The "Troika" and Its Effects on the Harmonisation of Contract Law - Illustrated by the Duty of Good Faith Between the Parties by G.C. Moss

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The “Troika” and its effects on the harmonisation of contract law – illustrated by the duty of good faith between the parties

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1. Introduction

This paper enquires to what extent application of non-state sources of law allows for a uniform application of the law of contracts, thus permitting to overcome the differences between Common Law and Civil Law systems.

To this aim, the paper will briefly analyse a specific aspect of the principle of good faith and fair dealing, namely that of the existence of a duty between the parties to act in good faith. The question is of central importance to the interpretation and performance of contracts, and is addressed in quite different ways in the various legal systems, as will be illustrated by the example of English law and of Norwegian law.

1.1 Two cases

To illustrate the impact that a duty of good faith might have on the assessment of the parties’ rights and obligations, the following two cases will be analysed:


a) The parties negotiate the terms and conditions of a commercial cooperation, and enter into an agreement that regulates the respective rights and obligations. One party is in possess of information that is likely to affect the other party’s evaluation of its position and interest in the cooperation, but does not disclose it during the negotiations, nor does the other party request it. After the contract was entered into, it becomes clear that the terms of the deal would have been different, if the other party had known about the circumstances that had not been disclosed during the negotiations. Does the non-disclosure have some legal consequences in terms of liability, validity of the terms or otherwise?

b) One party starts negotiations with the other party with the purpose of testing the efficiency of a commercial transaction that it intends to enter into with a third party. The real purpose of the negotiations, thus, is not to enter into a contract with the other party in the negotiations. The negotiations are regulated by a Letter of Intent containing the widely acknowledged and used language according to which neither party is liable to the other for failure to enter into the final contract, irrespective of the reasons for such failure. Does this language have the effect of excluding any liability under these circumstances, or are the effects of this commercial practice restricted by some overriding principle of good faith?

1.2 A common core of contract law for commercial contracts?

Comparative Law research has proven that many of the contradictions that traditionally are held to exist among the various legal systems and, notably, between the Common Law and the Civil Law, can be reduced to a common core that is shared by most legal systems. To appreciate this common core, it is necessary to look at the legal phenomena in the totality of the respective legal systems, and the observer must focus on the result that the totality of the legal system permits to reach, rather than on the doctrinal category into which the various rules may be organised in the respective system. By so doing, the scholar proves that different legal systems may have differing legal techniques to achieve the same result. These results constitute the common core of the analysed legal systems.3

3 “The Common Core of European Private Law Project”, under the general editorship of Mauro Bussani and Ugo Mattei, is perhaps the most systematic enterprise aiming at assessing the
Generalising particular rules and elevating them to the status of expressions of a principle underlying the whole system, however, is not always justified. That a certain result may be achieved in a particular context does not necessarily mean that the principle applied in that context underlies the whole legal system.\(^4\) A principle might be not unknown in a system, but this does not automatically mean that it extends to other areas of the law within that system. This is true, for example, in respect of particular rules assuming good faith in English law and that do not necessarily extend their scope to have a general validity for commercial contracts, as will be seen in section 2 below.

Moreover, when solving specific disputes existing between private parties, the technicalities required by the specific law are more important than a common core that might be shared with other systems: knowing that the applicable law would have permitted a party to reach the wished result, if only the contract had been written in a certain way or other circumstances had been present, highlights that a certain result is in abstract achievable under that law, but does not permit that party to achieve it in the specific case, if the applied legal technique was not complied with under the circumstances.

An international contract may, therefore, and in spite of the common core, create conflicting expectations, particularly if, as it often happens, it is drafted on the basis of a Common Law model and governed by a Civil law.\(^5\)

\(^4\) That relying on a monolithic view of legal systems may be misleading is convincingly argued by GRAZIADEI, M., “Variations on the Concept of Contract in a European Perspective: Some Unresolved Issues”, in SCHULZE, R., New Features in Contract Law, München 2007, pp. 311-324, who shows, on pp. 321ff., that notions of good faith are to be found in English law when looking beyond the narrow borders of contract law, notably in the field of fiduciary obligations. The author underlines thus that the absence of a general notion of good faith in the restricted context of contracts (defined as commercial contracts) does not exclude its presence in the wider picture of English law. However, this shall not induce to assuming the converse, i.e. that the presence of the good faith notion in the context of fiduciary obligations entails that the principle is applicable also to commercial contracts.

\(^5\) On the practice of drafting commercial contracts on the basis of Common Law models irrespective of the governing law, as well as on the difficulties of interpretation that may arise when the governing law belongs to a Civil system, see CORDERO MOSS, G., Anglo-American Contract Models and Norwegian or Other Civilian Governing Law – Introduction and Method, Oslo 2007, the first in a series of publications resulting from a research project at the Oslo University that analyses typically Common Law contract clauses and their effect when they are governed by a Civil Law: http://www.jus.uio.no/ifp/anglo_project/index.html.
1.3 Is the Troika’s harmonisation fully satisfactory?

To overcome these difficulties, it is sometimes suggested to refer to sources of regulation that do not make reference to a specific state legal system. In particular, three instruments, together sometimes referred to as the “Troika”, are often mentioned as sources that harmonise contract law and therefore are appropriate to govern international contracts and avoid conflicting expectations or unexpected results: the 1980 Vienna Convention on Contracts for the International Sale of Goods (“CISG”), the UNIDROIT Principles of International Commercial Contracts and the European Principles of Contract Law (“PECL”). These instruments are the object of other papers in this colloquium, therefore their genesis, function and main characteristics are assumed known here.

After having shown that the different approaches of, respectively, English and Norwegian law would lead to opposite results in the two cases described in section 1.1 above, this paper will examine whether and to what extent the Troika would have a harmonising effect for the same cases.

2 Good faith as a duty between the parties in English law

When considering the duties between the parties, the Common Law is mainly concerned with preserving the parties’ freedom to contract and to ensure that their contracts are performed accurately according to their precise wording. An English judge is less concerned with providing means for ensuring the fairness in the relationship between the parties. The English judge does not have the task of creating an equitable balance between the parties, but has to enforce the deal that the parties have voluntarily entered into. The parties are expected to take care of their own interests, and they expect from the system a predictable possibility to enforce their respective rights in accordance with the terms of the contract. A correction or integration of these terms would run counter these expectations, and the English judge does not consequently assume that role (unless specific statutory rules requires him to do so, which happens mainly in the context of consumer contracts). This is seen as the most appropriate attitude for a system where commercial and financial business flourishes. This is the prevailing attitude even after a famous decision by Lord Hoffmann, known as having restated the law of interpretation of contracts towards a more purposive and less literal approach. As long as the language of the contract is sufficiently clear, the

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6 *Investors Compensation Scheme Ltd. v. West Bromwich B.S.* [1998] 1 W.L.R. 898 (H.L.)
will of the parties will be implemented even if the result might seem unsatisfactory from the point of view of the balance of interests between the parties.\(^7\)

The same attitude is to be found in the phase of negotiations, prior to the conclusion of the contract: expecting that a party takes into consideration also the needs and expectations of the other party runs counter the very essence of a negotiation, where each of the parties positions itself, opens alternative possibilities, and plays the various possibilities against each other to achieve the best economic result for itself. In an often quoted House of Lords decision, Lord Ackner states that “[…] the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations.”\(^8\) Restrictions to the liberty to organise the negotiations as is most profitable for itself would have to be founded on an ideal of solidarity and loyalty between the parties which is unknown in a system that privileges the economic aspects of the transaction.\(^9\)

English law, however, is not a “hard-hearted Dickensian orge”, as was incisively and authoritatively said.\(^10\) Other legal techniques are applied to reach results in part similar to a general duty of good faith. An often quoted decision has expressed this clearly: “English law has, characteristically, committed itself to no such overriding principle [as the principle of good faith] but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways.”\(^11\)

These piecemeal solutions, however, do not necessarily always have the same scope of application as a general principle.\(^12\) Many situations that would be

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\(^7\) See for example Lombard North Central plc v. Butterworth [1987] 1 All ER 267, Court of Appeal.

\(^8\) Walford v Miles [1992] 1 All ER 453, House of Lords.


\(^10\) ZIMMERMANN, WHITTAKER, Good Faith in European Contract Law, cit., pp. 45ff.


\(^12\) That the English approach is not equivalent to a general clause as known in the Civil Law is shown by WHITTAKER, S., “Theory and Practice of the ‘General Clause’ in English Law: General Norms and the Structuring of Judicial Discretion”, in GRUNDMANN, S., and MAZEAUD, D., General Clauses and Standards in European Contract Law, cit., pp. 57-76, 64ff.
covered by a general principle are left out by the specific rules and remain thus unregulated. Thus, failure to give to the other party information relevant to that party’s evaluation of the risk or the value of the transaction is not sanctioned under English law, since this conduct is not specifically regulated and does not violate a duty of loyalty between the parties that does not exist.\(^\text{13}\) Even the doctrine of misrepresentation, which could at first sight be deemed to be equivalent to a duty to exercise good faith during negotiations, does not ensure the same results. False information given to the other party during negotiations gives raise to damages in tort; however, silence is not considered to be false information. Withholding relevant information during negotiations, therefore, does not constitute misrepresentation and the parties remain free to adopt such a conduct without consequences.\(^\text{14}\)

The case described under item a) in section 1.1 above, therefore, would be solved in favour of the party that did not disclose the relevant information.

The unjustified break-off of negotiations is a further example showing how the piecemeal solutions of English law not necessarily correspond to a general principle. The lack of a duty to act in good faith during the negotiations permits a party to conduct negotiations even without having the intention to conclude an agreement with the other party (for example, for the sole reason of preventing the other party from negotiating with a third party, or for obtaining business information, etc.). Even the doctrine of restitution, which could at first sight be deemed to be equivalent to a duty to enter into negotiations in good faith, does not ensure the same results. Restitution aims not at compensating the losses suffered by the other party, but at recovering a benefit gained by the party breaking off the negotiations.\(^\text{15}\) If the unjustified break-off has caused losses for the other party but has not resulted in a gain for the party breaking off, therefore, the party suffering losses is not necessarily entitled to compensation under the doctrine of restitution.\(^\text{16}\)

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\(^\text{13}\) In some situations a duty of care arises between the parties; it does not seem, however, that negotiations of commercial contracts are within that number, see, for example, Chandler v. Crane, Christmas & Co. [1951] 2 K.B. 164., and see Walford v Miles, cit.


\(^\text{15}\) GUEST, Chitty on Contracts, cit., p. 1632

\(^\text{16}\) In some cases, however, restitution was given even if no benefit has been gained: ivi, pp. 1638, 1645. In these cases, the losses incurred by the other party consisted in services rendered at the request of the party breaking off the negotiations. It remains to be seen whether the lack of benefit can be disregarded as a prerequisite for restitution, in cases where the losses were not incurred at the request of the party breaking off.
The case described under item b) in section 1.1 above, therefore, would be solved in favour of the party that started the negotiations without the intention to conclude a contract.

The attitude of English law towards the risk of being bound by a contract that is not fair or exposed to a behaviour that is not in good faith is clearly expressed in the formula used by Lord Mansfield in 1778 and still often referred to: *caveat emptor*, the buyer has to pay attention and cannot rely on being taken care of by the legal system if it wrongfully assessed the risk.\(^\text{17}\)

### 3 Good faith as a duty between the parties in Norwegian law

Norwegian law of contracts is strongly influenced by German legal doctrine, especially of the XIX century.\(^\text{18}\) The Act on Formation of Contracts of 1918 is clearly inspired by German doctrinal categories, and so is the traditional doctrinal explanation of the subject-matter.\(^\text{19}\) Of inspiration was, among other things, the general clause on good faith contained in § 242 of the BGB, that has traditionally been actively used by German judicial practice to reverse the BGB’s focus on the will of the parties and to privilege an equitable balance of the parties’ interests from a substantive point of view rather than the formal application of the words of the contract.\(^\text{20}\) The rule on good faith contained in § 242, and a rule in § 241(2) BGB providing for a duty of care towards the rights, things and interests of the other party, regulate expressly the performance of the contract, but were extended to the phase of negotiations by judicial practice and after the reform of 2001 by § 311. One of the most important obligations that arise in connection with this duty of care is the obligation to inform the other party of material aspects that are relevant to the proper assessment, understanding or performance of the contract.\(^\text{21}\)

Norway has not codified the law of obligations systematically, as Germany and the other countries influenced by German law have. Also, the


\(^\text{20}\) RGZ 107, 18ff. See also, for further references, among others ZIMMERMANN, WHITAKER, *Good Faith in European Contract Law*, cit., pp. 20ff.

\(^\text{21}\) BGHZ 132, 175, BGH NJW 1973, 542
Norwegian judge and interpreter have less inclination than their German colleagues to indulge in abstract categorisations; the purpose of applying the law is seen in Norway to be the fair solution of a concrete case, rather than the abstract confirmation of the consistency of the system. The lack of a systematic codification of the law of obligations and the pragmatic attitude of the Norwegian lawyer are coupled with a strong ideal of social solidarity, that privileges the ideal of equitable justice over the individual autonomy. All these features have brought the Norwegian law of contracts to focus less on the individual freedom and more on justice and reasonableness than German law, although recent judicial practice seems to have somewhat mitigated this approach in the context of commercial contracts.

Also in Norwegian law the principle of good faith and fair dealing results in extensive duties of loyalty between the parties, both during performance as well as in the phase of negotiations. In this latter phase the principle of good faith results, among other things, in a duty to take into consideration the other party’s reliance on contractual negotiations, and in a duty to inform the other party of matters that might have a material significance for that party’s evaluation of the prospective contract.\(^{22}\) As a consequence of the latter, § 33 of the Act on Formation of Contracts provides that a contractual provision is not binding on a party, if enforcement thereof would be unfair because of circumstances that were known to the other party at the moment of conclusion of the contract.

In the cases described in section 1.1 above, therefore, failing to disclose relevant information and starting negotiations without having serious intentions to enter into a contract would have legal consequences.

4 Good faith as a duty between the parties in the Troika

4.1 The CISG

The CISG is silent on the question of good faith as a duty between the parties, in spite of repeated requests during the drafting phase to expressly mention that the parties have to perform the contract according to good faith. During the legislative works specific proposals were presented on good faith in the pre-contractual phase, as well as general proposals dealing with the requirement of good faith. The specific proposals relating to pre-contractual liability were rejected, and the generic proposals on good faith were incorporated in article 7 in

\(^{22}\) On the duty of information see, extensively, HAGSTRØM, V., AARBKKE, M., *Obligasjonsrett*, Oslo 2003, pp. 131ff.
such a way that the principle of good faith is not directed to regulating the parties conduct in the contract, but the contracting state’s interpretation of the convention. The main arguments against the inclusion of good faith as a duty of the parties were that the concept is too vague to have specific legal effects, and that it would be redundant if mention thereof had only the character of a moral exhortation.

On the basis of the foregoing, the CISG does not seem to create a liability for the behaviours described in section 1.1 above; the cases, therefore, would come under the CISG to a decision similar to that arrived at under the Common Law.

### 4.2 The UNIDROIT Principles

The UNIDROIT Principles contain a general clause on good faith in article 1.7, requiring each party to act in accordance with good faith and fair dealing in international trade. This rule is said to be mandatory in the second paragraph of the article. The UNIDROIT Principles contain also a clause regulating good faith in negotiations, article 2.15. Contrary to the rules in the other Civil Law systems, however, this rule does not mention a duty of disclosure, and it concentrates simply on the unjustified break off of negotiations and on the start of negotiations without the real intention to complete them.

The case described under item b) in section 1.1 above, therefore, would be decided under the UNIDROIT Principles in a way similar to the Civil Law approach, and contrary to the Common Law approach and to the commercial practice prevailing in this context.

The case described under item a) does not seem to find a direct solution in the UNIDROIT Principles. A duty of disclosure could, however, possibly be inferred in article 5.3, regulating the duty to co-operate with the other party if such co-operation may reasonably be expected for the performance of the other party’s obligations. This article refers obviously to the phase of performance, therefore it is rather uncertain whether it can be extended also to the phase of negotiations.

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23 For an extensive evaluation of this matter, as well as references to literature and to the legislative history in this respect, see KRITZER, A., Pre-Contract Formation, editorial remark on the internet database of the Institute of International Commercial Law of the Pace University School of Law, www.cig.law.pace.edu/cisg/biblio/kritzer1.html, pp.2ff., with extensive references also to the Minority Opinion of BONELL, M., who was representing Italy under the legislative works. According to BONELL, an extensive interpretation of the CISG would justify application of both concepts of pre-contractual liability and of good faith. See also GOODE, R., Transnational Commercial Law – Text, Cases and Materials, Oxford 2007, pp. 279ff.
In the comment to article 1.7, the UNIDROIT affirms that the standard of good faith always must be understood as “good faith in international trade”, and that no reference has to be made to any standard that has been developed under any state law. This approach is in line with the requirement of autonomous interpretation of the Principles contained in article 1.6 thereof: the Principles are an instrument with an international character, and it would not serve the purpose of becoming a uniform law, if the courts of every state interpreted them each in a different way, in light of their own legal culture. While the requirement of autonomous interpretation of the Principles is understandable in light of the ambitions of harmonising the law of contracts, however, it does not contribute to creating clarity in respect of the content of good faith as a standard, as will be seen below in section 5.

4.3 The PECL

Similar considerations as those made in respect of the UNIDROIT Principles may be made also for the PECL. Article 1:201 regulates a general duty to act in accordance with good faith and fair dealing, and article 1:202 regulates a duty to co-operate. Article 2:301 regulates the same eventualities of negotiations in bad faith as the UNIDROIT Principles (unjustified break off of negotiations and engaging in negotiations without real intention to conclude them).

Whether these rules may be applied to imply, for example, specific duties of disclosure during negotiations (thereby choosing the Civil Law rather than the Common Law approach) is uncertain. Article 4:107, on invalidity of the contract due to fraud, seems indirectly to confirm such a duty, since it considers it equivalent to fraud if a party fails to disclose, with intent to deceive the other party, information that should have been given according to good faith (which in turn has to be determined on the basis of a discretionary evaluation by the judge, based among others on the qualifications of the parties, the availability of the information, etc.). The requirement that non-disclosure has to be fraudulent seems to indicate a restrictive approach to the duty to disclose, close to the Common Law’s. The notion of information that should have been disclosed in accordance with good faith and fair dealing seems to indicate an extensive approach. Until judicial practice specifies with a certain uniformity how this

24 http://unidroit.org/english/principles/paragraph-1.htm, comment No 2 to art. 1.7.
25 Article 4:106, on incorrect information, does not require intent to deceive, but it applies only to information given, not to information withheld.
contradiction is to be interpreted, it is rather uncertain what the specific content of this article is.26

Also the PECL, as the UNIDROIT Principles, are to be interpreted without reference to specific systems of state law, which circumstance renders it hard to ascertain the scope of the principle of good faith, lacking an acknowledged international standard, as will be seen in section 5 below.

4.4 A clear harmonisation by the Troika?

As seen, the cases described in section 1.1 above would be solved in a way similar to the Common Law approach under the CISG, whereas the UNIDROIT Principles and the PECL would probably tend to a solution closer to the Civil Law approach, at least for one of the cases. This shows that these sources may not under all circumstances be considered as a unity based on uniform principles.27

The lack of a uniform approach within the Troika seems a serious enough ground for questioning the degree of harmonisation that can be achieved by applying these sources.

Moreover, the specific content of some legal standards contained in the restatements of principles, both by the UNIDROIT and by the PECL, is quite uncertain due to the reference that they make to acknowledged international standards. This creates difficulties in ascertaining the specific content, as will be seen immediately below; in turn, this uncertainty prejudices the ability of providing a satisfactory harmonisation.

5 Good faith and fair dealing as autonomous standard in international trade?

The regulation contained in the UNIDROIT Principles and the PECL, as seen above, refers to the standard in international trade, in order to ascertain the scope

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26 On the difficulties to specify the role of good faith in the PECL see the detailed analysis made by BEALE, H., “General Clauses and Specific Rules in the Principles of European Contract Law”, cit., pp. 210ff.
27 On the different approaches to good faith taken, respectively, in the CISG and in the restatements of principles, notwithstanding that several of the delegations drafting these instruments had the same composition in all negotiations, see GOODE, Transnational Commercial Law, cit., pp. 528f.
of the principle of good faith. But how can the standard in international trade be assessed?

Legal standards, or general clauses, are per definition in need of a specification of their content that depends to a large extent on the interpreter’s discretion. When the general clause belongs to a state system, the interpreter’s discretion is restricted or guided by principles and values underlying that particular system, for example in the constitution, in other legislation or in the society.\(^{28}\)

In an international setting, it is closest to look for inspiration and guidance to the body of rules regulating international contracts and emanating from non-authoritative and non-state sources, the so-called *lex mercatoria*.

The most important of the sources that are usually considered to constitute the *lex mercatoria* (generally recognised principles, trade usages, contract practice) seem not to give any specific criteria upon which a notion of good faith and fair dealing may be shaped:

a) There is no uniform notion of good faith and fair dealing that might be valid for all types of contracts on an international level, and there is hardly a notion that is generally recognised for one single type of contract either. There is no evidence of trade usages in respect of how the standard of good faith (if any) is applied in practice.\(^{29}\) As seen above, there are few principles in respect of good faith and fair dealing that may be considered common to Civil Law and Common Law systems, and, even among Civil Law systems, there are considerable differences.\(^{30}\) Even focusing on the common core that underlies the different legal techniques of the various systems may be of little help. To what extent the existence of piecemeal solutions in English law, that might permit to reach results comparable to the general principle of good faith in other systems, may be useful to substantiating a general clause on good faith in international trade, is uncertain. English law may, by applying own remedies or techniques, achieve results in part similar to those that the principle of good faith may permit to achieve in some of the other systems; this may be used as a basis

\(^{28}\) For an analysis of the application of general clauses, with particular, but not exclusive reference to the German system, see SCHLECHTRIEM, P., “The Functions of General Clauses, Exemplified by Regarding Germanic Laws and Dutch Law”, in GRUNDMANN, S., and MAZEAUD, D., *General Clauses and Standards in European Contract Law*, cit., pp. 41-56, 49ff.


\(^{30}\) Even ZIMMERMANN, WHITTAKER, *Good Faith in European Contract Law*, cit, p. 678, despite the observation that the principle of good faith is relevant to all or most of the doctrines of modern laws of contract, conclude that each system draws a different line between certainty and justice.
for a comparative observation that a conduct tending to avoid such results would be inconsistent with a generalized acceptance by various legal systems of the appropriateness of those results and of the consequent inappropriateness of a conduct aiming at avoiding the same results. This, again, could be seen as a concretization of a non-state standard of good faith. An indirect determination of the good faith standard such as this, if at all feasible, assumes a clear consistency in the results that the various legal systems consider appropriate. In many situations, however, the results do not coincide, as was seen in section 2 above.

b) The instrument that is generally considered as a high expression of the *lex mercatoria*, the CISG, willingly has not included good faith as a duty between the parties, which renders dubious the very existence of this criterion in the transnational context.

c) Contract practice is generally adopting contract models prepared on the basis of English law or at least of Common Law systems, which, as seen above, according to the traditional conception do not contemplate good faith and fair dealing as a standard. Even if, as seen above, the system in its totality might contain features that mitigate this aspect, Common Law contract models are clearly drafted on the assumption that the contracts shall be interpreted literally and without influence from principles such as good faith. As a consequence of the broad adoption of this contractual practice, the regulations between the parties move more and more away from the assumption of a good faith and fair dealing standard even in countries where the legal system does recognise and important role to good faith.

Other sources of the *lex mercatoria* may be found in a highly recognised database on transnational law, organised by the University of Cologne, the CENTRAL Transnational Law Database. This database lists the principle of good faith and fair dealing as one of the main principles of international contract practice, and refers to various sources upon which the principle relies: legal literature, arbitral awards, court decisions and international instruments.\(^\text{31}\)

d) The CENTRAL list of legal literature dealing with the principle of good faith and fair dealing is long and impressive, and it reflects the large variety of positions in respect of the subject, including also those that deny the existence of an international legal standard for good faith and fair

\(^{31}\) [http://www.tldb.net/], last visited on October 21\(^{st}\), 2007.
dealing.\textsuperscript{32} No uniform opinion arises from the doctrine quoted in the CENTRAL. From this source, therefore, it is not possible to clarify and specify the content of the standard in international trade.

e) Among the 11 arbitral awards listed in the CENTRAL database in support of the principle,\textsuperscript{33} 4 awards seem to have applied the standard of good faith of a state law,\textsuperscript{34} and the remaining awards refer mainly to the principle in general terms, as a moral rule of behaviour. On the basis of these 7 awards it seems difficult to conclude if the standard of good faith and fair dealing in international trade is to be interpreted as a moral rule that does not require an active duty of loyalty (such as the standard would be interpreted in Common Law), as a rule that must ensure that the contract is interpreted and performed accurately (as it would be interpreted in Italian law),\textsuperscript{35} as a rule that permits to integrate the contract and balance the interests of the parties (as it would be interpreted in German law), as a rule that permits to correct the contract and requires each party to actively take into consideration and protect also the interest of the other party (as it would be interpreted in Norwegian law), or yet in another way, characteristic only of international trade.

f) The international conventions mentioned in the CENTRAL database are the CISG, the UNIDROIT Convention on Factoring and the Vienna Convention on the Law of Treaties if 1969.

- As seen above, the relevance of the CISG in respect of the principle of good faith and fair dealing as a source of duties between the parties is questionable.
- The Factoring Convention contains, unlike the CISG, a rule prescribing good faith between the parties, in addition to the rule on interpretation of the convention present also in article 7 of the CISG - thus indirectly confirming that the rule contained in article 7 of the

\textsuperscript{32} For example, SCHLECHTRIEM, \textit{Good Faith in German Law and in International Uniform Laws}, Rome 1997.


\textsuperscript{34} ICC award No 5832 of 1988 applies Austrian law, ICC award No 6673 of 1992 applies French law, ICC award No 8908 of 1999 applies Italian law (corroborated by the UNIDROIT Principles), and ICC award No 9593 No 1999 applies the law of the Ivory Coast.

\textsuperscript{35} On the different function of the principle of good faith in German and in Italian law see SONNENBERGER, \textit{Treu und Glauben – ein supranationaler Grundsatz?}, in Festschrift für Walter Odersky, Berlin 1996, pp. 703ff., 705ff.
CISG is not sufficient to create a duty of good faith between the parties. The Factoring Convention regards a very specific kind of contract, and it can be questioned to what extent its provisions may be extended to all branches of international trade.\(^{36}\) Even if such an extension was possible, however, the rule on good faith is written in a general way and does not give criteria that can be useful for clarifying its scope.

- The Vienna Convention on the Law of Treaties is a convention on how states are supposed to perform the treaties that they have ratified, and it does not seem to have a direct relevance to the standard between private parties in international trade.

**g)** Of the 3 transnational instruments mentioned in the CENTRAL database (beyond the already mentioned UNIDROIT Principles and PECL), 2 are restatements of state law,\(^{37}\) and can therefore not be used to support an autonomous interpretation of the standard in international trade, and one is of dubious relevance, the Cairo Regional Centre for International Commercial Arbitration.

**h)** The CENTRAL database mentions also various state laws and court decisions: however, these sources have been expressly excluded by the interpretation of the standard of good faith and fair dealing under the UNIDROIT Principles or the PECL, as it shall be assessed autonomously on the basis of sources within international trade.

**g)** The sources in the CENTRAL database that mostly seem able to furnish support in the interpretation of the standard of good faith and fair dealing in international trade are the UNIDROIT Principles and the PECL. However, as seen, these sources assume an autonomous interpretation that has to be based on the standard applied in international trade. Therefore, when the CENTRAL refers to the UNIDROIT Principles and the PECL to support a principle of good faith in international trade, it creates a vicious circle, because the UNIDROIT Principles and the PECL in turn make reference to international trade practice to substantiate this principle.

\(^{36}\) At the moment of writing this article, nearly 20 years after its conclusion, the convention has been ratified by seven countries (http://www.unidroit.org/english/conventions/1988factoring/main.htm). It cannot, therefore, be deemed to enjoy a significant scope of application.

\(^{37}\) The Contract Code drawn by the English Law Commission and the Uniform Commercial Code of the United States
The foregoing shows that the transnational compilations of principles give good faith and fair dealing a central role; however, they do not define their scope and meaning, but they emphasise that these must be understood on the basis of the practice of international trade and without reference to the meaning developed in the single systems of state law. Generally recognised definitions of these standards do not seem to exist; international contractual practice is mainly based on Common Law contract models, the very structure of which rejects the interference of good faith. A strict application of the autonomous interpretation of the compilations of principles, therefore, would lead to a restrictive interpretation of the standard of good faith; this, however, seems to contradict the spirit of these compilations, that give good faith such a central role.

6 The effects of the Troika on international contracts

In the field of commercial contracts, the conception of contracts proper of the Common Law (whereby the contract is to be interpreted literally, notions of fairness or good faith are not central, the liability for non-performance is strict) is being adopted by contractual practice because most contracts are written on the basis of Common Law contract models. Commercial contractual practice is, therefore, increasingly following the caveat emptor approach that leaves it to the parties to regulate their interests in their contract without having the possibility to rely on implied terms that may protect them. The model contracts, the general conditions, the standard forms have the ambition to regulate exhaustively all aspects of the transaction, irrespective of what country’s law is governing the contract.

At the same time, many of these contracts are governed by the laws of Civil Law systems, and are written by lawyers educated in Civil Law systems, with their expectations of integration of the contract by implied terms contained in the law, correction of the text of the contract with the criteria of fairness and good faith, relevance of the diligence or negligence of the non-performing party, etc. Their understanding of the contract’s scope, function and relation to the governing law, therefore, may be different from the assumptions that the used contract models are based on.

How these opposed assumptions are to be coordinated, is left to the sensibility and degree of information of the judges who may be called to decide upon disputes arising out of these contracts. This creates an uncertainty that is detrimental to the efficiency of international business relationships.

The idea underlying the lex mercatoria and the Troika is to overcome this uncertainty by excluding the applicability of state laws. Being the legal
relationship that they regulate international, and not national, it is sometimes affirmed that international commercial contracts should not be subject to a domestic system of law; being the interests and requirements of international transactions in continuous development, international contracts should be subject to a system that is equally capable of developing in a flexible way. The *lex mercatoria*, as a spontaneous system of law that arises outside of the boundaries of domestic law and derives from the practice of international business, is according to this approach affirmed to be the proper system to govern international commercial contracts.\(^{38}\)

The theory of the *lex mercatoria* (more recently also defined as transnational law or non-state law) has received convinced support in certain academic circles, but has been met with scepticism by legal practice. The main reasons for this scepticism are that its is quite demanding to determine what the exact content of the *lex* is, that the principles that can be determined as being part of the *lex* are mainly quite vague and therefore cannot be used to decide specific disputes of legal-technical character, and that the content of the *lex* is quite fragmentary, leaving many areas of the law uncovered. Some of these negative aspects may be remedied to by the restatements, systematisations and standardisation of the *lex* that have been produced in the recent years and, in particular, by the Troika.

Subjecting a contract to regulation by commercial practices or generally acknowledged principles or restatements thereof (including the Troika), however, would leave too much room for discretion, thus representing an uncertain ground for the solution of potential disputes. The theory of the *lex mercatoria* seems to be based on the assumption that the parties desire a flexible system that the interpreter (judge or arbitrator) can adapt to their needs. On the contrary, practitioners emphasise that they desire a predictable legal system that can be objectively applied by the interpreter; the task of adapting the contract to the specific needs of the case is a task of the contract drafters, not of the interpreter.\(^{39}\) This difference in approaches is obviously of great significance to the evaluation of the *lex mercatoria* theory.

The related notion of the “autonomous contract”, *i.e.* of a contract that is detached from domestic law and has to be interpreted and applied autonomously in the light of its own language and non-state principles and rules of international trade,\(^{40}\) should therefore be reviewed in the light of the importance of the

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\(^{38}\) Literature on the subject-matter is very vast. Among the most frequently referred to articles is LANDO, O., “The Lex Mercatoria in International Commercial Arbitration”, (1985) 34 ICLQ, 747. For extensive references see GOODE, _Transnational Commercial Law_, cit., pp. 24ff.

\(^{39}\) For an interesting analysis of this aspect see GROSHEIDE, W., “The Duty to Deal Fairly in Commercial Contracts”, in GRUNDMANN, S., and MAZEAUD, D., _General Clauses and Standards in European Contract Law_, cit., pp. 197-204, 201.

\(^{40}\) For a recent suggestion to promote autonomous agreements that are not affected by the differences among the various contract laws, see COLLINS, H., “The Freedom to Circulate
domestic governing law. Even the European Commission abandoned its intent to support the use of standard contracts, originally meant as a possible tool to overcome the differences between the various state contract laws.

This does not mean, however, that the undeniable special characteristics of international contract drafting are, to a certain extent, not capable of rendering the contracts autonomous: within the scope of the freedom of contract that the parties enjoy under the relevant governing law, the parties develop their own contractual mechanisms that respond to the needs of international business and the requirements in the specific transaction.

Contract laws usually do not contain many mandatory rules, therefore the parties might not even notice that the contract is regulated by a certain governing law. In the absence of mandatory rules, i.e. within the scope of the freedom of contract granted by the governing law, the parties are free to use their contract to develop practical mechanisms to respond to the needs of the specific case. Within this scope, the autonomous contract thrives: transnational sources and the Troika provide useful regulations and models, and the parties develop mechanisms for the regulation of their respective interests that do not depend on the governing law and may be used across the borders.

However, there are also numerous examples of mandatory rules that are relevant to commercial contracts (e.g., the rules prohibiting penalties or binding


41 The practitioners’ reluctance to agree on the assumption that international contracts are drafted and should be interpreted outside of a domestic system of law was recently confirmed in FONTAINE, M., and DE LY, F., Drafting International Contracts. An Analysis of Contract Clauses , Ardsley, New York, 2006, pp. 629ff.. The book is an analysis of contract terms based on the reports prepared by the Working Group on International Contracts, a group that has existed since 1975 and consists of practicing lawyers who specialise in drafting, interpreting or litigating international contracts, as well as of academics. See also, on this point, CORDERO MOSS, G., Lectures on International Commercial Law, Oslo 2003, pp. 59ff.


43 For an incisive analysis of how standard contract terms would not be capable of being autonomous because they are subject to, among others, the governing law’s influence in respect of the normative context and the interpretation, see WHITTAKER, S., “On the Development of European Standard Contract Terms”, (2006) European Review of Contract Law, 1, pp. 51-76.

44 Numerous standard contracts, codifications of commercial practices, etc., are extremely well received in commercial practice, for example the INCOTERMS and the UCP 500 (recently updated and published as UCP 600) issued by the International Chamber of Commerce on, respectively, the allocation of risk and delivery obligations between the buyer and the seller and the payment mechanism of the documentary credit. On the challenges that nevertheless courts may face in applying the latter see TWIGG-FLESNER, C., “Standard Terms in International Commercial Law – The Example of Documentary Credits”, in SCHULZE, New Features in Contract Law, cit., pp. 325-339.
unilateral promises under English law), so that awareness about the governing law is central to the enforceability of most contracts.

The governing law will also have a considerable significance in the interpretation of the contract and filling of any gaps, as shown by the two cases described in section 1.1 above and their opposite solutions depending on the governing law. It is in these contexts that the legal standards such as good faith and fair dealing represent a limit to the freedom of contract, and it is in these contexts that the harmonisation provided by the Troika does not seem to achieve a satisfactory degree.

7 Conclusion

As seen above, there are significant differences between English law and the Civil Law systems, but also among the Civil Law systems themselves, that are due to a different conception of the role of the judge towards the law, of the role of the judge towards the parties, of the purpose of the legal system. Whether a system privileges predictability or equitable justice in the specific case, is going to heavily influence the rules and the application of the rules, as well as the expectations of the parties. These differences are deeper than the mere use of varying technicalities, and affect the structure of the legal instruments that have to be employed in the respective system to obtain the desired results. It may be difficult to overcome these differences by adopting a uniform text of law, since they go to the roots of the system and a uniform rule would most probably be applied differently.

The Troika, commendable initiative to create transnational compilations of principles that may be used to govern international contracts instead of or in addition to the state laws, seems to suffer under the tension between the mentalities of Common Law and of Civil Law. This is particularly true in respect of the role that subjective evaluations or objective standards of equitable justice should play in the interpretation or enforcement of contracts. While commercial practice seems to adopt an approach close to the Common Law’s in drafting contracts that aspire to be self-sufficient and objectively interpreted, the restatements of principles seem to follow the Civil Law tradition and attach a great importance to considerations of equitable justice. However, they also insist on detaching these criteria from the legislative, judicial and doctrinal tradition of specific legal systems in favour of an autonomous interpretation based on international standards. However, not many sources are available to establish the meaning of good faith and fair dealing as a standard in international trade.
The definition of the scope and function of the principle of good faith and fair dealing in the Troika is too vague to permit an independent application; this in turn leads to unpredictable results, which are not desirable in the context of commercial contracts.