik herved er, at finde sammenlignelig empiri, da retskilderne for det danske retssystem og CISG retssystemet ikke er ens. Derudover er anvendelsesområderne for principperne forskellige, hvilket afspejler sig i analysens udformning.

Specialets analysepunkter vil være opdelt efter deres respektive retssystem, således at der i analysepunktet først undersøges loyalitetsprincippet, og derefter undersøges CISG princippet ”Good Faith”. I slutningen af hvert enkelt analysepunkt, vil der være en opsamling af ligheden af principperne. Denne opsamling skal give læseren en klar forståelse for det netop analyserede, og vil give standpunkter i specialet, hvorved der opnås naturlige adskillelser og delkonklusioner.

Da loyalitetspligten favner bredt, har det ikke været muligt at inkludere alle områder, hvori loyalitetspligten har relevans. Derimod er en gennemgang af loyalitetspligten obligationsretlige grund inkluderet, for derved at give læseren en forståelse af pligtens omfang og anvendelsesområde. ”Good Faith-princippet” har derimod et klarlagt anvendelsesområde inden for CISG, hvorfor en kort gennemgang heraf, med kommentarer angående princippet, er inkluderet.

Hjemmelsspørgsmålet er mere enkelt for loyalitetspligten, hvorfor der ligesom tidligere, ikke vil blive henvist til samtlige love, hvori paragrafferne indeholder spor af loyalitetspligten. Derimod er retstilstanden for hjemlen til ”Good Faith-princippet” væsentligt mindre afklaret, og specialet vil derfor indeholde en analyse heraf, i forbindelse med en gennemgang af fortolkningsreglerne for CISG.

Retspraksisanalysen vil genanvende strukturen fra de tidligere delanalyser, hvorigennem der undersøges, om hvorvidt princippet "Good Faith" og loyalitetspligten bliver anvendt på sammenlignelige måder ved domstolene og voldgiftsretterne.

Den sidste del af analysen indeholder en opsamling på de tidligere delanalyser fund, hvori en gennemgang af de rettigheder og pligter, der kan udledes af principperne, vil blive gennemgået og sammenlignet.

Herefter kan en sammenligning gennemføres, hvorved delspørgsmålene til specialet kan besvares. Specialet afsluttes konkluderende, hvor læseren gerne skulle have opnået en forståelse for sammenligneligheden mellem loyalitetspligten og CISG-princippet "Good Faith".

## 1. Introduction

Since the United Nations Convention on Contracts for the International Sale of Goods (CISG) took effect in 1988<sup>1</sup>, the international trade and overall connectivity of the world have progressed immensely. With new technologies like the internet, which made its way into private homes in the early 90's, many of the barriers which previously reduced or even prohibited international trade has been broken down. This is clearly seen in the bloom of the current international trade<sup>2</sup>. Not only have the international trading community gotten easier ways to communicate with one another, but the sheer processing power of our tools have progressed as well. This has led us to a situation, where one can easily forget the safeguards that has been implemented in the past, to ensure that the international trade is promoted and developed under fair and equal conditions. Many readers will undoubtedly have tried ordering something online for their personal household, and at least in Denmark, we have quite large amounts of legislation to safeguard and help consumers, if the seller has not fulfilled the contract as promised. However, it is a lot less likely, that one has ever had any experience with commercial trading, and thus potential risks loom in the wake of the now evermore interconnected international trade.

Even though most scholars, judges, legislators, and traders will agree on the fact that trading loyally in good faith is essential to making trade flourish, no such express rule has been implemented in the CISG. Instead the CISG prompts the interpreter to have regard for the principle of good faith in his or her interpretation of the convention<sup>3</sup>. But how does one do this exactly? A lot of the states who have adopted the CISG have different legislative points of origin, and thus lawyers and judges might have different views on the principle of good faith. Even more interesting from a Danish point of view, how does the principle of good faith compare to our own principle of loyalty? Is such a comparison even viable? Can a Danish trader expect to have the same rights and duties when trading within the CISG, as when dealing inside Denmark? And even if similar duties and rights can be extracted from the principle of good faith, how are these substances actually applied by the courts?

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<sup>1</sup> Lookofsky, Joseph: Understanding the CISG. 4. Udgave (Worldwide Edition). DJØF Publishing Copenhagen, 2012, Page 1

<sup>2</sup> WTO – World Trade Report 2013 <https://ourworldindata.org/international-trade>

<sup>3</sup> CISG Article 7(1)

To answer these questions, one must dive deeper into the subject of the CISG and the roots of the Danish legislation. The aim of this dissertation is to provide clarity to these intangible principles, and to prepare legal practitioners for the different understandings of what seems to be a very simple term.

## 2. Problem Statement

**To what extent is the application of the CISG principle of good faith comparable to the application of the Danish principle of loyalty?**

To make the question more comprehensible, sub-questions have been added to the problem statement. This will not only help to provide an answer to the problem statement, but will also introduce a natural order of proceedings throughout analysis.

Before applying any principle, one must first ask what gives the principle authority. The first step towards determining the legal authority of a principle, is to determine when the principle is even applicable. The scope of the legislation must be determined, since the principles ultimately receive their authority, from the legislation in which they operate.

Secondly, the legislation in which the principles exist must be studied, to determine wherefrom the principles gain their authority, and whether the legislation provides any guidance to the substance and use of the principles.

Once the scope of application and the authority of the principles have been determined, one can proceed to investigate the material substance of the principles. The actual application must be investigated, so it becomes clear in what context the principles are being used in practice by the courts.

Lastly, once the field of application, the legal authority, and the legal application have been illuminated, one can list the rights, duties and prohibitions that are derived from the principles, if any of such exists.

The list of questions towards the answer to the problem statement is then as followed:

1. To what extend is the field of application for the principles of loyalty and good faith comparable?
2. To what extend can the authorities of the principles of loyalty and good faith be compared?
3. To what extend is the application of the principles of loyalty and good faith comparable?
4. To what extend can comparable rights or duties be extracted from the principles of loyalty and good faith?

### 3. Framework

To promote understanding and create a natural flow in the proceedings of this dissertation, the analysis has been divided accordingly to the sub-questions of the dissertation. Each sub-question has been further divided into sections for the Danish principle of loyalty and the principle of good faith. After each sub-part of the analysis, a recapitulation will follow and accumulate the main discoveries of the part of the analysis. These recapitulations will serve as part-conclusions and anchors throughout the analysis.

First the reader will be introduced to the field of application of the principles. Due to the nature of the field of application for the Danish principle of loyalty, the part regarding this principle will be somewhat undefined. The part regarding the CISG however, will be well defined through the provisions which determine the field of application of the CISG. The section will however not contain a complete and detailed analysis of the full application of the CISG, since the main objective is only to observe the application of good faith. Remarks regarding the application of good faith will be contained in the section accordingly.

Secondly, the reader will be presented with an analysis of authority behind the principles. Once again, the part regarding the Danish principle of loyalty will be somewhat undefined and incomplete, due to the nature of the principle. The authority of the CISG principle of good faith will be analysed through the interpretational rules of the CISG, which the principle of good faith is contained within. Yet again, the aim of the dissertation is not to provide an analysis of the interpretation of the CISG, so the content of the section will focus on the interpretation of the principle good faith.



A larger section regarding the actual application of the principles in case law will then follow, through which the reader will see the aforementioned field of application and authority in use. In this part, equal amounts of case law from both the Danish legal system and the CISG legal system will be thoroughly reviewed, and the deductions of the cases will be provided to underpin both the previous and following sections of the dissertation.

Lastly, a section regarding the duties and prohibitions, which can be derived from the principles, will be presented. This section will draw on the knowledge from the previous sections, and aims to provide the reader with a more substantive understanding of contents of the principles.

A comparison will then follow, where the different part-conclusions will be reviewed, so that subsequent conclusion of the dissertation can be presented.

#### 4. Delimitation

Before continuing further, the reader should understand that this dissertation will not provide a lengthy discussion of the rightful understanding or application of the principle good faith. The subject of how, when, and why the principle of good faith should be applied, merits its own dissertation. The sources required to answer such a question, are vastly different from the sources provided in the following. As such, remarks on the application and understanding of the principle of good faith, is only to be considered editorial remarks, which serve to supply the reader with food for thought and the means to critically review the application of the principle.

Furthermore, the dissertation will not contain full and detailed analysis' of the different legislations which are mentioned, as this extends far beyond the object and limitations of this dissertation. Neither will the dissertation be able to comment or involve all the relevant legal sources and scholarly works, simply because the topic of loyalty and good faith is immense.

The reader should also keep in mind, that the analysis of the principle of good faith can only serve as a temporary glance onto its substance, since the principle will develop over time. Furthermore, the international courts are not bound by the case law which are reviewed in the dissertation. Therefore, completely different outcome could prevail, if the court deciding the case are not persuaded by the arguments of the foreign case law.

It could be argued, that a better “apples to apples” comparison could be made, if all types of contracts which are excluded from the CISG, were also excluded from the analysis as well. This would however distort the review of the principle of loyalty, since it applies to more than one legal area, and a true comparison of the principles extent, should represent the full area of application, to provide a correct representation of the principle. It should however be noted, that some of the rules regarding consumer protection, will support a stricter valuation of the professional contractual parts behaviour, and thus could provide a false view of the principle of loyalty. Cases with express mentioning of consumerism has been avoided. Furthermore, the cases wherein the courts could have weighed the behaviour differently, have been commented, so that the reader is not persuaded by false evidence. Regardless, one should not forget or dismiss the influence the European Union has on the Danish legislation, though this topic is not part of the dissertation either.

Certain legal areas of Danish law have been delimited as well. This includes employment law, insurance law and other specialised legislations, since an incorporation of all relevant legislation with traces of the principles under review, would increase the size of the dissertation considerably. It would also add to confusion rather than clarity. Their existences are however duly noted by the author.

The principle of estoppel will be shortly mentioned, but a larger study of the principle has been left out. This is due to the fact, that while the principle does carry similarities to the principle of good faith, the whole promissory theory is simply too large to implement properly in the dissertation. There are however some resemblances between the principles of loyalty, principle of good faith and the promissory theory, so a complete limitation has not been possible.

Lastly, the rules from the Principles of European Contract Law (PECL) and the International Institute for the Unification of Private Law “UNIDROIT” principles have been excluded, since the object is to solely compare the CISG principle of good faith to the Danish principle of loyalty.

## 5. Methodology

The dissertation has been composed by following the Danish “legal dogmatic”<sup>4</sup> method and a mixture of the international analytical method and the comparative method “Länderberichte”<sup>5</sup>. The legal dogmatic method is used to describe, interpret, analyse and organise applicable law<sup>6</sup>. The method utilises three basic choices to analyse the chosen law, namely the choice of fact, the choice of rule and the choice of result<sup>7</sup>. The aim is to arrive at the same conclusion as a competent court, using the same interpretation and analysis<sup>8</sup>.

The comparative method’s aim to compare legal systems through interpretation of the legislation, the relevant literature and similar court rulings<sup>9</sup>. The aim is the same as with the legal dogmatic method, which is to deduct the conclusion that a foreign court would arrive at. However, the method includes comparing the differences or similarities of the conclusions from both the foreign and domestic courts. This should provide for a comparable result.

### 5.1 Legal sources

Before one can analyse legal issues, one must first define the relevant legal sources. These legal sources include legislation, preliminary work of the legislation, case law and relevant legal literature et cetera.

The analysis of the Danish part of this dissertation is based on the Nordic tradition, in which four main legal sources exist. These are the legislation, the case law, the customs, and the facts of the case. Legal commentaries and literature however, are not viewed as legal sources in Danish law<sup>10</sup>.

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<sup>4</sup> Munk-Hansen, Carsten: *Rettens Grund*, page 95-97

<sup>5</sup> Lando, Ole: *Juridisk Forskning - Komparativ ret i juridiske afhandlinger*, 2012 – page 88-95 - Munk-Hansen, 2011, page 108

<sup>6</sup> Munk-Hansen, 2011, page 95

<sup>7</sup> Munk-Hansen, 2011, page 113

<sup>8</sup> Munk-Hansen, 2011, page 118

<sup>9</sup> Lando, 2012, page 88-95

<sup>10</sup> Munk-Hansen, 2011, page 121

When interpreting the principle of loyalty in the dissertation, a single specific choice of legislation cannot logically be made<sup>11</sup>. Therefore the analysis will contain references to several legal sources. When appropriate, the preliminary work of the referenced legislation will be mentioned, if these provide an explanatory value to the principles within the legislation. Furthermore, case law will inevitably be a large part of the analysis, since precedence of the cases of yesteryear, are the foundation on which the law of obligations is built upon. The current precedence from case law will clarify the current legal state of the Danish principle of loyalty, and thus ensure a timely analysis of the principle.

Legal customs will also be part of the dissertation, since customs in the Nordic tradition are described as behaviour “*which for a long time have been, and still are, commonly followed, from the assumption that the behaviour is legally binding*”<sup>12</sup>. Customs are a large part of the Danish law of obligations, and are as such still relevant. However, since many of the customs within the Danish law of obligations have been codified, customs do not play as a significant role as it would have in previous generations.

The facts of the case are perhaps the most difficult legal source to describe. It stems from the issue which arises, when a judge must decide a case, to which there are no legal sources which accurately provides an answer<sup>13</sup>. The facts of the case have also been dubbed “factual considerations” in many cases. This name was meant to demystify the term “the facts of the case”. The facts of the case can be seen as the courts balance of considerations, which contain considerations of the decisions, economic consequences, culture, the need to promote certain behaviour, the effect on the community, due process, harmony within the legislation and more<sup>14</sup>.

The facts of the case can be said to be a preliminary stage of the legal doctrines, and from the pattern in the “factual considerations” mentioned just above, it is easy to draw comparisons to the notion of loyalty<sup>15</sup>.

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<sup>11</sup> Andersen, Mads Bryde og Lookofsky, Joseph: Lærebog i Obligationsret I – Ydelsen, beføjelser. 3. udgave. Thomson Reuters forlag, 2010, page 19

<sup>12</sup> Munk-Hansen, 2011, page 171

<sup>13</sup> Munk-Hansen, 2011, page 182-183

<sup>14</sup> Munk-Hansen, 2011, page 185

<sup>15</sup> Munk-Hansen, 2011, page 186

However, within the CISG additional legal sources exist. The courts are not only to consider their own domestic case law as legal sources, but also international decisions from tribunals and courts in other states<sup>16</sup>. CISG-literature and scholarly work are, in contrast to the Danish method, also to be considered legal sources within the CISG<sup>17</sup>. This is due to article 7(1) of the CISG, which commands national courts to have regard for the international character of the convention and good faith in international trade, when the courts interpret the convention. The question of what weight the courts should apply to foreign case law and scholarly opinions are unfortunately non-conclusive, and as such these additional CISG legal sources are to be considered persuasive arguments only<sup>18</sup>.

The facts of the case and legal customs are not explicitly part of the CISG legal sources, but one could argue that these are still subjacent legal sources, which are just not pronounced in the convention. This is however a discussion for another time. A more systematic examination of the interpretational rules of the CISG will be provided below.

## 5.2 Interpretation and Analysis

According to the method above, the dissertation aims to provide an analysis of the comparability of the legal systems, using the aforementioned legal sources. Since the legal sources varies between the two systems, a complete “apples to apples” comparison cannot be achieved. Instead the findings must be interpreted, so that the legal substance of the principles can be established.

The dissertation does not aim to solve a specific issue, but rather shed light on the comparability of the principles. As such the conclusion will not be a specific answer to a specific case. Instead the conclusion will contain summarisation of the legal comparisons of the dissertation, which will lead to the general answer of the extent of the comparison.

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16 Lookofsky, 2012, page 30-33 - Kritzer, Alberh H: Cornell Review of the Convention on Contracts for the International Sale of Goods (1995) - The Convention on Contracts for the International Sale of Goods: Scope, Interpretation and Resources, page 154-162 - Lookofsky, Joseph: Vindobona Journal of International Commercial Law and Arbitration (2004) - Digesting CISG Case Law: How Much Regard Should We Have?, page 182-189

17 Lookofsky, 2012, page 30-33 - Kritzer, 1995, page 154 - Honnold, John O., edit by Flechtner, Harry M.: Uniform Law for International Sales under the 1980 United Nations Convention. 4.th edition, Wolters Kluwer International, 2009, page 125

18 Lookofsky, 2012, page 33 - Lookofsky, 2004, page 185-186

## 6. Analysis

The following analysis will categorically try to answer the problem statement of the dissertation through the sub-questions contained within the problem statement, the first of which is regarding the field of application.

### 6.1 Field of application for the Principles

The question at hand:

- To what extent is the field of application for the principles of loyalty and good faith comparable?

To answer the question, the field of application of both the Danish principle of loyalty and the principle of good faith will be reviewed.

#### 6.1.1 Field of Application for the Danish Principle of Loyalty

To fully understand the application of the Danish principle of loyalty, one must first understand and recognise the legal background of the principle of loyalty, and the way the principle presently works within the Danish legislation.

The Danish Principle of Loyalty is a keystone of the Danish Law of Obligations<sup>19</sup>. The Law of Obligations is not a distinct written law, but are ground rules which have developed from case law through centuries<sup>20</sup>.

The word “obligation” is derived from the Latin word “*obligatio*”, which means that one part is indebted to another, or expressed more fittingly, a party is obligated towards the other party<sup>21</sup>. Simplified the laws of obligations govern the rules of debt between the trading parties. If you purchase

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<sup>19</sup> Bryde Andersen et al. 2010, page 29

<sup>20</sup> Andersen, Mads Bryde, Bärlund, Johan, Flodgren, Boel, Giertsen, Johan: Aftaleloven 100 år – Baggrund, status, udfordringer, fremtid. 1. udgave, Jurist og Økonomforbundets Forlag, 2015, page 63

<sup>21</sup> Bryde Andersen et al. 2010, page 17 - Clausen, Nis Jul, Edlund, Hans Henrik og Ørgaard, Anders.: Købsretten. 5. udgave. Karnov Group forlag, 2012, page 15

a car from a dealership, the salesman owes you a car, and in return you owe the salesman the purchase price of the car. The person who purchases the car is known as the debtor of money, and the creditor of the car. The person who sells the car is logically the debtor of the car and the creditor of money. This setup is however not practical in realm outside academics, and thus normally a money creditor is typically known as the seller, and the creditor of goods are typically known as the buyer.

The field of application of the Danish Law of Obligations is extensive, since it is not bound only to the Danish Sale of Goods act. It rather extends to all legal cases in which persons are indebted. This extends far beyond the field of application for the Danish Sale of Goods act, and thus the rules of the Law of Obligations are tied to more than one legislation. This includes the Danish Contracts Act, the Debt Instruments Act, the Insurance Contracts Act, the Liability for Damages act and many others. It covers all the cases in which a person is indebted to someone else<sup>22</sup>. Mads Bryde Andersen limits the reach of the Law of Obligations as such: *“The teachings of the Law of Obligations cover mainly property obligations, e.g., the obligations which emerge from private person’s dispositions or tortious acts, and which relates to money and other economical values.”*<sup>23</sup>

The rules within the Danish Law of Obligation cover three basic steps in the life of an obligation. The first step is the determination of the legal basis for the obligation. Within this step, are the teachings of contract validity and its binding effects. The second step is regarding the performance itself. This involves determining what the performance the contract entails, and if no such determination can be made, the gaps in the contract must be filled by interpretation. The interpretation follows the principles from the Law of Obligations or the principles contained in either general or specific applicable legislation. The final step involves either fulfilment of the contract, or a claim of remedies which the favoured party can utilise, if the performance is non-conforming with the obligation<sup>24</sup>.

These rules contained in the Danish Law of Obligations have been developed through the ages and have been influenced from neighbouring societies. In practice, legal advisers often, and rightfully so, refer to the Danish Sale of Goods Act, when an argument is to be made regarding the Danish Law of Obligations. This is accepted since some of the legislation within the Danish Sale of Goods Act are

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<sup>22</sup> Bryde Andersen et al. 2010, page 17-25 - Gomard, Berhnhard: Obligationsret, del 1. 5. Udgave. Jurist og Økonomforbundets Forlag, 2016, page 15-19

<sup>23</sup> Bryde Andersen et al. 2010, page 17

<sup>24</sup> Bryde Andersen et al. 2010, page 19-20

de facto the same rules, just written down and modified to suit modern needs. The same applies with the Danish Contracts Act.<sup>25</sup>

As drawn from the section above, the principle of loyalty is not confined to one specific type of transaction, but can be applied in all the branches which the Law of Obligations covers. However, since many of the principles contained within the Law of Obligations have now been codified in Danish legislation, the principle of loyalty lives on in the articles of the Danish legislation.

The field of application for the principle of loyalty is thus not confined to a single legislation, but can be applied throughout the legal sphere of debts and obligations.

#### 6.1.2 Field of Application for the CISG Principle of Good faith

To apply the CISG-principle of good faith contained in article 7(1), one must naturally first be able to apply the CISG at all. While the field of application for the Danish Principle of Loyalty is somewhat vague, the field of application for the CISG is well defined and clear. The field of application for the CISG has been neatly outlined by the requirements for using the CISG contained in articles 1 to 6. To apply the CISG, all the requirements must be met.

To keep the dissertation focused, the requirements for the application of the CISG will not be thoroughly explained, since the object of the dissertation is not to clarify the general rules of application, but to specifically determine the similarities between the principle of good faith and the principle of loyalty. As such, one should review the following as a generalisation, and seek further insights in the treaty text itself or in scholarly works, if one wish to gain a more complete understanding of the application of the CISG.

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<sup>25</sup> Kristensen, Lars Hedegaard, Nielsen, Anne-Dorte Bruun, Iversen, Torsten: Lærebog i dansk og international køberet. 4. udgave, Jurist og Økonomforbundets Forlag, 2011, page 27 - Bryde Andersen et al. 2010, page 22-23 - Gomard 2016, page 15-19 - Lookofsky, Joseph og Ulfbeck, Vibe: Køb – Dansk indenlandsk køberet. 4. udgave. Jurist- og Økonomforbundets Forlag, 2015, page 14-19



## *International Contract*

For a sale to fall within the sphere of application of the CISG, the sale must be an international sale<sup>26</sup>. However, just like in Danish law, the application of the CISG rests on the fact that the contract in question, can be characterised as a “sale” of “goods”. No definition of these key concepts “sale” and “goods” are however provided by the convention text. Yet, from the wording and interpretation of article 30 and article 53<sup>27</sup>, the terms can be classified to involve the delivery of goods and transferal of the property rights within the goods, in return for payment<sup>28</sup>.

According to article 1(1) subparagraph (a) and (b), the term international refers to the situation, where the sale of goods is between parties whose place of business is in different CISG contracting states (1(1)(a)), or if the rules of private international law lead to application of the law of a CISG contracting state (1(1)(b)). Article 1(1)(a) is arguable the most important and the simplest rule to understand. Most of the first-worlds trading economies are CISG contracting states, and the chances of the CISG applying by virtue of article 1(1)(a) are thus quite large<sup>29</sup>. Article 1(1)(b) is a little harder to comprehend, since it can seem counterintuitive to place non-contracting states within the scope of the CISG. To simplify the reasoning behind this, it is important to note, that since all contracting states have ratified the CISG, the CISG is already part of the state’s domestic legislation. In Denmark, there are two co-existing sale of goods acts, one for domestic trade and one for international trade. Article 1(1)(b) simply elucidate the fact, that if the rules of conflict law point towards jurisdiction in Denmark, the CISG should apply regardless, since the CISG is part of Danish domestic legislation<sup>30</sup>. The sphere of application for the CISG can thus be broken down into the following main instances. International trades of which both parties have their place of business in a CISG contracting state, by which the CISG applies. International trades where only one party have their place of business in a

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<sup>26</sup> Lookofsky, 2012, page 12 - Gomard et al. 2014, page 53-55 - Kristensen m.fl. 2011, page 241, Ferrari, Franco: *Contracts for the International Sale of Goods*, 1. Udgave, Martinus Nijhoff Publishers, 2012, page 60 - Honnold, John O., edit by Flechtner, Harry M.: *Uniform Law for International Sales under the 1980 United Nations Convention*. 4.th edition, Wolters Kluwer International, 2009, page 40

<sup>27</sup> Schlechtriem, Peter: *Commentary on the UN Convention on The International Sale of Goods (CISG)*. 2. Udgave. Clarendon Press, Oxford, 1998, page 2-3 - Gomard, Bernhard and Henschel, René Franz: *International Købelov (CISG)*. 1. Udgave Jurist og Økonomforbundets Forlag, 2014, page 55-56 - Honnold et al., 2009, page 55

<sup>28</sup> Holdsworth, Judith L.: *Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* - Gomard et al. 2014, page 55-57 - Kristensen m.fl. 2011, page 245

<sup>29</sup> Lookofsky, 2012, page 12

<sup>30</sup> Lookofsky, 2012, page 13

CISG contracting state, but the rules of private international law points towards the contracting state, and thus the CISG applies. On the contrary if the private international law point towards the non-contracting state, the CISG will not apply, and the domestic law of that state will decide the case. Lastly, the CISG can apply even if none of the traders have their places of business in a contracting state, but have specified in the contract, that the domestic law of a contracting state shall apply. Since CISG is part of contracting states domestic law, the CISG will apply<sup>31</sup>.

However, article 95 reservations prevent article 1(1)(b) from taking effect. For example, a dispute between two traders, one with place of business in a contracting state called trader A and one in a non-contracting state called trader B. Even if the rules of private international law lead towards A's domestic law, by which the CISG should apply according to 1(1)(b), this will not be the case if trader A's state has made an article 95 reservation<sup>32</sup>. Another potential barrier for 1(1)(b) is the special interpretation of German courts. In the case as just above, the CISG would be applied, if trader A and B decided to settle the case in a competent German court. However, Germany has announced that they will not interpret the CISG as applicable in this instance, since trader A's state has made an article 95 reservation, and as thus has specifically decided that the CISG should not apply in this instance<sup>33</sup>.

There are many other variable outcomes of the article 1(1)(b) rule, but since an increasing part of the worlds trading nations have all ratified the CISG, the simple article 1(1)(a) rule will more frequently solve the issue of application<sup>34</sup>.

### *Sale of Goods*

Article 2 lists all the types of sales, which are specifically excluded from the CISG. The most prominent exclusion of sales, is the "*sale of goods bought for personal, family or household use*", according to article 2(a). This exclusion mean that all sales to consumers are excluded from the CISG, and matters regarding consumer purchases, shall be resolved using private international law instead. Article 2 (b)-(f) also excludes sales by auction, on execution or otherwise by authority of law, of

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<sup>31</sup> Lookofsky, 2012, page 13

<sup>32</sup> Schlechtriem, 1998, page 27-28 - Gomard et al. 2014, page 61-63 - Honnold et al., 2009, page 40

<sup>33</sup> Lookofsky, 2012, page 16 - Ferrari, 2012, page 90-91

<sup>34</sup> Lookofsky, 2012, page 16

stocks, shares, investment securities, negotiable instruments or money, of ships, vessels, hovercrafts, aircrafts or of electricity<sup>35</sup>.

By virtue of the definition of “sale” and “goods”, services are also excluded from the CISG. If a mixture of goods and services are present in a contract, the preponderant part of the obligations will determine whether the CISG is applicable or not<sup>36</sup>.

### *Goods in Stock or Goods to be Manufactured*

Article 3 (1) and (2) solve the issue that can derive from mixed contracts. According to article 3(1), the CISG only applies to contracts, in which goods are to be manufactured, if the seller supplies the substantial part of the materials which are needed to manufacture the goods. Article 3(2) relates to situations where goods already exist, but part of the obligation of the seller is the furnishing of the goods. In this case, the CISG only applies if the preponderant part of the obligation is the goods, and not the furnishing of the goods<sup>37</sup>.

### *Issue Governed*

Even though the transferal of property is contained within the definition of a CISG sale, there are certain issues that the CISG does not govern. According to article 4(a), the convention is specifically not concerned with issues of validity of the contract, of any of its provisions or of any usage of the contract. Article 4(b) states that the convention is also not concerned with any effect the contract may have on the property of the goods sold. The CISG only regulates objective rules regarding the creation of a contract. If either of these issues arise, the solution must be found within domestic law, such as the Danish Contracts act or the Danish law of Obligations and Law of Property<sup>38</sup>. The use of article 4 is interesting, since it could potentially conflict with the principle of good faith.

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<sup>35</sup> Lookofsky, 2012, page 16-17 - Gomard et al. 2014, page 65-70 - Ferrari, 2012, page 129-149 - Honnold et al., 2009, page 49-63

<sup>36</sup> Lookofsky, 2012, page 18 - Ferrari, 2012, page 115-121 - Honnold et al., 2009, page 49-63

<sup>37</sup> Honnold et al., 2009, page 63-73

<sup>38</sup> Lookofsky, 2012, page 20-23 - Gomard et al. 2014, page 75-82

### *Concerning Liability for Death or Personal Injury*

While the CISG does impose liability for damages in association with contracts and sales under the CISG, any liability for death or personal injury are left to national tort law according to article 5<sup>39</sup>. Certain issues can arise from this disposition though, since delict claims can co-exist with contract based claims in some jurisdictions while not being able to in others. However, since the aim of this dissertation is not to elaborate on liability issues, further explanation of the interplay between contractual and delictual claims must be discovered elsewhere<sup>40</sup>.

### *Contractual Freedom*

Perhaps the most conspicuous limitation to the field of application of the CISG is found in article 6. Article 6 provides the trading parties with the freedom to contract out of the CISG. Much like in the Danish Sale of Goods act, this freedom extends both to opt out of the CISG completely, or to alter and vary from specific parts and articles in the CISG<sup>41</sup>. It is however very important to note, that if trading parties opt out of the CISG all together, by contracting that Danish domestic law should apply instead, the CISG will still apply, since the CISG is an integral part of Danish law. If the parties want to apply the Danish Sale of Goods act and the Danish Contracts act, these specific legislations should be expressly stated in the contract<sup>42</sup>. Some scholars believe the contrary to be true though.<sup>43</sup>

If the trading parties do not reside in a CISG contracting state, but still want to apply the CISG, applying the CISG is still an option if the private international laws of the state will allow it<sup>44</sup>.

Like in the Danish Sale of Goods act, implicit exclusions or variations from the convention text are also included within the contractual freedom, though the CISG does not directly refer to implicit derogations. The reference has been excluded from the convention text to prevent courts from inferring exclusions of the CISG too often, and to promote explicit derogations in the contract to

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<sup>39</sup> Gomard et al. 2014, page 82-86 - Honnold et al., 2009, page 93-102

<sup>40</sup> Lookofsky, 2012, page 23-24, Honnold, 2009, page 93-95

<sup>41</sup> Lookofsky, 2012, page 15 - Gomard et al. 2014, page 87-88 - Honnold et al., 2009, page 103-104

<sup>42</sup> Lookofsky, 2012, page 25 - Honnold et al., 2009, page 104-108

<sup>43</sup> Ferrari, 2012, page 178

<sup>44</sup> Ferrari, 2012, page 179-182

prevent unbalance and uncertainties<sup>45</sup>. Exclusions and variations are not restricted to limiting the application of the CISG provisions. The parties can choose to expand provisions if they so choose, by for example increasing liability ceilings, increasing interest rates or other remedies for breach. The contractual freedom of article 6 could potentially also conflict with the principle of good faith, if a party tries to exclude or derogate certain provisions of the CISG in bad faith.

### 6.1.3 Recapitulation:

From the extraction of the expositions above, it can generally be concluded that the fields of application of the principles is quite different. The Danish principle of loyalty is derived from generations of legal practice, and is an integral part of a particularly wide-stretching legal area. The principle of loyalty is not restricted solely to matters of international trade, like the CISG principle of good faith, but can exist as a principle behind and in the legislation.

The principle of good faith however, can only be applied if all the requirements for the CISG are met. This constraint the application of the principle of good faith to contracts solely related to international trade, of which the principle is further constricted by the exclusion of goods in article 2 and 3. Furthermore, the CISG is not concerned with the validity of the contract, which is included in the application of the Danish principle of loyalty.

The difference in applicable situations is striking, and the conclusion must be that the principle of good faith is severely limited in its sphere of application in comparison to the Danish principle of loyalty.

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<sup>45</sup> Schlechtriem, 1998, page 54-55 - Ferrari, 2012, page 159-171

## 6.2 The Authority of the Principles

The question at hand:

- To what extent can the authorities of the principles of loyalty and good faith be compared?

Normally when looking for authority to a legal statement, one can consult the black letter text of whatever legislation is applicable. But as mentioned above, the principle of loyalty is not confined to a single article, but is rather a principle which has helped shape the form of many articles in various legislations. Contrary, the only mentioning of good faith in the CISG, is found in article 7(1), but good faith could however gain authority from many other sources.

This begs the question of how can one interpret the principles, and even more relevant, how can one define the extend of the principles, if no delimitation is found within the legislation?

Before reading the following, the reader should keep in mind, that the black letter text of a legislation is not the only source of a principles authority. Case law is equally important, but for the sake of simplicity and comparability, the following section will not contain much caselaw. Instead, case law will be reviewed later during the section of application in case law, during which references to the articles explained in this section, will be drawn into the analysis.

### 6.2.1 The Authority of the Danish Principle of Loyalty

As previously mentioned under the topic of field of application, the Danish Principle of loyalty originally gained its authority from a large amount of case law, which had built up over the decades. Following the drafting of the Danish sales of goods act in 1906, many of the legal standards and principles, which were previously unwritten, became text bound hard law<sup>46</sup>. The Danish Sale of Goods act did however not contain all the nuances of the principle of loyalty, so other standards have been codified since then<sup>47</sup>. However, not all the rules regarding the Danish principle of loyalty have

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<sup>46</sup> Lookofsky og Ulfbeck, 2015, page 14-19

<sup>47</sup> Gomard, Bernhard, Pedersen, Hans Viggo Godsk og Ørgaard, Anders: Almindelig kontraktsret. 4. udgave. Jurist- og Økonomforbundets Forlag, 2012, page 20

specific authority from neither legislation or the contract, and some are therefore still reliant of the authority provided by case law<sup>48</sup>.

Since the principle of loyalty is not the main obligation of the parties, but rather an implied accessory obligation, firm rules regarding the general authority of the principle of loyalty are impossible to create. The authority of the principles will follow the scope of application, which is provided by the relevant case in question<sup>49</sup>. The main thought behind the principles is that every party has a responsibility to reasonably consider the other party's interest<sup>50</sup>.

It would require a vast amount of research and writing to address all the Danish articles with traces of the principle of loyalty, and the following will thus not provide the complete picture. With that said, some main derivative doctrines can be named, and these will be reviewed below.

### *The General Duty to Act Loyal*

The first of these doctrines contains the general duty to act loyally towards one's counterpart. In Denmark, the principle of loyalty is applied as a mandatory obligation of the parties, and is raised to the same level of fundamentality as the obligation to perform.<sup>51</sup> This obligation applies whether it has been expressed in the contract or not, and cannot logically be opted out of.<sup>52</sup> The concept of this standard is, that a failure to conduct trade loyally, and with both parties' best interest in mind, can constitute a breach of contract, the same way as any other contractual breach.<sup>53</sup> Within this general obligation lies the doctrine of assumptions, which appear in the form of a party's rightful assumptions as to what the contract may yield. Rules regarding assumptions in trade are found partially within the

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<sup>48</sup> Bryde Andersen et al. 2010, page 24-25

<sup>49</sup> Gomard 2016, page 64

<sup>50</sup> Gomard 2016, page 64 - Bryde Andersen et al. 2010, page 68-70

<sup>51</sup> Bryde Andersen et al. 2010, page 70

<sup>52</sup> Lookofsky og Ulfbeck, 2015, page 66-67

<sup>53</sup> Bryde Andersen et al. 2010, page 68 - Lookofsky og Ulfbeck, 2015, page 66 - Clausen, Nis Jul, Edlund, Hans Henrik og Ørsgaard, Anders.: Købsretten. 5. udgave. Karnov Group forlag, 2012, page 20 - Gomard 2016, page 64-66

Danish Contracts act articles 28-36<sup>54</sup>, but these articles do not cover the full extent of the doctrine of assumptions.

The general duty to act loyally can also be seen in the Danish Marketing Practice Act articles 1 and 2, which specifically prohibits disloyal competition. This is furthermore seen in the confidentiality clause within article 19<sup>55</sup>.

### *The General Duty to Cooperate*

The second of these doctrines is the duty of cooperation. While being closely related to the common standard of loyalty, the duty to cooperate is different since it specifically seeks action from the trading parties. According to this duty, a party cannot stand idle and watch his counterpart fall into despair. The trading parties have a common obligation to make the trade a success<sup>56</sup>. An example of this is seen in U.1997.557.H, which will be reviewed later, where the sellers lack of effort and cooperation constituted a breach. The notification rules, albeit they also belong within the duty of disclosure, also signifies a certain duty to cooperate. This applies to rules of notifications within several legislations, seen both in the Danish Contracts Act, the Danish Rent Act and Business Rent Act and more. Several articles within these legislations require notification without delay or as soon as possible, such as in the Danish Sale of Goods Act articles 12, 26, 27, 31, 32, 52, 81 and 85. The unintermittent notification required, can be viewed as a duty to cooperate, since it allows your counterpart to immediately make an informed decision of his following options and interests<sup>57</sup>.

### *The General Duty of Disclosure*

The third doctrine, is the duty of disclosure, which prompts the trading parties to loyally inform one another, and to correct misunderstandings and misinformation<sup>58</sup>. This duty has been codified in the

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<sup>54</sup> Andersen, Lennart Lyng: Aftaleloven med kommentarer. 6. udgave, Jurist og Økonomforbundets Forlag, 2014, page 184-186

<sup>55</sup> Bryde Andersen et al. 2010, page 54

<sup>56</sup> Bryde Andersen et al. 2010, page 69 - Lookofsky og Ulfbeck, 2015, page 66

<sup>57</sup> Nørager-Nielsen, Jacob, Theilgaard, Søren, Bjerg Hansen, Michael og Hørmann Pallesen, Martin: Købeloven med kommentarer. 3. udgave. Forlaget Thomsen, 2008., page 517 -518

<sup>58</sup> Nørager-Nielsen et al. 2008, page 771, Kristensen et al. 2011, page 111-112



Danish Sale of Goods act article 76<sup>59</sup> amongst others, which instructs the seller to inform the buyer of all relevant information, which could influence the buyers' assessment of the goods. In relation, the seller has a duty to provide guidance and advice. Article 76(3)(1) of the Danish Sale of Goods act, states that “*goods are non-conforming, if the seller has neglected to inform the buyer about circumstances, which have had effect on the buyer's evaluation of the goods, and the seller knew or should have known this*”<sup>60</sup>, which specifies that failure to comply with the duty of disclosure can constitute a breach<sup>61</sup>. Moreover, the notification rules found in the Danish legal system as previously mentioned, can also be regarded part of the duty of disclosure<sup>62</sup>. The duty to loyally inform one's counterpart is seen not only in the Danish Sale of Goods act, but also in the Danish Contracts act, for example article 30 regarding fraud<sup>63</sup>.

While it could seem that the duty of disclosure only applies for the seller, it does however also apply for the buyer. The buyer is loyally obligated to keep himself informed, which is manifested in the Danish Sale of Goods act articles 47 and 77(b)<sup>64</sup>. The rules are an extension of the Latin *caveat emptor* rule, which loosely translates to “buyer beware”, and basically states that “*what you see is what you get*”<sup>65</sup>. The premise is, that the buyer cannot claim that goods are non-conforming, if he has inspected the goods and seen potential defects or flaws. The thought of a buyer knowingly purchasing non-conforming goods, only later to claim remedies, seems disloyal to the same extend as a seller knowingly withholding information. Articles 47 and 77(b) of the Danish Sale of Goods act state that a buyer loses his rights to claim remedies, if the buyer was aware or should have been aware of the non-conformity<sup>66</sup>.

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<sup>59</sup> Clausen et al. 2012, page 28 - Købelovudvalget, Betænkning om forbrugerløb, Betænkning nr. 845, Det juridiske Laboratorium Københavns universitet, 1978 - page 46

<sup>60</sup> KBL § 76, stk. 3, nr. 1

<sup>61</sup> Lookofsky og Ulfbeck, 2015, page 88 - Nørager-Nielsen et al. 2008, page 1266-1267

<sup>62</sup> Nørager-Nielsen et al. 2008, page 517 - 518

<sup>63</sup> Clausen et al. 2012, page 166

<sup>64</sup> Clausen et al. 2012, page 194 - Nørager-Nielsen et al. 2008, page 906-920 and 1293-1295 - Kristensen et al. 2011, page 112-114

<sup>65</sup> Bryde Andersen et al. 2010, page 71

<sup>66</sup> Clausen et al. 2012, page 194

### *The General Duty of Solitude*

The fourth and final doctrine, is the duty of solitude. This principle prevents parties from exploiting unfair advantages or remedies, when a dispute can be resolved without causing the counterpart a loss, or where the loss can at least be lessened. Additionally, the duty obligates the parties to assist in the protection of the counterpart's interests.<sup>67</sup>

According to the "Danish Law 5-1-2", a contract is not binding if the contracts "*strides against the law or virtuousness*"<sup>68</sup>. The Danish contracts act article 33 states that "*a contract cannot be enforced, if doing so would stride against common integrity*"<sup>69</sup>, and article 36 states that a "*contract can be changed or disregarded, if it would be unfair or in conflict with honest conduct to enforce it*".<sup>70</sup> These rules directly exclude bad faith, but leaves the substantive evaluation of bad faith to the courts. While Danish Law 5-1-2 and article 33 of the Danish Contracts act directly address contracts in violation with virtuousness or common integrity<sup>71</sup>, article 36 goes beyond. Article 36 cannot only be used to counter bad faith, but can also be used in cases where upholding the contract as it stands, would be unreasonably burdensome for one of the parties involved<sup>72</sup>.

This follows the logic found in the Danish Sale of Goods Act article 33 and 55, which positively charges the parties with a duty to manage the other contracting party's interests if needed<sup>73</sup>. This extends to the situation, where a contractual claim has arisen. The claimant is obligated to minimise the damages to the furthest extend possible, which describes a common term in Danish law known as the *duty of mitigation*<sup>74</sup>.

While some of these principles and duties seem very closely related, one must remember that they all spring from the same main principle. Thus, there are bound to be some overlap, and the way the

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<sup>67</sup> Bryde Andersen et al. 2010, page 69 - Kristensen et al. 2011, page 101

<sup>68</sup> Gomard et al. 2012, page 36 - Andersen, Lennart Lynge, Madsen, Palle Bo, Nørgaard, Jørgen: Aftaler og Mellemmænd. 3. udgave, GadJura 1997, page 263

<sup>69</sup> Gomard et al. 2012, page 36 – Lennart Andersen et al. 1997, page 210

<sup>70</sup> Gomard et al. 2012, page 183 - Lennart Andersen et al. 1997, page 242-243

<sup>71</sup> Andersen, 2014, page 233-239

<sup>72</sup> Andersen, 2014, page 249

<sup>73</sup> Nørager-Nielsen et al. 2008, page 677-681 and 1036-4043

<sup>74</sup> Bryde Andersen et al. 2010, page 262 - Gomard 2016, page 65

principles are being used in the Danish legal system, cannot be described in absolutes, since the objective of all the duties is to ensure protection of value within trade and avoid unnecessary loss<sup>75</sup>.

While this section aimed to provide authority to principle of loyalty through the legislation, the upcoming section regarding the principles application, will add case law to the principle, which does not only exemplify the principles at work, but also adds to their authority.

### 6.2.2 The Authority of the CISG Principle Good Faith

The only article that specifically mentions good faith is article 7(1). This article serves as an interpretation guide, which commands the decision makers of the CISG, to interpret the convention in a way, which the founders of the convention thought as a necessity. However, the single mentioning of good faith in article 7(1) has given rise to many scholarly articles and comments on the matter of good faith<sup>76</sup>. A full explanation of what gives the principle of good faith its authority, is without a doubt a topic so vast and disputed, that answering the question completely goes beyond both the scope of the dissertation, and would also vastly exceed its limitations and constraints. Instead the dissertation will focus on the alleged sources to the authority of good faith, and not elaborate too much on whether the principle of good faith is applied correctly. As such the focus will be oriented towards “where and when” the principle is applied, and less about “why” it is applied in that context.

To fully understand the extend of the principle of good faith, and to understand why there are so many different opinions on the matter, one must first know how to view and interpret the CISG.

When interpreting the CISG, one must always have regard for its autonomous interpretation method<sup>77</sup>. When the CISG was drafted, the delegates from around the globe, who were working on the draft text, had different agendas and interests to care for, since they came from vastly different economies and regions of the world<sup>78</sup>. While the general population of the world has generally grown richer since

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<sup>75</sup> Gomard 2016, page 64-65

<sup>76</sup> Sim, Disa: The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods, September 2001, section IV, B, 2

<sup>77</sup> Sim, 2001, section I, C – Ferrari, 2012, page 60, Zeller, Bruno: Good Faith - The Scarlet Pimpernel of the CISG, May 2009, introduction section

<sup>78</sup> Schlechtriem, 1998, page 1-2

then<sup>79</sup>, the different regions and economies of the world are still not homogenous and uniform, and since many regions have different legislative backgrounds, the understanding and interpretation of legislation can vary from place to place.

A uniform international trade law is not going to appear uniform, if the different courts of the contracting states do not all interpret the law equally<sup>80</sup>. If the traders cannot rely on the understanding and continuity of the law which their contracts are subject to, the legislation has no purpose, since no trader would ever gamble with his business and risk losing in a foreign state, if he could be sure to win the same case in his own state. This could lead to situations where trades would not be conducted, since the traders could not accept to surrender their rights to foreign legal systems. This would undoubtedly counteract the growth in international trade. In the scenario above, the purpose of the CISG would be rendered pointless, since the trading parties would be engulfed with the same insecurity with the CISG as without it. Thus, traders could begin to opt out of the CISG, defeating its purpose all together<sup>81</sup>.

To counter the situation above, the CISG provides courts and arbitrators with tools, guidelines and commands as to how to understand and interpret the CISG. It is also in these rules that the only black letter mentioning of the principle of good faith is found, and it is from these rules that the principle gains its authority.

Before heading into the more specific interpretation rules, a short explanation of the principle of good faith will be reviewed. This is to clarify the importance that the principle has in the interpretational rules.

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<sup>79</sup> World Health Report, Global statistics 2009-2015 - <https://www.worldwealthreport.com/u/f7bzipkgk>

<sup>80</sup> Excerpt from Camilla Baasch Andersen, Francesco Mazzotta & Bruno Zeller, A Practitioner's guide to the CISG, Juris Publishing (May 2010) - The Nature of CISG Case Law: The Key to Uniformity and Many Persuasive Examples of Counsel to Draw from, page 850

<sup>81</sup> Lookofsky, 2012, page 31-32

## *Interpretation which Promotes the Observance of Good Faith in International Trade*

Article 7(1) states the following:

*(1) 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**<sup>82</sup>.*

When interpreting the CISG treaty, article 7(1) commands that the interpreters must observe and have regard for good faith in international trade. The rule is quite substantive, in contrast to the two other rules of article 7(1), and has its roots in the rules of conduct, by which parties concluding a contract should adhere<sup>83</sup>. Rules regarding “good faith”, “honesty” and “loyalty” is know from many domestic legal systems, both from Europe but also from other legal systems from around the world. The notion of good faith or “bona fides” and “bona foi” took its baby steps in the ancient roman empire, and became essential to the roman contractual system. It provided judges with the ability to decide in accordance with fairness and reasonableness<sup>84</sup>. However, article 7(1) does not expressly require conduct of good faith by the trading parties. For diplomatic reasons, and due to the fear of uncertainties between the buyer and the seller, the convention drafters left out an express rule commanding good faith<sup>85</sup>. However, the need for good faith in international trade was still so commendable, that a good faith requirement was added to the convention, in the form of an obligation for the courts to interpret the convention, in a way which promotes good faith within international trade<sup>86</sup>. As such, the black letter text of article 7(1) does not directly obligate the contracting parties to act in good faith, as seen Danish domestic legislation<sup>87</sup>.

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<sup>82</sup> CISG article 7(1)

<sup>83</sup> Schlechtriem, 1998, page 63

<sup>84</sup> Zimmermann et al. 2000, page 16-18

<sup>85</sup> Lando, Ole: European Review of Private Law 6-2007 [841-853] Kluwer Law International BV - Is Good Faith an Over-Arching General Clause in the Principles of European Contract Law?, page 847 - Lookofsky, 2012, page 34 - Schlechtriem, 1998, page 60 - Honnold et al., 2009, page 134

<sup>86</sup> Lookofsky, 2012, page 33-34 - Gomard et al. 2014, page 97

<sup>87</sup> Bryde Andersen et al. 2010, page 68-70

Because of this, one cannot simply imply the domestic meaning of good faith to the CISG principle of good faith, since good faith is to be interpreted and used with international trade in mind, and viewed through the lens of article 7.

Since article 7(1) states that one must interpret the *convention* with regards to the observance of good faith in international trade, the rules and understanding of the general interpretation of the convention is essential, before the authority of good faith can be fully understood.

Article 7 has been divided into two segments, article 7(1) which focuses on the uniform interpretation and application of the CISG. Article 7(2) applies a gap-filling function to the CISG, which solves the cases where the CISG governs an issue but does not provide a solution to the issue in the treaty text.

### *Interpreting the CISG Treaty Text*

When interpreting the different provisions of the CISG, in which the interpreter should have regard to the observance of good faith, one could logically begin with the black letter text of the CISG. But can one find the plain meaning of an article simply by reading it, and be able to extract the correct interpretation of the black letter text? Joseph Lookofsky has an interesting example, which reveals that literal interpretation of the treaty text cannot only lead to the wrong conclusion, but can furthermore be quite absurd at times: “...Article 11, which provides that under the Convention a contract of sale ‘may be proved by any means’? Since the plain dictionary meaning of ‘any’ is (of course) ‘any’, the ‘plain meaning’ of the sentence is that courts applying the Convention must let the proponent of a contract prove its existence with (e.g.) hearsay evidence, by evidence that domestic rules of evidence would block as prejudicial or violative of public policy, by Ouija boards, by reading sheep entrails – in short by ‘any’ means.”<sup>88</sup>

The absurd example above is a clear testament to why more than just the black letter text is needed.

Another potential hurdle with the black letter text, is that the convention has six authentic languages, which all have equal value and are all legally binding. Regardless of the expertise of the translators,

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<sup>88</sup> Lookofsky, 2012, page 28 - Honnold et al., 2009, page 120

some words and phrases just do not translate directly, which can potentially lead to six different understandings of the same article<sup>89</sup>.

To find the true meaning behind the black letter text, one could consult the secondary sources of the CISG, such as the CISG legislative history. However, the intent of the legislation is unfortunately not clearly shown in the documentary history, since many of the comments made by the national delegates, during the years of drafting and re-drafting of the CISG, are just trails of proposals and counter-proposals, which simply does not provide definite solution. A more prominent issue is that the history might not provide any answers at all<sup>90</sup>.

Obviously, if the meaning and intent of black letter text is clear, one should not overinterpret the meaning behind the text, and thus sometimes, the plain meaning is just what it seems. To help guide the decision makers and legal advisers in the task of interpreting the CISG correctly, article 7 contains two simple-looking rules, which however contain more depth and potential issues than meets the eye.

### *Uniform Interpretation and Application*

According to article 7(1), all who use the CISG must have regard not only to the uniform interpretation of the CISG but also to uniform application.

The term uniform interpretation does not just instruct decision makers within CISG states to interpret the treaty text in the same uniform way, but also prompts the decision makers to have regards in their interpretation, to the origins of the rules, their international character, and finally to promote good faith in international trade.

Uniform application instructs those who settle disputes, to also apply the treaty text in harmony with other decision makers, to achieve similar results in similar cases. This does not only apply to local precedents, but rather commands courts to have regard for all internal cases<sup>91</sup>.

Since having regard to all CISG cases around globe requires access to it, UNCITRAL has established the CLOUT system, which collects and disseminate court decisions, arbitral awards and other

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<sup>89</sup> Schlechtriem, 1998, page 64

<sup>90</sup> Lookofsky, 2012, page 29-30

<sup>91</sup> Bassch Andersen 2005, page 59-179 - Gomard et al. 2014, page 94-95

UNCITRAL texts. To streamline the information even further, CISG experts have been enlisted by UNCITRAL, to author the *Digest of CIST Case Law*. The digest publishes quotations and summarised decisions related to specific CISG provisions. The aim is to provide more readily available precedents, so that courts can more easily interpret and apply the CISG uniformly. Other sources have emerged as well, and there is now a rather large collection of information, which can create basis for uniformity within CISG cases<sup>92</sup>.

### *Interpretation in Accordance with the International Character of the CISG*

The CISG is not the result of a century long domestic legislation, but rather a mixture general principles of international trade, common sense and influence from the delegates who worked on the CISG draft text<sup>93</sup>. Therefore domestic interpretational methods cannot directly be used to interpret the CISG, since doing so would likely result in interpreting the CISG in accordance with one's own domestic legislation. The semantics of the words within the convention is not necessarily the same as in one's own state, and decision makers and legal advisers should take great care, when applying a certain semantics to familiar words from their own legal systems<sup>94</sup>.

While it can be difficult to expressly determine what the correct international interpretation is, determining what is not correct international interpretation proves to be easier. Thus, the term "Homeward Trend" has emerged in the literature regarding CISG, which is the definition of a person applying the interpretation of one's domestic state to the CISG, and thus warping the substance of the provision to align with one's domestic understanding and application of the rule<sup>95</sup>.

A clear example of the homeward trend, one which has been much criticised and even awarded as the worst CISG decision in 25 years by Joseph Lookofsky and Harry Flechtner, is the Manfred Forberich case. In this case, the U.S. District Court correctly decided to use article 79 of the CISG regarding force majeure, but then continued by using the U.S. domestic sales law the UCC as a guideline. The court argued that provisions in the UCC provided guidance to interpreting the CISG text, since the provision contained similar requirements. The court then analysed only domestic rulings without

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<sup>92</sup> Lookofsky, 2012, page 30-31 - Baasch Andersen et al. 2010, page 850 - Gomard et al. 2014, page 95-96

<sup>93</sup> Schlechtriem, 1998, page 1-3

<sup>94</sup> Bassch Andersen 2005, page 159-179

<sup>95</sup> Bassch Andersen 2005, page 159-179 - Gomard et al. 2014, page 91-93 - Zeller, 2009, part 2 II



regard to the uniformity and internationality of the CISG, which resulted in a ruling which could just as well have been decided under the UCC. Flechtner continues that *“The only good that could come of the Manfred Forberich decision, in this author's view, is if it became an example of what to avoid when interpreting the CISG”*<sup>96</sup>.

While the case does not demonstrate specifically how to interpret in accordance with the international character of the CISG, it can at least demonstrate what not to do.

While the general principles of loyalty, good faith, reasonableness and fairness in contracts seem rather straight forward, especially with so much legislative history in the Danish legal systems, one could easily be tempted to use one's domestic knowledge as a yardstick for the application of good faith in the CISG. However, the interpretational methods of the CISG does not allow for this, and thus the Danish knowledge carries no authority to the application of the CISG term good faith. In continuation of the Manfred Forberich case, it is clear that case decisions, which are considered blatantly wrong, does not carry much weight. However, one could wonder, whether a continuous specific interpretation of the principle of good faith, which may or may not be correct, could eventually amount to a situation, where the courts are obliged to consider this specific interpretation of the principle, when interpreting in accordance with the international character of the CISG?<sup>97</sup>

The question above adds confusion to the authority of the principle of good faith, but should not be ignored nonetheless.

### *Uniform Application of the CISG*

Besides the international interpretation of the CISG, courts are also obliged to promote uniformity through their interpretation. This is partially done through the aforementioned international interpretation, but another key point is aligning court rulings with those from other CISG states. The courts must both aim to promote uniformity through their interpretation, but also through their application of the CISG. The problem with demanding uniform application of the CISG, is that the

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<sup>96</sup> Lookofsky, Joseph and Flechtner, Harry: *Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?*, 9 *Vindobona Journal of International Commercial Law and Arbitration* (2005/1) 199-208

<sup>97</sup> Sim, 2001, section IV, B, 2 - Schlechtriem, 1998, page 63 - Gomard et al. 2014, page 97 - Lookofsky, 2012, page 33

courts are not directly bound by the precedence of other states<sup>98</sup>. Since there is no supranational court who can overrule the decisions either, the courts of the contracting states are left to decide whether or not they wish to follow an already established interpretation and application of the CISG. While this is clearly unsatisfying, establishing a supranational court to overlook and overturn national court decisions, is not accepted by the contracting states<sup>99</sup>. Without an Editorial Board or similar, the rulings of courts from one state remains simple guidelines or arguments for other courts, which they should follow if the arguments of the case are persuasive<sup>100</sup>.

However, with an increasing amount of easily available CISG literature and CISG rulings, one can hope that uniformity prevails, and until then, CISG case law and scholarly opinions should be regarded as persuasive arguments and not hard law or mathematical science<sup>101</sup>.

### *Governed but not Settled*

Article 7(2) serves its purpose as a gap-filling tool, which enables courts and arbitrators to utilise the general principles of the CISG. Courts are prompted to do so, before resorting to domestic law, if an express answer cannot be found in the treaty text. Although this provision could seem to extend beyond the reach of the CISG, it is important to note that the provision only applies to matters which are governed but not settled by the CISG. All matters that fall outside the field of application, as presented above, are not to be included by this provision. Within the field of governed but not settled, are questions regarding the previously explained good faith, but it extends to much more than just singular instances<sup>102</sup>.

Article 7(2) sounds as following:

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<sup>98</sup> Lookofsky, 2012, page 33 – Lookofsky, 2004, page 185

<sup>99</sup> Lookofsky, 2012, page 32-33

<sup>100</sup> Bassch Andersen 2005, page 159-179

<sup>101</sup> Lookofsky, 2012- Page 33

<sup>102</sup> Lookofsky, 2012, page 34-36 - Gomard et al. 2014, page 98-101

*“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.”*<sup>103</sup>

Some scholars believe that article 7(2) provides the authority to the principle of good faith, while others do not. Those who believe it does, argue that the principle of good faith is a general principle, on which the CISG was founded. They add, that since article 7(2) expressly commands that matters which are governed but not settled, should be resolved in conformity with the general principles of the CISG, then the principle of good faith can be applied to all these matters. Others argue that good faith is not a general principle of the CISG, but merely an interpretative tool, which should only be used to interpret the convention.

One of these principles, which many scholars believe are derived from the principle of good faith, is the principle of “estoppel<sup>104</sup>”. The principle is also known by its Latin description “*venire contra factum proprium*”. Estoppel defines the situation, where the promisor is barred from relying on or exercising the promisor’s legal rights, once the promisor has promised to refrain from doing so, if the promise has been relied on by the promisee<sup>105</sup>. While a further investigation of estoppel will not be provided, readers familiar with the Danish legal system, will undoubtedly recognise the principle from the Danish contract teachings<sup>106</sup>.

Regardless of scholarly beliefs, decision makers are to fill the gaps in convention in conformity with the convention’s general principles, whether good faith is one of these principles or not. This can be done by establishing principles through analogy and generalisation of the legal ideas expressed in the CISG<sup>107</sup>, but the intent of article 7(2) was not to extend the articles of the CISG, to a point where they are no longer appropriate or fitting. Where this line is drawn, is not exactly clear, since scholars in favour of an expansionist interpretation of the CISG, will dislike resorting to domestic law to solve

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<sup>103</sup> CISG article 7(2)

<sup>104</sup> Honnold et al., 2009, page 142-143 - Lookofsky, 2012, page 34 - Schlechtriem, 1998, page 67 - Lookofsky, Joseph: Walking the Article 7(2) Tightrope Between CISG and Domestic Law, *Journal of Law and Commerce* (2005-06) 87-105, page 88

<sup>105</sup> Uçaryılmaz, Talya: Equitable Estoppel And Cism, Peer-Reviewed Article - Uçaryılmaz / Hacettepe Hukuk Fak. Derg., 3(2) 2013, page 162-163

<sup>106</sup> Gomard et al. 2012, page 58

<sup>107</sup> Honnold, 2009, page 70, Lookofsky, 2015, page 88-89

the case, whilst those in favour of a narrower interpretation of the CISG, will prefer using the conflict-of-law route. An example of an overreach is German case OLG Düsseldorf, 2nd of July 1993, where a dispute regarding where to damages were to be payed, was solved by using the principle of article 57(1)(a), which states: *“If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller: (a) at the seller’s place of business”*. This decision was criticised for various reasons, and is an example of a court using article 7(2) to overextend its juridical jurisdiction<sup>108</sup>.

It can then be established, that while it is rather complicated to create principles from the provisions of the CISG, article 7(2) were not intended for pro-convention, expansive and creative use provisions. Whether this is happening with the principle of good faith, relies on whether the reader of the convention is of the persuasion that good faith is a general principle of the CISG or not. If so, then article 7(2) expands the use of good faith to a lot wider range of cases, in comparison to only using good faith to interpret the convention.

Another understanding of good faith in regard to article 7(2), is that the principle of good faith is underlined in several of the convention articles, just like the Danish principle of loyalty. The Secretariat Commentary to the 1978 Draft of the Convention mentions good faith as a principle underlining the following articles:

*“article 14(2)(b) [draft counterpart of CISG article 16(2)(b)] on the non-revocability of an offer where it was reasonable for the offeree to rely upon the offer being held open and the offeree acted in reliance on the offer;*

*- article 19(2) [draft counterpart of CISG article 21(2)] on the status of a late acceptance which was sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time;*

*- article 27(2) [draft counterpart of CISG 29(2)] in relation to the preclusion of a party from relying on a provision in a contract that modification or abrogation [termination] of the contract must be in writing;*

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<sup>108</sup> Lookofsky, 2012, page 37-38 - Honnold et al., 2009, page 141-142

- articles 35 and 44 [draft counterpart of CISG articles 37 and 38] on the rights of a seller to remedy non-conformities in the goods;
- article 38 [draft counterpart of CISG article 40] which precludes the seller from relying on the fact that notice of non-conformity has not been given by the buyer in accordance with articles 36 and 37 [draft counterpart of CISG articles 38 and 39] if the lack of conformity relates to facts of which the seller knew or could not have been unaware and which he did not disclose to the buyer;
- articles 45(2), 60(2) and 67 [draft counterpart of CISG articles 49(2), 64(2) and 82] on the loss of the right to declare the contract avoided;
- articles 74 and 77 [draft counterpart of CISG articles 85 to 88] which impose on the parties obligations to take steps to preserve the goods.<sup>109</sup>”

However, following this interpretation of good faith, one could wonder what the exact substance of good faith should be. While the articles above, and many others in the CISG, do seem reasonable and fair, they all settle their respective issues. Article 7(2) specifically settles matters which are *not* expressly settled by the convention. To apply authority to good faith through this interpretation, decision makers would have to create links through analogy and interpretation of principles within the express provisions of the convention. This could very quickly resemble the issue of the OLG Düsseldorf case, if the principle of good faith and article 7(2) becomes a mantle which protects overextending use of the CISG from criticism<sup>110</sup>. On the other hand, it could help courts decide on matters, where the parties have clearly acted against good faith. Whatever the case might be, the correct use of good faith is not the focus of this dissertation. The interpretational methods above, including their strengths and weaknesses, are included as an attempt to provide answers to what gives the principle of good faith authority.

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<sup>109</sup> Secretariat Commentary, Guide to CISG Article 7 - Text of Secretariat Commentary on article 6 of the 1978 Draft

<sup>110</sup> Honnold et al., 2009, page 146-148

## *Interpretation of CISG Contracts*

Another interpretational tool, which could merit authority to the principle of good faith, is the tools for interpreting CISG contracts, which are specified in article 8.

Article 8 serves as an interpretation tool for CISG contracts, and focuses on the substance of the contract, rather than the provisions of the CISG<sup>111</sup>. Besides focusing on the parties' true intentions, article 8(1) and 8(2) also determine the order of which its interpretative solutions are to be applied. The contract will undergo a subjective or objective test, depending on which of the tools provided by article 8 is to be used. The parties' subjective intentions take priority in the interpretation of the contract, in cases where the other party knew or could not have been unaware of his intentions. If a solution is not apparent from this interpretation, one must resolve the matter through objective interpretation according to article 8(2)<sup>112</sup>. The objective interpretation of the contract, states that the contract shall be interpreted according to the understanding that "*a reasonable person of the same kind as the other party would have had in the same circumstances*"<sup>113</sup>.

Whether the contract is to be subjectively or objectively interpreted, article 8(3) states that "*due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties*"<sup>114</sup>. One could argue that the principle of good faith could find authority through interpretation of the contract, if one assumes that every trade is entered with good intentions<sup>115</sup>. Applying authority to the principle of good faith accordingly, would however be very vague. Furthermore, since most traders do not explicitly enter good faith in their contracts, the determination of whether a party had good intentions or not, would be at the mercy of the court deciding the case. Not surprisingly, it has not been possible to find many scholars or CISG cases, which argue that good faith should be used to interpret the contents of the contracts<sup>116</sup>. Instead, some scholars believe that good faith could instead be a part of the parties' practices or an international trade usage.

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<sup>111</sup> Lookofsky, 2012, page 39 - Gomard et al. 2014, page 101

<sup>112</sup> Schlechtriem, 1998, page 70 - Gomard et al. 2014, page 103-105 - Honnold et al., 2009, page 153-155

<sup>113</sup> CISG Article 8(2)

<sup>114</sup> CISG Article 8(3)

<sup>115</sup> Gomard et al. 2014, page 106

<sup>116</sup> Gomard et al. 2014, page 106

Regarding conflicting standard business terms, the conflict may be solved through the application of the “battle of forms”<sup>117</sup>, which is a topic for another dissertation. The issues regarding the battle of forms in light of the principle of good faith, will however be lightly addressed in the section of application below.

### *Trade Usage and Party Practices*

As mentioned just above, some scholars believe that good faith could gain authority through the trade usage and practices of the parties. The basic thought is that through trade usage, different international trades will over time establish a usage, which requires a conduct in good faith within the field. Following, the parties will furthermore establish the same requirement through their continuous business practice, and thus good faith can be required on two levels.

According to article 9, parties are bound not only by the express terms of their contracts, but also by their prior practices and widely observed usages within their relevant branch of trade<sup>118</sup>. It is rare though, to see parties who expressly agree to being bound by these practices, but parties who have previously traded, may have established a binding practice, by virtue of their previous conduct. The article covers situations where a series of dealings have established a certain conduct, but could presumably also apply in situations where one trade has multiple and repeated occasions for performance. While one prior dealing may not be enough to establish a trade practice, previous trades can however indicate how a certain contract is to be interpreted, as mentioned in the section just above<sup>119</sup>.

Parties can also be bound impliedly to an observed usage within their branch of international trade. The parties can however only be bound impliedly if both parties knew, or should have known, that such a usage existed. Furthermore, the observed usage must be widely known, especially within the concerned trade<sup>120</sup>. Parties can expressly note in the contract if no such usage is to be regarded, or if their previous conduct is to be disregarded.

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<sup>117</sup> Lookofsky, 2012- page 52-56

<sup>118</sup> Schlechtriem, 1998, page 78-79 - Gomard et al. 2014, page 107-109 - Honnold et al., 2009, page 167-170

<sup>119</sup> Lookofsky, 2012, page 41 - Gomard et al. 2014, page 108-109

<sup>120</sup> Schlechtriem, 1998, page 78-79 - Gomard et al. 2014, page 108

The thought that good faith gains its authority through trade usage and practice does seem intuitive, especially if one interprets article 9 through the scope of article 7(1), which states that regard is to be had to the observance of good faith in international trade.

### 6.2.3 Recapitulation

From the sections above, it can be drawn, that the authority to the principles of loyalty and good faith comes from vastly different sources. While the Danish principle of loyalty can draw on authority from a wide array of legislation, the CISG-principle of good faith is constrained to the convention. Furthermore, the ongoing discussion of the rightful place and application of the principle of good faith constraints its authority even further, since different courts with different opinions, might interpret the principle of good faith in different or inconsistent ways. However, the Danish principle of loyalty might be less pronounced throughout the use of the legislation it is contained within, since courts and tribunals have less reason to directly refer to the principle of loyalty, when they can refer directly to the legislation. The latter is undoubtedly also more reasonable, since express legislation allows the trading parties to foresee their legal status and adjust their trade accordingly.

While this dissertation has no intention of solving the mystery of the place for the principle of good faith, it can however be noted, that uncertain authority to the principle will make it harder to analyse and compare. Since the extend of the authority and even the application is not yet definite, this dissertation could be rendered inaccurate, if the substantive content of the principle is changed or redefined over time. For now, the next logical step in determining the extend of the similarities, is to observe and analyse the actual application of the principles.

## 6.3 The Application of the Principles

The question at hand:

- To what extend is the application of the principles of loyalty and good faith comparable?

The actual application of the principles is of great importance to the analysis. While scholarly opinions on the field of application and the authority behind the principles are also of value, the actual application by the courts will de facto show the true extend of the principles in practice. It is not



thereby stated, that every case ruling is equally valuable or equally correct, but it is nonetheless in these case rulings that the substantive substance of the principles will appear.

### 6.3.1 Application of the Duty of Loyalty

As previously mentioned, the principle of loyalty emerged from case law. While the direct references to the principle has decreased since the introduction of codified legislation, the application of the principles remain largely the same. The following section has been divided into the same classifications as previously, and several cases for each obligation will show the alleged coherence between the principles and the legislation.

#### *The Common Obligation of Loyalty*

In U.2008.1911.H, two parties, a Norwegian manufacturer “N” and a Danish seller “D”, had decided to terminate a sole distributor contract by 31st of December 2001. During the summer 2001 however, D began to market N’s products under a different name, and simultaneously had its subsidiary market competing brands on the Danish market. N protested this behaviour on numerous occasions, since the parties were in fact still bound by original contract, but D continued to market N’s products under a different label regardless. The 11th of November 2001, N discontinued the deliveries and on 19th of December 2001 N terminated the contract early. N did so because he believed D’s behaviour to be severely disloyal. N later sued D for damages. During the following proceedings, D were fined 10.000 DKK for having shown severe disloyal behaviour towards N, and having shown disloyal conduct in conflict with the contract. D had however claimed damages from N due to the early termination, but the claims were not sustained. The court stated that N had not breached his obligation of loyalty by terminating the contract early.

The court remarked that a general mutual duty of loyalty was present throughout the remainder of the contract, even if a termination was planned. With the emphasise on the disloyal behaviour, the case shows that disloyal behaviour can amount to a violation of the contract, even without a specific reference to legislation.

Similarly, in U.1999.1523.H, damages were amounted due to disloyal behaviour. The case revolved around a car importer “B” and a company creating plastic solution “P”. The contract was for P to produce some specialised hard-top plastic covers for cars. The contract was modelled after the “no

cure – no pay” principle, since P was not to receive payment, if P could not manufacture a hard-top prototype fast enough, which could also live up to the quality standards required. At a later meeting, P showcased a fully functioning prototype, which lived up to the quality requirements set by B. Nonetheless, B informed P that an order had been placed at another manufacturer, and that the product P had created, was therefore no longer needed. Since the deal was no cure – no pay, P were left without any compensation for his work. Since P had both delivered a prototype in correct time, and since the prototype also lived up to the quality qualifications set forth by B, P saw no reason to why B could terminate the contract and sued for damages. It later became apparent that B had no actual intentions of purchasing P’s products, but only used P as a bargaining chip, to put pressure on B’s former manufacturer. A minority of the court found that B had grossly neglected his regard for P, and thus the burden of proof for P’s consequential losses could be lessened.

The case shows that the disloyal behaviour is not condoned by the courts, and furthermore that disloyal behaviour can result in extended risks for the disloyal contracting party.<sup>121</sup>

In regard to the legislation mentioned above, UfR 2010.1628 H relates to the use of article 36 of the Danish Contracts act. A bank “S” had provided a farmer “G” with a loan of 1.5 million DKK. The loan was an addition to G’s already established debt and a bank overdraft of 250.000 DKK. G’s parents “A” and “B” granted surety for the loan to the extent of 750.000 DKK including interest. A and B secured the surety by issuing mortgage deed for their house with the value of 600.000 DKK. When G later came in financial trouble, his bank overdraft had risen from 250.000 DKK to 1.4 million DKK. S wanted A and B to provide their surety of 600.000 DKK, to pay for some of G’s increased debt. The district court and high court both ruled according to S’s claim. However, the supreme court added, that G’s debt had been increased to far extend his values, and that the increase had happened after A and B had provided surety, and thus went beyond their anticipated risk. Furthermore, A and B were 60 and 57 years old, with very limited income, and a sale of A and B’s house could only produce 350.000 DKK. The supreme court continued that the debt A and B stood to amount, was heavily disproportional to their fortune and to the risk they had intended to take, when they provided their surety. The supreme court thus concluded that it would be an unreasonably burdensome, to hold A and B to their surety contract, in reference to the Danish Contracts Act article 36.

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<sup>121</sup> Bryde Andersen et al. 2010, page 70

While the principle of loyalty was not mentioned in the case, the idea of loyalty behind article 36 is, that it is unreasonable and unethical to insist on a contract, which will undoubtedly cause great detriment to your counterpart, which this case demonstrates fully. It should however be noted that the ruling in this case were potentially influenced by the inequities in strength between the professional S and the “weak” A and B.

### *The Obligation of Cooperation*

In U.1997.557.H a dispute had arisen from a contract relating to the purchase of a pension in Spain. The buyers “M” and “H” entered a contract with real estate agent “E” and a Danish citizen living in Spain. The intention of the contract was to provide M and H with a house, from where they could conduct business of a pension. It was clear from the contract, that the time needed and the cost of establishing the pension was of the essence. When issues arose regarding the preparations of the pension, it was clear that the leased house could not live up to the expectations of the contract. The buyers cancelled the contract and sued for damages.

The Supreme Court added that the real estate agent had not assisted the buyers enough in their efforts to establish the pension within reasonable time and cost, and that it must have been clear for the agent, that the house could not live up to the expectations of the buyers. Thus, the buyers had rightfully cancelled the contract and were awarded damages.

While the case is regarding purchase of real estate and lease of real estate, the reasoning behind the court’s decision was based on the lack of cooperation, which could rightfully have been expected by the buyers<sup>122</sup>. While the lack of cooperation did not in itself constitute a fundamental breach, the emphasis on the cooperation shows that failure to comply with the duty to cooperate can intensify the assessment of the breach.

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<sup>122</sup> Bryde Andersen et al. 2010, page 303

## *The Obligation of Disclosure*

Since the following obligation contains a large amount of case law, the sections regarding have been divided further into categories which all stem from the obligation of disclosure, but have quite different contents.

### *The Seller's Lack of Disclosure*

In U. 2011.47 Ø, a buyer purchased a café with the intend to do business. The seller of the café had provided the buyer with an accounting prospect, showing revenue of approximately 900.000 DKK. However, the seller had before the sale experienced a decrease in revenue down to approximately 270.000 DKK, which calculates to a drop of 70%. The court found that the seller should have informed the buyer of this decrease in revenue, and since the seller could not lift the burden of proof, the court found that she had neglected to do so. The buyer was then permitted to avoid the contract, since the immense decrease in revenue constituted a fundamental breach.

The case shows a clear example of how a failure to disclose important information in a sale, can lead directly to the avoidance of the contract.

In contrast to U 2011.47 Ø, the seller in the case U 2001.1293 H was not found to have neglected his obligation of disclosure. The seller had not informed the buyer of a boat rental company, of a report which suggested the trade was in decline. The report commented on some tax regulations and other commonly known factors within the trade, and was not meant to warn potential buyers, but rather as an outcry to the politicians. Since the report only commented on tax regulations and common knowledge, the court did not find that the buyer had missed any information, which he could not have gathered himself.

Another example of the obligation of disclosure is in the case U.2014.578H. The case revolves around the purchase of a television, just before the period of which Denmark switched from the analogue signal to the digital signal in November 2009. More precisely, the broadcast of national television channels like DR1, DR2, TV2 and more, were to abandon the old MPEG 2-standard and move to the new MPEG 4-standard. The information of the upcoming switch had been widely communicated to the TV-industry, already from the time when the switch was planned back in 2007. The buyer in this case bought his MPEG 2-standard TV in January 2008, and was not informed of the upcoming switch

by the seller. When the signal was switched, the buyer was forced to buy an additional digital decoder box to watch the broadcasts.

The buyer claimed that the seller had not informed him properly, and that he would have bought another TV, if he had had the information. The seller claimed that he was not aware of the upcoming switch at the time, and thus could not be blamed for neglecting to disclose information to the buyer. The Supreme Court stated, that regardless of the seller's actual knowledge of the switch, he should have been aware of it, due to the nature of his business and the widely-communicated warnings throughout the industry. As a result, the court concluded that the seller had failed to disclose valuable information to the buyer, and thus the sale could be avoided.

The case shows not only the pure principle of disclosure, but also the fact that the buyer should be able to rely on the seller's professional knowledge of his field. The obligation of disclosure is not specifically mentioned, but the reference to article 76(1)(3) is a clear indication of the obligation, since the rule is a codification of the obligation<sup>123</sup>. It should however be noted that the case is regarding a consumer sale, but this does not seem to alter the extend of the principle of disclosure in the case.

In U 2010.556 H the matter of a contaminated property became the basis of a case. The property had belonged to the seller "S", who had run a graphical company on the property, which can cause contaminations. The buyer "B" knew that the seller had driven the company, but had no further knowledge of contaminations or the circumstances regarding the company.

When S sold the property in 2002, he made B sign an exemption of liability, stating that S could not become liable for any non-conformities. It was later discovered that the soil was contaminated, and it would require a larger sum of money to clean it. B then sued S for damages.

S claimed that the exemption of liability excused him of any claims, but it was discovered that S had received a letter from the county administration, notifying him that the property could be contaminated. S had not disclosed this information to B, and was therefore found to have neglected his obligation of disclosure. B had however not neglected his obligation of inspection, since he had

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<sup>123</sup> Clausen et al. 2012, page 28 - Købelovudvalget, Betænkning om forbrugerkøb, Betænkning nr. 845, Det juridiske Laboratorium Københavns universitet, 1978 - page 46

no reason to believe the soil was contaminated, in contrary to S, who had been given specific notice of the risk. The exemption of liability was waived by the court, and S was charged with damages.

The case expresses both the principles of the buyer's obligation to inspect and the seller's obligation to disclose information. More importantly, it shows that contract terms and liability waivers can be altered or excluded from the contract, if enforcing them would provide a solution in conflict with the principle of loyalty.

The obligation of disclosure is also illustrated in U 2000.355 H, regarding the sellers guarantee that dishwashers could function on a ship, and U 2009.1636 V regarding the seller's failure to notify of known contaminants in the water supply. Contrary, U 1993.72 H states that the buyer could not claim damages for a non-conformity in the underfloor heating, since he had no knowledge of the floor heating even being there. Thus, the lack of information could not have been determinative to the buyer's decision, since he did not expect there to be any underfloor heating at all. U 1961.953 Ø and U.1995.366.H both illustrate that a contract party is loyally obligated to inform his counterpart, if he knows the information is of critical value to the counterpart.

### The Buyer's Lack of Inspection

The case U 2002.1096 V revolves around a real estate agents purchase and inspection of a real property. The purchases regarded an older villa, which had illegal furnishing in the basement according to Danish regulations. The furnishing of the basement had been there even before the seller acquired the villa, and the court was uncertain as to whether the seller knew or should have known that the furnishing was illegal. The buyer however was a real estate agent, and had inspected the property before his purchase. The court held that the buyer should have known that the furnishing was illegal, or at least should have prepared further inspections of the basement before the purchase. The court held that the buyer, given his occupation, should have displayed more care. Since he had omitted further examinations of the basement, he had also excluded himself from the right to claim remedies due to the illegal furnishing.

The court does not mention bad faith, but the underlining idea is that the buyer should have shown loyal behaviour towards the seller by conducting further investigations, because the court found that he either knew about the illegal furnishing or should have known. The case shows a clear example of the syncretism between the caveat emptor rules and the buyer's loyal obligation of inspection. The

case shows that the expected extend of a buyer's awareness, is depended in the circumstances and what the buyer can reasonably be expected to notice.

As can be seen, extensive amount of case law is present on the matter regarding the Danish obligation of disclosure. There are many more court cases to find, and the obligation can be said to be both well-known and authorised through case law and legislation.

### *The Obligation of Solicitude*

The obligation of solicitude is closely related to the duty to mitigate losses<sup>124</sup>. The first case under review is U.2004.1968.V, where "A" had signed a cooperation agreement simultaneously with an agreement regarding a chain of stores with the contracting partner "B". Both contracts had a term of notice of six months till the extend of the current year. A cancelled the store chain contract to the extent of 2002, but did not specifically cancel the cooperation agreement simultaneously. B refused to release A from the cooperation agreement as a result hereof.

The high court noted that there was no incentive for B to keep A in the cooperation agreement, where against A had significant economic reasons to be released from the contract. The court then established, that A should be released from the contract with reference to the Danish Contracts Act article 36, regardless of the missing notice.

The case shows that even if one are materially right to contain a contracting party within a contract, this cannot rightfully be done so, if it conflicts with the loyal obligation to one's counterpart, specifically the obligation of solicitude.

U 1969.243 Ø revolves around the sale of pet monkeys. The case relates to the situation, where a buyer went into a pet store in January 1966 and bought two pet monkeys. He arranged for the monkeys to be picked up at later time. However, the buyer did not return until September 1966. By the time the buyer returned, the pet store had sold the monkeys elsewhere. The trade usage for pet stores revealed that pets were only kept in store for a maximum of two weeks after they had been purchased. The court stated that not only had the pet store been authorised to sell the monkeys elsewhere, according to article 34 in the Danish Sale of Goods act, the pet store had furthermore the right to

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<sup>124</sup> Bryde Andersen et al. 2010, page 262 - Gomard 2016, page 65

offset the cost of the monkeys tending in the purchase sum acquired from the sale according to article 36.

The case exemplifies two sides of the same principle. Firstly, the pet store could have left the monkeys to die, since the pet store had already received payment. This would however be in conflict with the duty to mitigate losses. Secondly, it shows that a buyer can obviously not postpone collecting interests which require care to the extent shown in the case. While the seller is loyally obligated to care for and resell the buyer's interests, the buyer is also both loyally and legally obligated to accept this<sup>125</sup>.

### 6.3.2 Application of the Principle Good Faith

Now that the application of the principle of loyalty has been reviewed, the application of good faith is the next natural step. In the following, it has been attempted to arrange the application in a similar order to the application of the principle of loyalty. However, since there are discrepancies between the principle of good faith and the principle of loyalty, the exact same order as before cannot be achieved.

#### *Good Faith as a Common Standard*

Whether good faith in the CISG has become a common standard or not, has been under much scrutiny by scholars, after its recognition in certain court cases.

In the Hungarian arbitration case VB/94124, a Hungarian seller and an Austrian buyer had a longstanding business relationship trading mushrooms. It was established that the buyer should issue a bank guarantee for each delivery, but no guarantee had been issued or required so far in the relationship. As the buyer failed to make payment for a delivery, the seller avoided the contract and stopped further deliveries. The parties later tried to resume the relationship, at which point the seller required a bank guarantee for the payment. The buyer issued a guarantee accordingly, which however bore the expiry date of the previous trade, and was therefore no longer valid. The seller broke of the deal, and commenced arbitral proceedings, claiming both payment and interests for the previous trade.

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<sup>125</sup> Bryde Andersen et al. 2010, page 186-188



The court held, besides that the buyer had to pay the purchase price for the delivered goods, that the issuance of a bank guarantee which had already expired, was contrary to the principle of good faith and to the understanding that a reasonable person in the same circumstances would have had. Moreover, the court pointed out that *“the observance of good faith is not only a criterion to be used in the interpretation of CISG but is also a standard to be observed by the parties in the performance of the contract”*<sup>126</sup>.

At the Russian arbitration proceedings in case 131/2004, a dispute regarding the limitation period of a contract was reviewed. An agreement to interrupt the limitation period of 8th July 1998, had been signed by the person who was the “Director General” of the buyer’s company in 1996. When the seller later claimed the payment, the buyer claimed that another person had been Director General in 1996. The person who had signed the extension in 1996, could therefore not have been the Director General, and thus the agreement had been signed by an unauthorised person. The court however noted, that the person who had signed the limitation agreement, was also the one who had signed the specification order for the delivery of the goods, and had conducted the correspondence with the seller regarding the issues of payment. The same person had also signed the statements of the defence in present arbitration case. Moreover, the seller had stated that the extension agreement was signed in the presence of, and with the consent of the person who at that time was Director General of buyer’s company. The seller was therefore confused as to who had the power to sign for the company.

The tribunal continued that the buyer had intentionally tried to mislead the seller, which was clearly in contravention with the basic business practice principle of good faith. The tribunal then concluded that the limitation period had not expired.

Even though the tribunal could have solved the case by reference to the basic rules of the limitation period, the tribunal added the statement regarding good faith, thus reinforcing the notion of a general common standard of good faith. This general standard is comparable to the notion of the Danish general principle of loyalty.

In another arbitration case M/115/97 before the commission Compromex, a Mexican producer of candy and sweets was dealing with a Korean buyer. The agreement followed to prior lesser significant

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<sup>126</sup> Hungarian Chamber of Commerce and Industry Court of Arbitration 17 November 1995 (VB/94124)

trades, though with the same kind of products and the same payment conditions. Namely a letter of credit with a two-year expiration date, was to be issued before the manufacturing and shipment of the goods would be issued. Following the previous satisfactory business experiences with the buyer, the seller agreed to initiate the production of goods for a third contract, even before the letter of credit had been received. However, when the letter of credit was received, the seller noticed that the expiration date had been reduced by one year. The seller contacted the buyer, who claimed that Korean legislation imposed restrictions on letters of credit, and that they were not to be used as they were issued, and could thus not extend to two years. Trusting the buyer, the seller agreed to correct the discrepancies in a certified document, and following agreed to ship the goods to the buyer, believing that the issues of payment could be solved later. The seller was never paid, and it turned out that there was no government restriction on the letter of credit, as asserted by the buyer. The seller then submitted a claim before Compromex.

The commission added that the conduct of the seller was “*contrary to one of the basic principles in international trade provided for in Article 7 of the United Nations Convention on Contracts for the International Sale of Goods, that parties must act in good faith and deal fairly throughout their contractual relations*”<sup>127</sup>.

From the cases above, it can be drawn that general principle of good faith exists both in Danish case law and in CISG case law. Several of the following cases will refer to this general principle of good faith as well, typically in the relations to a more specific doctrine or duty.

#### *Good Faith as a Duty to Cooperate*

In the Russian arbitration case no. 18/2007, the Claimant, a Russian company, entered a contract for the supply of natural gas with the Respondent, a Moldovan company. The gas was however to be delivered to a third-party Recipient. Although the Recipient was not formally a part to the contract, it was specified that the Recipient should pay for gas directly to the Claimant. When issues arose, the Respondent had repeatedly informed the Claimant of its unsuccessful attempts to make the Recipient pay the price to the Claimant. The Claimant nonetheless resumed with providing gas to the Recipient, and thereby deliberately assuming the risk on behalf of the Respondent. During the negotiations, the

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<sup>127</sup> Compromex - Mexican Commission for the Protection of Foreign Trade, 30 November 2008 M/115/97

Claimant had also not invited the Recipient to the negotiations, and had thus solely focused on the Respondent, and thereby not tried to solve the case extra-judicially.

The tribunal held that since the Claimant had continued to provide gas to the Recipient, the Claimant had thereby accepted the risk of not getting paid. In addition, the tribunal stated that the Claimant had failed to act in accordance with basic principles of good faith, since it continuously failed to invite the Recipient to the negotiations. The tribunal remarked that the principle of good faith *“is to be extended to cover the parties’ conduct all the way through development of contract relations, starting from the holding of negotiations on making a contract and ending with steps on settlement of disagreements that arose in fulfillment of the contract, i.e. at the pre-arbitral stage”*<sup>128</sup>.

The statement above shows a clear attitude by the tribunal, and confirms that the parties have a duty to cooperate and try to fix the problems at hand before commencing proceedings.

In another Russian arbitrational case 95/2004, the seller had not delivered the goods as contracted, because of some predicament with a third party to the contract, to whom the buyer had transferred the purchase sum, before the goods were to be shipped. The buyer had however transferred a prepayment correctly to the seller, which the seller then refused to return. The seller also refused to ship any goods until the full payment was made, why the case ended at arbitration. It was then stated that *“The Tribunal considers that [Seller]’s conduct does not comply with the principle of good faith (art. 7(1) CISG) and finds it possible to regard this conduct as a de-facto unilateral refusal to fulfill the contract.”*<sup>129</sup>. Since the seller refused to fulfill the contract, the tribunal concluded that the seller had committed a fundamental breach and allowed the buyers avoidance of the contract.

The case shows that even in situations where the parties might find themselves deadlocked, they still have a duty to comply with the principle of good faith and cooperate accordingly.

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<sup>128</sup> International Court of Arbitration of the Chamber of Industry and Commerce of the Russian Federation 8 February 2008 Case No. 18/2007

<sup>129</sup> Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry Russia, 27 May 2005 Arbitration proceeding 95/2004

## *Good Faith as a Duty to Inform*

### The Sellers Obligation of Disclosure

In a Dutch case no. 99/474, a Belgian buyer and a Dutch seller had made a contract for the purchase of wheat-flour. The flour contained potassium bromate, which did not comply with neither the demands of the Dutch FDA or the international standard for the product. The Dutch seller had not informed the Belgian buyer of the potassium bromate, and from a fax sent between the contracting parties, it was evident that the quality of the flour had been of utmost importance to the buyer. The reactions and statements of the seller, could easily be understood as a guarantee that the flour would at least be conforming with regular international standards. The court pointed out, that if the seller had no intentions of using an international standard, the seller should have explicitly disclosed this information to the buyer, in accordance with the principle of good faith. The seller tried to argue that the addition of potassium bromate was a trade secret, but failed to convince the court accordingly. The court added, that *“a company secret should not be protected in jure if good faith demands that there is a duty to inform the other party”*<sup>130</sup>.

The case shows a clear indication of the obligation of disclosure, though the court does not mention a clear authority to its statement regarding good faith.

### The Buyers Obligation of Disclosure

Not only the seller has an obligation of disclosure within the CISG. In an Austrian case 1 Ob 49/01i, a Spanish seller of vegetables and fruits entered a contract with an Austrian buyer. When the buyer failed to meet his obligation, the seller sued to obtain the purchase price. However, the buyer protested that the sales contract had not been between the Spanish seller and the Austrian corporation, but rather between the Spanish seller and the Austrian corporation's subsidiary. The court found that the contracts had been concluded between the Spanish seller and the Austrian corporation, and not the subsidiary. The court followingly stated that according to the principle of good faith in article 7(1) and considering the type of business, the seller could rightfully assume, that the buyer was the

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<sup>130</sup> Hof 's-Gravenhage: Rynpoort Trading & Transport NV et al. v. Meneba Meel Wormerveer B.V. et al., no. 99/474

Austrian corporation, and not its subsidiary, since the buyer had not disclosed information which could disprove this assumption.

The case shows that the obligation to disclose relevant information according to good faith, is not limited to the realm of the seller.

### Information Regarding Terms and Conditions

In a German case no. 10 O 74/04, the question at hand was whether the buyer had to inform himself of any terms and conditions, or whether the seller had to actively disclose any such terms to the buyer.

The court concluded, that it is easily possible for the user of terms and conditions to attach them to standard business terms, and furthermore to draft them in favour of the user. Therefore it would contradict the principle of good faith according to article 7(1), and the general obligation of the parties to cooperate and disclose information, if the user of such terms could burden an unknowing contractual partner with substantial risks and disadvantages stemming from the terms. Furthermore, it would imply a duty to familiarise oneself with clauses, which have not ever been sent or disclosed to one.

The case is just one of many, which states that business terms do not become legally binding, unless the opposite contractual party is aware of them. Additionally, this, and many other cases, confirm the fact that a buyer does not have a duty to ask for or familiarise himself with business terms, if the seller does not make him aware that any terms are in existence. Courts stating similar results are found in German cases no. 20 U 3863/08 and no. 13 W 48/09, as well in the Italian case no. 914/06 and Dutch case no. LJN BH6416; 279354 / HA ZA 07-576. The same applies in German case no. VIII ZR 304/00, where recognition of good faith, in addition to last shot rule, amounted in the exclusion of standard terms, on which the contracting parties had not explicitly agreed.

A limit to the obligation of disclosure is seen in the German case 1 U 167/95. In this case, a German seller had contracted to deliver iron-molybdenum from China, to an English buyer in Rotterdam on October 1994. The goods were never delivered, because the seller could not receive delivery from its own supplier in China. After an additional period of time, the buyer avoided the purchase, and commenced a substitute contract with another seller, and avoided the original contract. The buyer sued the German seller for the difference in price paid and the price under the original contract. The

German seller claimed that the buyer had not sent an explicit declaration of avoidance before avoiding the contract, and had thus acted against the principle of good faith.

The court however stated, that an explicit declaration of avoidance is not necessary, when it is certain that the seller will not perform according to the contract. On contrary, the court found that the seller insisting on such a declaration, even once the seller had refused to deliver, was in fact in conflict with the principle of good faith.

The case clarifies that the principle of good faith, cannot be used as last resort, to avoid damages or other adequate remedies.

In the German appellate case before the Court of Köln<sup>131</sup>, the court had to decide whether terms and conditions, which were not effectively included in the contract, could become binding for the parties, under the assumption that the terms were a trade usage. While the specifics of the case are excluded from the translation, the court's reasoning are however present. The court states that it contradicts the principle of good faith, as well as the general duty to cooperate and communicate, to impose a clause on the contract which was not disclosed to the contractual party, regardless of the clauses origin. The court continued stating "*that which contradicts the principle of good faith can never be considered to be a usage in trade*"<sup>132</sup>.

The case determines that terms and conditions can never become trade usages, if the parties influenced by the terms are not aware of them, since this would contradict the principle of good faith. Furthermore, it states that an assumed usage in general contradiction with good faith, can neither be considered a binding trade usage.

One must assume, that the courts statement is to be weighed against article 9(2) of the CISG, from the wording "*The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which*

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<sup>131</sup> Germany 21 December 2005 Appellate Court Köln case no. 16 U 47/05 (*Trade usage case*)

<sup>132</sup> Germany 21 December 2005 Appellate Court Köln case no. 16 U 47/05 (*Trade usage case*)

*in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.*"<sup>133</sup>

### *Good Faith as a Duty of Solicitude*

In a French case no. 93/3275, a French manufacturer of jeans had contracted a sale of jeans with an American buyer. It was specified in the contract, that the jeans were supposed to be sent to and sold in South America and Africa. During a follow-up on the performance however, the seller realised that the buyer had shipped the jeans to Spain. The seller then refused to maintain the trade relationship or further deliveries, which triggered the following proceedings. The court invoked article 8(1) to conclude that the buyer had not respected the sellers wish to know the destination of the goods. This amounted in a fundamental breach according to article 25. Furthermore, the court ordered the buyer to pay damages of 10.000 French Francs, for the abuse of process, since the court found that the buyer had acted "*contrary to the principle of good faith in international trade laid down in article 7 CISG, aggravated by the adoption of a judicial stand as plaintiff in the proceedings, constituted abuse of process*"<sup>134</sup>.

The case is an example of good faith being used to charge a contractual party with damages, for behaving disloyally towards its counterpart.

In the ICC Arbitration Case No. 11849, a buyer had failed to pay or open a letter in credit in due time according to the contract. The seller sent a letter requiring payment on August 2nd. By August 10th, the buyer informed the seller, that he intended to pay and asked for the necessary information required to open a letter of credit. The seller did however not respond until August 23-24th. The buyer following opened a letter of credit on September 12th. However, the seller claimed that the additional 20 days' period for payment began on August 2nd., and that the buyer had therefor not opened the letter of credit in due time. The seller avoided the contract accordingly on September 19th. The arbitrator however found that because the seller had not replied before August 23-24th, the 20 days extension period could not begin to expire before after August 24th. The arbitrator stated that the buyer had no possibility of opening a letter of credit before receiving the necessary information. The

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<sup>133</sup> CISG Article 9(2)

<sup>134</sup> CA Grenoble: SARL BRI Production "Bonaventure" v. Société Pan African Export, no. 93/3275

Arbitrator followed by stating that the “*general principle of good faith prevents a party from taking undue advantage of the remedies provided in case of breach of the other parties' obligations*”<sup>135</sup>.

The case also shows notions of the principle of estoppel, or “*venire contra factum proprium*”, which prohibits a party from acting contrary to his previous conduct or statements, and are thought to be derivative principle of good faith<sup>136</sup>.

The principle of estoppel is however more clearly shown in the Austrian arbitration cases no. SCH-4318 and SCH-4366, where the seller of some rolled sheet metal had waived his rights provided by articles 38 and 39 regarding timely notice. The seller later tried to raise a defence in the case based on late notice, in accordance with articles 38 and 39. The argument was dismissed by the arbitrator, who stated, “*since the seller had behaved in such a way that the buyer was led to believe that the seller would not raise the defense*”<sup>137</sup>.

The arbitrator then added that “*while estoppel was not expressly settled by CISG, it formed a general principle underlying CISG (“venire contra factum proprium”; Articles 7(2), 16(2)(b) and 29(2) CISG)*”<sup>138</sup>.

A somewhat similar situation had arisen in a Belgian case 2001/AR/0180. The case revolved around a large purchase of pagers, which had turned out to be hard to sell, and thus less valuable. The buyer and the seller in the case had negotiated the annulment of the contract, and had both executed a letter of intent, stating that the final agreement was yet to be made. After a meeting between the parties, the buyer had sent a minute of the meeting to the seller, containing options for further negotiations, including a proposal to call off the order. The seller did not respond until two months later, claiming that the buyer was in default and should pick up the pagers as contracted. The court concluded that the contract had been annulled by the parties according to article 29 (1), and furthermore that it would be unreconcilable with the principle of good faith to support the sellers claim.

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<sup>135</sup> Court of Arbitration of the International Chamber of Commerce, no. 11849 of 2003

<sup>136</sup> Lookofsky, 2012, page 34 - Schlechtriem, 1998, page 67 - Honnold et al., 2009, page 142-143

<sup>137</sup> Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, 15 June 1994 no. SCH-4318

<sup>138</sup> Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft, 15 June 1994 no. SCH-4318



Both cases show examples of contractual parties relying on their remedies or provisions, in situations where their actions contradict their duty to act considerately to their contractual party.

The German case 13 U 102/01 and American case No. 50181T 0036406 shows similar attempts to exploit remedies or avoid the contract in bad faith.

### 6.3.3 Recapitulation

As shown above, the application of the principles of loyalty and good faith varies greatly. Since the principle of loyalty is not bound to a specific type of sale, but can rather coexist in many different legal regions, its actual field of application is larger. However, in contrary to the principle of good faith, the principle of loyalty is very rarely directly mentioned by the courts.

Good faith on the other hand, is mentioned in a vast amount of decisions, but references to its substance and authority are scarce. In many cases, good faith is added as a complementary reason for the court's decision, and are as such being used as a supplement with interpretational value. An example is the Belgian case 2001/AR/0180, where the court could have concluded the case with reference to article 29(1). The same argument applies to the French case no. 93/3275.

It seems though that the Danish courts do not feel the need to stress the principle of loyalty within their reasoning's, while the courts in the CISG cases have chosen to mention good faith as an argument to support their decision. Nonetheless, the case law quoted and reviewed above, is testament to the difference between the legal systems.

## 6.4 The Duties and Prohibitions Derived from the Principles

The question at hand:

- To what extent can comparable duties or prohibitions be extracted from the principles of loyalty and good faith?

The following set of duties and prohibitions are derived from the analysis above. While extrapolating such an amount of literature, legislation and case law do simplify the matter somewhat, these completely basic duties still have explanatory value. The duties and prohibitions can serve as a simple reminder, which one should consider, when selecting a path of progress within trade. The duties and

prohibitions are not self-explanatory, and can thus not replace a thorough examination of the principles of loyalty and good faith, nor the references to legislation, case law and preliminary works which give them authority.

#### 6.4.1 Duties and Prohibitions from the Principle of Loyalty

From the general principle of loyalty, the following set of duties and rights can be extracted. From the common obligation of loyalty, the duty stay loyal towards your contractual counterpart can be extracted. If the duty is neglected, the negligence can ultimately cause a breach of contract. Furthermore, the common obligation of loyalty imposes a duty on both parties to have regard for the other party's best interest and a prohibits the parties from exploiting advantages.

The obligation of cooperation contains the duty to actively seek to fulfilment of the contract, and to loyally help the other party to achieve their goal. The duty of cooperation can also contain omissions, such as an omission to disclose classified information of value to one's counterpart.

The obligation of disclosure contains several duties, among these, the seller's duty to disclose information, which could have significance to the buyer's evaluation of the goods. The buyer on the other hand, has a duty to be aware during the trades. Hereunder lies the prohibition from claiming non-conformities, if the buyer is aware of the non-conformities before the contract is concluded. The duty of notification is also part of the obligation of disclosure.

From the obligation of solicitude, a prohibition against disloyally enforcing contracts to harm your counterpart is drawn. Furthermore, the duty mitigate losses can be extracted from the obligation of solicitude, as well as the duty to considerately care for the contractual parties' interests.

#### 6.4.2 Duties and Prohibitions from the Principle of Good Faith

The general principle of good faith prescribes a duty to act in good faith towards your counterpart. Failure to act in good faith seems to imply a more stringent assessment of the party acting in contrast to good faith, but decisions solely based on the general notion of good faith, do not seem present in case law.

Failure to comply with the duty to cooperate, have shown the potential remove otherwise protected rights according to case no. 18/2007. However, this is hard to asses from just one arbitral award, and

the lack of further explanation of the tribunals evaluations of the case, makes it even harder to establish. In case no. 95/2004, the duty to cooperate was similarly part of the evaluation, but the decision of the tribunal seems to be mainly reliant on the seller's lack of delivery, which constitutes a fundamental breach. As such, the duty to cooperate plays the role of an additional argument, rather than a rule of law with actual substance.

Regarding the duty to disclose information in good faith, the case law applies similar application of the duty as the previous duties. While failure to disclose information does amount to some significance, the courts and tribunals conclude their decisions with references to CISG legislation, and then comment on the lack of disclosure in good faith. As such, it does not seem that the parties have more extensive duties or rights. However, failure to comply with the duty of disclosure, does appear to cause a more stringent interpretation of the contract. This is clearly seen in the cases regarding standard business terms, where the courts rule according to article 8, but their interpretation of the contract has been influenced by the need to promote good faith.

From the duty of solicitude, a clear substance of the duty cannot be expressed either. It is clear from case no. 93/3275 that abuse of process strides against good faith, but the damages awarded to the seller, were a result of a fundamental breach according to article 25 and the damages caused to the seller, from the unlawful proceedings of the buyer. Furthermore, the principle of estoppel prohibits the parties from subordinating one's promises, which the other party has relied on. The other cases in the section of solicitude also have references to articles with substantive substance, and the mentioning of good faith mostly provide interpretational value, but not substantive duties or prohibitions.

#### 6.4.3 Recapitulation

The main difference in the duties and prohibitions derived from the principles, appear to be the difference in legal substance of the principles. The duties derived from the principle of loyalty carry substance from the legislation it is found within, while the duties derived from the principle of good faith does not intrinsically carry weight or substance. The principle of good faith seems to provide interpretational value, but no case was found to be solely decided on the principle alone.

## 7. Comparison

From the expositions and answers to the sub-questions above, the following comparison will gather the main findings of the disposition.

Firstly, the Danish principle of loyalty has a much wider field of application compared to the principle of good faith. This is because the principle of good faith applies to several legal areas, where against the principle of good faith only applies to international sale of goods. The field of application is furthermore delimited by the CISG article 2. The Danish principle of loyalty will consequently apply more often, since it has a larger field of application to work within.

Secondly, the authority of the Danish principle of loyalty is well-defined, compared to the CISG principle of good faith. While the correct authority and application of the principle of good faith is still disputed, the principle of loyalty is an integral part of the Danish legislation. Since the principle of loyalty is well defined, it is used commonly and securely. The principle of good faith however, could gain its authority from many CISG sources, either through interpretation, implicitly through legislation, as a general principle of the CISG or as a common trade usage or practice. Still, since there is debate and insecurity regarding the “where, why, and when” the principle should be used, it is hard to specifically conclude on the definite authority of the principle.

Thirdly, neither of the systems seem to have rulings solely on the principle of loyalty or good faith, but the principles in the Danish legal system carry more weight and authority through the codified legislation it is within. The applications of the principles are quite different, since both the fields of applications and the authorities of the principles vary in extent. As such, several matchings can be observed in the case law. However, the difference in the certainty of which the courts apply the principles, and the differences in the substance the courts contribute to the principles, are striking.

Finally, this becomes evident when one tries to boil down the specific duties, rights or prohibitions of the principles. While the Danish principle of loyalty does provide tangible duties with actual substance, the CISG principle of good faith seems to rather provide guidelines, which however can carry substance if the court decides so, in relation to the interpretation of the case.

## 8. Conclusion

The main question and problem statement of the dissertation was: “To what extent is the application of the CISG principle of good faith comparable to the application of the Danish principle of loyalty?”

The conclusion is unfortunately somewhat vague. The main answers are that the ideas behind the principles are equal to some extent. The basic field of application overlap somewhat, so the principles of good faith and loyalty are comparable to the extent of the field in which they equally apply. The authorities of the principles are vastly different, and it seems hard-pressed to compare the two principles accordingly. Within the application of the principles in court cases, some convergence can be observed, if one compares the subjective reasoning's behind the rulings. The substances of the principles in case law are however non-comparable. Regarding the duties derived from the principles, the main difference is the firmness of the Danish duties compared to the vague duties of the CISG. The contracting parties within the Danish legal system appear better equipped to foresee their legal position in contrast to their international counterparts within the CISG-system.

The dissertation can as such not provide a clear answer to the extent of the comparability, mainly because the extent of the principle of good faith is yet unknown. The principle is still in development through scholarly persuasion and a growing amount of case law. It can however be concluded, that the interpretation and understanding of the Danish principle of loyalty should under no circumstances be applied to the principle of good faith, since one would arrive at a conclusion, which is too substantive and extensive compared to the merits of the principle of good faith.

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### 9.3 Court Cases and Arbitrational Awards

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- Belgium 15 May 2002 Appellate Court Gent **case no. 2001/AR/0180** (*NV A.R. v. NV I.*) [Cite as: <http://cisgw3.law.pace.edu/cases/020515b1.html>]
- France 22 February 1995 Appellate Court Grenoble **case no. 93/3275** (*BRI Production "Bonaventure" v. Pan African Export*) [Cite as: <http://cisgw3.law.pace.edu/cases/950222f1.html>]
- Germany 9 January 2002 Supreme Court **case no. VIII ZR 304/00** (*Powdered milk case*) [Cite as: <http://cisgw3.law.pace.edu/cases/020109g1.html>]
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- Germany 24 July 2009 Appellate Court Celle **case no. 13 W 48/09** (*Broadcasters case*) [Cite as: <http://cisgw3.law.pace.edu/cases/090724g1.html>]
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- Mexico 10 March 2005 Primer Tribunal Colegiado en Materia Civil del Primer Circuito **case no. 127/2005** (*Kolmar Petrochemicals Americas, Inc. v. Idesa Petroquímica S.A. de C.V.*) [Cite as: <http://cisgw3.law.pace.edu/cases/050310m1.html>]
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- Netherlands 23 April 2003 Appellate Court 's-Gravenhage **case no. 99/474** (*Rynpoort Trading v. Meneba Meel*) [Cite as: <http://cisgw3.law.pace.edu/cases/030423n1.html>]

### 9.3.2 CISG Arbitrational Awards

- American Arbitration Association 23 October 2007 **case no. 50181T 0036406** (*Macromex Srl. v. Globex International Inc.*) Interim Award [Cite as: <http://cisgw3.law.pace.edu/cases/071023a5.html>]
- Hungarian Chamber of Commerce and Industry Court of Arbitration 17 November 1995 **case no. VB/94124** [Cite as: <http://www.unilex.info/case.cfm?id=217>] – visited 08/05/2015
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- U 1969.243 Ø
- U 1993.72 H
- U 1995.366 H
- U 1999.1523 H
- U 2000.355 H
- U 2001.1422/2 Ø
- U 2001.1293 H
- U 2002.1096 V
- U 2004.1968 V
- U 2008.1911 H
- U 2009.1636 V
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### 9.3.4 Table of Statutes

- CISG - The United Nations Convention on Contracts for the International Sale of Goods (1980)
- The Danish Sale of Goods act - LBK nr 140 af 17/02/2014 - current
- The Danish Contracts act - LBK nr 193 af 02/03/2016 - current

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