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Good faith and fair dealing in contracts formed and performed by electronic agents[1]

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Abstract. The development of electronic agents that increasingly play an active role in the contract formation and execution process has highlighted the need for the creation of law-abiding autonomous agent systems. The principle of good faith is an important guideline for contractual behaviour which permeates civil law systems. This paper examines how this principle is applied both during the negotiation of a contract and during its performance. Selected examples from civil law literature of precontractual duties of good faith, and of precontractual behaviour that is deemed to be contrary to good faith, are discussed. This is followed by a discussion of the extent to which such duties are recognised, or such behaviour proscribed, in common law jurisdictions. Some common standards for precontractual behaviour in civil and common law systems are identified. There is then a parallel analysis of the principle of good faith in contract performance with a view to identifying common traits or standards between civil and common law systems. These standards, in the situation where contracts are being negotiated and/or performed by or through electronic agents, would need to be reflected in the way such agents operate.

Key words: autonomous agents, contract formation, contract performance, electronic agents, fair dealing, good faith

1. Introduction

Electronic agents are playing an increasingly active role in the negotiation, formation and performance of contracts. There is a wide variety of software agent types, ranging from the more simplistic search engines, to personal assistants, to buyer and seller agents which respectively assist buyers and sellers in identifying and comparing the characteristics of goods and services in the electronic marketplace, to the more autonomous, intelligent agents. Indeed, a fundamental characteristic of intelligent software agents that distinguishes them from other software agents is their autonomy. Such agents operate without the direct intervention of human beings or other agents, and have some degree of control over their actions and internal states.[2] It should be noted that current state-of-the-art electronic agents in the market today

assist the individual in various stages of the buying process (e.g., to search for and compare products and merchants), but there is usually required the intervention of a human being at some stage in this process, for example to make the definitive selection of the product or merchant. However, there is much ongoing research to develop autonomous, intelligent agents that would be capable of initiating action, negotiating and concluding contracts without the knowledge or oversight of the human being (hereinafter referred to as "the user") who deployed such agents. Furthermore, nowadays it is not only possible for agents to assist in the negotiation and conclusion of contracts on behalf of a party – a fact recognised expressly in the legislation of some countries[3] – but also to perform part or, in some cases, even all of that party's obligations in the contract. For example, where the object of the contract is the delivery of a digital product, the contract may be performed by the agent where the product is delivered electronically to the user upon instruction by the electronic agent. It is such autonomous, intelligent agents that are capable of initiating, negotiating, concluding and performing contracts without any human oversight or intervention that are the focus of this paper.

Some of the issues being discussed in a number of disciplines such as Computer Science, Cognitive Science and Logic are how such agents should behave in order to fulfil their contractual obligations, with issues like trust, risk and reliability being at the forefront. Contractual behaviour is also regulated, to a greater or lesser extent, by legal norms which impose duties, conditions or requirements on the contracting parties. One important guideline for contractual behaviour which permeates civil law systems, particularly in contract law, is the requirement that parties negotiate, conclude and carry out contracts in good faith. In common law countries, there is no general rule requiring the parties to conform to good faith. English jurists prefer the term "fair dealing" which appears to be a more objective test of fairness to pragmatic, common law lawyers. However, many of the results which in civil law systems are achieved by requiring good faith, have been reached in common law countries albeit through a different, piecemeal approach.

1.1. RESEARCH APPROACH

The aim of this article is to examine the principle of good faith and fair dealing as a guideline for contractual behaviour with a view to determining how electronic agents should operate during contract negotiation and performance. It consists of two main sections. Section 2 will examine the good faith duty in the **precontractual** stage and will try to map the constitutive elements of good faith and fair dealing by focusing on the stage of contract negotiation and formation, in order to determine

what standards and norms of behaviour are expected from parties entering into a contract. It will then discuss how such standards may be applied to contracting via electronic agents. Section 3 will focus on the principle of good faith and fair dealing in the **performance** stage of the contract, with a view to establishing what standards of behaviour are legally expected and required at that stage. It is presumed that where contracts are to be negotiated and performed by electronic agents, such agents would need to conform to the aforementioned standards of behaviour. Selected civil law jurisdictions (Germany, France and Italy) and selected common law jurisdictions (England and the United States) will be examined. Reference will also be made to Norwegian law.

With respect to the latter, in comparative legal theory, it is debated whether the legal orders of the Nordic states form a separate legal family or whether they are best regarded as part of the continental Germanic legal order (Graver 2003, p. 14).[4] Roman law reached the Nordic countries[5] only in the 17th century, at a time when the traditional legal institutions had long been stabilized in provincial and city laws and were being applied in a well-constructed court system. The influence of Roman law was therefore confined to those areas in which the rules of the medieval codes were particularly deficient such as contract law (Zweigert and Kötz 1998, p. 284).[6] In this paper, the discussion of the Norwegian position will be made towards the end of those sections discussing the position in civil law jurisdictions.

2. The precontractual stage

2.1. GENERALLY ON GOOD FAITH AND FAIR DEALING

Legal literature usually refers to two different meanings of good faith. This paper shall focus on *objective* good faith which constitutes a standard of conduct to which the behaviour of a party has to conform and by which it may be judged. It should be distinguished from *subjective* good faith which has to do with knowledge, for example with regards to *bona fide* acquisitions in the field of possession.[7]

2.1.1. Civil law notion of good faith

The principle of good faith finds its origin in Roman law where good faith added an element to *iudicia stricta* ('strict law') which enabled a court to take into account circumstances, defences and considerations of fairness which might otherwise have been excluded.

In Germany, good faith is linked with the notion of *Treu und Glauben* (literally, fidelity and faith),[8] and is enshrined in §242 of the *Bürgerliches Gesetzbuch* (BGB) which provides that "the debtor is bound to perform according to the requirements of good faith, ordinary usage being taken into consideration." As Whittaker and Zimmermann (2000a, p. 30) explain,

> "*Treue* ... signifies faithfulness, loyalty, fidelity, reliability; *Glaube* means belief in the sense of faith or reliance. The combination of *Treu und Glauben* is sometimes seen to transcend the sum of its components and is widely understood as a conceptual entity. It suggests a standard of honest, loyal and considerate behaviour, of acting with due regard for the interests of the other party, and it implies and comprises the protection of reasonable reliance. Thus it is not a legal rule with specific requirements that have to be checked but may be called an 'open' norm. Its content cannot be established in an abstract manner but takes shape only by the way in which it is applied."

Though the wording of § 242 is rather narrow, it had a profound effect in the area of German contract law, through the way it was developed by the courts and legal writers. It operates *supplendi causa* and gives rise to a host of supplementary duties that may arise under a contract such as duties of information, disclosure, etc.

According to Galgano (1985, p. 327) writing on Italian contract law, the requirement of good faith in contracting implies a duty on the contracting parties to behave correctly and loyally ('*con correttezza e lealtà*'). Article 1337 of the *Codice Civile* provides that "[t]he parties, in the conduct of negotiations and the formation of the contract, shall conduct themselves according to good faith".

French contract law was initially dominated by the idea of the *autonomie de la volonté* rather than good faith. Heavy emphasis was placed on examining whether, in the circumstances leading up to the making of an agreement, there was a defect in consent of one of the parties, with the notion of *erreur* being widely interpreted. The *Code Civil* provides that contracts must be performed in good faith (Article 1134, para. 3) but this principle has been also extended to the negotiation and formation of contracts. However, the French courts have not given the principle of good faith the same importance as have the German courts, but similar results were obtained in France by the application of a general theory of abuse of rights, developed at the end of the nineteenth century and based on good faith. This basically provides that a party's right may be limited or lost if enforcing it would amount to an abuse of right. Though there appears to be no juristic agreement on its proper limits, two variants became particularly prominent (Whittaker and Zimmermann

2000b, p. 34): a person is said to abuse a right if its purported exercise (i) was effected with an intention to harm another person or (ii) was contrary to its economic or social purpose.[9]

As regards the precontractual, negotiation stage, in France, by virtue of tort law, the parties are subject to a duty to negotiate in good faith, but once the negotiations have attained a mature stage, the parties are subject to

> "[a] contractual obligation ... to continue to negotiate in good faith. This obligation is sometimes express, but most often implicit in the structure of the preliminary dealings. A sort of *affectio contrahendi* grows between the parties ... this obligation strengthens as negotiation proceeds. Its extent grows: it makes one party furnish information to the other, it prevents his putting up unacceptable proposals with the aim of ... causing a break-off of negotiations, or of merely pretending to negotiate seriously, while in fact he has decided to deal with a competitor, it compels him to work towards the reaching of a definite decision within a reasonable period."[10]

The recognition of *obligations d'information* (obligations to inform or disclose) is another development related to good faith in French law. Similar duties to provide information also emanate from Italian contract law.

As regards the Nordic countries, the joint Nordic Contracts Act[11] contains a general requirement of mutual loyalty and honesty in section 33 which provides:

> "Even if a declaration of will under other circumstances would be considered valid, it shall not be binding for the person who made it if, because of circumstances prevailing at the time when the other party gained knowledge of the declaration, and of which he must be presumed to have been aware, it would not be in conformity with honest behaviour and good faith for the receiver of the said declaration to make use of it."[12]

Moreover, according to section 36, contracts may be invalidated or adjusted on the grounds of unreasonablness.[13]

The requirement of loyalty (*lojalitet*) in contractual relations in Norwegian legal doctrine is manifested in many and various rules of law, some statutory and some judge-made and includes such diverse obligations as the duty to disclose information, the duty to notify about a defect in the other party's performance and the duty not to passively allow an offer or to incur additional expenses when it is already decided that the offer will be rejected (Craig 1992, p. 73).

2.1.2. Is there a duty of good faith in common law countries?

An important principle that permeates both civil and common law contract law is the freedom of the parties to enter into contractual relations or to choose not to enter into contractual relations. Cohen (1995, p. 25) describes the former as ''the positive freedom of contract'' in that the parties are free to create a binding contract reflecting their will, and the latter as ''the negative freedom of contract'' which means that the parties are free from obligations so long as a binding contract has not been concluded. However, in civil law countries, the negative freedom of contract is subject to the principle of good faith and other doctrines based on good faith such as the doctrine of abuse of right and unjustified enrichment.

In English law, according to many writers, there is no general rule requiring the parties to negotiate in good faith (O'Connor 1990, p. 20; Whittaker and Zimmermann 2000a, p. 39). This does not mean that there is a free-for-all, with no controls on contracting parties. The traditional rules proscribing duress, undue influence and fraud, still apply. Other than that, in English law, either party is entitled to break off negotiations at any stage before the final conclusion of the contract. Liability for pre-contractual behaviour is only imposed under limited circumstances such as fraudulent representation or negligent misstatement, as discussed more fully below.[14]

Although English common law recognised a principle of good faith in contractual dealings in the mid-eighteenth century,[15] the modern view is that in English law, good faith is, in principle, irrelevant. Bingham L.J stated in *Interfoto Picture Library Ltd v. Stilletto Visual Programmes Ltd* (1989) that:

> ''[i]n many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table'. It is in essence a principle of fair open dealing … English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.''

Many English writers often use the term ''fair dealing'' rather than ''good faith'' on the basis that the latter term ''nowadays has a fuzzy sound to the

ears of English lawyers'' (Harrison 1997, p. 7) and may appear as a vague literary concept. The term ''fair dealing'' connotes observance of fairness which appears as a more objective test to common law lawyers, in the sense that it is linked to the observable behaviour of the parties. However, it should be emphasised that this objective connotation is also included in the civil law notion of ''good faith''.

The United States recognises a duty of good faith in contract performance and enforcement. Thus, the Uniform Commercial Code (UCC),[16] section 1–203, provides:

> ''Every contract … imposes an obligation of good faith in its performance or enforcement.''

This is mirrored in section 205 of the Restatement of Contracts Second[17] which provides:

> ''Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.''

Good faith is defined in the UCC as ''honesty in fact in the conduct or transaction concerned''.[18] In the case of a merchant, the UCC provides that good faith means ''honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.''[19] According to American jurists, similar to English law, the requirement of good faith in American law does not apply to contract negotiations.

2.2. ELECTRONIC AGENTS AND THE GOOD FAITH REQUIREMENTS

From the above discussion on the meaning of the principle of good faith in civil law countries, where terms such as ''honesty'', ''faithfulness'', ''loyalty'', ''fidelity'' and ''reliability'' are used, it appears difficult to envisage whether and how such characteristics could be portrayed by autonomous electronic agents. The main difficulty is that such notions refer to the aims, goals or intentions of each party, that is, to an internal state of mind not visible to the other party.

However, this question begs deeper, more fundamental questions: What is the legal position of intelligent autonomous agents? Are they mere tools of the user? Or are they something more? To date, to the author's knowledge, no legal system regards electronic agents as separate legal persons distinct from their users. One obstacle to the granting of legal personality to intelligent agents is that as yet, it is difficult with the current state-of-the-art regarding autonomous electronic devices to identify such intelligent agents

and to determine with precision what action has been taken by a particular agent. This is because electronic agents may multiply themselves and delegate tasks to a clone in a manner which is invisible to the user or third parties.

Nor is it a better solution to consider an autonomous agent as nothing more than a tool of the user because this would imply that the user would be responsible for all actions and omissions of the agent, and possibly even if it malfunctions, in spite of the fact that the user may not have been directly involved or "consulted" by the electronic agent in the conclusion or performance of the contract. However, the current tendency of some legislators, in particular in the U.S., is to attribute the acts of the electronic agent to the user who activated it and to view the electronic agent as a tool of the user.[20]

Agents are able to exhibit goal-directed behaviour by taking the initiative – a characteristic described as pro-activeness by Wooldridge and Jennings (1995). They are also reactive, in that they perceive their environment and respond in a timely fashion to changes that occur in it. An autonomous agent, therefore, has the ability to make determinations which are appropriate to its objectives, and to act upon such determinations. It is submitted that, in order to gauge what these goals and determinations are, one should look at the behaviour or conduct of the agent. Conversely, if one knows what the goals or determinations of the agent are, one can predict its behaviour or gauge what this is likely to be. This would appear to be in line with Sartor's mentalistic approach for software agents, as opposed to a purely behaviouristic approach:

> "The difference between a behaviouristic and a mentalistic approach … consists in that the first approach only registers other people's behaviour, while the second, on the basis of behaviour, attributes mental states." (Sartor 2003, p. 68)

Basing himself on the works of the philosopher Daniel Dennett, Sartor attributes mental states, or what they both call "an intentional stance", to autonomous software agents.

> "When looking at an entity from the intentional stance, we are explaining the behaviour of that entity assuming that it has certain cognitive states. … Typically we assume that the entity we are examining is trying to achieve certain objectives (goals) or to apply certain instructions (intentions) on the basis of certain representations of its environment (beliefs). The behaviour of an intentional entity will then be explained as resulting from that entity applying the instructions it has adopted (according to its intentions and its beliefs on the existence of the relevant circumstances) or from its attempting to achieve its goals (through means it believes to be appropriate)". (Sartor 2003, p. 76)

It is therefore submitted that the focus should be on behaviour, that is, on conduct observed objectively. On the basis of this, one could attribute mental states (e.g., goals, intentions). The next question that arises regards which, or whose, behaviour should be observed: that of the user or that of the electronic agent? It is proposed that the conduct of both the user and the electronic agent are relevant. In other words, one should determine and examine both the parameters and terms of reference that the user pre-established and those parameters that the agent determined. Both of these have to be in compliance with the good faith and fair dealing requirements.

2.3. PRECONTRACTUAL BEHAVIOUR

The focus of this section is the behaviour of the parties at the precontractual stage, that is, just before the parties conclude a contract or else decide not to enter into a contract.

As mentioned above, both civil and common law systems regard the freedom of the contracting parties as sacrosanct. Parties should be free to decide whether to enter into contractual relations or not. However, the question that arises is what happens when because of certain blameworthy conduct of a contracting party at the precontractual stage, the contract is invalid or not perfected.

The doctrine of *culpa in contrahendo*, stemming from an article by the German jurist Jhering in 1861, is based on the notion that damages should be recoverable against the party whose blameworthy conduct during negotiations of a contract brought about its invalidity or prevented its perfection. Jhering's thesis has strongly influenced the development of many, though not all, civil law systems, not least of which the German and Italian legal systems. *Culpa in contrahendo* has become an important doctrine in German law, developed by case law with the aid of legal literature.[21] This doctrine became anchored in the principle of good faith and fair dealing. In the recent reform of the German BGB in 2002, this doctrine was codified through newly introduced pre-contractual duties of care to protect the prospective partner's real and personal rights and interests.[22] According to case law, once parties enter into negotiations for a contract, a special relationship is created between the parties, giving rise to rights and duties. Thus, protection is accorded against blameworthy conduct which prevents the consummation of the contract (Kessler and Fine 1964, p. 404).

Some selected examples from civil law literature of precontractual duties of good faith, and of precontractual behaviour that is deemed to be contrary to good faith, will be discussed. An attempt will be made to determine whether, and to what extent, such duties are imposed, or such behaviour proscribed, in common law jurisdictions. The aim is to identify common

standards for precontractual behaviour in civil and common law systems. Any such standards, in the situation where contracts are being negotiated by or through electronic agents, would have to be reflected in the way such agents operate.

It is therefore proposed to examine, in the following sections:

- the applicability of the obligation of information or the duty to disclose and the extent to which, if at all, it applies in the negotiating stage (section 2.3.1);
- the situation where there is a rupture of negotiations, with particular reference to sudden and unjustified rupture of negotiations (section 2.3.2);
- the situation where one of the parties has no real intention to contract (section 2.3.3).

2.3.1. Obligation to provide information

2.3.1.1. Obligation to provide information in civil law systems. In civil law systems, as a consequence of good faith, one finds duties of information or disclosure imposed on the negotiating parties in the interest of fair dealing and the security of transactions. According to Kessler and Fine (1964, pp. 404–405) referring to civil law, ''each party is bound to disclose such matters as are clearly of importance for the other party's decision, provided the latter is unable to procure the information himself and the nondisclosing party is aware of the fact''. Galgano (1985, p. 328) explains further that the disclosure should be of circumstances of which the other party is ignorant when these can be determining factors to such party's consent, in the sense that had such party known of the existence of these factors, he/she would have offered different conditions or opted not to contract at all. Galgano gives the example of the seller being in bad faith if he fails to inform a prospective purchaser of a piece of commercial land that there exist plans at the local council office to modify the designated purpose of the area in question. In this case, one would not be able to annul the contract on the basis of there being an error in the object of the contract, since at the moment of transfer of the land, such land is still considered to be commercial land.

In Italy, a specific example of this duty of information is given in Article 1338 of the *Codice Civile* which provides that a party who knows or should know of the existence of a reason for invalidity of the contract and does not give notice to the other party is bound to compensate for the damage suffered by the latter by relying, without fault, on the validity of the contract.

However, even in countries like Germany which impose a duty to disclose material matters inaccessible to the other party, this duty is not

imposed indiscriminately. The courts have been aware and taken account of the natural antagonism of interest between the seller and the buyer. Therefore, the scope of the duty of disclosure varies with the type of transaction involved and with the circumstances of each individual case. Stricter demands of disclosure are made in transactions of a fiduciary nature such as insurance, partnership or mandate, than in sale or lease.

France has a highly developed notion of duties of disclosure which has evolved both through direct legislation[23] and through case law. A party should disclose only such information as is relevant, having regard to the subject matter of the contract and to the obligations undertaken by the parties. For instance, in a contact of sale of a machine, the seller should inform the buyer of the conditions of use of the machine; however, the same obligation does not arise for the person who repairs it. Duties of disclosure arise due to the parties' unequal information. However, a party's lack of knowledge should be legitimate. The *Cour de Cassation* held that the contracting party who made a mistake by being too gullible or careless in checking some information has only himself to blame (Fabre-Magnan 1995, p. 105). A party is allowed to be unaware of information if it was impossible for him to know it or if he could legitimately rely on the information given by the other party.

Since in most cases where the duty to disclose was violated the other party, if correctly informed, would have abstained from entering into the contract, such party will not be able to recover the value of the promised performance (the expectation interest, i.e., the benefit anticipated) but the reliance interest (for relying on the validity of the contract).

In Norway, the contract law rules on the duty to give information (*opplysningsplikt*) at the time of contract formation are a manifestation of the requirement of *lojalitet* in contract.[24] Thus, for example, the law on sale provides that even in sales *tale quale*,[25] there is a defect in the sale where the thing sold does not match the information which the seller had given on the thing, its characteristics or its use and which can be assumed to have influenced its purchase.[26]

Moreover, where one party intentionally gives incorrect information to the other party, causing the latter to make an error which affected the promise (*løfte*) that he gave, such a promise or declaration of will would not be binding on the party who made it.[27] However, as Hov (2002, p. 262) explains, ''small white lies'' are permitted, in the sense that one is allowed to bluff with regards to the maximum price that he is willing to pay for the contract goods. However, information on concrete qualities or characteristics of the good, e.g., the horsepower of a car, would fall within section 33 *avtaleloven* cited earlier.[28] A literal interpretation of section 33 would not cover situations where the error is caused through negligence

(*uaktsomhet*). However, as Hov (2002, p. 263) explains, if one accepts a wider interpretation of section 33 such that it would cover every situation where the recipient of a promise has been negligent, then it would also cover situations where such negligence has actually caused the error in the promisor. As regards situations where the promisee has caused an error in good faith by, for example, giving information that he himself thought was correct, but which in fact was wrong, although this would fall outside the literal interpretation of section 33, legal doctrine and court judgments have not found in favour of the promisee (Hov 2002, p. 264).[29]

2.3.1.2. The situation in common law systems. In common law, the situation appears to be different to that prevalent in civil law countries. As abovementioned, there is no duty to negotiate in good faith. However, Harrison (1997, p. 28) explains that:

> "the duty 'bites' when the contract is made. Something rather like a contractual Judgment Day occurs at this point, exposing the seller's evasions, pregnant half-truths and the like, and penalising him for failing in his duty of good faith by deeming the contractual provisions to have included the duty of good faith."

Although the main rule is *caveat emptor* (let the buyer beware) and thus "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" (*Smith v. Hughes*, 1871), certain implied warranties were developed in English sale of goods law which, to a certain extent, have reduced the effect of *caveat emptor* in this area. As Whittaker and Zimmermann (2000b, p. 656) explain,

> "where English law sees the circumstances as ones in which one of the parties to the contract is in a position to know of the characteristics of the subject matter of the contract and the other is not, it may simply place the *responsibility* for those characteristics being present on the shoulders of the typically knowledgeable party by means of an implied term."

Examples are the implied terms about title (that the seller has a right to sell the goods), and the implied terms about quality or fitness.[30]

A distinction has been made between silence as such, i.e., mere nondisclosure, and *active suppression* which constitutes fraud. As Kessler and Fine (1964, p. 441) note, it has become increasingly difficult to draw a clear line between them. Kessler quotes *Turner v. Harvey* (1821) where it was held that "a very little is sufficient to affect the application of [*caveat*

emptor] ... If a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate.'' As the New York case of *Donovan v. Aeolian Co*. (1936) further explains,

> ''it depends upon the circumstances of each case whether failure to disclose is consistent with honest dealing. Where failure to disclose a material fact is calculated to induce a false impression, the distinction between concealment and affirmative misrepresentation is tenuous. Both are fraudulent.''

Moreover, facts which are true when said must be corrected if they have become untrue by the time the contract is entered into.

An action will lie in tort[31] for negligent misrepresentation causing loss to the representee where the relationship of the parties is such as to give rise to a duty of care (*Hedley Byrne & Co Ltd v. Heller and Partners Ltd* (1964)). A negligent misrepresentation is one which is made carelessly, or without reasonable grounds for believing it to be true.

Therefore, while a party who positively misleads the other party (even if innocently)[32] will in principle be faced with rescission of the contract, a person who says nothing will be secure.[33] While parties to a contract should not mislead each other as to the subject matter of the contract, whether innocently or fraudulently, they should not in general have to act so as to protect the other's interests, but may act in their own interest.

However, the situation is rather different in the case of fiduciary contracts such as, for example, insurance contracts and agency.[34] In contracts of insurance, both parties have a duty to observe ''the utmost good faith'' (*uberrima fides*) towards the other party, which imposes a duty of disclosure. A special characteristic of insurance contracts is that they are based on facts and knowledge of facts which are almost invariably under and within the exclusive control of one of the parties (usually the insured), and a proper assessment of the risk could not be made unless there were full disclosure of all material facts. The insurer, very often, does not have independent means, or has impaired means, of finding out risk-relevant information, and would have to rely on disclosures made by the person applying for an insurance policy. Similarly, in the law of agency (or mandate), an agent is expected to act with good faith, requiring full disclosure of all the material circumstances, when he deals with his principal. He is required to make full disclosure of all material circumstances and the exact nature and extent of his personal interest in a transaction where this might conflict with his duty to his principal. Furthermore, he must not use his position or his principal's property to acquire benefits for himself.[35]

Harrison (1997, p. 29) opines that the duty of good faith or fair dealing as it applies in the formation of contracts of sale, is normally a twin duty

of *candour and accuracy*. This is the duty to give proper information or none at all about what is being sold in contracts outside the area of fiduciary contracts.[36] Harrison states that this is a presumption of law and operates both as an obligation in interpreting the contract and as an additional implied term where there are no relevant express terms to be interpreted. She holds that it does not operate as regards matters which it would be normal and possible for the buyer to investigate himself. Most importantly, Harrison states that a precontractual breach of this duty *has no effect unless a contract is made*. Thus, the effect on the parties only occurs when a contract is made, but not if negotiations break down.

Where negotiations broke down and a contract was not concluded, a remedy in tort for fraudulent representation or negligent misstatement may be available in the circumstances mentioned above.[37]

2.3.1.3. Discussion on the precontractual duty of disclosure. To sum up, in most civil law systems, there is a duty of disclosure where each party is bound to disclose such matters as are clearly of importance for the other party's decision, provided the latter is unable to procure the information himself and the non-disclosing party is aware of the fact.

As regards English law, legal writers hold that there is no such duty of disclosure at the stage of contract negotiation, save for fiduciary contracts as abovementioned. Where there has been fraudulent representation or negligent misstatement, a remedy would be available in tort. However, when negotiations have led to the conclusion of a contract, the silence of one party could be problematic for such party (who could be liable for damages and/or find the contract rescinded) where the information suppressed relates to a fact that is deemed to be an implied term. Hence the importance for negotiating parties, to act with ''candour and accurately''.

One should also mention at this point the important role played by the applicable law that is used to determine a particular dispute because the rules and remedies vary as explained above, according to whether the applicable law chosen is that of a country which has a common law system or a civil law system (and even in the latter, there are some differences among civil law countries, as seen above). However, some common threads may be identified and certain behaviour should be refrained from at the stage of negotiation, irrespective of whether a contract is subsequently concluded or not. Thus:

- one should refrain from fraudulent representation, that is where the party has actual knowledge of the incorrectness of a certain (material) fact or facts presented as true. This duty applies both to the behaviour of the user and any pre-set parameters he or she inserts in the electronic agent, and vis-à-vis the actual behaviour of the electronic agent (stemming from its

design) as regards the way it interacts with the other contracting party or his/her agent. This duty appears to mandate that electronic agents closing contracts should possess the attribute of veracity discussed in (technical) agent literature (Wooldridge and Jennings 1995) which states the assumption that an agent will not knowingly communicate false information.

- one should refrain from negligent misstatement: each party should be careful not to make remarks on facts material to the goods which fact(s) turn out to be incorrect, where such remarks are made carelessly or without reasonable grounds for believing them to be true. Needless to say, this duty also applies to both electronic agent and human behaviour as discussed in the preceding paragraph.

Put positively, the parties should behave, as Harrison (1997, p. 29) opines, with candour and accuracy and give proper information about what is being sold in contracts outside the area of fiduciary contracts.

Moreover, if a certain feature of the subject matter of the contract is of paramount or fundamental importance to one of the parties, such party (or its electronic agent) should make its existence an essential term or condition of the contract.

2.3.2. Sudden and unjustified rupture of negotiations

Before the conclusion of a final contract, each party is free to withdraw from the negotiations; each party bears its own expenses and acts at its own risk. However, as Cohen (1995, p. 27) explains, strict adherence to freedom from contract might transform it into a freedom to manipulate the rules of the game. Freedom of action which is the underlying idea of freedom of contract, may be abused.

Sections 2.3.2.1 and 2.3.2.2 shall focus on the case of a sudden and unjustified rupture of negotiations.

2.3.2.1. Sudden and unjustified rupture of negotiations: Perspectives under the civil law. A sudden and unjustified rupture of precontractual negotiations by one party may be deemed to be in breach of good faith, when the other party had good reason to rely on the future conclusion of the contract and had, for example, incurred some expenses in preparation of the fulfilment of its obligations. This is the opinion of Galgano (1985, p. 329), with regards to Italian law. This is also the case in a number of other civil law countries. In fact, Lando and Beale (2000, p. 192) mention that the German Supreme Court has held a person liable if, without good reason, he refuses to continue negotiations after having conducted himself in such a way that the other party had reason to expect a contract to come into

existence with the content which had been negotiated. They explain further that the same also applies in Austria, Belgium, Denmark, France, The Netherlands, Portugal and Italy.

This notion was enshrined in the Principles of European Contract Law drawn up by the Commission on European Contract Law under the chairmanship of Prof. Ole Lando (Lando and Beale 2000), and in the UNIDROIT Principles of International Commercial Contracts (UNIDROIT 1994). The Principles of European Contract Law and the UNIDROIT Principles do not have the binding force of either national law or international treaties.[38]

Article 2.301 of the Principles of European Contract Law starts with the general rule in sub-article (1) that "a party is free to negotiate and is not liable for failure to reach agreement." This is identical to Article 2.15 (1) of the UNIDROIT Principles. However, the Principles of European Contract Law then provide that a party who breaks off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party (Article 2.301 (2)). The UNIDROIT Principles contain a mirror provision in Article 2.15 (b) which however provides that a party who breaks off negotiations in bad faith is liable for the losses caused to the other party.

In Norway, there may be a contractual basis for claiming compensation even though a contract has not been entered into. It is possible for the parties to agree that certain preparatory activities are carried out as a separate task and in fact, architects often draw up a "pre-project" which is to be paid for, even if the client then decides not to go for the main project but for another solution.[39] This is similar to the notion of collateral contract in common law discussed below.

2.3.2.2. Sudden and unjustified rupture of negotiations: The common law position. In England, the basic principle of freedom of contract, and the absence of any legally relevant intermediate stage between contract and no-contract,[40] often makes it difficult to identify a possible cause of action for breaches of good faith in the negotiation stage (O'Connor 1990, p. 36). In general, a party will not be held liable for breaking off negotiations. However, a remedy in tort for negligent misstatement may be available to the innocent party who relied on a negligent misstatement by the other party who led him to believe that a contract would be concluded, whereby the innocent party suffered loss and on the facts there was a special relationship between the parties (Lando and Beale 2000, p. 192).

Common law authors mention two other bases on which recovery could be made: (i) by holding that a collateral contract had come into existence between the parties; (ii) by way of a claim for restitution.

The former was the basis for the decision in *Brewer Street Investments Ltd v. Barclays Woollen Co. Ltd.* (1954) and in *Harvela Investments Ltd. v. Royal*

Trust Co. of Canada (CI) Ltd. (1986). In Brewer Street, defendants were negotiating the lease of plaintiffs' premises and, in the expectation shared by both parties that a lease would be agreed, defendants had requested that the plaintiffs have certain work done on the premises which was otherwise of no benefit to the plaintiffs. The defendants had, moreover, expressly undertaken that they would be responsible for the cost of this work. However, before the work was completed, it became clear that the lease would not be concluded. Plaintiffs stopped work and sued for the amounts which they had paid to the contractors in respect of the work carried out. The Court held there was a contract between the parties for the carrying out of the work on the premises, despite the fact that there was no contract of lease concluded. Recovery was granted on the basis of a contractual *quantum meruit*, i.e., a reasonable sum for the work done (which was set at the amount which the plaintiffs had paid their contractors) as the defendants had agreed to pay for the cost of the work.

The other possible basis for recovery is by a claim for restitution. This is the case where one party, upon request by the other party, carries out certain work which was not intended to be gratuitous but which was intended to be compensated for out of the profit which the former would have made out of the future contract, and this work benefited the other party (*William Lacey (Hounslow) v. Davis*, 1957). One here notes parallels with the civil law notion of unjustified enrichment.[41]

Another solution offered by some common law jurisdictions is the rule of promissory estoppel which is a hybrid notion, comprising elements of contract (promise) and tort (reliance). This institution has been highly developed in the United States and Australia, but is of somewhat limited application in English law.[42]

One thus notes that common law judges ingeniously provided a basis for recovery, without entering into the notion of good faith, by using the notion of collateral contact, restitution and the law of torts. Cohen (1995, p. 30) postulates that the collateral contract and the tort of negligence currently serve as the main tools for imposing pre-contractual liability. As Furmston et al. (1998, p. 320) explain, whether or not English and Australian courts ultimately embrace good faith, there is an inherent strength in the common law to police bad faith.

Electronic agents with contact negotiating abilities should therefore be designed in a manner that prohibits them from breaking off negotiations suddenly or without justification in situations where the other party or his/her agent had good reason to rely on the future conclusion of the contract and had incurred expenses in anticipation of that, and of which expenses the electronic agent had been informed. Such behaviour would be deemed to be contrary to good faith in civil law jurisdictions and is also likely to be proscribed in common law countries.

2.3.3. No real intention to contract

As a specific example of breach of good faith, the Principles of European Contract Law mention the case where a party enters into or continues negotiations with no real intention of reaching an agreement with the other party (Article 2:301(3)). The UNIDROIT Principles of International Commercial Contracts go one step further and clearly state that such behaviour constitutes bad faith.

Although legal systems may vary as to the scope of precontractual duties, generally they do not permit one party to break off negotiations with impunity in pursuance of a scheme never to come to agreement. In civil law, a party who has used negotiations solely to induce the other party to take a desired course of action and then terminates them after his goal has been accomplished, will have to answer in damages to the party (Kessler and Fine 1964, p. 419).

Similarly, in Norway, while the main rule is that a contracting party cannot claim expenses incurred by him where no contract has been entered into, liability for damages may arise where a party has entered into negotiations without any intention of successfully concluding negotiations and entering into a contract (Hov 2002, p. 130). Hov gives the example of A who has always intended to sell to B but who entered into negotiations with C to try to get B to pay a higher price. Another example mentioned by Hov (2002, p. 43) is where negotiations are used to push up the price of one's own company's shares. (Sometimes the possibility that a company could land a large contract can push the share value up.) This type of behaviour would be deemed to be disloyalty (*illojalitet*) during negotiations.

Such behaviour is also likely to be proscribed in common law as fraudulent representation. As Furmston et al. (1998, p. 287) explains:

> "[s]uppose for instance it can be shown that the defendant never intended to enter into contract with the plaintiff and simply entered negotiations in order to deflect the plaintiff from negotiating with somebody else. Granted that one's state of mind is a question of fact, this is capable of being a fraudulent representation."

However, although such behaviour could also be proscribed in common law, this is not because of any duty to negotiate in good faith, but because it would be tortuous behaviour, i.e., fraudulent representation.

To sum up, where a contract is being negotiation by a party's autonomous electronic agent, the agent should not enter into or continue negotiations where the goal of the user or of the agent is never to finalise and conclude such contract with that party (or his/her agent).

3. Good faith and fair dealing in contract performance

Having examined the duty of good faith and fair dealing in contract negotiation, it is now pertinent to examine whether and to what extent it is required in the performance of contracts.

3.1. THE CIVIL LAW NOTION

Section 242 of the German BGB had a profound effect on the development of German contract law by the courts who created a number of obligations to ensure a loyal performance of a contract such as the duty of the parties to co-operate, to protect each other's interests and to give information.

In France, according to article 1134, para. 3 of the *Code Civil*, contracts must be performed in good faith. Although the French courts have not given the notion of *bonne foi* the same importance as the German courts, similar results were obtained by the application of a general theory of *abus de droît* which was developed at the end of the nineteenth century and was based on good faith. Performance of contracts in good faith has been interpreted by French jurists as implying two duties on the contracting parties (i) a duty to act loyally (*obligation de loyauté*) and (ii) a duty to co-operate (*devour de coopération*) (Weill and Terré 1986, p. 359 *et seq*). These duties are discussed in more detail below.[43]

Similarly, according to the Italian *Codice Civile*, good faith is required in the negotiation (art. 1337) and performance (art. 1375) of the contract. Article 1175 dealing with obligations in general provides that the debtor and creditor shall behave in accordance with the rules of fairness (*correttezza*).

Some words should also be said about the current trend in Europe and internationally. The Principles of European Contract law impose a duty of good faith in the formation, performance and enforcement of the parties' duties under a contract. Article 1:201 provides that "(1) Each party must act in accordance with good faith and fair dealing. (2) The parties may not exclude or limit this duty". The UNIDROIT Principles of International Commercial Contracts (Unidroit 1994) have a similar provision to Article 1:201.[44] As a corollary of good faith, Article 1:202 of the Principles of European Contract Law imposes on each party "a duty to co-operate in order to give full effect to the contract".

3.1.1. Focus on the objective requirement of good faith

If one looks more closely at how contractual good faith has been interpreted in civil law countries such as France and Italy, one finds that *objective* criteria have been set by the courts.

Italian writers point out that good faith and fair dealing in contract are objective concepts which refer to the behaviour of the honest businessman.[45] Levanti links *buona fede* during the performance of the contract with the notion of abuse of rights and holds that there is a negative and a positive duty on each of the parties: a negative duty not to abuse of one's position so as not to unjustly aggravate the situation of the other party, and a positive duty to safeguard the contract's usefulness for the other party insofar as this does not import an appreciable sacrifice of one's reasons for contracting.[46]

In France, in assessing whether the debtor of an obligation – the person who has to execute the obligation forming the object of the contract – has acted loyally, the court will examine whether he acted as a *bonus paterfamilias* (Weill and Terré 1986, p. 359). This is a familiar objective legal standard in civil law jurisprudence which measures behaviour by considering whether a good "father of a family"[47] would have behaved in such a manner. Reference is made to the aim – the object – of the contract. If the behaviour of the debtor has permitted the attainment of such object, then he cannot be said to have acted in breach of good faith, even if the actual performance does not conform strictly to the contractual stipulations. This means that the debtor should abstain from behaviour which amounts to fraud (*dol*).

The creditor of an obligation is also bound by the duty to act loyally. He must abstain from bad faith, disloyalty, and from manoeuvres which will make the performance of the contract impossible or more onerous for the debtor. He is also deemed to be in breach of his duty of loyalty if, on the pretext of conforming with the execution, he imposes on the debtor pecuniary hardships which are disproportionate to the usefulness of the object which the contract is aimed to achieve. Therefore, he should refrain from causing the debtor useless expenses. For example, French jurisprudence has held that a carrier should send merchandise on the itinerary which is most advantageous for the shipper (Weill and Terré 1986, p. 360).

Good faith in the performance of a contract implies a certain duty of co-operation between the parties. The duty to co-operate is linked with the duty of disclosure (*obligation de renseignement*) in virtue of which one party may be deemed to have a duty to bring to the knowledge of the other party certain facts which he has an interest to know in order to perform the contract. For example, jurisprudence in France has held that the manufacturer or the seller of a piece of equipment should indicate its mode of use and the dangers that its use may bring. Similarly, the lessor should inform the lessee about known defects in the property leased (Weill and Terré 1986, p. 361). The duty to co-operate also implies the obligation that each party has to facilitate the performance of the contract by the other party. For example, in a publishing contract, the author must correct the proofs and return them.

In Norway, the duty to treat the other contracting party loyally exists both during the formation and performance of a contract. This duty emanates both from specific legal provisions (e.g., the provisions on repudiation)[48] and also from a general principle of *lojalitet* (Hov 2002, p. 41 *et seq*). As Hov explains, the content of such a general duty of loyalty is difficult to explain. It implies that a contracting party shall think of the other contracting party. At the same time, in many situations, one has a clear right to let one's own interests come first.

3.2. FAIR DEALING IN CONTRACT PERFORMANCE UNDER THE COMMON LAW?

As with the case of contract negotiation, there is a general reluctance of English lawyers to discuss the notion of good faith in contract performance. However, as Furmston (2001, p. 28) succinctly puts it:

> "On being told that the German civil code imposed a duty to perform a contract in good faith or that the Italian civil code provides for a duty to negotiate in good faith, a thoughtful English lawyer might have responded by suggesting that the practical problems covered by these code positions were often covered in English law but in different ways."[49]

Harrison (1995, p. 508 *et seq*), for example, mentions a number of principles recognised by English judges which are based on notions of fairness or fair dealing, such as: (i) the obligation of the vendor to be reasonable in giving or witholding approval in situations where the vendor's approval is required for some act to be done by, on or in relation to the subject matter of the contract; (ii) the principle that "a man is not permitted to rely on his own wrong"; (iii) a positive duty of the contractual parties to take steps to achieve the purpose of the contract.

Moreover, Steyn (1997, p. 438), writing extra-judicially, observed that:

> "Undoubtedly, good faith has a subjective requirement: the threshold requirement is that the party must act honestly. That is an unsurprising requirement and poses no difficulty for the English legal system. But good faith additionally sets an objective standard, viz. the observance of reasonable commercial standards of fair dealing in the conclusion and performance of the transaction concerned. … Used in this sense, judges in the greater part of the industrialised world usually have no great difficulty in identifying a case of bad faith. It is not clear why it should perplex judges brought up in the English tradition."

He concludes that "there is not a world of difference between the objective requirement of good faith and the reasonable expectations of parties".

As discussed above (section 2.1.2), the American Uniform Commercial Code imposes an obligation of good faith in the performance or enforcement of a contract (section 1–203), an obligation mirrored in Section 205 of the Restatement of Contracts Second. Good faith is defined in the UCC as "honesty in fact in the conduct or transaction concerned".[50] In the case of a merchant, the UCC provides that good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[51] The emphasis here is on *conduct* and not on (subjective) intentions.

3.3. AN IMPOSSIBLE CRITERION FOR ELECTRONIC AGENTS?

As mentioned above, in interpreting the notion of good faith in contract performance, courts of law in civil law countries such as France and Italy have laid down *objective* criteria which puts the focus on the observable conduct of the contracting parties. This notwithstanding the fact that, as Steyn LJ noted, there is also a subjective element in good faith, namely that the parties must act honestly. Where autonomous electronic agents are performing contracts, it is submitted that one should direct one's focus on the objective elements to determine whether there has been a breach of good faith or of the fair dealing requirements. On the basis of the observable conduct, one can then infer the intentional stance of the agent (i.e., what its goals and intentions were). The twin duties of loyalty and co-operation in contract performance should thus be given an objective interpretation, as explained above.

Furthermore, focusing on the objective criteria of good faith and fair dealing would also facilitate the programming and design of intelligent agent software. As discussed above,[52] it is difficult to envisage how one could design and programme subjective elements without also taking account of desired and expected conduct or behaviour (i.e., objective elements).

4. Concluding remarks

Throughout this paper, one could note the marked difference of approach between civil law and common law jurisdictions. While the notion of good faith has affected contract law and is applied from the stage of contractual negotiation to contract performance in most civil law countries, English and American jurists start from the premise that there is no general rule to negotiate in good faith. In these common law countries, piecemeal solutions have been developed to problems of unfairness. However, it has been shown that there are marked similarities in the behaviour expected of negotiating parties and

contractual parties. Efforts to identify standards for behaviour that are common in different legal systems, in order to then ensure that such behaviour is followed by one's electronic agent, will help minimise the risk of falling foul of national law.

This paper has also highlighted the importance of examining the conduct of both the user and the electronic agent since both are relevant in a discussion whether the good faith/fair dealing requirements have been complied with. That is, one should determine and examine both the parameters and terms of reference that the user pre-established and those parameters that the agent determined. Both of these have to be in compliance with the good faith and fair dealing requirements as discussed above.

Users may find it difficult to determine what kind of electronic agent system they should use for different applications, and may be deterred from using electronic agent software. If there is to be more widespread use of electronic agents, consumers must have confidence in the technology. This means that there is need for the constant development of more secure and reliable agent systems that take into account the above-mentioned good faith factors. One solution is the development of a security classification and the certification of agents that clearly marks and distinguishes autonomous software agent products according to each product's security level and standard.[53] Requirements could then be imposed in respect of the security level which the electronic agent must fulfill if it is to be authorised or accepted for certain activities such as contract negotiation, closure and performance.[54]

Notes

[1] This paper is an extended and fully revised version of Weitzenböck (2002a, b).

[2] According to Russell and Norvig (1995, p. 35), "An agent's behaviour can be based on both its experience and the built-in knowledge used in constructing the agent for the particular environment in which it operates. *A system is autonomous to the extent that its behaviour is determined by its own experiences*".

[3] Thus, the U.S. Uniform Electronic Transactions Act (1999) in section 14(1) provides that "a contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements". A similar provision is found in the U.S. Uniform Computer Information Transactions Act (1999) (section 107) and in Canada's Uniform Electronic Commerce Act (1999) (section 21).

[4] See also Lillebakken (pp. 1–2).

[5] The term "Nordic countries" as used in this paper is referring to Norway, Sweden, Denmark, Finland and Iceland.

[6] Zweigert and Kötz (1998, p. 277) recognise that Roman law has played a smaller role in the legal development of the Nordic countries than in Germany but opine that "it would be right to attribute the Nordic Laws to the Civil Law, even although, by reason of their close interrelationship and their common 'stylistic' hallmarks, they must undoubtedly be admitted to form a special legal family, alongside the Romanistic and German legal families." Since the end of the nineteenth century, there

has been a substantial amount of legal cooperation among the Nordic states, particularly in commercial law and other branches of private law such as contract law.

[7] Thus, in the field of possession, a person to whom a non-owner has transferred property can still acquire ownership if he is in good faith, and he is not in good faith if he knows or as a result of gross negligence does not know, that the piece of property does not belong to the transferor – see Whittaker and Zimmermann (2000a, p. 30). See also Galgano (1985, p. 327), Hov (2002, pp. 200–201) and Falkanger (1999, p. 19) on the two meanings of good faith.

[8] In fact, good faith is officially translated into German as *Treu und Glauben* in European Union legislation such as the Directive on unfair terms in consumer contracts (Directive 93/13/EEC of 5 April 1993), see Article 3(1) and the Recitals.

[9] As Whittaker and Zimmermann (2000a, pp. 34–35) opine, this second view – the much wider view – has met with considerable success in France though at the same time it was acknowledged that it strikes at the liberal notion of individual rights in that it can give rise to considerable uncertainty and judicial discretion. On the other hand, the French courts have consistently refused to accept any one theory of the abuse of rights, but have instead interpreted it to mean different things in different contexts. See further on this the references in Whittaker and Zimmermann (2000a, p. 35).

[10] Jauffret-Spinosi, C. quoted in Cohen (1995, pp. 38–39).

[11] It was enacted in Sweden, Denmark and Norway between 1915 and 1918, and in Finland in 1929.

[12] The version of section 33 is a translation provided by the Norwegian foreign service of section 33 of the Norwegian Act of 31 May 1918 relating to conclusion of agreements, etc. (*Lov om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer*, hereinafter abbreviated to "*avtaleloven*.").

[13] Article 36 provides: "If a person has consented to pay a sum of money or make any other form of contribution as a penalty for not fulfilling an obligation or for committing or failing to commit a certain act, the said penalty can be reduced if payment in full would be manifestly unreasonable. When making a decision in a case of this type, all the circumstances surrounding the case shall be taken into consideration, i.e., not only the direct loss sustained by the creditor, but also the special interest he may have in the obligation being fulfilled in time, or in the act being committed or refrained from. Reduction can, however, not take place if the penalty has been paid in full when it fell due, and no reservation was taken at the time." Regarding the source of translation, see note 12

[14] See section 2.3.1.2 *infra*.

[15] Several legal writers make reference to the famous dictum of Lord Mansfield C.J. in 1766 in *Carter v. Boehm* (3 Burr. 1905, 1910) that "[t]he governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon." See, for example, Beale (1999, pp. 1–019).

[16] In 1960, the U.C.C. was being introduced in, and adopted by the American state legislatures.

[17] The Restatement Second was introduced in 1979 with official promulgation in 1981.

[18] See §1-201(19) of the U.C.C.

[19] See §2-103(1)(b) of the U.C.C.

[20] Section 107 of the U.S. Uniform Computer Information Transactions Act (1999) provides that a person that uses an electronic agent "is bound by the operations of the electronic agent, even if no individual was aware of or reviewed the agent's operations or the results of the operations." Similarly, section 9 of the U.S. Uniform Electronic Transactions Act (1999) attributes an electronic record to a person if this resulted "from the act of the person, or its electronic agent". A similar attribution clause is found in the UNCITRAL draft convention on electronic contracting. The drafters however acknowledge that "at present, the attribution of actions of an automated computer system to a person or legal entity is based on the paradigm that an electronic agent is capable of performing only within the technical strictures of its preset programming." They admit, however, that "at least in theory it is conceivable that future generations of automated computer systems may be created with the ability to act autonomously, and not just automatically." See

para. 73 of the Note by the Secretariat to this Convention, Document A/CN.9/WG.IV/WP.95, 20th September 2001.

[21] Although the drafters of the German BGB in 1900 were not ready to adopt a general theory of *culpa in contrahendo*, the impact of Jhering's theories can be seen in some of the Code's provisions, e.g., §307 which provides that "(1) If a person, in concluding a contract the performance of which is impossible, knew or should have known that it was impossible, he is obliged to make compensation for any damage which the other party has sustained by relying upon the validity of the contract; not, however, beyond the value of the interest which the other party has in the validity of the contract. The duty to make compensation does not arise if the other party knew or should have known of the impossibility. (2) These provisions apply *mutatis mutandis* if the performance is only partially impossible, and the contract is valid in respect of the possible part, or if only one of several alternative acts of performance promised is impossible." See excerpts from Forrester et al. (1975). This doctrine was codified in the recent reforms to the law of obligations in the BGB in 2002. See also note 22.

[22] §311(2) BGB provides that "An obligation with duties in accordance with §241(2) also arises as a result of … entry into contractual negotiations; …". §241(2) provides that "An obligation may require each party to have regard to the other party's rights, legally protected interests and other interests." These sections are translations made by Thomas and Dannemann (2002).

[23] For example, to protect consumers of goods and services.

[24] On *opplysningsplikt*, see further Hov (2002 p. 41).

[25] This is a sale of a thing "as it is".

[26] Sale of Goods Act (*Lov om kjøp*) of 13 May 1988, section 19(1).

[27] Section 30 of the Act of 31 May 1918 relating to conclusion of agreements, etc. (*avtaleloven*).

[28] See section 2.1.1.

[29] Hov (2002, p. 264) mentions that there has been a certain disagreement as to what extent this situation can be said to fall within section 33. Though such a situation does not fall within the literal meaning of section 33, Hov holds that when one holds an agreement to be invalid because the promise has been brought about by incorrect information from the promisee, even when this is given in good faith, this is still an instance of the same honesty principle which lies at the basis of section 33.

[30] The common law position was enshrined in the English Sales of Goods Act 1979 (amended by the Sale and Supply of Goods Act 1994) which provides in section 14(1) that, except as provided in that section, there is no implied term about the quality or fitness for any particular purpose of goods supplied under a contract of sale. However, section 14(2) then goes on to provide that "[w]here the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality." The quality of the goods "includes their state and condition and … fitness for all the purposes for which goods of the kind in question are commonly supplied." Moreover, according to Section 14(3) "where the seller sells goods in the course of business and the buyer, expressly or by implication, makes known … to the seller … any particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied …". See further on this Whittaker and Zimmermann (2000b).

[31] That is outside contract, and irrespective of whether a contract will be concluded or not.

[32] This is referred to as innocent misrepresentation.

[33] See further on this discussion, Whittaker and Zimmermann (2000b, p. 656) and Kessler and Fine (1964, p. 441).

[34] Harrison (1997) also holds that there is a duty of disclosure by the debtor to his/her surety, i.e. where property is put up as security for another person's debt, in the case where the surety could not be expected to find out the information in question for himself or herself.

[35] For a further discussion of these fiduciary duties in agency law, see O'Connor (1990, p. 46 et seq).

[36] This is also held by Whittaker and Zimmermann (2000b, p. 656) who hold that "while a person who positively misleads the other (even if entirely innocently and taking all reasonable care) will in principle be faced with rescission of the contract, a person who says nothing will be secure". Harrison's 1997 book is cited as part of literature on good faith and/or fairness in English law in Whittaker and Zimmermann (2000a) in footnote 200.
[37] For further discussion on the remedies in English law under the Misrepresentation Act, see Beale (1999).
[38] However, among the stated aims of the Principles of European Contract Law, is to suggest a modern European *lex mercatoria*, and to help bring about harmonisation of general contract law within the European Union. Of course, these Principles are also available for immediate use by individual contracting parties who may choose to subject their contract to these Principles. See further on this, Lando and Beale (2000 p. 24). Similarly, parties may wish to subject their contract to the UNIDROIT Principles.
[39] Hov (2002, p. 131).
[40] In English law, an offer is revocable until it has been accepted.
[41] In civil law systems, the notion of unjustified enrichment is founded on good faith. For further discussion on restitution see Furmston et al. (1998 p. 296 *et seq*) and Whittaker and Zimmermann (2000b).
[42] According to this doctrine, sometimes known as 'forbearance in equity', where a person promises not to enforce a legal right against another person and the latter relies on this promise to his detriment, then the court may, if it is equitable to do so, prevent the promisor from going back on the promise.
[43] See section 3.1.1. *infra*.
[44] Article 1.7 provides that "(1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty."
[45] See further on this, Betti, *Teoria generale delle obbligazioni*, Vol. I (1953), cited by Lando and Beale (2000, p. 118).
[46] Levanti (2001) explains these twin duties as "[il] dovere (negativo) di non abusare della propria posizione al fine di non aggravare ingiustificatamente la condizione della controparte, nonché … nel dovere (positivo) di attivarsi per salvaguardare l'utilità della controparte nei limiti in cui ciò non comporti un apprezzabile sacrificio delle proprie ragioni". She holds that "si è visto nella violazione della buona fede un indice sintomatico di abuso del diritto, sanzionato nelle forme tipiche della responsabilità contrattuale o, talora, attraverso rimedi che potremmo definire di 'esecuzione in forma specifica'".
[47] This use of the term here is similar to the test of the reasonable man in common law jurisdictions.
[48] For example sections 23(3) and 32 in the Sale of Goods Act (*Lov om kjøp*) of 23 May 1988 No. 27).
[49] Although this is the orthodox position regarding English law, as Furmston (2001, p. 28) points out, the recent literature of English law has begun to consider much more carefully whether there might not be merit in explicitly recognising the advantages of imposing good faith duties on negotiation and performance. See, for example, recent works on good faith by O'Connor (1990), Harrison (1997), Cohen (1995), cited in this paper. Furmston (2001) tentatively concludes that "it might not be inconceivable that on appropriate facts and with skilful argument, English law may make tentative steps in the same direction."
[50] See §1–201(19) of the UCC.
[51] See §2–103(1)(b) of the UCC.
[52] See section 2.2.
[53] Stuurman and Wijnands (2001) have advocated the development of a security classification and the certification of agents by reference to a particular class of security standards.
[54] Such a system may require monitoring to determine whether the agent complies with the specified level of security. This may lead, in turn, to the development of a system of independent

verification marks for agent security features. Karnow (1997, p. 178) has proposed the introduction of a certification system for electronic agents, in virtue of which agents could only be used after they have been certified. Other authors (Lerouge, 2000, p. 430) have suggested voluntary labelling systems.

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