

GOOD FAITH IN INTERNATIONAL COMMERCIAL CONTRACTS UNDER UN SALE CONVENTION AND ISLAMIC LAW: A BRIEF COMPARISON

Anowar Zahid¹, Rohimi Shapiee², Sohaib Mukhtar³ and Syed Munawar Shah⁴

Abstract: The United Nations Convention on International Sale of Goods (CISG) is a harmonization of common law and civil law rules relating to sale of goods. Islamic law was not in the consideration of the drafting body, the United Nations Commission on International Trade (UNCITRAL), whereas it is one of the oldest leading legal families of the world. This accounts for a scrutiny of the CISG provisions from Islamic perspective. The present study chooses the principle of good faith, which is one of the general principles that underlie the convention, to compare with its Islamic counterpart. It finds that the principle, in general, and with respect to the formation and performance of contract, in particular, is friendly with Islamic *Shari'ah*.

Keywords: Islamic law/*Shari'ah*, Good faith, CISG, and Unidroit Principles

INTRODUCTION

“Good faith is a vital norm in contract law and always has been and remains a critical part of real word contract” (Reitier 1983, p. 707). This phrase succinctly presents that good faith is essential for a contract in general. Its importance has, in particular, been emphasized in the context of international sale contract under the UN Convention on International Sale of Goods (CISG) 1980. It categorically requires all parties including the domestic courts and arbitral tribunals to interpret its provisions in such a way so that good faith is observed in international trade in addition to upholding its international character and uniform application worldwide (CISG, Art. 7). This instruction is directed to the interpreters of CISG, not to the contracting parties. CISG does not clearly mention its relevance to them. However, it is commonly held that the principle of good faith is also applicable to

¹ Associate Professor, Faculty of Law, Universiti Kabangsaan Malaysia (National University of Malaysia), Bangi 43600, Selangor, Malaysia, E-mail: anowar_zahid@ukm.edu.my; dr.anowar.zahid@gmail.com

² Professor, Faculty of Law, Universiti Kabangsaan Malaysia (National University of Malaysia), Bangi 43600, Selangor, Malaysia

³ PhD Student, Faculty of Law, Universiti Kabangsaan Malaysia, Bangi 43600, Selangor, Malaysia

⁴ PhD Candidate in Economics, Universiti Kabangsaan Malaysia, Bangi 43600, Selangor, Malaysia.

the parties' contractual relationships (Magnus, 2007). This view may be maintained when CISG is read conjunctively with the Unidroit Principles of International Commercial Contracts (Principles), which is considered as a gap-filler for CISG (Unidroit Principles, 2010).

The philosophy behind the adoption of CISG or Principles is to bring legal uniformity in international trading and thereby to remove/narrow down the differences between common law and civil law jurisdictions. There was no major representation from the Islamic law jurisdictions on the bodies that planned, deliberated and drafted these instruments. Egypt and Syria were members of the CISG drafting body, but their purpose was not to represent Muslim world and to thereby to ensure CISG's friendliness with Islamic principles. This necessitates an investigation into the provisions of CISG, Principles and other related instruments in light of Islamic teachings. This would facilitate the harmonization or a peaceful co-existence of these three legal families (common law, civil law and Islamic law). What accounts for this endeavor is that Islamic law is one of three major legal families of the world. As the CISG and the Principles aim at universal uniformity, without their friendliness with Islamic law and principles that aim may not be attained. Another reason is that now-a-days, Islamic law or Shari'ah (henceforth used interchangeably) is being chosen as a governing law in international transactions, especially because of the increasing popularity of Islamic finance worldwide. Therefore, the present paper has chosen one of the important principles of international sale contract law, namely good faith, to examine from a comparative perspective- CISG versus Shari'ah.

CONCEPTION OF GOOD FAITH IN GENERAL

Scholars have defined "good faith" in different ways, such as reasonableness (Holmes, 1978), fair dealing (Holmes, 1980), decency, fairness and reasonableness (Farnsworth, 1963), community standards of fairness, decency and reasonableness (Thigpen, 1981), and standards of appropriate behavior relevant in the community (Reitier, 1983). Because of the definitional divergence, Summers (1968) attempted to put it in negative terms. According to him, good faith is what excludes bad faith, which exists at four different stages, namely negotiation and formation of contract, its performance, raising or resolving disputes, and taking remedial actions. At the stage of negotiation and formation of contract, bad faith includes lack of serious intent to contract, abusing privileges to withdraw proposals or offers, entering a deal without a serious intent to perform, non-disclosure of material facts and taking advantage of another in driving a bargain. At the performance stage, it includes bypassing the spirit of the deal, lack of diligence and seriousness, abusing powers to determine contractual compliance, and not cooperating with the other party in the contractual performance. Bad faith also ensues through, among others, trickily raising disputes, or taking advantage of

another for a favorable settlement of dispute. Last, bad faith is shown through wrongful or unreasonable rejection of contractual performance, wilful failure to mitigate damages and abusing the power of termination of a contract (Reitier, 1983). In fact, there is no single unanimously accepted definition of good faith. Applicability of the various definitions may be determined by case-by-case basis.

Now, what does Islam say about good faith? Islamic legal system is a monotheistic faith-based system. Moral and legal ethics are part and parcel of this faith. So is good faith. It is attached, as a condition, to the very belief (Imaan) of its followers. The Qur'an says in this respect, "And they have been commanded no more than this: To worship Allah, offering Him sincere devotion, being true (in faith); to establish regular prayer; and to practice regular charity; and that is the Religion Right and Straight" (98:5). While this verse talks about sincerity in faith and religious practices, at another place the Qur'an reprimands people for their unfair and deceitful economic and commercial dealings: "Woe to those that deal in fraud, those who, when they have to receive by measure from men, exact full measure, but when they have to give by measure or weight to men, give less than due" (83:1-3). With respect to keeping contractual obligation, the Qur'an commands the Muslims to "fulfil (all) obligations" (5:1). Prophet Muhammad (peace be upon him) said about how a Muslim character should be like in the following words- "A believer is frank and decent, whereas a wrongdoer is deceitful and blameworthy" (Al-Bukari, 1997). Thus, in Islam, good faith includes sincerity, truthfulness, straightforwardness, fair dealings, fulfilling promises, etc. Both Allah and His Messenger (the Lawgiver) have provided for the maintenance and observance of good faith in their belief, religious practices and all sorts of economic and commercial dealings whatsoever. This is an all-comprehensive command. With respect to economic and commercial transactions, the principle applies both to individuals and corporate entities.

MEANING AND APPLICATION OF GOOD FAITH UNDER CISG AND ISLAMIC LAW: COMPARISONS

Prologue

The above is a brief outline of good faith in general. For the purpose of international trade, this general conception may be taken as precursor. Good faith of international standard is essential for international trading transactions and so for the interpretation of CISG (Magnus, 2007), which is a piece of *lex mercatoria*. Below, this paper makes an attempt to identify the good faith principle contained, expressly or implicitly, in various provisions of CISG, such as the provisions of pre-contractual obligations, form and performance of contract, etc. Then, it will determine the bailiwick of the principle by interpretation, which is important for the

understanding of its (good faith) contextual use within CISG. To quote Zeller (2003, p. 238),

Unfortunately good faith is not a principle with a clear and precise meaning and therefore consideration must be given to the fact that good faith requires interpretation. To give substance to a term whether express or implied requires interpretation of concepts with the aid of relevant tools. Good faith is not only a legal term but by its very nature it also has a behavioral function. Courts can only fully understand the intent of parties if they inquire into the objective intent and also explore the subjective intent of parties as demonstrated in the CISG pursuant to article 8.

Thereafter, the CISG good faith would be compared with that under Islamic law or Shari'ah, which is also advocated as a lex mercatoria as its rules and principles apply across the border to transactions between Muslim automatically or between a Muslim party and a non-Muslim party by choice (Sansom 2005).

GOOD FAITH IN RESPECT OF SPECIFIC MATTERS

(a) Pre-contractual Obligations

Article 16 of CISG lays down the rules of revocation of offer. Under Paragraph (1), an offeror may revoke his/her offer if the revocation reaches the offeree before he/she has dispatched an acceptance. Paragraph (2) makes two exceptions to this provision. Subparagraph (a) precludes the offeror from revoking the offer if he/she has made the offer irrevocable by stating a fixed time for acceptance or otherwise. Under Subparagraph (b) he/she cannot exercise the revocation power, if the offeree relied on the offer and it was reasonable for him/her to do so. This is an insertion of the good faith principle. This principle applies where the offeror, by his/her words or conduct, induces the offeree to believe that the offer shall not be revoked and the offeree relies on that inducement. This is an evidence of the general principle of estoppel. This may be explained with an example related to supply of goods, which is a post-contractual obligation though. If the buyer makes complaints about the goods supplied by the seller after the agreed time of notice and the former asks the latter for information about the complaints, this gives the latter a belief that the former would not raise the defense of delayed notice of nonconformity. In particular, the evidence under subparagraph (b) may also be pleaded as a promissory estoppel (UNCIITRAL, 2012). The purpose is to stop fraudulent and treacherous behaviors of trading parties and to create a fair environment for business. In the same vein, Islamic Shari'ah provides for the observance of fairness in economic transactions. For example, the Qur'an, as quoted above (83:1-3), admonishes the people while dealing with others not to take more than what they deserve and not to give less than what they are obliged to give. This verse has a comprehensive scope of application. It covers all sorts of actions or words that lead to ultimate curtailment of what is due to others (Shafi, 2004).

The present case attracts the application of this verse in that the offeror, after inducing the offeree to rely on his/her representation, later changes his/her position and thereby purports to deceive the latter from rightful claims. The origin of this principle goes back to the history of human creation. When Adam (peace be upon him), the Father of mankind, beguiled by Devil, breached the command of Allah not to go “near” a tree (Qur'an, 2:35-36) and later felt utterly remorseful, Allah, the Almighty, taught him a supplication for forgiveness (Qur'an, 7:23). This created a hope in Adam that Allah would forgive him. Accordingly, with this hope, Adam made the supplication and Allah turned to him in mercy and forgave him (Qur'an, 2:37).

(b) Forms of Contract

Under CISG Articles 11 and 29(1) read together, a sale contract may be concluded, modified or terminated in any form, written or otherwise. Under Article 29(2), if a contract made in writing requires its modification or termination to be in writing, it cannot be modified or terminated otherwise. This requirement is subject to the good faith principle entrenched in the same sub-Article. According to this, the requirement of writing to modify the contract may not apply where one party has relied on the conduct of the other to the contrary. For example, where the seller has extended the time for payment by letter of credit (L/C) and the buyer has opened an L/C account, the seller was precluded from terminating the contract (<http://www.unilex.info/case.cfm?id=1160>). In the same way, Shari'ah allows contracting parties to make contract in any form backed by testimony of witnesses (Akaddaf, 2001; Jalil and Rahman, 2010), though written contract is preferred because of its certainty in meaning (Al-Mahali and Al-Suyutu, 2007). This rule may be derived and generalized from the Qur'anic instruction to write down a debt contract testified by witnesses (Qur'an, 2:282). The Qur'an, of course, permits non-written form of contract when the creditor trusts the debtor (Qur'an, 2:283). In other words, written contract is recommended while oral contract is permissible (Akaddaf, 2001). In the same way, modification or termination may also be done in any manner agreed upon by the parties. If, however, the word or conduct of any of them leads the other to change the agreed manner, the principle of good faith shall apply as Shari'ah does not tolerate any treacherous dealing. To quote the Prophet (peace be upon him), “The greatest of all deceptions is to lie to your brother when he believes all that you say” (Al-Bukhari, 1999).

(c) Issues of Material Validity

Since CISG is an attempt to harmonize sale transactional rules of different nations, it does not cover validity issues of contract because national laws conflict most in this respect. The Principles fill this gap by defining the factors that may affect the validity of a contract. While laying down provisions in this connection, the

Principles underline the relevance of good faith. For example, as to when mistake may vitiate a contract, Article 3.2.2.1(a) of the Principles provide, among other matters, that “A party may only avoid the contract for mistake if,... it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error” (emphasis added). Similar to the Principles, under Shari’ah there are certain factors for which a party may avoid his/her contractual obligations, such as mistake, fraud, coercion, etc. The principle of good faith is considered in determining the contractual validity on these grounds, where appropriate. For example, mistake as to the object of the contract, which is short of the customary mercantile standard, may account for the avoidance of the contract as it will be an unfair dealing for the mistaken party (Rayner, 1991).

(d) Good Faith Requirement in the Performance of Contract

As mentioned earlier, under CISG there is no general requirement for observance of good faith by the contracting parties. Of course, in some particular cases, the CISG incorporates this principle. For example, Article 35(2) requires the seller to supply goods that are fit for particular purpose indicated to him by the buyer unless the latter did not rely or it was unreasonable for him to rely on the skill and judgment of the former, such as where the buyer is an experienced importer (UNCITRAL, 2012 citing <http://cisgw3.law.pace.edu/cases/100730n6.html>). In addition to the explicit good faith obligations, there are implied obligations as well. For example, CISG specifies duties of cooperation for the parties, which include duty to mitigate loss by taking reasonable measures (Article 77), duty to notify, such as providing information for buying insurance policy (Article 32), and duty to enable each other to perform the contract and not to jeopardize it (Articles 32 and 60 read together). All of these obligations are based on the good faith principle (Magnus, 2007).

The shortcoming of CISG that it does not provide, in general, for the observance of good faith by the contracting parties is made up by the Principles. Article 1.7 of the Principles reads thus- “Each party must act in accordance with good faith and fair dealing in international trade.” It may be noted that the phrase, “good faith and fair dealing in international trade”, underlines that the good faith to be observed by the parties must be of international standard. Essentially, domestic good faith is not acceptable within the purview of this provision. Domestic good faith that is generally accepted in different jurisdictions qualifies for this purpose. Unlike CISG, the Principles explicitly provide that implied obligations stem from, among other things, good faith (Unidroit Principles, 2010, Article 5.1.2), such as the duty of cooperation for the performance of the contract (Article 5.1.3). If a buyer, for example, contracts with a seller for immediate supply of some goods and then buys similar products from another seller, it has not cooperated with the first seller and so has acted against good faith. Thus, the rule of cooperation “can

be understood as an expression of the general principle- based on good faith- that neither party must hinder performance of the other nor otherwise militate against the contractual purpose" (Magnus, 2007, pp. 47-48).

Like the CISG and the Principles, Islamic Shari'ah, as mentioned earlier, also requires the contracting parties to be just and fair in their dealings. To iterate, the general instruction is that the (believing) businessmen must be honest in their dealings and that is their godliness, for which, as Prophet Muhammad (peace be upon him) said, they will enjoy the company of the Prophets, the Truthful and the Martyrs in the afterlife (No'mani, 2002). In particular, for example, the Prophet commanded the seller not to conceal details of the products from the buyer or the buyer not to take advantage of the seller's ignorance of the (actual) market price and thereby not to cheat him to buy goods from him (and vice versa) (No'mani, 2002). Further, if the parties have not mutually decided to end the contract, they are bound to keep it up and cooperate with each other in respect of explicit and implied terms based on good faith (Qur'an, 5:1-2; No'mani, 2002). Thus, both the buyer and the seller must observe good faith in their transactions. The good faith required here is, similar to the Principles, international in nature as Shari'ah is meant to be applicable across the borders to all mankind. To quote the Qur'an, "(We sent the Messengers) with clear signs and Books. And We have also sent down to you (O Muhammad) the Reminder (the Qur'an), that you may explain clearly to men what is sent down to them, and that they may give thought" (Qur'an, 16:44) (emphasis added).

(e) Good Faith in Respect of Non-performance of Contract

CISG provides that "(a) party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission" (Article 80). This purports to mean that if a party to a contract fails to perform it because of the fault of the other party, the other party cannot take advantage of that. This is based on the equitable principle that no one can take benefit of one's own mistake. This "has been cited as evidence that principles of good faith apply under the CISG" (UNCITRAL, 2012, P. 400). Similarly, under Shari'ah a buyer may return the goods after purchase for a defect that existed in the goods at the time of sale. On this ground, once the Prophet (peace be upon him) ordered the seller to take back his object of sale. The buyer took some benefit from the sale object. For this reason, the seller asked for compensation. Then, the Prophet ruled that "He has the right to benefit who is accountable for loss (i.e., who is responsible to bear the loss)" (No'mani, 2002, p. 108; Elgari, 2003). Accordingly, because the buyer, in this case, suffered loss from the purchase due to the pre-existing defect, he has the right of replacement of that loss. In other words, the seller cannot claim compensation for the use of the sale object. That would be tantamount to taking benefit of one's own fault. As such, both CISG and Shari'ah principles are same in this respect.

CONCLUSION

From the foregoing discussion, it is found that both CISG and Shari'ah law share, in common, the principle of good faith. Though the former calls upon the interpreter to follow the principle while interpreting its provisions, it does not entrench it as a general requirement for the contracting parties. This gap is filled up by the Principles. Besides, CISG read together with the Principles, embeds the principle in different specific provisions, explicitly or impliedly, in respect of the formation and performance of the contract. In the same way, Shari'ah lays down the principle of good faith and requires the contracting parties to comply with the requirement in various stages of the contract, particularly sale contract. Both the general and particular requirements of good faith under CISG and Principles, on the one hand, and Shari'ah law, on the other, are similar (See Akaddaf, 2001). As such, they should have equal application both in Islamic and non-Islamic jurisdictions with respect to the obligations of the parties to an international sale contract.

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