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THE KEEPER OF THE FLAME: GOOD FAITH AND FAIR DEALING IN INTERNATIONAL TRADE

Mary E. Hiscock*

Section 1-203 of the Uniform Commercial Code (UCC) provides that “[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”¹ “Good faith” is defined in section 1-201 as “honesty in fact in the conduct or transaction concerned.”² Section 2-103 further defines good faith for a merchant in the context of transactions in goods as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”³ The *Restatement (Second) of Contracts* states that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”⁴

These formulations of American law are mirrored in one of the central principles of the new UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles).⁵ The principle on good faith and fair dealing states that: “(1) Each party must act in accordance with good faith and fair dealing in international trade [and] (2) The parties may not exclude or limit this duty.”

The resemblance is not coincidental. This discussion considers the role of the concept of good faith and fair dealing in nondomestic, nonconsumer transactions in common-law systems. Many eminent

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1. U.C.C. § 1-203 (1990).

2. *Id.* § 1-201(19).

3. *Id.* § 2-103(1)(b).

4. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

5. UNIDROIT Principles of International Commercial Contracts, 1994, art. 1.7, 34 I.L.M. 1067, 1069 (1995). A working group of members of UNIDROIT, the International Institute for the Unification of Private Law, developed the UNIDROIT Principles between 1980 and 1994. Michael Joachim Bonell of the University of Rome coordinated the project. The working group consisted of eminent lawyers from all parts of the world, representing all major families of law.

legal scholars have discussed the general topic of good faith.⁶ As part of the discussion of common-law systems, I would like to emphasize the contribution to the debate from Australian law and lawyers.⁷

The inclusion of a good faith duty as a fundamental and mandatory principle of contract law in international commercial transactions indicates how far commerce has traveled along a rocky road. The common-law world has been split over the existence and extent of a discrete principle in these terms for over a century.⁸ I return to the battlefield only because I believe that the balance has tipped within the last decade such that there is a consensus supporting the UNIDROIT statement, in substance if not in form. I do so in a Symposium on the UCC because, given the strength of the opposition to the concept of good faith as a source of obligations in contract, it is unlikely that the principle would have achieved its present level of acceptance had it not found a safe harbor within the UCC after its journey from European law. From there it can now emerge in the battle amongst the common-law lawyers in the hope that, at least, a dusty truce can be achieved.

6. A brief bibliography must include 2 J.V. STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GEFEKBUCH MIT GINFÜHRUNGSGEFEK UND REBENGEFEKN (11th ed. 1957); Michael G. Bridge, *Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?*, 9 CANADIAN BUS. L.J. 385 (1984); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980); M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963); Paul Finn, *Commerce, the Common Law and Morality*, 17 MELB. U. L. REV. 87 (1989) [hereinafter Finn, *Commerce*]; Clayton P. Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619; Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964); H.K. Lucke, *Good Faith and Contractual Performance*, in *ESSAYS ON CONTRACT* 155 (P.D. Finn ed., 1987); Raphael Powell, *Good Faith in Contracts*, 9 CURRENT LEGAL PROBS. 16 (1956); Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810 (1982); and Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

7. See ANTHONY DUGGAN ET AL., *CONTRACTUAL NON-DISCLOSURE* 122-47 (1994); Ellinghaus, *supra* note 6; Finn, *Commerce*, *supra* note 6; Lucke, *supra* note 6.

8. In *Allen v. Flood* Wills J stated that "any right given by contract may be exercised as against the giver by the person to whom it is granted, no matter how wicked, cruel, or mean the motive may be which determines the enforcement of the right." *Allen v. Flood*, 1898 App. Cas. 1, 46 (P.C. 1897) (appeal taken from Eng.). Compare the discussion by the New York Court of Appeals in *Brassil v. Maryland Casualty Co.*, 104 N.E. 622, 624 (N.Y. 1914) about the "implied obligation of good faith and fair dealing" in contract performance.

Significant in the UNIDROIT principles is the acceptance of good faith in commercial contracts—contracts between merchants—from different systems. Good faith is professed as a shared value in international trade. It is not merely manifested in solutions to particular contract problems, such as the right to terminate,⁹ but it is seen as an overarching source of obligations. That role has been regarded as controversial in the past. Critics have regarded good faith in this sense as antithetical to the value of certainty in the commercial law developed in common-law systems,¹⁰ as an unarticulated major premise behind many specific rules of the law,¹¹ or, at best, accepted it as a synonym for reasonableness.¹²

In the same way that the good faith duty is separate from all those particular rules that exemplify it, so also is it separate from the concept of unconscionability and the host of equitable doctrines that have permeated contract law.¹³ Unconscionability, whether measured by a process or by a result which is shocking and unacceptable to the law, demonstrates management of contract by crisis. The good faith duty is part of the norms of contract management. As such, it is part of the common-law component of common-law systems.

A shared European-based heritage of the ethical concerns underlies good faith and fair dealing. In Cicero's dialogue, *De Officiis* (On the Nature of Duties), he discussed duties of disclosure in the context of a grain merchant who was carrying a cargo of grain from

9. This is neatly summarized by Priestley JA in *Renard Constrs. (ME) v. Minister for Pub. Works*, 26 N.S.W.L.R. 234, 269 (1992) as follows: "[T]he same reaction by a court to what is felt to be unfair use of a contractual right can manifest itself in two apparently quite different forms: one by saying the right [to terminate] does not exist in the particular circumstances, the other by saying it is wrong to use it."

10. Professor Bridge speaks of good faith as "a concept which means different things to different people in different moods at different times and in different places." Bridge, *supra* note 6, at 407.

11. See ONTARIO LAW REFORM COMM'N, REPORT ON AMENDMENT OF THE LAW OF CONTRACT 166 (1987), which recommended the adoption of § 205 of the *Restatement (Second) of Contracts* after stating: "[W]hile good faith is not yet an openly recognized contract law doctrine . . . a great many well-established concepts in contract law reflect a concern for good faith, fair dealing and the protection of reasonable expectations, creating a legal behavioural baseline."

12. See *Schenker & Co. v. Maplas Equip.*, 1990 V.R. 834, 840-41 (1989) (Austl.). *But cf. White & Carter (Councils) Ltd. v. McGregor*, 1962 App. Cas. 413, 430 (P.C. 1961) (appeal taken from Scot.) (per statement by Lord Reid in the House of Lords; "[I]t never has been . . . the law that a person is only entitled to enforce his contractual rights [only] in a reasonable way").

13. These doctrines include the expansion of the role of the fiduciary to play a greater role in commerce.

Alexandria to Rhodes.¹⁴ Rhodes was experiencing famine.¹⁵ The merchant had a fast ship and overtook a number of other merchants also carrying grain to Rhodes.¹⁶ He preceded them to their destination.¹⁷ Should he have disclosed their imminent arrival? Cicero's view was clear: He described a merchant who would not disclose in these circumstances as the reverse of "open, straightforward, well bred, just or good; but rather a twister, mysterious, cunning, tricky, ill-intentioned, crafty, roguish and sly."¹⁸ The contrary view he put in the mouth of Diogenes: "Where it is up to the buyer to judge, how can there be deceit on the part of the seller?"¹⁹

Significantly, Cicero was not only putting forward an ethical view about the merchant's conduct, but one which he believed was reflected in Roman law.²⁰ This debate has endured through the ages. It was the nineteenth century triumph of Diogenes that turned the path of the common law away from its earlier ethical and commercial roots. Blackburn J, one of the strongest commercial judges on the late 19th century English bench, stated in *Smith v. Hughes*²¹ that "whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor."²² Or in a literary setting:

Six days shalt thou swindle and lie!
 On the seventh — tho' it soundeth odd —
 In the odour of sanctity
 Thou shalt offer the Lord, thy God,
 A threepenny bit, a doze, a start, and an unctuous smile,

14. CICERO, ON DUTIES 118-19 (M.T. Griffin & E.M. Atkins eds., Cambridge Univ. Press 1991).

15. *Id.* at 118.

16. *Id.*

17. *Id.*

18. *Id.* at 121. This example is quoted by DUGGAN ET AL., *supra* note 7, at 1-2.

19. CICERO, *supra* note 14, at 120.

20. This view is also supported by F.H. Lawson. See F.H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW 125 (1955). In the case of a sale, the tribunal had the burden of deciding what the defendant ought in good faith to have done, in other words what kind of performance the contract called for. This meant that, in contrast to the stipulation, where all the terms have to be expressed, the parties would be bound not only by the terms they had actually agreed to, but by all the terms that were naturally implied in their agreement.

Id.

21. 6 L.R.-Q.B. 597 (1871).

22. *Id.*

And a hurried prayer to prosper another six days of guile.²³

The convergence of commercial morality and common law most clearly appears in the earlier legacy of Lord Mansfield, common to both American and Anglo-Australian law. In *Carter v. Boehm*²⁴ Lord Mansfield said that good faith was a principle "applicable to all contracts and dealings."²⁵ He maintained this position, together with an emphasis on the values of certainty. In *Vallejo v. Wheeler*²⁶ he stated his policy as follows: "In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon."²⁷

This mature and informed commercial judgment illuminated the law of the United States only for a time. Then the light dimmed, or, as Professor Farnsworth described it, the general principle of good faith performance was in a poor and neglected state except in New York and California.²⁸ Hence decisions such as *Wigand v. Bachmann-Bechtel Brewing Co.*²⁹ emanated from the New York Court of Appeals, which stated that "[e]very contract implies good faith and fair dealing between the parties to it."³⁰ This decision preceded and led to the statement of the general principle of good faith as a single unitary duty in the 1950 draft of the UCC. The terms used were similar to the language of section 1-203, but included an additional requirement of observance of the reasonable commercial standards of any trade or business in which the relevant person is engaged, as well as honesty in fact.³¹ However, at the insistence of the American Bar Association Section on Corporation, Banking and Business Law, the single statement was recast as a general statement, and a merchant's definition was inserted.³² The rationale for this

23. GEORGE ESSEX EVANS, ODE TO THE PHILISTINES (n.d.).

24. 97 Eng. Rep. 1162 (K.B. 1766).

25. *Id.* at 1164.

26. 98 Eng. Rep. 1012 (K.B. 1774).

27. *Id.* at 1017.

28. Farnsworth, *supra* note 6, at 671.

29. 118 N.E. 618 (N.Y. 1918). To the same effect, see *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163 (N.Y. 1933) and *Universal Sales Corp. v. California Press Mfg.*, 20 Cal. 2d 751, 128 P.2d 665 (1942).

30. *Wigand*, 118 N.E. at 619.

31. Farnsworth, *supra* note 6, at 673.

32. *Id.*

appears to have been a belief that the drafting change meant no substantive change in the effect of section 1-201.³³

This development leads to the second limb of the controversy over the good faith duty. Even assuming such a duty exists, what is its content and purpose? Farnsworth answers this question:

[T]he chief utility of the concept of good faith performance has always been as a rationale in a process which is not intrusted to the trier of the facts—that of implying contract terms. It was so even under Roman law; it was so under the pre-[Uniform Commercial] Code case law in this country; and it remains so under the Code. Good faith performance has always required the cooperation of one party where it was necessary in order that the other might secure the expected benefits of the contract. And the standard for determining what cooperation was required has always been an objective standard, based on the decency, fairness or reasonableness of the community and not on the individual's own beliefs as to what might be decent, fair or reasonable. Both common sense and tradition dictate an objective standard for good faith performance.³⁴

Two recent sets of cases portray the range of views in the English and Australian jurisdictions on the meaning of a good faith obligation in performance. They provide an interesting contrast and should be a sufficient platform on which to mount a consensus supporting the UNIDROIT formulation of good faith duties as an extension of domestic systems into international trade. The assumption must be made in international trade that, apart from the Vienna Convention on the International Sale of Goods,³⁵ national law will ultimately determine the rights of the parties, although this may be less true than it once was.³⁶

33. *Id.*

34. *Id.* at 672.

35. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 19 I.L.M. 668 (1987). Even the Vienna Convention itself, which is adopted by national systems, finds a small place for good faith in Article 7, stating "[i]n 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." *Id.* art. 7, at 673.

36. See *Amin Rasheed Shipping Corp. v. Kuwait Ins. Co.*, [1984] 1 App. Cas. 50 (1983) (appeal taken from Eng.); *Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. v. R'As al-Khaimah Nat'l Oil Co.*, [1987] 3 W.L.R. 1023 (C.A.).

*Service Station Ass'n v. Berg Bennett & Associates*³⁷ was a federal court decision issued by Gummow J, now a Justice of the High Court of Australia. The appellant and the respondent had a publishing agreement for a trade journal for service station proprietors.³⁸ In the course of performance, the publisher assumed greater contractual responsibilities, eventually sharing the risk and the profits, as well as providing technical publishing services.³⁹ The respondent informed the defendant that it would cease publication of the journal after four weeks and then publish a new trade journal for the industry, to be distributed to a similar readership list.⁴⁰ The appellant sought orders for injunctive and declaratory relief.⁴¹ The court held that there was no binding Australian authority which mandated that there be implied into every contract as a matter of law a term that each party to a contract will act in good faith and with fair dealing in its performance and enforcement.⁴²

Gummow J examined the Australian position in terms of section 205 of the *Restatement (Second) of Contracts*.⁴³ He considered the statement of Judge Breitel, then recently retired as Chief Judge of the New York Court of Appeals, offered as expert witness testimony and accepted by the court in *United States Surgical Corp. v. Hospital Products International*,⁴⁴ and approved by Dawson J in the High Court on appeal from that decision.⁴⁵ Ohio law governed the transaction, a distributorship agreement.

Judge Breitel swore in his affidavit that the good faith obligation "extends only to the performance of the express terms of an agreement"; that it "may not be used as a springboard for other implied terms"; and that it "simply means that neither party to an agreement may do anything to impede performance of the agreement or to injure the right of the other party to receive the proposed benefit."⁴⁶

37. 45 F.C.R. 84 (N.S.W. Dist. Reg. 1993).

38. *Id.* at 86.

39. *Id.*

40. *Id.* at 87.

41. *Id.*

42. *Id.* at 91-92.

43. *Id.* at 92.

44. 2 N.S.W.L.R. 766, 799-801 (1982), *rev'd on other grounds*, 156 C.L.R. 41 (1984) (Austl.).

45. *Hospital Prods. Ltd. v. United States Surgical Corp.*, 156 C.L.R. 41, 137-38 (1984) (Austl.).

46. *United States Surgical Corp.*, [1982] 2 N.S.W.L.R. at 800.

Gummow J further relied on *Secured Income Real Estate (Australia) Ltd. v. St. Martins Investments Proprietary Ltd.*,⁴⁷ a decision of the High Court of Australia applying well-established Australian and English authority.⁴⁸ In that case, Mason J summarized existing law, stating that parties to a contract are under "an implied obligation . . . to do all that [is] reasonably necessary to secure performance of the contract. . . . [and] 'to enable the other party to have the benefit of the contract.'"⁴⁹

In particular, Gummow J found the concluding words of Mason J to be consistent with the decision of the New York Court of Appeals in *Wigand v. Bachmann-Bechtel Brewing Co.*⁵⁰ and, by inference, the whole stream of United States authority, when he said:

It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself.⁵¹

Gummow J then makes three further points of importance, two of substance and one of structure. The first substantive point is that the law on implied terms required for the "business efficacy" of a

47. 144 C.L.R. 596 (1979) (Austl.).

48. *Service Station*, 45 F.C.R. at 89.

49. *Secured Income Real Estate*, 144 C.L.R. at 607 (applying the rationale of Lord Blackburn in *Mackay v. Dick*, 6 App. Cas. 251, 263 (1881) (appeal taken from Scot.) and quoting Griffith CJ in *Butt v. M'Donald*, 7 Q.L.J. & R. 68, 71 (1896) (Austl.)).

50. 118 N.E. 618 (N.Y. 1918).

51. *Secured Income Real Estate*, 144 C.L.R. at 607-08.

contract, an area which has painfully evolved in Australian law,⁵² is otiose if the same ground could be covered by an implied "good faith" term.⁵³

The second substantive point is that the concept of good faith is imprecise, whereas "bad faith" is not. It is easier to identify examples of bad behavior than to postulate a standard of good faith behavior in positive terms. Canadian authority is cited in support of this point as follows:

In most cases, bad faith can be said to occur when one party, without reasonable justification, acts in relation to the contracts in a manner where the result would be to substantially nullify the bargained objective or benefit contracted for by the other, or to cause significant harm to the other, contrary to the original purpose and expectation of the parties.⁵⁴

This formulation is also in line with established Australian authority.⁵⁵ Interestingly, this result aligns with the Japanese understanding of a good faith performance obligation, an inheritance from its civil law antecedents, but more directly from the Allied occupation after World War II and the process of democratization of Japanese law.⁵⁶

The structural point is that Anglo-Australian law has developed differently from American law on implied terms, with greater emphasis on specifics rather than the identification of a principle expressed in wide terms.⁵⁷ Equity has played a role in determining the quality of performance, but it "requires a leap of faith to translate

52. See *Codelfa Constr. v. State Rail Auth.*, 149 C.L.R. 337 (1982) (Austl.); *Secured Income Real Estate (Australia) Ltd. v. St. Martins Invs.*, 144 C.L.R. 596 (1979) (Austl.); *B.P. Refinery (Westernport) v. Shire of Hastings*, 52 A.L.R. 20 (P.C. 1977) (Austl.).

53. There are cases where good faith and reasonableness are implied in order to give "business efficacy" to a contract and to save it from failure for uncertainty. These cases include *Meehan v. Jones*, 149 C.L.R. 571 (1982) (Austl.) (implying good faith subject to finance clause in a real estate sale contract) and *Booker Indus. v. Wilson Parking (Qld)*, 149 C.L.R. 600 (1982) (Austl.) (implying good faith where rent to be fixed by a third party).

54. *Gateway Realty Ltd. v. Arton Holdings Ltd.*, 106 N.S.R.2d 180, 197 (1991).

55. See case cited *supra* note 46 and accompanying text.

56. The Japanese Civil Code, states that "[t]he exercise of rights and performance of duties must be done faithfully and in accordance with the principles of trust." MINPO book I, art. 1; see Veronica L. Taylor, *The 'New' Japanese Contract: Law and Practice in the 1990s*, in ATTORNEY-GENERAL'S DEP'T & LAW COUNCIL OF AUSTRALIA, TWENTIETH INTERNATIONAL TRADE LAW CONFERENCE 37, 62-69 (1993).

57. *Service Station Ass'n*, 45 F.C.R. at 96.

these well-established doctrines and remedies into a new term as to the quality of contractual performance, implied by law."⁵⁸

The twin of this decision is *Renard Constructions (ME) v. Minister for Public Works*.⁵⁹ This case concerned the exercise of powers of termination in a construction contract, including giving notice to show cause why the powers should not be exercised.⁶⁰ The court held that such contractual powers were to be exercised reasonably and honestly.⁶¹ The importance of the decision is the link drawn by Priestley JA between reasonableness as required by the court and good faith. He said:

The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith which are regarded in many of the civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contract. Although this implication has not yet been accepted to the same extent in Australia as part of judge-made Australian contract law, there are many indications that the time may be fast approaching when the idea, long recognised as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States.⁶²

These cases together indicate that the law in Australia has reached a state of fluidity where the substance of the law under the UCC and Australian law may be the same, but a range of judicial attitudes exists concerning the acceptance of a discrete good faith contract performance obligation. The attitude of the recently appointed Chief Justice of the High Court is therefore especially important. Considering the question extrajudicially in 1989, when invited to propound a precise theory of morality for application to commercial law—an invitation he declined—he quoted the prayer of St. Augustine “in resisting conversion from a profligate life: ‘Not yet, O Lord, not yet!’”⁶³

58. *Id.* at 97.

59. 26 N.S.W.L.R. 234 (1992).

60. *Id.*

61. *Id.* at 263.

62. *Id.* at 263-64.

63. Honourable Sir Gerard Brennan, *Commercial Law and Morality*, 17 MELB. U. L. REV. 100, 100 (1989).

The other set of cases is drawn from England and Australia and relates to a good faith obligation in the negotiation of contract terms. In England, the House of Lords decided that no such obligation existed.⁶⁴ However, the Court of Appeal in New South Wales stated in dicta that it did not share the English opinion that no promise to negotiate in good faith would ever be recognized, although in the instant case of negotiation of a joint venture contract, the promise was too vague to be enforceable.⁶⁵ This difference may be more apparent than real and may rest more in differences of judicial attitudes than in the law itself.

Article 1.106 of the Principles of European Contract Law⁶⁶ reflects the result of the judicial discussions in the 1980s and the 1990s in the common-law jurisdictions of England and Australia.

Good Faith and Fair Dealing

(1) In exercising his rights and performing his duties each party must act in accordance with good faith and fair dealing.

(2) The parties may not exclude or limit this duty.⁶⁷

A comment and notes accompany these Principles. The comment to article 1.106 points out that:

What is good faith will, however, to some extent depend upon what was agreed upon by the parties in their contract.

However, a party should not have a right to take advantage of a term in the contract or of one of these Principles in a way that, given the circumstances, would be unacceptable according to the standards of good faith and fair dealing.⁶⁸

The note further illustrates that, although the principle for good faith and fair dealing is evident in contractual behaviour in all European Community countries, there is a considerable difference as to its extent and power. The spectrum runs from German law, where

64. See *Walford v. Miles*, 1 All E.R. 453 (1992) (appeal taken from Eng.).

65. See *Coal Cliff Collieries v. Sijehama Ltd.*, 24 N.S.W.L.R. 1, 26-27 (1991).

66. See COMMISSION ON EUROPEAN CONTRACT LAW, THE PRINCIPLES OF EUROPEAN CONTRACT LAW art. 1.106, at 53 (Ole Lando & Hugh Beale eds., 1995). This reflection was the result of the deliberations of a group of European scholars, the Commission on European Contract Law, under the chairmanship of Professor Ole Lando.

67. *Id.*

68. *Id.* art. 1.106 cmt. H.

section 242 of the German Civil Code has revolutionized the law,⁶⁹ to England where the principle is specifically not recognized, although in many cases application of particular rules would achieve the same result. This is a classic scenario for a common law system to move, when it is ready, to the induction of a fundamental principle.⁷⁰ The existence of statements of principle, such as those in UNIDROIT and the European Principles, as well as those of the UCC, is a significant reinforcement. Similarly, the recognition of the place of guidelines in international transactions, as occurs in the Inter-American Convention on the Law Applicable to International Contracts, is also part of this incremental process.⁷¹ When the last steps are taken, as they will soon be in Australia, the extensive body of case law and of writing that has accumulated around the UCC will inform the law, as it has so many times before.

69. For a brief review of this point see NORBERT HORN ET AL., *GERMAN PRIVATE AND COMMERCIAL LAW: AN INTRODUCTION* 135-46 (Tony Weir trans., 1982).

70. As happened most notably in Anglo-Australian law in the case of *Donoghue v. Stevenson*, 1932 App. Cas. 562 (appeal taken from Scot.), when a general duty of care in negligence was propounded resting on a concept of proximity. It is interesting to note that the idea of a duty to a neighbour is also put forward as the basis of a good faith obligation across the sphere of private law. See P.D. Finn, *Equity and Contract*, in *ESSAYS ON CONTRACT* 104 (P.D. Finn ed., 1987); Eric M. Holmes, *A Contextual Study of Commercial Good Faith: Good-Faith Disclosure in Contract Formation*, 39 U. PITT. L. REV. 381 (1978); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1717 (1976).

71. The Inter-American Convention on the Law Applicable to International Contracts was approved in March of 1994 and is binding on 19 states in North and South America. Inter-American Convention on the Law Applicable to International Contracts, Mar. 17, 1994, 33 I.L.M. 732. Article 10 of that Convention provides, "[i]n addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case." *Id.* art. 10, at 735.