From the Selected Works of Bashar Malkawi

2018

Bashar H. Malkawi, Good Faith under UAE Law and the CISG.pdf

Bashar H. Malkawi

Creative Commons License

This work is licensed under a Creative Commons CC_BY International License.

Available at: https://works.bepress.com/basharhmalkawi/29/
GOOD FAITH UNDER THE CISG AND THE UAE LAW

(Comparative Context)

Bashar H. Malkawi
GOOD FAITH UNDER THE CISG AND THE UAE LAW

I. Introduction:

This research is written to shed the light on good faith as one of the most controversial concepts in the United Nations Convention on Contracts for the International Sale of Goods (CISG) by way of comparison with the doctrine of good faith in the law of the United Arab Emirates (UAE). It seeks to provide the readers with a quick background of the concept of good faith and its role in both the CISG and the UAE law.

The introduction will focus on the definition of good faith along with a short distinction between the concept of good faith and other close concepts.

a. The Definition of Good Faith:

Numerous definitions can be found for the concept of good faith however, one can tell that most of the definitions provide the same meaning. While some legislatures and jurists prefer to define good faith in a positive form by focusing on the way the parties shall behave and the manners they shall adopt in their relations, others tend to define it in a negative form as an omission from a certain act or behaviour.

A clear example of the positive form definition is where good faith is described as the obligation of the parties to act honestly, moderately and in a cooperative manner. In contrast, an example of the negative form definition of good faith states that the parties must not seek an unfair advantage or use the terms of the contract to abuse the rights of the other contracting party, and if possible, avoid conflicts.¹

The Black’s Law dictionary defines good faith as “a state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. – Also termed bona fides”²


b. Distinction Between Good Faith and other Principles:

i. Fair Dealing

The Black’s Law Dictionary defines fair dealing as “the conduct of business with full disclosure”. It also provides a definition of the “duty of good faith and fair dealing” as “A duty that is implied in some contractual relationships, requiring the parties to deal with each other fairly, so that neither prohibits the other from realizing the agreement’s benefits.”

The above definitions clarify how common could be the confusion between the concept of “good faith” and “fair dealing”. Thus, the main question to be answered here is whether “fair dealing” is another term for the concept of “good faith”.

There is an argument that “both concepts are textual representations of the same duty and the superficial differences are only a result of different legal schools”. According to the supporters of this argument, “good faith might be called the minimum requirement to achieve the reasonable expectations in every contract by fulfilling the contractual obligations, while fair dealing could be considered an obligation designed for specific situations to enhance the possibility of achieving the reasonable contractual expectations.”

ii. Reasonableness

There is a belief that reasonableness is a legal fiction that was developed to provide the court with an objective standard to measure the compatibility of the party’s behaviour with the standard imposed by the society of the contract in question. It was created to give the contracting parties the predictability they require in their contractual agreement.

As can be seen from the Black’s Law Dictionary definition of good faith above, reasonableness becomes part of the wider meaning of good faith. Thus, there is an argument that reasonableness was created to add an objective element to good faith wherein the party’s behaviour is examined through its explicit conduct and measured against the standard behaviour in the specific trade.

---

4 Supra note 2.
5 Supra note 2.
7 See id, at 28-31.
II. The requirement of Good Faith in Sale Contracts under the CISG and the UAE Law:

a. Does the CISG impose a duty to act in “Good Faith” on the contracting parties?

The answer to the above question depends on a revision of the articles in the CISG that refer to good faith and the way they are drafted. Good faith is incorporated in Article 7 (1) of the CISG which is placed under the General Provisions. It states that:

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

It is very clear from the text of the above article that it deals specifically with how should the CISG be interpreted. To achieve that, the article draws a guideline setting out the principles that should be taken into consideration upon interpretation. Among these principles, Article 7 (1) requires an “observance of good faith in international trade”.

The wording of Article 7 (1) has given rise to the question of whether the requirement of good faith is strictly limited for the purpose of interpreting the CISG or it extends beyond that. In particular, does Article 7 (1) extends to impose a duty to act in good faith on the contracting parties.

Theoretically, jurists divided into three groups in understanding Article 7 (1). The first group took the black letter approach by tending to concentrate exclusively on the “letter” of Article 7 (1). As a result, this group argues that the principle of good faith was laid down for the purpose of interpreting the CISG and does not impose a general duty of good faith in the formation and performance of the contract.

The above approach was objected to by the remainder of the jurists. However, although they agree that the principle of good faith incorporated in Article 7 (1) is not meant to deal with the interpretation of the CISG only, they did not agree to what extent the principle of good faith is supposed to cover.

On one side, some jurists believe that good faith should be implied to the performance of the contract. On the other hand, some jurists argue that the principle of good faith governs both the formation and performance of the contract. In their “Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods”, Professor Jacob S. Ziegel and Professor Claude Samson state that the language of Article 7 (1) is sufficiently broad to admit the inclusion of good faith in the formation of the contract. They continue “The [Secretariat] Commentary (p. 45) provides numerous examples of situations in which good faith may be a relevant factor and several of them include the formational phase in which good faith is a relevant aspect”.

---

of a contract”. ⁹ According to these two groups, the parties to an international sale of goods contract that is subject to the CISG have an implied obligation to act and perform the contract in a manner consistent with good faith.

The above variation is fairly predictable due to the international character of the CISG. The legislative process involved representatives from common law countries and civil law countries. Additionally, when the CISG came into force, it was adopted by many countries, some following the common law system while others follow the civil law system, each of which follows a different approach with regards to good faith. ¹⁰

The common law systems generally recognize no duty to negotiate in good faith -unless the parties contract themselves into such a duty- while the civil law systems do. This might be put in terms of an obligation of good faith or, perhaps more traditionally, a negative obligation not to abuse the right to break off negotiations. ¹¹

For instance, under the English common law, if the parties want to have an express duty of good faith they need to create one and they should think very carefully about its scope. The English courts will not allow good faith-type wording to overrule an absolute contractual right such as the right to terminate for convenience. The parties will need to expressly provide that a good faith obligation operates in relation to such a provision. In stark contrast in civil law countries such as the UAE, performing obligations in a manner consistent with good faith is a fundamental part of the contract. ¹² This could be considered as the core factor beyond the differences in understanding Article 7 (1).

Another main factor is related to the historical development which Article 7 (1) underwent during the legislative process. ¹³ This development comprised of three stages described as follows:

1. Stage One:

   Good faith first appeared in the draft convention in the following form:

   i. In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith.


   ¹¹ MARTIN DAVIES and DAVID V. SNYDER, INTERNATIONAL TRANSACTIONS IN GOODS “GLOBAL SALES IN COMPARATIVE CONTEXT” 74-75, (Oxford University Press 2014).


ii. The exclusion of liability for damage caused intentionally or with gross negligence is void.

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

Later on this stage, the second and the third paragraphs were rejected and removed from the draft. However, as for paragraph one, delegates were divided into two groups. The first group supported the language of paragraph one arguing that at least in the formation of the contract the parties must observe the principles of fair dealing and good faith. Others resisted the language of paragraph one on the basis that “fair dealing” and “good faith” had no fixed meaning and would lead to uncertainty.

2. Stage Two:

Many delegates called for deleting any reference to good faith on grounds that it was too vague and therefore would increase uncertainty and decrease uniformity by tempting reference to domestic good faith concepts. Additionally, they argued that good faith was implicit in all business laws and thus the inclusion of this principle in the CISG is superfluous. Some of the delegates also pointed to the lack of specific sanctions which would lead the courts to consider the sanctions set out by the domestic laws.

On the other hand, supporters argued that omitting good faith might send the wrong signal to parties involved in international trade as good faith was recognized as a fundamental principle of public international law. Good faith, according to this group, would afford flexibility by allowing courts to fashion individually-tailored sanctions and reduce discriminatory or undesirable trade practices.

Due to the above divergent views, a Working Group was set up to reach a compromise. They produced Article 6 (became CISG Article 7 (1)) in the following form:

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

3. Stage Three:

During the 1980 Diplomatic Conference which was convened by the United Nations General Assembly to work on the draft convention, many countries submitted different proposals concerning good faith. Article 7 (1), in its current form, was an attempt to please everyone although the nature of good faith and the extent of its precontractual application remained debatable.

In practice, the interpretation of Article 7 (1) and its scope differs from one jurisdiction to another. The case law issued by the competent courts in each jurisdiction reveals the approach of interpretation adopted in that specific jurisdiction. It is likely that similar approaches will be found in jurisdictions that follow the same system of law.

In Spain, for example, the early 2016 case of Depuradora Servimar, S.L. v. G. Alexandridis & CO.O.E.SC reveals that the Court applied a broad and purposive approach regarding Article 7
(1) of the CISG having implied a duty to act in good faith on the parties. The dispute involved a contract for the international sale of live molluscs which were to be sent to Spain for purification. One question that was before the Court of Appeal is to decide the starting date of the payment of interest.

First, “the Court ruled that the starting date for the payment of interest should be the date of the invoices (30 August 2010). However, the Court modified that conclusion by applying the principle of good faith under article 7(1) of the Convention, as it was only on 11 July 2012 that the first out-of-court complaint was recorded; that date was set as the dies a quo for the collection of interest in the present case, as the Court did not consider to be in good faith the almost-two-year delay in the seller’s filing the complaint in order to claim interest from the buyer for that period. Thus, the Court considered that this was the best solution for ensuring that good faith remained of prime importance in international trade.”

In Germany, the Court of Appeal ruled that: “Under the CISG, the party relying on the incorporation of standard terms needs to submit the relevant document as such or make it sufficiently accessible for the recipient. It would run contrary to the principle of good faith (Art. 7 (1) CISG) if the recipient were under a full duty to investigate the content of any standard terms which the declaring party has not sufficiently communicated or, in other words, if the recipient was burdened with the risk of unfavourable standard terms which had never been made known to it.”

b. Does the UAE Law impose a duty to act in “Good Faith” on the contracting parties?

The UAE legislator has codified the duty of good faith in the UAE Federal Law No. 5 of 1985 Concerning the Civil Transactions Law, as amended, (the UAE Civil Code). Article 246 (1) of the Civil Code stipulates that:

The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith.

The above Article was mentioned under the first part of the first book entitled “Personal obligations and rights” which set out the general legal framework of the contracts that are subject to the UAE law and the general principles applicable to them.

Based on the abovementioned Article and its placement in the UAE Civil Code, it is clear that good faith is implied into all contracts that are subject to the UAE law, including contracts of sale. This is underscored by principles of fairness, sincerity and honesty developed under

---


Islamic Sharia law. Many verses in the Holy Quran call people to execute their obligations and to act in fairness.\(^{16}\)

Notwithstanding the aforesaid, many think that the UAE doctrine of good faith is difficult to define.\(^{17}\) In general, some practitioners tend to believe that the concept of good faith is often described as the obligation to act honestly, reasonably, moderately and in a cooperative manner. Other practitioners state that it is a requirement not to use the terms of the contract to seek unfair advantage, cause unjustified damage or exploit the other, and if possible, avoid conflicts.\(^{18}\)

Good faith could be further explained by referring to the requirements of subparagraph (2) of Article 246 as it is usually read together with the first subparagraph. Article 246 (2) states that:

\[
\text{The contract shall not be restricted to an obligation upon the contracting party to do that which is (expressly) contained in it, but shall also embrace that which is appurtenant to it by virtue of the law, custom, and the nature of the transaction.}
\]

In relation to this Article, the Ministry of Justice Commentary\(^{19}\) provides that:

\[
\text{In Islamic jurisprudence as well as in western jurisprudence, the following are guiding factors in defining the scope of the contract:}
\]

\[\text{(A) Custom and usage.}\]

\[\text{(B) The nature of the obligation: matters appurtenant and ancillary to the nature of the property.}\]

\[\text{(1) With regard to custom and usage:}\]

\[\text{Al-Majalla gives numerous general rules for the adoption of custom and usage in defining the scope of contracts including “established usage” 208, and the practices of people, as a material factor to be followed, such as “that which is refrained from in custom is deemed to be refrained from in fact”, and “facts may be established by the circumstantial evidence of usage”, and “regard is had to usage only if it is widespread and prevailing”, and “the criterion is the prevalent and widespread and not what is unusual, and that which is known}\]

\[\text{\hfill 208 See DR. SHEIRZAD AZIZ SULIMAN, GOOD FAITH IN CONCLUDING CONTRACTS 31-32 (Dar Dijlah 2008) (transaltion by the authors). See also King, supra note 12.}\]

\[\text{\hfill 17 See Raymond Kisswany, Duty of Good Faith in Contracts: How might a UAE Court interpret the duty of good faith in contracts that are governed by foreign law?, 17 MARASI NEWS 38, (2016) available at http://www.marasinews.com/sites/default/files/marasi%20%2017%20Full.pdf (last visited 16 Dec. 2017). See also Hodgins and Rotherham, supra note 1; Tadros, supra note 1.}\]

\[\text{\hfill 18 See Hodgins and Rotherham, supra note 1. See also Tadros, supra note 1; Robinson, Laurence and Gunson, supra note 1.}\]

\[\text{\hfill 19 UAE CIVIL CODE AND MINISTRY OF JUSTICE COMMENTARY, JAMES WHELAN 153 (Thomson Reuters 2010).}\]
by custom has the same effect as that which is stipulated by a condition”, and the Code adopts these rules.

(2) The second point of reference is the nature of the obligation:

This provides that that which is ancillary or appurtenant to a thing by its nature will follow it and be treated as part of it. In this regard the legislature relies on rules of jurisprudence such as that an appurtenant matter shall not be dealt with in isolation from the principal matter, and that he who owns a thing owns the things necessarily appurtenant to it, and if the root falls the branch falls with it, and if a thing becomes void then all that it contains also becomes void.

According to the text of Article 246 (2), there is an implied obligation to perform not just what is contained in the contract, but what is ancillary to it by law, custom or the nature of the transaction. This means that a party cannot rely on a strict interpretation of the terms of a contract to do exactly what it has contracted to do and no more.

One example of how good faith is implied into contracts governed by the UAE law is the occasion where the taxi driver is required to take a passenger to a specific destination. The taxi driver, in this example, has a duty to act in good faith by using the shortest and the easiest road.20

The implied obligation of good faith was also upheld by the courts in the UAE in many reported cases. In several occasions e.g. cassation petition 93 of 2004, it was held that a contract should be executed according to its terms and in good faith, and that a contracting party is not only bound by what is expressly stated in the contract but also by matters which are regarded as ancillary thereto, according to the Law, customs and the nature of the transaction.21

In cassation petition No. 23 of 2009, Dubai Court of Cassation provides that: “Under Article 246 of the Civil Code, a contract must be performed in accordance with its own terms and in accordance with the requirements of good faith. The effect of that is that both parties to the contract must perform the mutual obligations created by the contract, and each party must perform that which he is obliged to do. The performance of the contract is by performing and satisfying the subject matter thereof, whereupon the obligation created by the contract comes to an end, notwithstanding that the contract may remain in existence as the ground of the rights arising out of it.”22

In another case, the Federal Supreme Court found that the defendant acted in bad faith when he refrained to pay the claimant (the appellee) the amounts due to the latter pursuant to the transfer of shares agreement signed between them. The transfer agreement, according to which the claimant sold his shares in a school to the defendant for AED 148,000, included an obligation of the defendant to collect the study fees due before or by 31 March 2001 (end of the semester) and pay them to the claimant in weekly installments. The invoices showed that

---

20 ABDUL NASSER TAWFIQ ALATTAR, RESOURCES OF OBLIGATIONS UNDER THE UNITED ARAB EMIRATES CIVIL TRANSACTIONS LAW 195-196 (United Arab Emirates University Press 2000) (translation by the authors)
21 See OMER ELTOM, THE EMIRATES LAW IN PRACTICE 28 (Future Bookshop 2009)
the total outstanding fees were amounting to AED 277,058 from which the claimant received AED 36,420 only. The Court of First Instance awarded the claimant AED 1000 only and this judgment was affirmed by the Court of Appeal on grounds that the claimant was not entitled to the outstanding fees on the basis that they were never collected from the students.

In contrast, the Federal Supreme Court held that the defendant was contractually obliged to pay the outstanding fees to the claimant whether he did collect them from the students or not. The latter court further explained that even if the amounts were never collected from the students the defendant will not be exempted from his obligation to pay the outstanding fees as the agreement did not provide for such exemption. Based on the above reasoning, the Federal Supreme Court reversed the Court of Appeal judgment.23

Given the above doctrine of good faith in the UAE, it is important to know whether this doctrine includes an implied duty of good faith to continue to negotiate or it is limited to the performance of the contract. There is an opinion that prior to the formation of a binding contract, there is no onus on the parties to continue negotiations in good faith.24 This opinion might be relying on the exact words of Article 246 (1) which requires the parties to “perform” the contract in good faith.

By way of exception, the above group clarifies that where the essential elements of a contract together with all the lawful conditions which both parties regard as essential have been agreed upon, and in the absence of an express stipulation that the contract has not yet been agreed, then a contract may be deemed to have been already made.25 This is understood from Article 141 (2) of the UAE Civil Code.26

The authors are of the opinion that, if the doctrine of good faith is originally derived from the Islamic Sharia law, as confirmed by the official UAE Civil Code Commentary, then the parties are required to negotiate or continue to negotiate in good faith.

25id.
26Article 141 (2) states that: If the parties agree on the essential elements of the obligation and the remainder of the other lawful conditions which both parties regard as essential and they leave matters of detail to be agreed upon afterwards but they do not stipulate that the contract shall not be regarded as made in the event of absence of agreement upon such matters, the contract shall be deemed to have been made, and if a dispute arises as to the matters which have not been agreed upon, the judge shall adjudicate thereon in accordance with the nature of the transaction and the provisions of the law.
III. The Right to Exclude “Good Faith” by Mutual Agreement of the Parties:

a. Under the CISG:

If the parties to an international sale contract decided to opt into the CISG, they still can derogate from or vary the effect of any of its provisions pursuant to Article 6 of the CISG. However, does Article 6 allow the contracting parties to derogate from Article 7 (1)?

According to a large group of jurists, the doctrine of “freedom of contract” or “autonomy of the parties” should prevail over the principle of good faith when they are deemed inconsistent. The main justification, this group argues, is that the CISG does not impose any restrictions on the parties save for those set out in Article 12. Therefore, Article 7 (1), and in particular the principle of good faith, could be derogated from by the mutual agreement of the contracting parties.

It is important to note here that, during the 1980 Diplomatic Conference, a Canadian proposal suggested that the obligation of good faith be made non-excludable but the parties may agree to the standard by which the performance of a good faith could be measured. However, this proposal was rejected.

Unlike the above opinion, another group of jurists is inclined to the view that Article 6 does not allow the parties to exclude good faith. Looking more closely at its purpose, this group argues that Article 7 (1) is meant to set out the rules of interpretation which are addressed in the first instance to the courts and the tribunals as a tool to be used whenever they face a matter of an interpretation of the CISG. Therefore, it is unlikely that the parties can, even by their mutual agreement, derogate from the provisions of Article 7 (1).

Other supporters of this view rely on the Secretariat Commentary on Article 6 of the draft convention (became Article 7 (1)) which listed numerous applications of the principle of good faith and concluded its commentary on the Article by stating that good faith is “broader than these examples and applies to all aspects of the interpretation and application of the provisions of this Convention”.

---

27 Article 6 of the CISG states that: “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”


30 See BRIDGE, supra note 8.

The Secretariat Commentary stated that the requirement of the observance of good faith is contained in the below-listed articles:

1. 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;

2. 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;

3. 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;

4. 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;

5. 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;

6. 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;

7. 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.

The authors’ opinion is that good faith shall be considered one of the most fundamental concepts in the international trade. From their point of view, the principle of good faith has a vital role in maintaining the stability of relations between the parties. Conventions that are enacted to regulate international commerce seek global trade uniformity and harmonization in the first instance. This is what the CISG is meant to achieve as well. It is therefore unacceptable to argue that Article 6 provides for the derogation from Article 7 (1).

---


33 In this meaning, Bonell states that ‘To permit the parties to derogate from Article 7 by agreeing on rules of interpretation used with respect to ordinary domestic legislation would be inconsistent with the international character of the Convention and would necessarily seriously jeopardize the Convention’s ultimate aim, which is to achieve worldwide uniformity in the law of international contracts of sale and to promote the observance of good faith in international trade. See Michael Joachim Bonell, Bianca-Bonell Commentary on the International Sales Law available at https://www.cisg.law.pace.edu/cisg/biblio/bonell-bb7.html (last visited 16 Dec. 2017)
b. Under the UAE Law:

In civil law countries, legal rules are divided into two categories; the mandatory (obligatory) rules and complementary rules. While the parties to a contract can agree to the contrary of a complementary rule, they cannot do so when it comes to a mandatory (obligatory) rule. This is the main difference between the two categories.

If this is the case, then which category does the requirement of good faith contained in Article 246 of the UAE Civil Code fall under?

Given the wording of the Article, it is clear that the legislator meant it to be obligatory. Therefore, the agreement of the parties must always be consistent with good faith. In other words, the parties cannot exclude the principle of good faith from governing their contract.

The above conclusion is supported by other articles in the UAE Civil Code. For instance, whilst Article 390 (2) of the UAE Civil Code does provide that parties may fix a pre-agreed compensation mechanism or amount in their contract, the court may also vary the pre-agreed amount of compensation or damages to equal the actual loss in any event, regardless of whether there was any “act of prevention” on the part of the employer.

Notwithstanding the foregoing, and based on Article 19 of the UAE Civil Code which grants the contracting parties the right to choose the law governing their contract, is there any likelihood that the UAE Courts will imply the doctrine of good faith into that contract even if the law chose by the parties does not imply such a doctrine unless otherwise agreed between the parties?

Raymond Kisswany argues that although Article 19 allows the parties to agree to any governing law, “however, in practice, UAE Courts invariably apply UAE law and disregard foreign governing law provisions in contracts if the UAE Court considers it has competent jurisdiction to adjudicate a dispute. It is important to note that UAE Courts willingly accept jurisdiction over disputes. Therefore, contracting parties who have expressly chosen a foreign law to govern their contract may be faced with a duty of good faith under UAE law, rather than their choice of law, in the event a dispute arises where the UAE Courts have accepted jurisdiction. In such circumstances, contractual parties may have a more onerous duty of good faith than they would have anticipated at the time of agreeing to be contractually bound to one another.”

---

34 Article 390 states that: “1. The contracting parties may fix the amount of compensation in advance by making a provision therefor in the contract or in a subsequent agreement, subject to the provisions of the law. 2. The judge may in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the loss, and any agreement to the contrary shall be void.”

35 King, supra note 12.

36 Article 19 (1) states that: “The form and the substance of contractual obligations shall be governed by the law of the state in which the contracting parties are both resident if they are resident in the same state, but if they are resident in different states the law of the state in which the contract was concluded shall apply unless they agree, or it is apparent from the circumstances that the intention was, that another law should apply.”

37 Kisswany, supra note 17.
c. Liability of the parties due to non-compliance with “Good Faith”:

What are the sequences of breaching the principle of good faith under the CISG? May a contract be void or terminated because of that?

As explained in the first section of this research paper, there is no uniform interpretation of the role of the principle of good faith under the CISG. This would, as a result, affect the answer to the above questions.

An important point to highlight here is that voidness is not contained in the provisions of the CISG.\(^3^8\) This is clearly indicated by Article 4 of the CISG which states that:

\[
\text{This Convention governs only the formation of the contract of sale... In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage;...}
\]

Therefore, the determination as to whether a contract shall be void is to be decided by the rules of the private international law. However, the above Article raised some problematic questions one of which is which issues shall be considered as “validity” issues for the purposes of Article 4 (a)?

With respect to a number of issues, it is generally agreed that they are validity issues and are not expressly addressed by the CISG rules. A list of such issues includes incapacity (due to insanity or infancy, for example), lack of agency authority, fraud and misrepresentation, duress, unconscionability, illegality or violation of public policy and mistake. The status of certain other issues is uncertain. It is not clear whether they are validity issues excluded from the scope of the CISG by Article 4 (a) and thus subject to a choice-of-law process, or are issues expressly addressed in the CISG and thus controlled by the CISG.\(^3^9\)

As such, one could say that the liability or the sequences of non-compliance with good faith much depends on the domestic law specified by virtue of the rules of private international law together with the way good faith in the CISG is interpreted. It is possible that where a court adopt the wide interpretation of the principle of good faith in the CISG, and therefore imposes a duty on the parties to act in good faith, such a court may reach the result of declaring the contract void if its national law permits and it finds that one of the parties acted in bad faith.

Under the UAE law, the determination as to whether the parties have fulfilled their contractual obligations in a manner consistent with good faith is a matter of fact that fall within the discretion of the trial court. i.e. the court of first instance and the court of appeal in the UAE.\(^4^0\)

\(^{38}\) See AHMED, supra note 8, at 541.


However, due to the imprecision in the UAE good faith doctrine, perhaps it is easier to determine whether a party has acted in bad faith rather than whether it has acted consistently with the requirements of good faith. In deciding whether an act constitutes bad faith, the court may also look at Article 106 of the UAE Civil Code which provides that a person cannot exercise its rights unlawfully. The exercise of a right is deemed to be unlawful if there is an intentional infringement of another person’s rights or there is a violation of rules of Islamic Sharia, public order or morals. Other situations are where the desired gain is disproportionate to the harm that will be suffered by the other party or it exceeds the bounds of custom or practice.  

A quote from the judgment of the Federal Supreme Court reveals how the court relied on Article 246 and 106 of the Civil Code to decide whether a party has breached his contractual obligations. The court held that: “The effect of the general rules in contract, and of the provisions of articles 246 and 247 of the Civil Code, is that contracts must be performed according to the contents thereof, and in a manner consistent with the dictates of good faith. In contracts binding on both parties, if the mutual obligations are due for performance, either of the contracting parties may withhold performance of his obligation if the other contracting party has not performed his obligation. If a contracting party ceases to perform his obligation by reason of circumstances that have arisen after the making of the contract, whether by his own default or whether by an extraneous cause giving the other contracting party the right to withhold performance of what he is obliged to do as aforesaid, then it will follow from that that the other contracting party will not have the right to have recourse for an indemnity against the other contracting party so long as it is not proved that he has abused his right. The effect of the provisions of article 106 (2)(c) and (d) of the Civil Code is that the exercise of a right, whether in person or otherwise, will be unlawful if the interests sought to be protected are disproportionate to the harm that may be suffered by others, or if it exceeds the limits of custom and usage.”

Another example where the court may find bad faith relates to the application of Article 141 of the UAE Civil Code. This Article provides that the parties to a contract must agree on the essential elements of the obligation, but that they can leave matters of detail to be determined at a later date. In this circumstance, if a dispute arises, the judge will make a ruling on the missing terms in accordance with the other provisions of the contract and the law. However, it is clear from the Ministry of Justice official commentary that, for a UAE court to do so, it must be clear that the parties intended to reach an agreement even if they fail themselves to finalise all of the details of the contract. Therefore, it is worth noting in this context that the implied obligation of performing the contract in good faith may mean that the courts will find bad faith (and therefore a breach of contract) if the parties fail to agree in certain circumstances, such as one party failing to take reasonable efforts to reach an agreement, or entering into parallel negotiations with a third party.  

41 See Article 106 of the UAE Civil Code. See also King, supra note 12; Teo, supra note 40.  
43 Robinson, Laurence and Gunson, supra note 1.
The application of the principle of good faith under the UAE Civil Code is not limited to the above examples. In contracts that are governed by the UAE law:

1. Any provision which entirely exempts a guilty party from liability will be void.

2. A limitation of liability cannot be relied upon where the defendant has committed a “serious fault”. This depends on several factors, including the severity of the breach (including whether it was deliberate), the skill of the defendant, and the harm caused.

3. In exceptional circumstances, a court or arbitrator can reduce an oppressive obligation to a reasonable level.44

Decisions of the Dubai Court of Cassation have ruled that a bad faith action of the other contracting party may provide a cause of action in itself for the other. The effect of good faith on the terms of a contract is, therefore, wide-reaching and may have a significant impact on the outcome of a dispute.45

IV. Termination of Contracts and “Good Faith”:

a. Under the CISG:

The CISG set out the grounds on which the buyer46 or the seller47 may rely to declare that the contract is avoided. However, the declaration of avoidance will not be effective according to


45 Robinson, Laurence and Gunson, supra note 1.

46 Article 49 states that: “(1) The buyer may declare the contract avoided:
(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.
(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:
(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
(b) in respect of any breach other than late delivery, within a reasonable time:
(i) after he knew or ought to have known of the breach;
(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or
(iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

47 Article 64 states that: 1) The seller may declare the contract avoided:
(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
Article 26 unless it is “made by notice to the other party”. Also, avoidance requires that the non-performance of obligations of one party amounts to a fundamental breach of the contract in order to enable the other party to use its right to terminate the contract.

As noted above, the Secretariat Commentary specifically referred to some articles of the CISG that contain the requirement of the observance of good faith. Among those articles were the articles that deal with the termination of the contract or the declaration that it is avoided. Therefore, this section aims to focus on those articles to illustrate how good faith is required therein. It is not meant to cover in detail the grounds of termination under the CISG and the provisions related thereto.

1. Article 29(2):

Article 29 states that:

(1) A contract may be modified or terminated by the mere agreement of the parties.
(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

The link between this Article and the requirement of the observance of good faith therein is that ‘If a party deliberately contradicts the content of the contract by his conduct and the other party relies on such conduct, this constitutes a breach of good faith in line with article 7(1).’

Cases dealing with a breach of good faith pursuant to article 29(2) are rare and hence the observation has to be made that such breaches are either not taken to court or are not a mischief which needed fixing.

---

(b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.
(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:
(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
(b) in respect of any breach other than late performance by the buyer, within a reasonable time:
(i) after the seller knew or ought to have known of the breach; or
(ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

49 id.
2. Article 38\textsuperscript{50} and 39\textsuperscript{51}:

These two articles are interrelated and should be treated together. Article 38 obliges the buyer to examine goods "with as short a period as is practicable in the circumstances." Pursuant to Article 39, the result of these examinations must be communicated to the seller "within a reasonable time after he has discovered or ought to have discovered it." The principle of good faith clearly indicates that a buyer must establish efficient and expeditious business practices. Goods, which show defects or cause disputes should not be left in a country in storage because costs should be held to a minimum. The seller must be afforded the opportunity at the earliest possible opportunity to make a decision as to the fate of the goods in order to minimize unnecessary costs.\textsuperscript{52}

The Landgericht Berlin\textsuperscript{53} refused the application for damages as the defects in children's shoes was easily discoverable and should have been noted at delivery. The defects were only communicated to the seller after three months. The court indicated that pursuant to Article 38 the buyer should have inspected the shoes at delivery or at least within a week and should also notified the seller pursuant to Article 39 within a week after discovery of the defects.\textsuperscript{54}

3. Article 40:

\textit{Beijing Light Automobile Co., Ltd v. Connell Limited Partnership} (Beijing Metals)\textsuperscript{55} is a leading case. It revolves around whether article 40 was applicable. The non-conformity related to the installation of a part, a lock plate of a 4,000 ton rail press, which broke four years after installation. Pursuant to Article 39(2) the buyer loses the right to rely on a lack of conformity of goods after two years. However, Article 40 states: "The seller is not entitled to rely on the provisions of Article 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer." Article 40 is a "safety valve" which allows a buyer to overcome Articles 38 and 39 if the reason for his late

\textsuperscript{50} Article 38 states that: “1. The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances. 2. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination. 3. If the goods are redirected in transit or redelivered by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redelivery, examination may be deferred until after the goods have arrived at the new destination.”

\textsuperscript{51} Article 39 states that: “1. The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it. 2. In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.”

\textsuperscript{52} Zeller, supra note 48.

\textsuperscript{53} Kammer für Handelssachen 99, 16 September 1992, 99 O 29/92

\textsuperscript{54} Zeller, supra note 48.

discovery of non-conformity is based on the seller exhibiting bad faith (or not exhibiting good faith).

The Tribunal was of the opinion that the requisite state of awareness that is the threshold criterion for the application of Article 40 must amount to at least a conscious disregard of facts that meet the eyes and are of evident relevance to the non-conformity.

4. Article 49:

Pursuant to Article 49, four different situations may give rise to the buyer’s right to declare the contract avoided: non-delivery of the goods, delivery of non-conforming goods, late delivery and neglect of other duties. In each of these cases, avoidance requires that the seller's non-performance amounts to a fundamental breach of contract.

The above situations, save for non-delivery, are exceptional grounds for the buyer’s to declare avoidance of the contract. The general rule under Article 49 provides that if the seller has delivered the goods the buyer loses the right to declare the contract avoided.

The fact that the buyer loses the right to avoid the contract after delivery is made is an expression of good faith as otherwise it would allow the buyer to "deliberately exploit a position of dominance over others."

In a dispute that arose in relation to a contract for the sale of eleven cars concluded between an Italian buyer and a German seller, the German court dismissed the buyer’s claim for damages as the court determined that “there had not been a fundamental breach, as the cars were ready for delivery in October, therefore there was no right to avoid for non-delivery. In any event, the buyer failed to declare the contract avoided at the time. To allow the buyer to declare the contract void at the time of the trial, two and a half years after the event, would violate the principle of good faith in article 7(1) of the CISG.”

In another German decision, it was held that the buyer may not declare the avoidance of the contract due to late delivery by the seller if it is inconsistent with good faith. The case involved a German buyer who ordered, by fax, 1,000 memory modules (computer parts) from a Chinese seller which needed to be delivered within two to three days. The seller fulfilled the buyer’s request by supplying the purchased goods to the carrier after he had received

---

56 See Zeller, supra note 48.
59 See Zeller, supra note 48.
61 Keily, supra note 29.
confirmation from the buyer's bank that he had received payment for a previous order. It took four days to deliver the goods to the buyer. On the same day as the goods arrived, the buyer sent another fax containing details of the order with a “cancelled” note and returned the delivered memory modules to the customs warehouse. The buyer challenged the seller’s claim for payment of the purchase price by arguing that the contract was void as, by delivering the goods late, the seller had breached the contract. The District Court (Landgericht) established that the delay in delivering the goods was mainly because the seller waited to receive confirmation of the buyer’s payment of the previous order. Therefore, the buyer might not use any delay in the seller’s performance because it was seen as contradictory to his own previous conduct which was not permissible under the standard of good faith.63

The Bulgarian Chamber of Commerce and Industry in Arbitration Case 11/1995, 12 February 199864 refused the application of the defendant to have the contract avoided because the goods were delivered and the buyer did not give reasonable notice. In fact, he sold 90% of the goods and therefore waived the right to protection under article 49(2). A Spanish court65 ruled that a 48-hour period was sufficient to avoid the contract after the buyer was notified of a late delivery. It was noted that this was the third late delivery. As the buyer did not complain as to the late delivery on the two prior occasions, he could only avoid the contract as far as the third delivery was concerned.66

b. Under the UAE Law:

As it is deemed one of the basic principles in UAE contract law, good faith governs the termination of contracts as well. Under the UAE law, the parties may seek to end the contract, subject to good faith, through one of three ways: the contract is declared null and void by the court, the contract is cancelled, terminated or rescinded or where the performance becomes oppressive or impossible.67

Generally, whether or not a contract is void68 is decided by the court. Either party to a contract may seek to have the contract declared void, either by bringing a claim before the competent court or as a defence to a claim by the other party. Also, a court may rule on its own motion that a contract is void.69

63 See ALMUTAWA, supra note 6, at 136-137.
66 See Zeller, supra note 48.
68 Article 210 of the UAE Civil Code defines a void contract as “…one which is unlawful in its essence and form, lacking the elements of a contract or defective in its subject matter or purpose or form as laid down by law for the making of a contract, and such contract shall be of no effect and shall not be capable of being rectified by consent.”
69 Al Shaikh and Dark, supra note 67.
However, if one of the parties brought a claim before the court to have the contract declared void then can the other party request the court to dismiss the claim on the basis that the party who brought the claim has acted in bad faith?

It is unlikely that the defendant party will succeed in his defence. Although the first party might have acted in bad faith in fact however, the defendant party cannot benefit from this fact when the contract is void by law. The parties should not have concluded such a contract from the beginning.

Notwithstanding the above, it is important to point out that there is a time limit for such claims to be brought before the courts. Article 210(3) provides that “No claim (for a declaration) that a contract is void shall be heard after the expiry of 15 years from the date the contract was made, but any person having an interest may raise the defence of the voidness of the contract at any time.”

As for the second way to end contracts, Article 267 provides that whenever the contract is valid and binding, it is prohibited on the parties to withdraw from or rescind it “save by mutual consent or an order of the court, or under a provision of the law.” The Article contains three situations.

The first situation is where the parties “mutually revoke the contract”. The second situation is where the contract is cancelled by a court order. Either party of a contract may seek to obtain a court order to cancel the contract if the other party refrain from performing its obligations. However, before a party may do so, it has to notify the other party as required by Article 272. In this regard, it was held that the statement of claim submitted to the court to request the cancellation of the contract sufficiently fulfill the “notice” requirement under Article 272.

Notwithstanding the above, the parties may agree that the contract shall be automatically cancelled without the need to obtain a court order or to notify the other party where an obligation under the contract is breached. The final situation is where the termination of a contract occurs by law as an application of one of its provisions.

In a case related to a sale of a property, the purchaser claimed cancellation of the contract and the refund of the advance payment. The Dubai Court rejected the case and accordingly the purchaser lost the advance payment he had made. The defence raised in this case was that the plaintiff was the defaulting party according to the terms of the contract as he had an...

---

70 Article 268 of the UAE Civil Code.
71 Article 272 of the UAE Civil Code states that: (1) In contracts binding on both parties, if one of the parties does not do what he is obliged to do under the contract, the other party may, after giving notice to the obligor, require that the contract be performed or cancelled. (2) The judge may order the obligor to perform the contract forthwith or may defer (performance) to a specified time, and he may also order that the contract be cancelled and compensation paid in any case if appropriate.
72 Federal Supreme Court, 217/JY 13, 12 Jul 1992. See also ALATTAR, supra note 20, at 319.
73 Article 271 of the UAE Civil Code states that: It shall be permissible to agree that a contract shall be regarded as being cancelled spontaneously (automatically) without the need for a judicial order failing performance of the obligations arising thereout, and such agreement shall not dispense with notice unless the contracting parties have expressly agreed that it should be dispensed with.
obligation to redeem an existing mortgage over the property, which he failed to do. The seller’s obligation was only to transfer the title of the property into the purchaser’s name, which he showed the Court he was willing and able to do. In this case, the Court also made reference to the concept of good faith, as mentioned in Article 246 of the Civil Code. This implies a general duty to act reasonably and honestly and decently. Article 247, regarding reciprocity of breach of contract, may also be a relevant factor.74

Another consideration in respect of the ways to end a contract is when the performance of the same becomes oppressive or impossible. This is related to Article 249 and 273 of the UAE Civil Code. Article 249 provides that if a contractual obligation becomes oppressive or impossible because of exceptional circumstances of a public nature which could not have been foreseen, the oppressed party can report to the court requesting to reduce the oppressive obligation to a reasonable level. Pursuant to Article 273, it is also possible for an event of force majeure to be a good ground for the suspension or termination of contractual obligations. There is no definition of force majeure in the Civil Code, but it is generally accepted in the UAE to be limited to events that are unforeseeable, notably natural disasters such as earthquakes and floods and may extend to wars and civil unrest, depending on the circumstances.75 The termination of a contract due to the occurrence of a force majeure event is considered a termination “under a provision of the law” for the purposes of Article 267.76

In a claim filed against a seller who refrained from supplying the purchaser with the remainder quantity of the ordered steel because of the dramatic increase in the steel price a short period after the contract was concluded, it was held that the seller’s omission was neither in contradictory to the duty of good faith nor deemed unlawful use of the right. The court reasoning was that such an increase was beyond the control of the seller, unforeseen and would be such an oppression and harm to the seller.77

Finally, It is noteworthy to point out the position of the “Termination for Convenience” concept under the UAE law where parties have a duty to act in good faith. One can say when reading Article 246 and 106 of the UAE Civil Code together, that these two articles could hinder a party’s right to terminate for convenience where it is not being exercised in good faith.

Therefore, a party who wishes to terminate a contract for convenience under UAE law must make sure that it is doing so in compliance with the duty of good faith. It is also worth noting that there is a degree of uncertainty under UAE law as to whether unilateral termination of contracts is ever possible and whether a party wishing to terminate needs to obtain a court order to that effect. For this reason, from a UAE law perspective, a clause entitling a party to terminate for convenience can be made more robust by expressly waiving the requirement for a court order. Termination for convenience may seem like the easiest option but all options and associated risks should be considered before making that choice.78

74 Al Shaikh and Dark, supra note 67.
75 See Al Shaikh and Dark, supra note 67.
76 See ALATTAR, supra note 20, at 327.
78 Tadros, supra note 1.
V. **Conclusion:**

This research paper demonstrates how different the principle of good faith is under the UAE law compared with the CISG. While the UAE Civil Code expressly requires that every contract be performed in a manner consistent with good faith and therefore imposes a duty on the contracting parties to act in good faith, the CISG did not contain such an express duty.

Good faith was referred to in Article 7(1) of the CISG which specifically governs the interpretation of the CISG. The incorporation of the principle of good faith in the latter Article was intended as the drafters meant to provide a compromise solution between different types of legal systems in order to encourage the states to adopt the convention. However, because of the ambiguous wording of Article 7(1), different courts and tribunals presented different interpretation and implementation of the role of good faith in the CISG. The authors think that, in deciding the role of the good faith in the CISG, the court or the tribunal would be affected by their national law and the role of the good faith therein.

As such, the authors think that if the UAE decided to become a party to the CISG, the UAE courts will be affected, in deciding the role of good faith in the CISG, by the role of good faith provided in its domestic laws.