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The duty to negotiate in good faith

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Abstract

Purpose – Precontractual liability may be imposed when a party acts in bad faith to damage the other party, when a party negotiates in order to discover business secrets with no intention of reaching a final agreement, or when a party to a non-binding letter of intent terminates negotiations during a later phase of negotiations without legitimate reason. The purpose of this article is to clarify the concept of the duty to negotiate in good faith, either for Civil Law or Common Law system practitioners.

Design/methodology/approach – The paper describes the concept of good faith and fair dealing and its effects on the negotiation process. After establishing this description, we will analyze the differences in the interpretation and the application of the concept of good faith in the pre-contractual procedure. The article explores the Civil Law approach for this matter, followed by the Common Law approach. In order to illustrate the Common Law System, we will focus on English and American Law, while we will look mainly at German, Brazilian and French Law to illustrate the Civil Law. In the conclusion, we will compare the approaches of the two systems.

Findings – The obligation of good faith in negotiation is found practically in all civil law system countries and generally provides a remedy for a wrongful conduct produced by a bad faith act. However, there is no general rule in Common Law requiring the parties to negotiate in good faith. We are in favor of applying a more expansive view of good faith obligations for international business transactions involving two or more different countries from these two different legal systems (civil law and common law), so as to apply them to the duty to negotiate arising from preliminary agreements and negotiations. Although there is no general rule about pre-contractual liability in the common law system, we strongly believe that the existing body of case law and statutes may punish a party which engages in unfair conduct at the pre-contract stage if the parties had signed a letter of intent or a memorandum of understanding, requiring them expressly and clearly to "act in good faith" and/or "to use their best efforts to reach an agreement".

Originality/value – This article has discussed a relatively unexplored area related to the obligation of good faith in negotiation either for civil law and common law's practitioners. Our research has highlighted the complexity of this matter between these two legal systems, and has helped to the identification of the concept of good faith in a relation between two or more parties.

Keywords Negotiation, Trust, Contracts, Civil law, Common law

Paper type Research paper

1. Introduction

The objective of this article is to clarify the concept of the duty to negotiate in good faith, in order to avoid misunderstandings in a pre-contractual negotiation stage, either for Civil Law or Common Law system practitioners.

In a bargaining procedure between two or more different parties from different legal systems, several legal, economic, political and cultural issues are normally involved. Fulfilling all the expectations from the parties is always a huge challenge for any lawyer or business man/woman involved in the transaction.

When two or more parties decide to enter into a negotiation, they normally expect eventually to reach an agreement that benefits everyone. That's the primary idea about business: cooperation in order to obtain mutual profits:

> Negotiation can be defined as a communication process that people use to plan transactions and resolve conflict (Wiggins and Lowry, 2005).

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But what happens when the agreement is not reached? What if a party finds out that the other party is not acting with good faith in the preliminary phase of negotiations? What if a party with no intention of reaching a final agreement enters into a bargain procedure only in order to have access to some business secrets of the other party? What if a party to a non-binding letter of intent terminates negotiations during a later phase of negotiations without legitimate reason?

Imagine a situation in which one individual breaks off, without reasonable grounds, contractual negotiations before a contract is agreed upon (see, for example, cases sited in Palandt, 1989). If this individual has negligently or fraudulently created an expectation on another party, although he knows or should have known that the expectation could not be realized, is he liable for damages caused by the other's reasonable expectations? What if there is no negligence or fraud? Does the outcome differ? Are negligence and fraud the same?

First of all, to answer these questions, we have to describe the concept of good faith and fair dealing and its effects on the negotiation process. After establishing this description, we will analyze the differences in the interpretation and the application of the concept of good faith in the pre-contractual procedure.

The article will analyze the Civil Law approach for this matter, followed by the Common Law approach. In order to illustrate the Common Law System, we will focus on English and American Law, while we will look mainly at German, Brazilian and French Law to illustrate the Civil Law. In the conclusion, we will compare the approaches of the two systems.

2. Definition of good faith

The doctrine of good faith is recognized as one of the general principles of contract law. Broadly speaking, good faith is a concept of honesty, which means to act without any malice or the desire to defraud others[1]. However, good faith is a subjective concept and it should be applied and enforced on a case by case basis.

According to the *Black's Law Dictionary* (Bryan, 2000), "good faith" is:

> A state of mind consisting in (1) honesty in belief of purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade business, or (4) absence of intent to defraud or to seek unconscionable advantage.

To identify good faith in a relation between two parties, we have to take into consideration the conduct and the facts of each case, such as the personal, cultural and economic status of the parties involved in a transaction. It means that there is not an automatic application of the good faith standard.

In commercial law, good faith and fair dealing can be defined as honesty in the conduct of the transaction concerned. A simple example is as follows: A pays $1,000 to B as a good faith deposit on car that B offers for sale. Actually, B does not own the car and does not plan to sell it, so his acceptance of the deposit is not in good faith.

In order to apply the principle of good faith, we have to analyze not the consequences of the act, but the action *per se*. Therefore, in the phase of negotiation, prior to the conclusion of the contract, if a party acts with no intention to violate the other party's rights, it can be considered good faith performance.

Determining the content of good faith under a particular negotiation involves an inquiry into the expectations of the parties. In making this inquiry we must look to the surrounding circumstances of the bargain.

As was already said, good faith is an elusive idea, having different meanings as we move from a context to another. It can depend on the legal system involved (e.g. common law or civil law), the type of the contract (e.g. commercial, labor, or consumer), the nature of the subject matter of the contract (e.g. sale of goods, employment, services).

Most claims that a party has engaged related to the absence of good faith in negotiations can be related to the concept of honesty, fairness and reasonableness. This idea will be used as the focus for a survey of manifestations of good faith in a number of different areas of law, and to identify what might properly be labeled as good faith rules (O'Connor, 1990).

In contract law, good faith can be read as having both a subjective sense (requiring honesty in fact) and objective sense (requiring compliance with standards of fair dealing)[2]. The more we may specify and clarify the nature of the subject related to the issue, the greater are the chances to finding the right doctrine of good faith applicable to the specific case.

Good faith is applying both the civil and common law. Although there are other important legal traditions, the influence of these two is clearly predominant and particularly evident in the development of international law. For that reason, the elements of good faith in the civil law, the common law and international law are described in the following chapters to provide a focus for the more detailed study of good faith.

3. Civil law approach to precontractual liability

The duty of good-faith bargaining ("fair dealing") in the Civil Law System takes into consideration mainly the relationship between the parties. Different from the Common Law, which considers strictly what is reduced to writing[3], Civil Law codifications focus on all the expectations of the parties to the transaction (Gauch *et al.*, 1982). It means that what was spoken and treated by the parties may have a greater value than what is written on a article. Therefore, sometimes, the signing of a written contract does not have the same significance in the civil law that it has under common law.

For this reason, under the civil law approach, mutual obligations can be enforced between two parties even if they have not concluded a written agreement[4]. As described on the chapter three of this article, it may be true in common law as well, but certain deals have to be in writing in order to be enforceable.

It was a French scholar, Raymond Saleilles, who in 1907 advanced the view that after parties have entered into negotiations, both must act in good faith and neither can break off the negotiations arbitrarily without compensating the other for damages measured by reliance (Saleilles, 1907).

If during the negotiation process a party takes advantage of the other, negligently and/or fraudulently creating an expectation in another party, although he knows or should have known that the expectation could not be realized, the defaulting party may be punished by having to perform the agreement or paying some amount of money in order to compensate the other party for this loss.

Under the civil law, a contract or a transaction should be first interpreted so as to establish the common intention of the parties (O'Connor, 1991). It is a subjective analysis of the conduct, intention and expectations of the parties. In other words, the parties are bound by the language of the contract and also by the conduct of the parties (O'Connor, 1991).

A good example of the tendency of civil law courts to impose a duty of good faith at an early point in the contractual process – during the negotiation stage – can be found in the *Société Muroiterie Fraisse* v. *Micon et Autres*[5], which a French Court of Appeals noted:

> [I]t must be recognized... that the preliminary phase of negotiations, during which the conditions of the contemplated contract are studied and discussed, certain obligations of rectitude and good faith rest on the parties; these obligations clearly relate not to the conclusion eventual contract but to the conduct of negotiation themselves (O'Connor, 1990).

This interpretation is applied to give an equable balance of the parties' interests from a substantive point of view rather than the formal application of the words of the contract (Zimmerman and Whittaker, 2000).

3.1 Culpa in contrahendo *(fault in negotiating)*

German Law applies the doctrine of *culpa in contrahendo* (fault in negotiation) to provide a remedy for a wrongful conduct during the pre-contractual phase[6]. This concept supports the civil and international/comparative law rules on good faith bargaining.

The following transcription of the German Civil Code's approach may be applied by most of the civil law systems:

> [The drafters of the German Civil Code] sought to lay down abstractly formulated rules, couched in terms of rigidly defined concepts and comprising as many individual solutions as possible... Still, they have sufficient insight into the variety and variability of life-situations to insert into the Code, a number of blanked concepts such as "good faith" (Treu und Glauben), "good morals" (gute Sitten), "fairness" (Billigkeit), and the like, which gave some leeway for judicial law-finding (Rumelin, 1930).

Therefore, a party is obliged to bargain in good faith, and shall avoid creating any expectation to the other party about future business and transactions between the parties, unless he so intends.

However, merely terminating the negotiations without reaching an agreement will not result in any liability if the parties involved were clear and transparent during their conversations. For example, if two companies are interested in having conversations in order to verify the possibility of future business transactions between them, they are able to do that without having any responsibility with each other for the result of this negotiation since they demonstrate in a clear and frank way their interests and intentions from the beginning of the bargain procedure (Schlesinger, 1968).

According to this doctrine, it is not illegal for a company or an individual to have parallel negotiations. Since the parties involved are aware about the real possibilities if closing the deal, this is allowed (Roger *et al.*, 1999a). On the other hand, if the parties decided to celebrate preliminary agreements such as "contracts to contract" and/or letters of intent, these documents are generally accepted by German courts[7] and may bind the parties for future obligations. In Germany, as in most of civil countries, some precontractual duties may be established during negotiations, such as an obligation to maintain the confidentiality of certain information or an obligation to restrain from negotiating with a third party for a specific length of time (Roger *et al.*, 1999b).

Under German Law, a party may be liable under the doctrine of *culpa in contrahendo* when he fraudulently states his intent or enters into a letter of intent that he does not intend to perform. The doctrine of good faith is a particularly tempting instrument for interstitial law-making because it has proved to be flexible enough to

respond to novel needs of the legal system, and firm enough to serve as a foundation even for new causes of action, such as the action for breach of negotiation.

In the last century, the doctrine of *culpa in contrahendo* inspired many civil law system law makers, so that in many jurisdictions the law of obligations recognizes and enforces the principle that in making and carrying out negotiations parties should act in good faith. For example, Brazil, which is a country that has inherited civil law system, has its precontractual responsibility mainly subject to the rules present in the Law 10.406 of 10/01/2002, the new Brazilian Civil Code. According this Code, legally capable parties are free to enter into negotiations with each other, setting mutual obligations at will. As long as an obligation is not illicit, in conflict with the Law, immoral or impossible to attain, it is deemed valid. Besides the principle of free will, the new Brazilian Civil Code introduced other important principle that must also be followed and observed in the performance and interpretation of any negotiation process. The principle called "Objective Good Faith" is defined in the art. 422 of the Brazilian Civil Code: Art. 422: "the parties are obliged to keep in the contract conclusion as well as in its execution, the principles of honesty and good faith". It is noteworthy that in addition to their more direct and immediate meanings, this principle may also be used to even out the principle of free will amplitude, imposing some restrictions on its interpretation. Therefore, although the Brazilian Legal System does not expressly require a negotiation procedure to be just, there is already a well defined tendency in admitting the "fair dealing" as an element of bargaining. It is in essence a principle of fair and open dealing (Jack and Daniel, 1995b).

4. Common law approach to precontractual liability

In principle, there is no general rule in Common Law requiring the parties to negotiate in good faith. However, legislation[8] may impose a degree of good faith in pre-contractual negotiation stage.

Although there is no general rule about precontractual liability in the common law system, the existing body of case law and statutes may punish a party which engages in unfair conduct at the pre-contract stage. An unjustifiable refusal to deal or an unreasonable last-minute withdrawal from negotiations are examples of the type of unfair conduct which may constitute a breach of the duty to negotiate in good faith (Jack and Daniel, 1995b).

However, for a breach of good faith in the negotiation stage, if a remedy in torts is not available, for example, by an action for deceit or for negligent misrepresentation under the principle in *Hedley Byrne* v. *Heller*[9], there may be no effective remedy at all in common law system[10].

According to common law approach to precontractual liability, in principle a basic agreement simply to negotiate does not bind the parties engaged into a negotiation procedure[11].

In general, the common law does not afford a remedy to a party to negotiations for a contract where the other party breaks off negotiations arbitrarily or prematurely, even though the result is to render abortive the time spent and unnecessary expenditures incurred by the first party in reliance on the conduct and continuance of negotiations in good faith[12].

There is no legal prohibition on an individual conducting negotiations simultaneously with several parties and without informing any of them that he is also negotiating with others, nor does he commit a breach of any legal duty if, having

conduced parallel negotiations, he celebrates an agreement with one party and terminates negotiation with the others[13].

This denial of remedy is justifiable on the general principle of good faith in common law, which does not recognize the German concept of *culpa in contrahendo*, and states that there is no halfway house between contract and no-contract[14].

The assumption is that the parties enter into negotiation at their own risk and unless and until they conclude the contract they have no claim whatever on the other party. As we have already mentioned, attention has been drawn to the possible liability of a party in tort where his statement is fraudulent or negligent and cause loss. Thus, if a person invites a tender from another knowing that he will not in any circumstances accept that party's tender, he may be liable to a lawsuit in tort for deceit or fraud[15].

The mere absence of good faith is not of itself a cause of action. It must be supported by conduct which the law recognizes as tortuous or as avoiding the party concerned from going back on what he has promised or represented. In these cases, the law may imply a promise on the defaulting party to pay on a *quantum meruit*[16].

4.1 Freedom to contract (or freedom not to contract)

The principle of freedom to contract (or freedom not to contract), and the absence of legally relevant intermediate stage between contract and no-contract, generally bars a possible cause of action for breaches of good faith in the pre-contractual procedure[17]. The common law system, there are two notions of freedom: the positive freedom of contract, which means that the formation of an agreement and the selection of its conditions and terms are the result of the free will of the parties (Berlin, 1969) and the negative freedom of contract, which means that the parties are free from obligations so long as a binding contract has not been concluded[18].

The freedom to act in the bargaining process is very slightly limited. The contracting party shall not act so as to frustrate the pre-conditions for the existence of freedom of contract. If he does so, the contract may not be binding, or may be invalid, and sometimes the party at fault might be subject to liability in tort (Farnsworth, 1987).

According to the second notion of freedom in the bargaining process, namely the negative freedom of contract or the freedom from contract, so long as a contract has not been concluded, the contracting parties are free to withdraw.

For this reason, if they are not contractually bound (and have not committed any tort), why should they be bound at all?

> By permitting liabilities to arise before agreement has been reached, the courts sense a danger that this would amount to the imposition of liability without consent (Collins, 1993)

It is clear that, according to most of the common law doctrines, imposing liability on the parties before the formal requirements, e.g. the requirement of consideration or a formal document, are met would be contradictory to the very existence of those requirements.

4.2 US courts' opinion about preliminary agreements (agreements to agree)

The first US court to consider a duty to negotiate in good faith was Delaware Supreme Court in Itek Corp vs Chicago Aerial Indus. Inc. There, the court granted summary judgment to the defendant ruling that the parties were obliged in the letter of intent to "make every reasonable effort" to agree upon a formal contract. Only if the parties failed to conclude the agreement after making every reasonable effort were they relieved of further obligations. The court held that the letter of intent "obligated each

side to attempt in good faith to reach final and formal agreement" and since there was evidence that the defendant "willfully failed to negotiate in good faith" and did not make "every reasonable effort" to agree on a contract, the court held that summary judgment was improper (Farnsworth, 1987)[19].

A similar case related to a "best efforts clause" was Thompson vs Liquichimica of America Inc. There, the parties signed a letter of intent requiring them to "use their best efforts to reach an agreement" to settle Thompson's rights. When the parties failed to agree, Thompson claimed that Liquichimica of America failed to use its "best efforts" to reach an agreement. The court refused to dismiss the claim holding that a "best efforts clause" may impose a binding obligation depending on the parties' intent[20].

In Teachers Ins. and Annuity Ass'n vs Tribune Co.[21], a federal court of the US has held that a party breached a duty to negotiate in good faith. In this case, Teachers (the lender) signed a commitment letter for a 14-year, $76 million loan at an interest rate of 15.25 per cent. The letter state a "binding agreement subject to preparation and execution of final documents to both sides and the approval of the Tribune's (the borrower's) Board of Directors". Before signing the final agreement, the Tribune terminated negotiations. Teachers filed a lawsuit claiming that the borrower decided not to conclude the agreement because interest rates declined in interim, allowing the Tribune to borrow the amount at a considerable lower cost.

The federal district court decided that:

> [T]here is a strong presumption against finding binding obligations in agreements which include open terms, call for future approvals and expressly anticipate future preparation and execution of contract documents[22].

Although there were open terms, the court noted the language in the letter of intent demonstrated a binding agreement that required the parties to negotiate in good faith.

As we can see, although most US courts still take the position that preliminary agreements to negotiate are not enforceable, a minority view recognizes that the duty to negotiate in good faith exists when a preliminary agreement contractually requires the parties to act in good faith.

In order to create this duty, the preliminary agreement must contain explicit language contemplating good faith negotiations[23]. It is a question of construction whether the letter of intent is intended to constitute a legally binding undertaking or is merely a prelude to agreement on terms to be negotiated and settled by some other document[24]. The main factor is not the label given to the document but the presence or absence of an intention to assume legal responsibility[25].

5. Convention on contracts for the international sale of goods

The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG)[26] represents the most recent attempt to unify or harmonize international sales law. The CISG created a uniform law for the international sale of goods[27] and is automatically applicable to contracts for the sale of goods between parties located in two CISG states unless the parties agree otherwise[28].

At the first glance, the Convention does not contain a provision expressly addressing the matter of liability for precontractual bargaining and preliminary agreements. This omission was not an oversight by the drafters of the CISG. An early draft of the Convention provided in its article 5 that "[i]n the course of the formation of the contract the parties must observe the principle of fair dealing".

This provision was omitted in the final agreement for several reasons: the concept of good faith could take the courts to have a non-uniform interpretation for the CISG; good faith would be more appropriate to contract performance than contract bargaining; good faith would be only a moral principle and not a legal obligation; and the provision in the draft failed to specify the consequences for the failure to accomplish its requirements[29].

The fact that CISG does not have a provision expressly dealing with the precontractual liability of the parties for their conduct during the negotiations dos not necessarily mean that the issue falls outside the scope of the Convention. In fact, the article 7 of the CISG forth one of the main considerations in interpreting the Convention: the principle of good faith between the parties[30]. Article 7(1) says:

> In the interpretation of this Convention, regard is to be had to its international character and the need to promote uniformity in its application and the observance of good faith in international trade[31].

The application for this principle to the interpretation of the Convention is controversial and raises two general questions (Schlechtriem and Schwnezer, 2005): it is difficult to determine what the standards of "good faith in international trade" are outside the Convention's principles; it is unclear whether and to what extent interpretation of particular concepts or provisions of the Convention can result in their modification in order to confirm which the required standard.

A preliminary consideration might moreover be made regarding the eventuality that the parties themselves have specified what their rights and duties during the negotiation process[32]. In Genova Pharmaceutical Technology Corp. vs Barr Laboratories, Inc.[33], an US District Court (SD NY) invoked the principle of good faith in international trade and referred to "usages and practices of the industry" in order to advocate a liberal approach to contract formation under the CISG.

Whether accepting or not the idea that the principle of good faith may be invoked in order to impose on the parties additional duties of behavior even during bargaining process is an issue for the courts and international tribunals to decide and to characterize such rule as containing to standards of good faith in international trade. The sooner the courts and tribunals refer to such standards, the more concrete the requirements for this provision become[34].

6. The duty to negotiate in good faith in international tribunals

The first discussion about the duty to negotiate in good faith by an international tribunal is found in the case of Railway Traffic between Lithuania and Poland[35]. In that case, the Council of the League of Nations had passed a resolution in 1927 calling upon the governments of Lithuania and Poland to enter into negotiations to end the state of war between them[36]. Later, in a case involving railway traffic between the two countries, the Permanent Court of International Justice, faced with a *pactum de negotiando*, held in its Advisory Opinion of 15 October 1931 that it was:

> [J]ustified in considering that the engagement incumbent on the two Governments in conformity with the [League of Nations] Council's Resolution [of 10 December 1927] is not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements [...] But an obligation to negotiate does not imply an obligation to reach an agreement, nor in particular does it imply that Lithuania, by undertaking to negotiate, has assumed an engagement, and is in consequence obliged to conclude the

> administrative and technical agreements indispensable for the re-establishment of traffic on the Landwarow-Kaisiadorys railway sector[37].

Although the court did not use the term "good faith", its requirement that the governments pursue negotiations "with a view to concluding agreements" is clearly a good faith standard. It is important to mention that in this case, the duty to negotiate in good faith came from a resolution of the League of Nations.

The duty to negotiate in good faith was emphasized by the International Court of Justice in a 1969 opinion in the North Sea Continental Shelf[38]. In this case, Denmark, the Netherlands and the Federal Republic of Germany entered into certain special agreements in which they assumed an obligation to negotiate a delimitation of their respective continental shelves[39]. The negotiations failed and a dispute was submitted to the Court on 20 February 1967, related to the delimitation of the continental shelf between the Federal Republic of Germany and Denmark on the one hand, and between the Federal Republic of Germany and the Netherlands on the other. The Parties asked the Court to state the principles and rules of international law applicable, and undertook thereafter to carry out the delimitations on that basis.

The court addressed the case ruling that governments must seriously consider compromising their position, even if involves a position they firmly believe to be correct. The implication of this decision is that government should be willing to compromise in negotiations and may be required to do so under some circumstances. In the same decision, the court also said that:

> This obligation was merely a special application of a principle underlying all international relations, which was moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes[40].

By this statement, the International Court of Justice recognized that the source of the duty to negotiate shall not be limited to resolutions of international agencies, but also comes from international law and may have a broader application.

Since the late 1960s, international courts have consistently held that parties are required to negotiate in good faith. Acts such as breaking-off negotiations where there has been an almost complete agreement on all terms; breaking-off negotiations where expenses have been incurred as a result of the encouragement by the other party who promised that a contract would eventually be concluded (Kuehne, 1990) may be punished by either specific performance and/or compensative damages. Nowadays, a number of international tribunals have recognized the principle of good faith as one of the basic principles governing the creation and performance of legal obligations[41].

7. Conclusion

Most specific rules of business can be traced to the norms of good faith and fair dealing. Good faith in negotiations can be interpreted as an expansive interpretation of contractual good faith.(Newman, n.d.) The obligation of good faith in negotiation is found practically in all civil law system countries and generally provides a remedy for a wrongful conduct produced by a bad faith act. However, there is no general rule in Common Law requiring the parties to negotiate in good faith.

Personally, I am in favor of applying a more expansive view of good faith obligations for international business transactions involving two or more different countries from these two different legal systems (civil law and common law), so as to apply them to the duty to negotiate arising from preliminary agreements and negotiations.

Although there is no general rule about pre-contractual liability in the common law system, I strongly believe that the existing body of case law and statutes may punish a party which engages in unfair conduct at the pre-contract stage if the parties had signed a letter of intent or a memorandum of understanding ("MOU"), requiring them expressly and clearly to "act in good faith" and/or "to use their best efforts to reach an agreement"[42]. In order to create this duty, the preliminary agreement must contain explicit language contemplating good faith negotiations[43].

In entering into a letter of intent or a MOU with a special clause establishing the duty to negotiate in good faith, I believe that the parties will be bounded by this document and will be able to enter into a bargain procedure knowing their rules and the expectations, and may conclude an agreement or not without any friction and/or litigation between them.

Notes

1. Sir Thomas Bingham, in his Foreword to Reziya Harrison, *Good Faith in Sales* (London, Sweet and Maxwell, 1997).
2. See Lando and Beatle (1995), Similarly, Article 1.7 of the UNIDROIT *General Principles for International Commercial Contracts* provides that each party should "act in accordance with good faith and fair dealing in international trade".
3. In the United States, contracts for the sale of goods where the price equals $500.00 or more (with the exception of professional merchants performing their normal business transactions, or any custom-made items designed for one specific buyer) fall under the statute of frauds under the *Uniform Commercial Code (UCC)* (article 2, section 201). UCC § 1-206 states that a contract for the sale of such property where the purchase price exceeds $500.00 is not enforceable unless memorialized by a signed writing.
4. In some civil law countries, a statutory duty of good faith explicitly extends to precontractual negotiations. See the Argentine Civil Code art. 1198 (1970), which requires that contracts be made as well as constructed and enforced in good faith; the Israeli Contracts (General Part) Law, 5733 – 1973 art. 12, which requires that in "negotiating a contract, a person shall act in customary manner and in good faith", the Italian Civil Code art. 1337 (1942), which requires the parties to act in good faith "in the conduct of negotiations and the formation of the contract"; and Yugoslavian Obligations Law of 1978 art. 30, which imposes liability on a party who engages in negotiations "without intention to conclude a contract" or "who renounces this intention without legitimate reason." In most civil law countries, however, liability must be based on a more general code provision.
5. *Société Muroiterie Fraisse* v. *Micon et Autres*, Cour d'appel de Pau, 14 Javier 1969, 1969 daloz et Sirey 716.
6. The collapse of the German currency in 1923 and the subsequent revalorization of obligations by German courts is discussed *inter alia* by Cohn (1968), vol. 1, pp. 60 et. Seq.; Nussbaum (1950), esp. p. 206 et. Seq.; Dawson (1968).
7. See, e.g. judgment of October 29, 1987, BGH, W. Ger., 42 Wetpapier-Mitteilungen (WM) 1988, page 336; judgment of May 8, 1907, RG, RGZ Volume 66 (1907), pages 116, 120.
8. *Unfair Contract Terms Act* 1977; *Sale of Goods Act* 1979; *Fair Trading Act* 1973; *Consumer Credit Act* 1974; *Restrictive Practices Act* 1976; *Resale Prices Act* 1976.
9. The mere withdrawal of an offer, which causes loss to the offeree, would not, it is suggested, give rise to a claim for damages in tort for misrepresentation.
10. Refisals to contract may be remedied by injunction and damages under legislation, for example, the *Resale Prices Act* 1976, sections 12 and 25, and *Sex Discrimination Act* 1975, sections 65, 66 and 71 and even at common law, in exceptional cases, a refusal to

supply may be restrained by injunction, Acrow (Automation) Ltd vs Rex Chainbelt Inc. (1971) 1 W.L.R. 1676.

11. For example, *Hoffman* v. *Red Owl Stores Inc*. 133 N.W. 2d. 267 (1965), noted, in Beale *et al*. (1985).
12. *Donwin Productions Ltd* v. *EMI Films Ltd* (1984) *The Times*, March 9.
13. See Goode, (1988), *Comercial Law*, pp. 117, 576 and *The Codification of Commercial Law* (1988) 14 Mon. L.R. 135 at p. 151.
14. *Richardson* v. *Sylvester* (1873) L.R. 9 Q. B. 34.
15. *Richardson* v. *Sylvester* (1873) L.R. 9 Q.B. 34.
16. *William Lacey, Hounslow Ltd* v. *Davis* (1957) 2 AII E.R. 712.
17. *Cf. Brewer Street Investments Ltd* v. *Barclay's Wooden Co. Ltd* (1953) 3 W.L.R. 869 at p. 873 (per Somervell L.J.) and at p. 874 (per Lord Denning).
18. Brudner, A. *Reconstructing Contracts* (1993) 43 UTLJ 1,5. On the relative character of consent see L Brilmayer, *Consent, Contract and Territory* (1989) 74 Minn L Rev 1; R Craswell, *Property Rules and Liability Rules Unconscionability and Related Doctrines* (1993) 60 U Chic L Rev 1.
19. Farnsworth (1987).
20. Del. Supr., 248 A.2d 625, 629 (1968).
21. 481 F. Supp. 365, 366 (S.D.N.Y.1979).
22. 670 F. Supp. 491, 497-8 (S.D.N.Y. 1987).
23. 670 F. Supp. 491, 497-8 (S.D.N.Y. 1987)
24. *British Steel Co.* v. *Cleveland Bridge and Engineering Co. Ltd* (1984) 1 AII E.R. 804, per Goff J. at pp. 509-10.
25. As was held to be the case *British Steel Co.* v. *Cleveland Bridge and Engineering Co. Ltd*, above.
26. S.N. Ball, *Work Carried Out in Pursuance of Letters of Intent*, 99L.Q.R. 572.
27. United Nations Conference on *Contracts for International Sale of Goods*, Official Records, U.N. Document No. A/CONF. 97/19 (E.81.IV.3) (1980). The popular acronym of the Convention is CISG. The Convention entered into force on January 1, 1988.
28. CISG, art. 1 (1).
29. Commentary on the Draft Convention on Contracts for the International Sale of Goods prepared by the Secretariat, Official Records, at 20, U.N. Doc. A/CONF.97/5 (1979) [hereinafter Secretariat Commentary].
30. CISG, art. 7(1). For an opposing view, see Arthur, R. (1984), *The International Sales Convention: A Dissenting View*, 18 Int'l Law. p. 445.
31. CISG, art. 7(1).
32. For different, yet equally interesting, attempts to provide a systematic analysis of the whole area of precontractual liability, see F. Kesser-E Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract; a Comparative Study in 77 Harvard Law Review* 401 (1964).
33. *Geneva Pharmaceuticals Technologies Corp*. v. *Barr Labs., Inc*., 201 F. Supp. 2d 236 (S.D.N.Y. 2002).
34. Herber Uncitral-*Ubereinkommen*, p. 11 (2000). Cf. Herber, previous English edition of this commentary, art. 7, para 18 ("as far as possible, with the maximum agreement of courts of Contracting States").
35. *Railway Traffic between Lithuania and Poland* (1931) P.C.I.J. Series A/B, No. 42 p. 116.

36. *Council of the League of Nations Resolution* of December 10, 1927, Art. 11.
37. See also the award delivered on 26 January 1972 by the Arbitral Tribunal for the Agreement on German External Debts in Greece vs Germany 47 ILR (1974) 453-4. On account of its importance, it is worth quoting the relevant passage of this award: `A *pactum de negotiando* is also not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken. It implies a willingness for the purpose of negotiation to abandon earlier positions and to meet the other side part way.
38. *North Sea Continental Shelf*, ICJ (1969).
39. The two Special Agreements had asked the Court to declare the principles and rules of international law applicable to the delimitation as between the Parties of the areas of the North Sea continental shelf appertaining to each of them beyond the partial boundaries in the immediate vicinity of the coast already determined between the Federal Republic and the Netherlands by an agreement of 1 December 1964 and between the Federal Republic and Denmark by an agreement of 9 June 1965. The Court was not asked actually to delimit the further boundaries involved, the Parties undertaking in their respective Special Agreements to effect such delimitation by agreement in pursuance of the Court's decision.
40. North Sea Continental Shelf Cases, 1969 I.C.J. at 47.
41. Nuclear Tests (Australia vs France) (Merits) [1974] ICJ Rep 253, 268 (*Nuclear Tests Cas*').
42. Thompson vs Liquichimica of America Inc. 481 F. Supp. 365, 366 (S.D.N.Y. 1979).
43. *British Steel Co*. v. *Cleveland Bridge and Engineering Co. Ltd* (1984) 1 AII E.R. 804, per Goff J. at pp. 509-10.

References

Beale, H.G., Bishop, W.D. and Furmstong, M.P. (1985), *Contracts Cases and Materials*, Foundation Press.

Bealson, J.-E. and Friedmann, D.E. (1997a), *Good Faith and Fault in Contract Law*, p. 28.

Bealson, J.-E. and Friedmann, D.E. (1997b), *Good Faith and Fault in Contract Law*, Clarendon Press, Oxford, p. 29.

Berlin, I. (1969), *Four Essays on Liberty*, Oxford University Press, Oxford.

Bryan, A.G. (2000), *Black's Law Dictionary*, p. 555.

Collins, H. (1993), *The Law of Contract*, 2nd ed., p. 169.

Farnsworth, E.A. (1987), *Precontractual Liability and Preliminary Arrangements: Fair Dealing and Failed Negotiations* 87 Colum L Rev 217, 221-2.

Gauch, P., Schluep, P. and Tercier, P. (1982), *Partie Generale du Droit des Obligations*, 340-4, 2nd ed.

Goode, R.M. (1985), *Commercial Law*.

Kuehne, G. (1990), *Reliance, Promissory Estoppel and Culpa in Contrahendo: A Comparative Analysis* 10 Tel-Aviv U Stud in Law 279.

Lando, O. and Beatle, H. (Eds) (1995), *The Principles of European Contract Law: Part 1*, Marhinus Nijhoff, Dordrecht.

Newman (n.d.), *The General Principles of Equity*, in Newman (Ed.), 589, 599-604.

O'Connor, J.F. (1990a), *Good Faith in English Law*, p. 11.

O'Connor, J.F. (1990b), *Good Faith in English Law*, Dartmouth, p. 97.

O'Connor, J.F. (1991a), *Good Faith in International Law*, p. 39.

O'Connor, J.F. (1991b), *Good Faith in International Law*, p. 41.

Palandt (1989), *Bugerliches Gesetzbuch*, 8th ed., p. 328.

Roger, B., Norma, J.H. and Geraint, H. (1999a), *Good Faith in Contract: Concept and Context*, p. 51.

Roger, B., Norma, J.H. and Geraint, H. (1999b), *Good Faith in Contract: Concept and Context*, p. 272.

Rumelin, M. (1930), *Erlebte Wandlungen in Wisenschaft unt Lehre*, translated in *Jurisprudence of Interests: Selected Writings 17-18*, Ed. M. Magdalena Schoch, (Harvard University Press, 1948).

Saleilles, R. (1907), *De la Responsabilite Precontractualle*, 6 Rev. Trim., Dr. Civ. 697, 718-9, 722.

Schlechtriem, P. and Schwnezer, I. (2005), *Commentary on the un Convention on the International Sale of Goods* (CISG), 100.

Schlesinger, R. (1968), *Formation of Contracts. A Study of the Common Core of Legal Systems*, p. 44.

Spanogle, J.A., Malloy, M.P., Del Luca, L.F., Rowley, K.A. and Bjorkund, A.K. (2007), *Global Issues in Contract Law*, Clarendon Press, Oxford, p. 2.

Wiggins, C.B. and Lowry, L.R. (2005), *Negotiation and Settlement Advocany: A Book of Readings*, West Group Publishing, p. 3.

Zimmerman, R. and Whittaker, S. (2000) *Good Faith in European Contract Law*, Cambridge University Press, Cambridge, pp. 20ff.

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