5.1.1 Positively Phrased Duties

A positively phrased principle is one that requires a party to engage in a certain conduct and in this regard article 80 expresses a common duty to cooperate with the other party.\(^{488}\)

The principle of cooperation between the parties exists in the Convention\(^{489}\) and is expressed in many provisions. At least three groups of provisions require or presuppose certain cooperation, recognising that a sales transaction is a series of interrelated steps by each party.\(^{490}\)

First, rules of communication of information in the interest of the other party are found in articles 19(2), 21(2), 26, 39(I), 48(2), 65, 68, 71(3), 72(2), 79(4) and 88(1).\(^{491}\) An example could be that article 21(2), which requires an addressee to notify the addressee when he realises that the otherwise late acceptance would have been received in due time. If he does not, the addressee is bound by the acceptance even though it may technically be late. This requirement of notification is in the other party's interest and imposes a duty for the addressee to cooperate.

Second, rules regarding the preservation of goods in articles 85-88 impose on a party a duty to cooperate by acting in the interest of the other party.\(^{492}\)

An example could be article 86(1) requiring the buyer to preserve goods that he has received though he may wish to reject them. He may not, so to speak, let the delivered horse run away.

Third, there are rules requiring steps in order to enable the other party's performance, i.e. articles 54 and 60(a).\(^{493}\) These provisions again recognise that a sales transaction presupposes a series of interrelated steps to be taken by each party.\(^{494}\)

An example of a step required to enable the other party's performance could be the naming of a particular place under FOB INCOTERMS.\(^{495}\) Such a situation is seen in the archetype case Propane Case.\(^{496}\) The case addressed that the buyer was supposed to nominate a ship since the parties had agreed to FOB delivery terms. However, the seller omitted to name the place of loading as agreed and consequently the buyer could not open a L/C, nor nominate a ship for the seller to load to the goods into. The adjudicator stated that by virtue of article 80 CISG the seller could not rely on the buyer's non-performance to avoid the contract since it was the seller himself who caused the buyer not to issue the L/C.\(^{497}\)

Another case illustrates the duty to cooperate and that attempts to do so must be real. In Steel Channels Case,\(^{498}\) the goods were detained by customs under the suspicion of smuggling. This caused the buyer to claim damages and the contract avoided due to seller's fundamental failure to deliver. The court found that the seller had delivered the goods correctly and that it was...
for the buyer to deal with customs. The buyer's claim of damages and avoidance were therefore rejected.

However, the seller knew that customs had questioned the goods twice before and in the case at hand the seller made it difficult to solve the problems with customs since it forwarded to the buyer irrelevant documents. The tribunal therefore decided that the purchase price should be lowered by 30%, thus placing the burden between buyer and seller in a 70/30 ratio. A similar fraction was used regarding the arbitration fee and inspection costs.

The duty to cooperate is well recognized in international trade. Both case law applying general principles of law\textsuperscript{499} and international instruments have adopted rules regarding the duty to cooperate,\textsuperscript{500} for example UPICC 2010 Article 5.1.3\textsuperscript{501} (Co-operation between the parties);

'Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.'

Also TLP has adopted a principle addressing the duty to cooperate in No.IV.6.9(b) [Duty to Notify/To Cooperate];

'(b) Each party is under a good faith obligation to cooperate with the other party when such cooperation can reasonably be expected for the performance of that party's obligations.'

An underlying principle requiring cooperation between the parties can thus be extrapolated from the CISG, is expressed also in article 80 and is possible to confirm in international soft law.

Thus, though the Convention does not contain a provision \emph{expressly} stating a duty to cooperate as it is done in UPICC, TLP, PECL, DCFR and ACQUIS Principles, it is underlying the Convention and article 80.

\subsection{5.1.2 Negatively Phrased Duties}

[...]

It is one thing to say that certain principles have been read into article 80. It is another to say whether these principles are underlying the Convention. It has been stated in \textit{Rolled Metal Sheets}\textsuperscript{509} that the prohibition of \textit{venire contra factum proprium} is a principle underlying the CISG.\textsuperscript{510}

Further, the principle and the protection of the other party's reliance is commonly said to be expressed in articles 16(2), 29(2) and 80.\textsuperscript{511} However, a number of other articles have been mentioned in addition to those, for example articles 2, 7, 8(3), 9(2), 14(2), 18(2), 19(2), 21(2), 25, 33, 35(2)(b), 39(2), 41, 42(2)(b), 46(1), 47(2), 48(2), 49(2), 62, 63(2), 64(2), 66.\textsuperscript{512}

An example of \textit{venire contra factum proprium} expressed in the CISG is article 16(2)(b). The provision establishes that an offer can not be revoked as it normally could be, if the offeree reasonably relied on the offer being irrevocable. The underlying principle was applied in \textit{Rolled Metal Sheets}\textsuperscript{513} where the parties had agreed that notice of non-conformity should happen in writing immediately after the delivery of the goods. The buyer sent a notice of non conformity six months after delivery, which according to the contract was too late. However, the adjudicator found that the seller's conduct led to the seller being estopped from raising the defence. After having received the late notice the seller did not object, but rather entered into negotiations and enquired about the status of the complaints from the buyer's buyer with the purpose of finding a solution.

Considering the many articles expressing the principle it is well-founded to claim that it underlies the Convention.\textsuperscript{514}
interpretation is confirmed with the principle of *venire contra factum proprium* or the prohibition of inconsistent conduct, being applied in practice as general principles of law.\textsuperscript{515} Further, it has been adopted in international restatements\textsuperscript{516} and may then act as interpretation aids for particular provisions in the CISG.\textsuperscript{517} See for example:

**UPICC 1.8 [Inconsistent behaviour];**

'A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment.'

**TLP No. I.1.2 [Prohibition of inconsistent behaviour];**

'(a) A party cannot set itself in contradiction to its previous conduct vis-à-vis another party if that latter party has acted in reasonable reliance on such conduct ("venire contra factum proprium"; "l'interdiction de se contredire au détriment d'autrui").

(b) Violation of this Principle may result in the loss, suspension, or modification of rights otherwise available to the party violating this Principle or to the creation of rights otherwise not available to the aggrieved party.'

The principles of *venire contra factum proprium*, duty not to abuse rights and not to derive a benefit from own wrong is underlying the Convention and is expressed in article 80.

### 5.2 A General Duty of Good Faith and Fair Dealing

[...]

Scholars and to some extent case law have confirmed that article 80 springs from good faith.\textsuperscript{521} However, it is controversial whether a general duty for the parties to act in good faith has been adopted in the Convention.

Considering the controversy and the fact that article 80 rests on a general duty of good faith, it is of interest to clarify whether the attitude towards good faith is significant to the application of article 80. If both trading parties are from jurisdiction that have a restricted view on good faith it may bee asked whether this in turn could restrict the use of article 80.

Furthermore, if the trading parties are from jurisdictions with a broad view on good faith, it is of interest whether it then is possible to define the content of the concept and let the concept of good faith inform the application of article 80.

Before elaborating the issues of good faith in relation to article 80 it is pointed out that several different roles of good faith within the CISG exist.\textsuperscript{522} The first is, as a criterion for interpreting the Convention text. The requirement precludes absurd interpretations by requiring consideration of context, object and purpose.\textsuperscript{523} This is dealt with supra section 2.2.3, p. 27 et seq.

The second is, as a general principle underlying the Convention. Though it is not directly mentioned in article 7(2), good faith has been said to be a principle underlying the CISG,\textsuperscript{524} thus making it a principle that can be used for gap-filling.\textsuperscript{525} If good faith is to be a workable underlying principle it must be possible to give it some specific content from which solutions can be derived. This is dealt with *infra* section 5.3, p. 133 *et seq*.

The third role is, as a general requirement imposed on the parties. This could follow from article 7(I) CISG in which good faith is mentioned. It is of interest whether a possible concept of good faith would return similar results as article 80 or if a different approach is called for.


16See for example TLP IV.6.9 [Duty to Notify/To Cooperate], PECL Article 1:202 [Duty to co-operate], ACQUIS Principles 7:104 [Duty to co-operate], DCFR III.1:104 [Co-operation].

17In UPICC 1994 the article is numbered 5.1.3.

18Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbitration], Austria, Rolled Metal Sheets, 15 June 1994.

19Compare, Arrondissementsrechtbank Amsterdam [District Court], Netherlands, Tuzzi Trend Tex Fashion v. Keijer-Somers, 5 October 1994, finding estoppel to be outside the Convention.


22Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbitration], Austria, Rolled Metal Sheets, 15 June 1994.


25See TLP No. I.1.2 [Prohibition of inconsistent behaviour], No. I.1.3 [Forteiture of rights], No. I.1.4 [Abuse of rights], UPICC Article 1.8 [Inconsistent behaviour], PECL Articles 2:105(4), 2:106(2), 202(3)(c), DCFR II.4:202(3)(c).

26For the use of UPICC article 2.4(2)(b) and PECL article 2:202(3)(c) in relation to CISG article 16(2)(b), see Vincze In Felemegas, An Int'l Approach, 2007, p. 91 and Akseli in Felemegas, An Int'l Approach, 2007, p. 307. For the use of UPICC article 2.18 in regard to article 29(2) CISG see Eiselen in Felemegas, An Int'l Approach, 2007, p. 166, who is more reserved regarding the use of PECL in this regard, according to Eiselen in Felemegas, An Int'l Approach, 2007, pp. 342-345.


**Referring Principles:**

- I.1.1 - Good faith and fair dealing in international trade
- I.1.2 - Prohibition of inconsistent behavior
- IV.6.9 - Duty to notify / to cooperate