

A COMPARISON OF 'DOCTRINE OF GOOD FAITH' UNDER UNIDROIT PICC AND THE INDIAN CONTRACT ACT 1872

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There are numerous procedural differences in law dealing with contracts under common law and civil law countries. But there are certain principles which are embedded in both these legal systems and cannot be done away with. One such principle is the concept of 'good faith and fair dealing' which serves as one of the fundamental principle of laws dealing with contacts. It is not feasible to bring down the concept of good faith in black and white. Various scholars have tried to interpret the doctrine. Atienza believed good faith consist of the "conviction of acting in accordance with the law¹". And if we go according to Escriche, good faith is "the sincere and just conduct with which one executes contracts, without trying to deceive the person with whom agreement is reached²". According to Daniel Markovits, "It is an attitude that the parties display towards each other one virtue of, one might say, by respecting the agreement. It is the very essence of contractual solidarity.³"

Good faith and Fair dealing has not been defined under the UNIDROIT Principle of International Commercial Contract (PICC). It also has not been defined under the Indian Contract Act, 1872 (hereinafter referred to as the "Act"). Though, a definition is provided under Sec 3(22) of the General Clauses Act, 1892.

¹ Falla, Laureano F. Gutierrez (2005) "Good Faith in Commercial Law and the UNIDROIT Principles of International Commercial Contracts," Penn State International Law Review: Vol. 23: No. 3, Article 4. Available at: <http://elibrary.law.psu.edu/psilr/vol23/iss3/4>

² See Franz Wieacker, *El Principio General de la Buena Fe [The General Principle of Good Faith]*, translated by Jos6 Luis Carro, Editorial Civitas, R.D.C.O., 652 (2d ed. 1986).

³ Daniel Markovits and Gabriel V Rauterberg, *Contracts: Law, Theory, and Practice* (1st edition, Foundation Press; 2018)

1. CONCEPT OF ‘GOOD FAITH AND FAIR DEALING’ UNDER UNIDROIT PICC

There are certain provisions under PICC which expressly and explicitly use the term ‘Good Faith and fair dealing’, for example, Article 1.7, Article 4.8, Article 5.1.2, Article 5.3.3, and Article 5.3.4. Also there are provisions under which the concept of good faith is embedded or implicit, like Article 5.1.3, or Article 7.1.4. Hence it could be stated that Good Faith and fair dealing serves as a fundamental principle of the PICC. By a plain reading of the above mentioned provisions it is clear that the purpose of these provisions is to “promote the observance of good faith and fair dealing in contractual relation⁴”.

If we consider the language of Article 1.7⁵, then we can easily interpret that Good faith and fair dealing works as a mandate or as an obligation, conformity of which is the crux of this provision. Moreover there is some room for judicial interpretation also, as every judge has his own subjective ideologies. So Article 1.7 is not restrictive in nature, rather it is inclusive in that sense.

But interestingly there is a limitation to this. The use of ‘international trade⁶’ in Article 1.7 makes it clear that the jurisdiction which it governs is only limited to ‘International Trade’ and it cannot be applied in accordance to the norms of different legal systems. This provision carefully avoids the mention of any obligation of good faith and fair dealing⁷.

Furthermore, the mandate under 1.7 is implicit in Article 1.8⁸ as it imposes an obligation on the party to not act inconsistently with an ‘understanding’ on which the other party has

⁴ Comment 3 under Article 1.6, UNIDROIT PICC

⁵ UNIDROIT PICC Article 1.7, “Each party must act in accordance with good faith and fair dealing in international trade”.

⁶ UNIDROIT PICC, Article 1.7 ‘Good faith and fair dealing in international trade’

⁷ Joseph M. Perillo, *Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 *Fordham L. Rev.* 281 (1994). Available at: <http://ir.lawnet.fordham.edu/flr/vol63/iss2/1>

⁸ UNIDROIT PICC Article 1.8, “The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such usage would be unreasonable”.

already acted upon. Thus, ‘good faith is a slippery expression that reflects the changing points of view of generations and succeeding societies’⁹.

Good faith as a principle of interpretation is also implicit in second paragraph of Article 1.6. Terminology used in Article 1.6¹⁰, clearly widens the scope of Good faith and fair dealing, as it takes into account, some fundamental principles of PICC. The concept of Good faith and fair dealing as inscribed in PICC tries to limit certain rights of the parties. It restricts the party from entering into negotiations, if there is no intention of entering into a contract. Para 3 of Article 2.1.15¹¹ serves as an ideal example.

According to some authors¹², ‘Related to the obligation to negotiate in good faith is the obligation to respect the confidentiality of information given during the course of negotiations. Disclosure of such information is forbidden and can result in an action for damages or restitution’¹³.

Another important aspect of Good faith is explicit in Article 4.8 and Article 5.2 of PICC. It helps in fixing the terms, which were not inscribed to by the parties during negotiations but are important in determining the rights and duties of the parties. It basically performs the ‘integrative functions.’¹⁴ Also, Good faith and fair dealing helps in determining those obligations which are not expressly mentioned under the agreement. Such obligations are termed as implied obligations¹⁵ under PICC. Hence it could be aptly said that the concept of good faith fills the gap in the commercial contracts and the inclusion of the concept of Good

⁹ Falla, Laureano F. Gutierrez (2005) "Good Faith in Commercial Law and the UNIDROIT Principles of International Commercial Contracts," Penn State International Law Review: Vol. 23: No. 3, Article 4. Available at: <http://elibrary.law.psu.edu/psilr/vol23/iss3/4>

¹⁰ UNIDROIT PICC Article 1.6(2) ‘Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles’.

¹¹ UNIDROIT PICC Article 2.1.15 “It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party”.

¹² Specifically Joseph M. Perillo in Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review.

¹³ UNIDROIT PICC, Article 2.1.15 and Article 2.1.16

¹⁴ Nanni, La Buona Fede Contrattuale [the good faith contract] 501 (1986)

¹⁵ UNIDROIT PICC, Article 5.1.2

faith and fair dealing in PICC provides an additional protection and extends the right of the parties.

2. CONCEPT OF 'GOOD FAITH AND FAIR DEALING' UNDER INDIAN CONTRACT ACT, 1872

At the outset, it is important to take notice of the observation of the Delhi High Court in *Association of unified telecom service providers of India v UOI*¹⁶:

'Every contract contains an implied covenant of good faith and fair dealing, obligating the contracting parties to refrain from doing anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'.

Hence, the Indian Contract regime, as per the above observation, is not restricted to a particular field or law but rather it is wide enough to include every contract under its ambit. But can the same also be said in the context of the legal provision is something which we will now try to figure out.

There are some provisions in the Act which explicitly deals with Good faith and fair dealing, for example, Sec 166, Sec 178, Sec 178-A, Sec 223 of the Act. But they lack the rigor of law.

¹⁶ *Association of unified telecom service providers of India v UOI* WP(C) NO. 3673/2010

It would be appropriate to say that an express recognition is not been given to the principle of Good Faith and fair dealing under the Act.

Although under Sec 178 of the Act, good faith works as an essential requirement¹⁷. Also Sec 223 imposes obligation on parties to act in good faith but it could hardly be considered as a fundamental principle of the Act. Another area of the Act where we can say that the concept of Good faith could have found an important place is Sec. 14¹⁸ of the Act which defines ‘free consent.’

Sec 3(22) of General Clauses Act 1897 says, “a thing shall be deemed to be done in ‘good faith’ where it is in fact done honestly, whether it is done negligently or not.” Meaning thereby, anything which is done honestly may come under the purview of Good Faith even if done negligently. After scrutinizing Sec. 14 of the Act, it could be said that at least 4 exceptions of coercion, undue influence, fraud, and misrepresentation, as mentioned under Sec. 14, could be covered under the concept of Good faith. There is an element of dishonesty involved in all these exceptions.

Also, the definition of ‘Free Consent’ as defined under Sec. 14 is exhaustive and restrictive; there is very less or rather no room at all for the judicial interpretation. If the legislatures could successfully add ‘Good Faith and fair dealing’ in this section, then the judiciary would be able to interpret the law in accordance with the concept of good faith which would provide us with an inclusive definition of ‘free consent’ which will protect the party whose contractual rights are infringed.

Interestingly, as of now there is no statutory obligation under Indian laws to use good faith while negotiating or entering into a contract, mere mentioning of good faith under certain provisions does not make the concept of good faith and fair dealing a mandate.

¹⁷ Dr Avtar Singh, *Law of Contract and specific relief* (ed 9, Eastern Book Company, 2006)

¹⁸ Indian Contract Act 1872, Sec 14: Consent is said to be free when it is not caused by: coercion, undue influence, fraud, misrepresentation, and mistake.

3. CONCLUSION / ANALYSIS

India, like England does not heed major importance to the concept of Good faith and fair dealing under its contract laws. But much could be said about the change which is taking place in English legal system in regard to the concept of good faith. The judiciary, it seems in England, is inclined to bring in the concept of good faith under its legal regime¹⁹, but in India even if the judiciary wants to follow the English model, they will not be able to because of the restrictive nature of the provisions under the Act which provides a very little room for judicial interpretation.

Under Indian legal system very less importance is provided to the concept of good faith, we can infer this by a mere reading of the provisions. There is no provision in the Act which requires the parties to have an intention to create a legal relationship. There are certain gaps in the appropriate terms and implied obligations in India, which are aptly represented by the PICC.

Also it is important to determine the general and particular nature of the doctrine before implementing it. A similar interpretation of UNIDROIT PICC by a member state is not possible as the ambit provided to good faith under PICC is twofold. It is broad in respect to the mandate and obligation it is providing and restrictive in terms of the jurisdiction. An implementation on the similar lines is not possible for the Indian scenario. Another important consideration for implementing the PICC is to enhance its impact as it would only have a limited impact unless its implementation is made available to the common folks, as the purpose of PICC is to provide benefits to the local manufacturers and consumers.

The reluctance of the legislature to adopt this doctrine is hard to understand as the good faith doctrine aims to promote honesty and fair dealing between the contracting parties. Its

¹⁹ following cases are some examples where the courts favorably engaged with the concept of good faith: *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* (1996) 78 Build LR 42; *Haines v Carter* [2002] UKPC 49; *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 33.

adoption in the Indian law would definitely enhance the power of the parties as it could also work as an obligation under the 'for cause' termination clause, as is the case in England.