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THE CISG AND THE GOOD FAITH PRINCIPLE

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Nina Tepeš[*] *and Hrvoje Markovinović*[**]

I. INTRODUCTION

Article 7(1) of the United States Convention on Contracts for the International Sale of Goods (hereinafter "CISG") contains an interpretative rule, providing that "[i]n the interpretation of the [CISG], regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[1] Although thirty years of its application ensured that its parts relating to the "international character" and "uniformity in . . . application" are generally considered to be uncontroversial, both legal theory and practice still seem to be far from reaching consensus on the meaning and application of "good faith in international trade."

The origins of the ongoing "good faith" contention are well-established. Reference to "good faith" was introduced in Art. 7(1) of the CISG because of the compromise between representatives of civil law countries (which argued in favor of wide acceptance of the good faith principle and its direct application to parties' conduct in terms of formation and/or execution of the sales contract) and representatives of common law countries (which argued for quite the opposite outcome, i.e., that reference to the good faith principle be deleted altogether).[2] It seems that the fact that reference to "good faith"

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[1] U.N. Comm'n on Int'l Trade Law, United Nations Convention on Contracts for the International Sale of Goods art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

[2] UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): A COMMENTARY 121 (Stefan Kröll et al., eds. 2d ed. 2018) [hereinafter CISG: A COMMENTARY].

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found its way into the CISG, albeit in a separate provision concerning interpretation, provided both scholars and practitioners with solid ground to continue their original debate. Although divergent opinions pertaining to the "good faith principle" represent a serious problem in terms of CISG's uniform application, this paper does not deal with the issue of whether the principle should be directly applied to the sales contract or merely used in the interpretative process. The reasons for such an approach are twofold.

Firstly, the authors of this paper (although both from civil law countries) are strong advocates of the narrow approach according to which the good faith principle must be applied only to the interpretation of the CISG. In the process of interpreting the interpretative provision, one can simply not overlook the fact that Art. 7(1) defines its own scope of application by stating that it applies "in the interpretation of the CISG." Although this analysis might seem (overly) simplistic, its premise is essentially based upon a well-established rule according to which an individual provision of a legal instrument must (to the extent possible) be understood according to the clear meaning of the words considered in its text. And there is simply nothing doubtful about the wording of Art. 7(1) of the CISG. We therefore must reject the argument that "[t]he placement of the good faith principle in the context of an operative provision dealing with the interpretation of the CISG creates uncertainties as to the principle's exact nature, scope, and function within the CISG."[3] The placement of the principle is not *per se* a source of confusion, but rather a clear indication that it was intended to serve only for interpretative purposes. As will be explained later in the paper, the interpretative role assigned to the good faith principle represents an unorthodox solution with potentially unfortunate consequences. However, this must not be used as justification to apply Art. 7(1) CISG *contra legem*.[4] To neglect the clear wording of Art. 7(1) of the CISG and argue that

[3] INST. OF INT'L COMMERCIAL LAW OF THE PACE UNIV. SCHOOL OF LAW, AN INTERNATIONAL APPROACH TO THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) AS UNIFORM SALES LAW 12 (John Felemegas ed., Cambridge Univ. Press 2007), http://cisgw3.law.pace.edu/cisg/biblio/felemegas14.html#iv; *see also* Lorena Carvajal-Arenas & A.F.M. Maniruzzaman, *Cooperation as Philosophical Foundation of Good Faith in International Business-Contracting—A View Through the Prism of Transnational Law* (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2000932 ("[Art. 7(1) of the CISG is] ambiguous because it is the result of a formal commitment between countries which wanted a general norm about good faith and those that did not accept such a norm.").

[4] *See* Michael Bridge, *Good Faith, the Common Law, and the CISG*, 22 UNIFORM L. REV. 1, 109 (2017).

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contractual parties have a general obligation to act in accordance with good faith is tantamount to inventing an entirely new substantive rule which is (arguably) applied in addition to Art. 7(1) of the CISG. The fact that the legislative history also speaks in support of our conclusion only adds to our resolve that the extensive application of the "good faith principle" to the contractual relationship must be abandoned as erroneous.

Secondly, it is often overlooked that every debate on application of good faith principle should start by recognizing that one must first determine its substantive meaning. Our analysis of scholarly writings and jurisprudence indicates that the fundamental question of what exactly constitutes "good faith in international trade" is rarely dealt with in a satisfactory manner. Proposed definitions often represent nothing more than a set of diverse, unprecise and ultimately impractical generalizations with an overall result of adding to legal uncertainty. In addition, this seems to apply irrespective of the scope of application of the good faith principle advocated for.

Without an ambition to provide for its definitive meaning, our primary focus in this paper will be on determining the appropriate frame of reference for the application of the good faith principle in the interpretative process envisaged by Art. 7(1) of the CISG. As will be shown, such an approach will hopefully provide an interpreter (either judge or arbitrator) with guidance as to the methodology that needs to be employed in the process of applying Art. 7(1) of the CISG, thus adding to legal certainty and (even if only indirectly) helping the process of determining substantive boundaries of the principle of good faith with the CISG.

II. THE LASTING EFFECTS OF AN UNFORTUNATE COMPROMISE

It seems wrong to insist that the problem surrounding application of good faith in the CISG is the exclusive result of the fact that it has different meanings and functions in different countries (the difference being most notable once compared along the lines dividing civil and common law legal systems). If nothing else, the fact that legal terms have intrinsically distinct meanings in various jurisdictions (including jurisdictions that form part of the same legal family) is the problem that the CISG drafters were facing, because such was the very nature of their endeavor. Finding solutions acceptable to delegates coming from different legal backgrounds was the very essence of their ambitious task to write a uniform set of rules applicable to international sales transactions. The success of the CISG as an

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international legal instrument is thus often correctly attributed to drafters' extraordinary ability to agree on a number of compromise solutions which, in turn, ensured that the overall result was acceptable to an unprecedented number of states.

As previously mentioned, one such compromise was reached regarding the principle of good faith. Considering that delegates were rightly concerned with the legal uncertainty stemming from the inherent vagueness of the principle of good faith,[5] one might expect that the search for a workable compromise would be focused on finding an acceptable substantive definition of the principle. However, legislative history clearly shows that delegates' efforts had little to do with defining the good faith principle itself. Quite to the contrary, the debate was mainly focused on finding a solution that would somehow reconcile two (ultimately irreconcilable) legal traditions—civil law tradition, which generally recognizes good faith as an independent legal principle, and common law tradition, which (although it uses various other legal tools to reach functionally comparable results) declines to adopt the general principle of good faith.

At this point, it helps to remember that the first proposal to introduce good faith had nothing to do with the interpretation of CISG's provisions. More specifically, it provided that "in the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith."[6] At the 1980 Vienna Conference, delegates from Italy proposed an alternative solution, providing that "in the formation [interpretation] and performance of a contract of sale the parties shall observe the principles of good faith and international co-operation."[7] In order to properly analyze these proposals, they must be considered by taking into account the function that

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[5] *See* UNITED NATIONS COMMISSION ON INT'L TRADE LAW, A/CN.9/142/Add.1—REPORT OF THE WORKING GROUP ON THE INTERNATIONAL SALE OF GOODS ON THE WORK OF ITS NINTH SESSION (GENEVA, 19–30 SEPTEMBER 1977) 67 (Volume IX 1978); *see also* UNITED NATIONS COMMISSION ON INT'L TRADE LAW, A/CN.9/146/ADD. 1-4 ANALYTICAL COMPILATION OF COMMENTS BY GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS ON THE DRAFT CONVENTION ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AS ADOPTED BY THE WORKING GROUP ON THE INTERNATIONAL SALE OF GOODS AND ON THE DRAFT OF A UNIFORM LAW FOR THE UNIFICATION OF CERTAIN RULES RELATING TO VALIDITY OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS PREPARED BY THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW 132–33 (Volume IX 1978) (critiquing insertion of good faith principle into the CISG during the drafting process).

[6] *See Pre-Contract Formation* (2008), https://www.cisg.law.pace.edu/cisg/biblio/kritzer1.html #leg.

[7] *Id.*

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the good faith principle has in those legal systems that recognize it as a general principle of law. At the very minimum, this represents the only applicable frame of reference as the comparison with the legal systems that do not recognize the general duty to act in good faith is impractical (if not entirely impossible).

Irrespective of the substantive meaning that may be attributed to it in various domestic laws, the good faith principle (when recognized as a general principle of law) essentially represents a *standard of parties' behavior*. In other words, by prescribing a general duty to act in good faith, a (national) legislator ensures that parties are discharging of their rights and obligations in a manner which is considered appropriate within the specific legal system. An obligation to conform to the standard of behavior in line with good faith is prescribed by means of a general, open-ended legal norm, as it is considered impossible (and counterproductive) to predict all situations and potential behaviors that could theoretically represent its violation. In addition, since determination of what constitutes an appropriate behavior in contractual transactions inevitably reflects (for lack of a better word) "moral values" of a specific legal system, the use of a general norm enables that the principle is (if need be) adaptable to various societal changes. However, the reference to *moral values* must not be equated with the subjective perception of morality reflecting either judges' or parties' personal views. The principle of good faith is an objective concept which must always be determined by reference to categories of behavior recognized as acceptable by the legal order. This is the reason why the ultimate concretization of the principle is primarily the task of jurisprudence and legal theory, which substantiate its meaning by outlining boundaries that must be respected by parties involved in contractual transactions.[8]

It is against these lines that one must test the "success" of the compromise as reflected in Art. 7(1) of the CISG. More specifically, by providing that good faith is one (of the three) interpretative criteria, and not a standard of behavior, drafters effectively distorted the meaning it has in the legal systems that historically recognize its role in the domain of contract law. At the same time, their refusal to provide for an express obligation of the contractual parties to act in good faith represented only pyrrhic victory

[8] *See* M. Baretić, Načelo savjesnosti i poštenja u obveznom pravu [The Principle of Consciousness and Honesty (Good Faith) in Obligations], 24 ZB. PRAV. FAK. SVEUC. RIJ. [Z.P.F.R.] 571 (1991) (Croatia) (comprehensively analyzing the good faith principle and its importance).

for the delegates that advocated for deletion of good faith from the CISG. After all, if CISG provisions must be interpreted in line with good faith, does that not mean that parties to the sales contract (observant of their rights and obligations prescribed by the CISG) must also conform their behavior to the same standard? At the same time, what does it mean to interpret CISG's provisions in line with good faith if the CISG itself does not provide for a general duty of the parties to act in good faith?

Although the inexplicable circularity of the existing solution certainly set a stage for debates on the role of good faith in the CISG, one conclusion that can undoubtedly be drawn from our analysis is that the interpretative process, which relies on the observance of good faith, will not come naturally to judges and arbitrators from either civil or common law backgrounds. However, to find a workable solution (under the assumption that such a solution exists in the first place), one must take step back and analyze the good faith principle within the intended dimension of an interpretative rule of Art. 7 of the CISG.

The need to *interpret* a legal instrument must start with the presumption that its provision(s) are in an actual need of interpretation. This would generally (and quite logically) imply that the proper meaning of a certain provision cannot be inferred from the text, as the wording is either doubtful or obscure. In other words, although the normative appeal to adhere to the good faith principle is quite understandable (especially if the principle is understood broadly in terms of drafters' aspiration to create equitable rules which promote justice and fairness),[9] one must be careful not to indulge in an overly extensive exercise of interpretation. The subtle task of the interpreter is to shed much-needed light on the meaning of the provision while simultaneously considering the paramount purpose and relevant circumstances on which the provision is based. Although judges (interpreting their national codes) employ interpretation techniques which may lead to the creation of new legal rules, it seems that such an endeavor should be used restrictively within the realm of the CISG. As already mentioned, the success of the CISG as an international instrument largely rests on the fact that its provisions represent compromise solutions which were deemed acceptable

[9] *See* Disa Sim, *The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods* (2001), http://www.cisg.law.pace.edu/cisg/biblio/sim1.html#iiia (warning about the "normative appeal of the concept of good faith" and dangers of applying it within CISG unless the doctrine proves to be a coherent one).

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to delegates coming from various legal traditions. Consequently, interpretation which uncritically broadens the scope of the CISG by inventing new rights and obligations which were never contemplated by the drafters (or, even worse, which were deliberately expunged from the CISG because they were too controversial and perilous for the success of the entire unification process) must never be utilized. Leaving aside the distinct problems stemming from application of Art. 7(2) of the CISG,[10] it follows that the interpretation mandated by Art. 7(1) of the CISG should apply only to provisions that are considered ambiguous (dubious or incomplete). This should primarily include instances where drafters left certain aspect(s) of the provision deliberately open because they were unable to reach a consensus but nevertheless wanted to retain the specific rule within the CISG.

Turning back to Art. 7(1) of the CISG, the next step should (quite logically) be to determine the substantive meaning of the good faith principle. After all, if certain provisions of the CISG must be interpreted by reference to the good faith principle, the interpreter surely must know the meaning of such an interpretative criterion.

Although application of good faith in the CISG still receives a lot of attention in scholarly writings, the majority of authors do not define the principle at all or, alternatively, use broad wording which lacks any substantive meaning. Judicial and arbitral practice unfortunately follows the same pattern as the available jurisprudence shows absence of a convincing reasoning which could persuasively justify application of good faith.[11] It seems like the self-fulfilling prophecy voiced during the drafting process by delegates who warned that the term is too vague and imprecise is now threatening to render Art. 7(1) of the CISG—or better to say its part relating to good faith—effectively inoperable.

However, this should hardly come as a surprise. As previously mentioned, the good faith principle primarily represents a standard of behavior which ensures that specific rights and obligations of parties involved in a transaction are discharged in accordance with the fundamental

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[10] As our primary focus was on Art. 7(1) CISG and analysis of good faith principle as an interpretative criterion, application of Art. 7(2) CISG and the discussion on whether good faith is a general principle on which the CISG is based is not analyzed in this paper.

[11] *See* Benedict Sheehy, *Good Faith in the CISG: The Interpretation Problems of Article 7*, *in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 153–96 (PACE INT'L L. REV. eds. 2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=777105.

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values of a specific legal system. If we ignore the obvious impracticality (if not absurdity) of applying a standard of behavior as an interpretative criterion and advance the argument by recognizing that good faith cannot be determined by reference to the values existing in domestic law, we are faced with the problem of not having a workable frame of reference.

Although one may be tempted to argue that the interpreter will, arguably by means of its own intuition, know the meaning of the good faith principle—it must be stressed that the process of substantively defining the good faith principle is as susceptible to the so-called homeward trend as any other term of the CISG. Before analysis of the plausible meaning of good faith within the CISG, it seems appropriate to briefly outline the potential dangers of an argument that the good faith principle needs no substantive definition as it apparently rests "in the eyes of the beholder."

Discussion on the substantive meaning of good faith often mandates that the principle must be viewed through the lens of moral and/or ethical values. To that extent, it has been pointed out that the "observance of good faith in international trade ought to be considered a moral or ethical standard to be followed by businesspersons, projecting fundamental ethical values in international sales contracts."[12] Although the appeal of moral and/or ethical standards is quite understandable (at least inasmuch as the terms are used interchangeably to denote equally elusive reference to justice and fairness), it is clear that such an approach, once introduced in the arena of international commercial transactions, becomes entirely unhelpful as it rests on undeterminable set of variables. It seems that an attempt to define one concept by way of introducing another one which is at least as vague as the one which it is supposed to define, ultimately rests on the premise that we will all unmistakably know what the good faith is *once we see it*. However, that argument is just another side of the same coin which defines good faith as essentially nothing more than the lack of bad faith (which we are, arguably, also able to detect instinctively).[13] Potential circularity of the argument, resting on the reasoning that the party acts in good faith if its behavior does not constitute bad faith, and *vice versa*, provides little guidance for constructive legal analysis. Even when faced with an attempt to define good faith by focusing on the perceived ethical values of a definite group (i.e.

[12] *See* CISG: A COMMENTARY, *supra* note 2, at 121.

[13] *See* Bruno Zeller, *The Observance of Good Faith in International Trade*, *in* CISG METHODOLOGY 144 (Andre Janssen & Olaf Meyer eds., 2009).

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businesspersons), the proposition is flawed unless the interpreter is provided with methodology for establishing the specific "values" that will facilitate the process of extracting the fundaments of the principle of good faith.

Complementary to the argument based upon moral and ethical standards, it has been argued that application of good faith demands a "holistic approach as it is a state of mind which is expected to preexist by all those interpreting the CISG."[14] However, unlike the task of applying CISG provisions which represent manifestations of the good faith principle (where certain CISG provision can *lege artis* be applied without defining the good faith principle itself),[15] an attempt to define good faith for the purposes of Art. 7(1) must rest on more tangible criteria.

As previously mentioned, in those jurisdictions that recognize the general principle of good faith, legislators employ the normative technique of an open-ended legal rule. Such an approach enables flexible application of the principle and opens the door for both jurisprudence and legal theory to substantiate its meaning in line with what is considered to be the appropriate standard of parties' behavior within a particular legal system. The potential problem with applying such method in relation to Art. 7(1) of the CISG is rather obvious. The substantive meaning of the good faith principle in the CISG clearly cannot be settled by the judicial process, as there is no "supreme" international commercial court that would have the task of maintaining uniform jurisprudence on the CISG. At the same time, only superficial review of scholarly writings shows that there is virtually no agreement on (at least) the lowest common denominator regarding the substantive meaning of the good faith principle in the CISG. Suggestions, to name only a few, include propositions that "the function of such a general clause can probably be fulfilled by the rule that the parties must conduct themselves according to the standard of the 'reasonable person,'"[16] that good faith "is a way of acting, one which most people know but cannot put into

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[14] Bruno Zeller, *Good Faith—The Scarlet Pimpernel of the CISG*, 6 INT'L. TRADE & BUS. L. ANN. 227, 238 (2000).

[15] *Id.* at 239–44 (analyzing application of the good faith principle in prescribed situations and by reference to Arts. 40, 49(2), 29(2), 38, and 39 of the CISG).

[16] PETER SCHLECHTRIEM, UNIFORM SALES LAW—THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 38 (1986), https://cisgw3.law.pace.edu/cisg/biblio/schlechtriem-07.html.

words,"[17] that "the obligation of good faith is the duty to act reasonably and to avoid a breach of the trusting relationship that exists between contracting parties,"[18] all the way to the outright denial of the need to substantively define the good faith principle as such "definition does not help to advance the application of good faith."[19]

Returning to the argument that good faith is a *preexisting state of mind* (supposedly intuitively known to all those interpreting and applying the CISG) moves the argument dangerously close to domestic law preconceptions of those who interpret the CISG. As the *preexisting notion* of any legal concept is both formed and adopted as early as receiving a legal education within a specific legal system, probably the best way to illustrate pitfalls of relying on the interpreter's *state of mind* is by quoting Atiyah:

> Nobody with any experience of legal teaching can doubt the power which legal concepts exercise over the minds of law students. Once a set of concepts falling into some overall pattern is grasped, the student often becomes incapable of seeing the physical facts themselves except through the conceptual process. Facts and events cease to be seen as physical occurrences and come to be seen as falling naturally into conceptual pigeon-holes . . . . The student learns to characterize and classify almost intuitively, and without conscious appreciation of the mental process involved; yet it is the initial act of classification which often determines the result of a case, while making it seem like the conclusion is deduced by inexorable logic from the facts.[20]

Although it is quite clear that no one can totally "escape" the deeply seeded preconceptions of domestic law, it seems that the national judge facing the problem of interpretation of the CISG should be provided with at least minimum guidance as to how to address the problem of substantively defining a general principle such as good faith. Left to his own devices (especially if the principle is recognized in his own domestic legal system), an interpreter will literally have no other option but to, either consciously or

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[17] Paul J. Powers, *Defining the Undefinable: Good Faith and the United Nations Convention on the Contracts for the International Sale of Goods*, 18 J.L. & COM. 333, 352 (1999).

[18] *Id.*; *see also id.* at 335 (proposing that the duty of good faith can be defined as an expectation and obligation to act honestly and fairly in the performance of one's contractual duties).

[19] BRUNO ZELLER, FOUR-CORNERS—THE METHODOLOGY FOR INTERPRETATION AND APPLICATION OF THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (2003), http://vuir.vu.edu.au/88/1/4corners.html.

[20] P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 685 (Clarendon Press 2000) (1985).

subconsciously, reach for solutions he is familiar with. In terms of good faith, this means that he will substantiate the good faith principle by reference to values inherent in his own legal system as that will be the only frame of reference he was given, while at the same time employing techniques that can (again, depending on normative techniques recognized within domestic law) either expand or narrow the scope of application of the principle itself.

There should be no doubt that an interpretation based upon (in)direct analogy with domestic law runs against Art. 7(1) of the CISG, specifically the need to uphold the international character of the CISG and its uniform application.[21] This is not to say that the meaning of good faith cannot be similar (or even identical) to the one contained in the particular domestic law, but rather that the autonomous application of the CISG is ensured by the proper interpretative process. In other words, the starting point of interpretation must never focus on a similar and/or identical term, principle or rule contained in the national law. Quite to the contrary, to minimize the danger of potential analogy one must interpret a specific term in relation to other CISG provisions while intentionally avoiding drawing parallels with domestic law. Influence of domestic law should be tolerated only if it can be shown that the specific meaning pertaining to the domestic law is either recognized or established on a comparative and international level.[22] Since there is (still) no workable uniform definition of the principle of good faith (either on a comparative or an international level), the process of defining it does not tolerate any domestic preconceptions. Our further analysis is thus based upon the premise that the wording of Art. 7(1) firmly places the intended meaning of *good faith* outside the reach of domestic law.

III. OBSERVANCE OF GOOD FAITH IN INTERNATIONAL TRADE

Proper analysis of the good faith principle in the CISG must start by recognizing that wording of Art. 7(1) contains specific reference to the *good faith in international trade*. Consequently, before one tries to attribute meaning to the good faith principle itself, it is necessary to define what is meant by *international trade*.

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[21] *See* CISG: A COMMENTARY, *supra* note 2, at 117 (pointing out that "internationality and uniformity are functionally interrelated and interdependent").

[22] *Id.* at 118.

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The most obvious way to explain reference to *international trade* is to put an emphasis on the word *international*. Insistence on an *international* dimension is in line with the CISG's general goal to eliminate legal obstacles by way of adopting autonomously defined rules governing contracts for the international sale of goods.[23] However, it should be remembered that Art. 7(1) of the CISG is a self-contained rule providing for three separate interpretative criteria: regard for the CISG's international character, need to promote uniformity in its application, and observance of good faith in international trade. The requirement to interpret good faith in an autonomous manner is already embodied in the criterion relating to CISG's *international character*.

If Art. 7(1) of the CISG did not provide for reference to *good faith in international trade* (but merely that in the interpretation of the CISG regard is to be had to *the observance of good faith*), that would still mean that the term *good faith* had to be interpreted by having regard to CISG's international character, i.e., in an autonomous manner and independent from preconceptions of domestic laws. It therefore follows that one should at least try to explore whether the reference to *international trade* in Art. 7(1) of the CISG attaches a qualitatively different meaning to the principle of *good faith*. Conclusion to the contrary would, at the very least, mean that Art. 7(1) refers to the same interpretative criterion twice (firstly, by stressing the need for an autonomous interpretation and then by repeating that the same interpretative method must be used in the process of defining and applying the good faith principle itself). Unless one is ready to conclude that explicit reference to *international trade* has no meaning at all (and should be disregarded every time the *good faith* criterion is applied), it seems appropriate to further

[23] *See* INST. OF INT'L COMMERCIAL LAW OF THE PACE UNIV. SCHOOL OF LAW, *supra* note 3. Author describes the qualification of the term "international trade" in Art. 7(1) of the CISG by making four main points: (1) that the principle of good faith must not be determined by applying standards of domestic laws, (2) that the CISG specifically governs only commercial contracts, (3) that the CISG deals only with international commercial transactions, and (4) that indications are to be found by reference to the CISG's Preamble. We believe that neither of these points are crucial for determination of the term "international trade" within Art. 7(1) of the CISG. Namely, point (1) is already covered by Art. 7(1) of the CISG, more specifically its reference to the requirement to interpret the CISG by having regard to its *international character* and points (2) and (3) are covered by the scope of the CISG's application itself. As to point (4), it will be shown further in the text that references in the Preamble are of a generic nature and irrelevant for legal analysis of Art. 7(1) of the CISG.

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examine the full wording of the third interpretative criterion—*observance of good faith in international trade*.

A. Reference to International Trade *in Art. 9(2) of the CISG*

Although reference to *good faith* is mentioned only once in the CISG, reference to *international trade* is mentioned three times in the preamble and in two separate provisions (Art. 7(1) and Art. 9(2) of the CISG). The Preamble uses the term *international trade* in a descriptive manner, denoting the exchange of goods and services across national borders as a tool for promoting "friendly relations among states"[24] and that instituting uniform rules removes differences in national laws and sets the stage for further development of international trade.[25] It follows that the references used in the Preamble are obviously of little help since they are of a generic nature and ultimately irrelevant for legal analysis of Art. 7(1) of the CISG. However, the wording of Art. 9(2) of the CISG is more precise as it provides that:

> The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.[26]

There are at least two (not mutually exclusive) ways in which one can approach the reference to *international trade* from Art. 9(2) of the CISG. The first (commonly put forward by legal theory) is placing emphasis on the word "international." In this way, reference to *international trade* in Art. 9(2) of the CISG is used to characterize the concept of international (as opposed to purely domestic) trade usages. Once again, this must not to be confused with the need to interpret the term *trade usage* autonomously, i.e., by having regard to CISG's international character as provided by Art. 7(1) of the CISG. The second approach assumes that the term *international trade* must

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[24] CISG, *supra* note 1, at pmbl. ("Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States[.]").

[25] *Id.* ("Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade[.]").

[26] *Id.* art. 9(2).

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be analyzed functionally and by taking into account the intended meaning of Art. 9(2) of the CISG. In other words, by providing that the usage must be "widely known in international trade and regularly observed by parties to contracts of the type involved in the particular trade concerned," Art. 9(2) of the CISG puts an emphasis on the perception of subjects conducting business transactions in international trade. The term *international trade* is not an abstract notion used to denote that the CISG applies to international contracts of sale and/or commercial transactions. Quite to the contrary, it is used to demonstrate that a specific set of subjects participating in *international trade* have a sufficient level of observance of the usage. To put it bluntly, to be "widely known in international trade" simply means that an international trade usage must be perceived by the critical number of subjects participating in the international trade. Likewise, to be "regularly observed by parties to contracts of the type involved in the particular trade concerned" relates to the level of observance of parties conducting their sales transactions in a particular sector of international trade. In other words, an international trade usage will be deemed impliedly applicable to the sales contract only if it is recognized as such (i.e., widely known and regularly observed) by the those participating in *international trade*.

At this point it is appropriate to point to the characteristic wording of Art. 9(2) of the CISG. Namely, unlike those CISG provisions where drafters were extra mindful to use the restrictive language (up to the point of deliberately leaving certain aspects of the provision open for subsequent interpretation), Art. 9(2) uses unusually broad language and seems to engage in unnecessary repetitions.

First of all, it is interesting to note that the meaning of Art. 9(2) of the CISG would be the same even if the provision did not contain its last part, but rather only read "the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to and regularly observed." In other words, even without specifically mentioning "parties to contracts of the type involved in the particular trade concerned," it would still follow that the requirement of knowledge and observance must be attributed to a critical number of subjects conducting their business transactions in the particular sector of international trade. An interpretation which would lead to a different conclusion would mean that Art. 9(2) of the CISG was intended to apply only to usages which are universally and globally recognized in literally all segments of

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international trade, rendering (at least to our best knowledge) the provision effectively inapplicable.

Secondly, there seems to be an intuitive problem with requirements relating to the need that the usage is "widely known" and "regularly observed" by parties conducting their transactions in international trade. Although one could engage in linguistic subtleties, it is hard to pinpoint a situation in which a usage will be *widely known* but somehow not *regularly observed* by the same set of targeted subjects. Moreover, if one were to indulge in an ultimate interpretation of Art. 9(2) of the CISG by means of teleological reduction, an argument could be made that even the requirements that the usage of international trade must be *widely known* and *regularly observed* are in itself superfluous. For example, if the provision only read that *the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of international trade of which the parties knew or ought to have known*,[27] an autonomous interpretation of the term *usage of international trade* would still have to rely on prior determination of whether the subjects participating in international trade actually perceive and acknowledge usage as such. In other words, reference to *international trade* would (unless understood only generically and descriptively) be used as a synonym for subjects which are conducting their business transactions in international trade. The level of their perception would only be sufficient if the majority of traders engaging in certain sectors of international trade observed a usage on a widespread and regular basis.

Since application of Art. 9(2) of the CISG is contingent on the perception of subjects participating in international trade, one can hardly ignore that the provision seems to imply the existence of a supranational set of international trade usages well observed by the business community. The first, and rather obvious, association, which comes naturally to those versed in the theory of international commercial law, is that Art. 9(2) of the CISG uses reference to *international trade* to ensure (implied) application of *lex mercatoria* to the sales contract. Deliberately bypassing the debate over the existence of the modern *law merchant*, we are using the term in (what we believe is) its least controversial meaning. Reference to *international trade*

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[27] *See* SCHLECHTRIEM & SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 191 (Ingeborg Schwenzer ed., 3d ed. 2010) (requiring that parties "knew or ought to have known" of the usage is of minimal practical importance once the objective knowledge is determined).

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in Art. 9(2) of the CISG is used to denote a set of mercantile customs and usages generated and recognized by subjects involved in international trade.

Under the assumption that same terms should be attributed the same meaning within the CISG, our analysis further focuses on Art. 7(1) and the meaning of *good faith in international trade*.

B. Reference to International Trade *in Art. 7(1) of the CISG*

As already mentioned, reference to *good faith* from Art. 7(1) of the CISG should not be uncritically equated with the requirement to define good faith in line with the CISG's international character, i.e., by using a method of autonomous interpretation. An analysis must take into account the full wording used in the provision and thus interpret the meaning of *good faith in international trade*.

Drawing on the conclusions relating to Art. 9(2) of the CISG, it seems that the wording of Art. 7(1) and its specific reference to *international trade* suggests that the application of good faith as an interpretative criterion depends on the perceptions of subjects involved in international trade. In other words, it is irrelevant whether legal scholars, practitioners, comparative law experts and proponents of unification sales projects will ever achieve feasible consensus on the substantive meaning of the good faith principle. Quite to the contrary, its existence (and ultimately its meaning) depends on it being recognized by critical number of participants of international sales transactions within a particular trade sector.

(In)direct confirmation of our conclusions can be found in Art. 1.7(1) of the International Institute for the Unification of Private Law's (UNIDROIT) Principles of International Commercial Contracts (PICC), which provides that "each party must act in accordance with good faith and fair dealing in international trade."[28] Although this provision clearly has a different scope of application than Art. 7(1) of the CISG—as it stipulates general obligation of contractual parties to act in accordance with good faith[29]—it seems that

[28] UNIDROIT, Principles of International Commerical Contracts art. 1.7(1) (Rome, 2016).

[29] *See* COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) 19 (Stefan Vogenauer ed., 2d ed. 2015). Although Art. 1.7(1) of the PICC refers to *good faith and fair dealing* (and not only to *good faith*, as Art. 7(1) of the CISG), official commentary confirms that the combination of these two terms must be viewed from a merely linguistic perspective. More specifically, it was not used to distinguish the content of the principle from that contained in the

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parallels concerning interpretation of the term *good faith in international trade* can nevertheless be drawn. At the very least, we found no authors who argue that the meaning of good faith in the CISG depends (and varies) according to its scope of application, nor can we conceive a viable argument that could be used to justify such different treatment of the principle.

The meaning of *good faith in international trade* in Art. 1.7(1) of the PICC takes into account that it is enough for the standard to be recognized within a particular trade sector (dismissing the premise that its application depends on the existence of one single global standard of good faith for all international transactions).[30] Furthermore, good faith is considered to be an objective standard which applies to everyone involved in a respective trade.[31] Although purely national standards are excluded, wording apparently leaves enough room for an argument that a standard is *common and well accepted* within a particular geographical region as the scope of the principle would otherwise be considerably (and arguably unacceptably) narrowed.[32]

Turning back to Art. 7(1) of the CISG and the need to observe *good faith in international trade*, it follows that the precondition for application of good faith as an interpretative criterion is that it is, in fact, an existing and operative principle perceived, recognized, and acknowledged by the critical number of subjects participating in (a particular sector) of international trade. Once again, it is hard to avoid association with *lex mercatoria*. However, this time one at least has to consider the possibility that its meaning might be broader than a previously suggested set of mercantile customs and usages. Indeed, it has been pointed out in legal theory that one of the possible roles of good faith in the CISG may be based upon the notion that good faith is a trade usage.[33] It was thus suggested that the strongest argument that can be advanced in that respect is that *an obligation of good faith can be derived from new lex mercatoria*.[34]

CISG or any other domestic law which (as is the situation in some civil law countries) uses the term *good faith*. As confirmed by both French and Italian versions of Art. 1.7(1) of the PICC (which refer to *bonne foi* and *buona fede*), the English version of the PICC opted to use a linguistic formula which was considered optimal for American, Canadian, and Australian lawyers.

[30] *Id.* at 213.

[31] *Id.* at 212.

[32] *Id.* (using this example under the presumption that both parties are located in that region).

[33] *See* Sim, *supra* note 9.

[34] *Id.* The author ultimately rejects this idea and concludes that it "would be unsafe to find an international obligation of good faith based on Article 9 of the CISG."

It should hardly come as a surprise that the idea that the good faith principle forms part of *lex mercatoria* as one of its most basic principles was voiced by legal theory.[35] However, although there is definitely no shortage of literature dealing with the concept of an omnipresent law merchant which apparently has its origins in the middle ages, even its most eager proponents will admit that the idea is still far from being universally accepted. Those more critical of the notion of a supranational set of international rules and principles (like the authors of this paper) will readily point out that *lex mercatoria* is not even recognized by the merchants themselves. Namely, if *lex mercatoria* indeed represents a self-contained uniform set of rules supposedly widely recognized by the business community, then its benefits would surely be recognized by that same business community in terms of their contracting practices. However, even the superficial analysis of arbitral awards (arbitration here being the preferred method of dispute settlement in international commercial practice) clearly shows that nothing could be further from the truth. International commercial contracts are not referring to *lex mercatoria* and the number of instances where arbitral tribunals chose to apply it (because parties did not choose applicable law) is practically negligible.[36]

Substantive meaning of the good faith principle cannot be derived from *lex mercatoria*, as there is no universal international obligation to act in good faith, allegedly known and recognized by members of the business community. And even if comparative analysis of all legal systems in the world could somehow deduce the lowest common denominator of what constitutes good faith, such a result could not be considered as binding on account of invoking *lex mercatoria*.

However, this still does not mean that the *observance of good faith* cannot be deduced by reference to international trade usages, as defined by

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[35] *Id.*

[36] The attempt to explain these underwhelming statistics must consider the perspective of both legal professionals and parties to the international commercial transaction. Lawyers will, as a rule, refrain from advising their clients to insert specific references to *lex mercatoria* into their contracts. The term is simply too vague and uncertain, which effectively prevents them from giving sound legal advice required in terms of both contract formation and execution. Parties to the international commercial contracts (especially those belonging to a specific sector or industry of international trade) are, again, as a rule, aware of the specific customs and usages applicable to their transaction. The reference to applicable national law does not run against what they recognize as a pre-established part of their contractual arrangement.

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Art. 9(2) of the CISG. As previously explained, usage does not need to be globally recognized by all subjects engaged in international trade. It will suffice that it is recognized by the parties conducting their business transactions within a particular trade sector. Although theoretically conceivable, it is unlikely that trade usage will explicitly provide for *observance of good faith*. It is far more likely that existing trade usage (if interpreted properly) may indicate that certain types of behavior are required by the business community on account of the fact that it is tantamount to conduct in good faith.[37] If such qualities can be attributed to an international trade usage, then the principle of good faith can be deduced and used as an interpretative criterion by virtue of Art. 7(1) of the CISG.[38]

This leads to rather interesting side effects. Namely, if an obligation to act in good faith can be deduced from an international trade usage as defined by Art. 9(2) of the CISG, this means that parties, unless otherwise agreed, will be considered to have impliedly made it applicable to their contract or its formation. This would, in turn, mean that the good faith principle (or better to say, its specific emanation as reflected in the usage) will be directly applied to the conduct of contractual parties. Surely, this portion of our analysis will satisfy scholars advocating that the good faith principle applies directly to parties as a standard of behavior they must follow while performing under their contract. At the same time, an identical standard would be used as an interpretative criterion by reference to Art. 7(1) of the CISG, provided, of

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[37] *See* Sim, *supra* note 9. Although the author advocates against the process of determining good faith by reference to Art. 9(2) of the CISG, she does recognize the possibility that there might be a usage of good faith "peculiar to a particular region or a particular trade sector."

[38] *See* SCHLECHTRIEM & SCHWENZER, *supra* note 27, at 128–29. The authors are stating that *standards* (arguably, standards of the good faith principle)

> may be reflected in Conventions or draft Conventions, in practices observed in certain trades, in usages not (yet) meeting the requirements of Article 9(2), in so-called International Principles of contract law, in widely used standard forms and trade terms, etc., although the respective rules will rarely bear a label "good faith standard" (but may refer this standard themselves).

Although we generally agree that good faith may potentially be reflected in all of the sources enumerated by authors, we believe that the source itself is ultimately of lesser importance. What is important is that the good faith principle is (either expressly or impliedly) reflected in trade usage which is recognized as international by a critical number of subjects engaged in particular sectors of international trade. At the same time, it would be erroneous to select one (or more) of the enumerated sources and/or instruments and uncritically recognize it as "compendium of international trade usages." International trade usage, which potentially reflects good faith, can be found to exist only if subjects engaged in international business transactions recognize and acknowledge both its existence and substance.

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course, that the relevant CISG provision needs additional clarification by courts and/or tribunals which are applying them.

For the completeness of our analysis, it should also be noted that legal theory has put forward an argument that usages, on account of them being reasonable by nature, always *promote the observance of good faith in international trade*.[39] Although we can generally support this view, it is important not to forget that the principle of good faith is essentially a standard of parties' behavior. This means that the purpose of the analysis we are proposing is not to declaratorily identify that the good faith principle is reflected in an international trade usage. Its purpose is to substantiate the meaning of the good faith principle by identifying a specific standard of parties' behavior which is considered appropriate in the particular sector of international trade. Once (and if) such a standard is identified, this can then be used as a supplementary interpretative criterion by virtue of Art. 7(1) of the CISG.

Finally, it must also be noted that our line of reasoning could be put to the test by an argument that the interpretative process envisaged by Art. 7(1) of the CISG is not a factual one, but rather a normative one. It has indeed been argued that good faith in the CISG must be understood normatively, as it is not to be *determined by the action of trading but by the adjudication of disputes that arise out of trade transactions*.[40] The contrary, and arguably unacceptable view, was said to *confuse trade usages and good faith*.[41]

An argument that an interpretative process should have normative function fundamentally rests on the premise that an interpreter must apply good faith by reference to conduct that *ought to be* observed in international trade rather than extrapolating the principle from the conduct which *is* observed in international trade. In this respect, we stand by our previous conclusion that the present wording of Art. 7(1) of the CISG should not be viewed as a success, but rather as an unfortunate compromise. Drafters not only used the principle of good faith (i.e., a standard of parties' behavior) and elevated it to the level of an interpretative criterion, but also further qualified

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[39] *See* Patrick X. Bout, *Trade Usages: Article 9 of the Convention on Contracts for the International Sale of Goods* (1998), https://cisgw3.law.pace.edu/cisg/biblio/bout.html#N_1_.

[40] *See* ULI FOERSTL, THE GENERAL PRINCIPLE OF GOOD FAITH UNDER THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)—A FUNCTIONAL APPROACH TO THEORY AND PRACTICE 43 (2005), https://open.uct.ac.za/bitstream/handle/11427/4611/thesis_law_uli_foerstl_2005.pdf?sequence=1.

[41] *Id.*

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its meaning by adding reference to *international trade*. As previously mentioned, unless one is ready to conclude that reference to *international trade* has no meaning at all (or alternatively, that its purpose is to simply reiterate what is already clearly stated in other CISG provisions), it seems that the drafters (un)intentionally moved the concept of good faith away from the classic meaning it traditionally has in those domestic laws that recognize it as general principle of law. Good faith is still an *objective* concept, as an interpreter must consider what is perceived as the recognized standard of conduct by the subjects engaged in international trade. Although subjective state of mind of the contractual parties (much like the interpreter's own subjective view on this issue) will still be irrelevant, the process of determining *good faith in international trade* will indeed have more of a descriptive (i.e., factual) rather than normative role. In other words, a central factor of the interpretative process will be to determine what conduct is considered adequate and appropriate (or, if one prefers, *reasonable*) among international tradesmen.[42] If the factual background of such an investigation is neglected, the interpreter will have nothing but an option to rely on its own perceived notion of what conduct is tantamount to good faith in international trade. Although that is certainly an option, it seems that a previous factual investigation should not be *a priori* viewed as damaging for the interpretative process.

IV. CONCLUSION

There is little doubt that Art. 7 of the CISG is one of the most important provisions of the CISG. The fact that it is still highly disputed is thus not only unfortunate but potentially detrimental for the overall application of the CISG. It seems that Art. 7(1) of the CISG, and especially its part relating to the requirement to interpret the CISG by *observance of good faith in international trade*, is one of the fundamental factors contributing to the overall controversy. However, to conclude that the problem exclusively lies in the alleged ambiguity of the term *good faith* (as could be inferred from the abundance of scholarly writings on the topic) would be an oversimplification of the issue. After all, if that is indeed perceived as a crucial problem, then

[42] In this sense, see also Felemegas (ed.), loc. cit. n.2, text accompanying footnote 483. Although author also opts for a descriptive rather than normative value of the interpretative criterion, he makes no proposition that good faith should be determined in relation to Art. 9(2) of the CISG.

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even the biggest enthusiasts will most likely admit that the search for an all-inclusive, independent, universally applicable and autonomous definition of the principle of good faith in international trade will continue at a frustratingly slow pace. To patiently wait for a world-wide recognition of *lex mercatoria* (or some other uncertain and mystical supranational authority which will arguably be regarded as the ultimate source of the principle of good faith in international trade), although certainly an option, hardly represents a satisfactory solution for courts, arbitrators, and, most importantly, parties to international sales transactions.

Our analysis shows that one of the main problems pertaining to Art. 7(1) of the CISG is not so much the notorious elusiveness of the term *good faith*, but rather the absence of an agreement on a workable frame of reference against which the substantive meaning of the principle can be measured. Fully acknowledging that the good faith principle at its very core represents a standard of parties' behavior may be a helpful first step in finding a workable solution within the CISG. A second step would be to recognize the full wording of the respective part of Art. 7(1) of the CISG, i.e., *good faith in international trade*. The purpose of the reference to *international trade* is not to promote the need for an autonomous interpretation of the good faith principle within the CISG, as this is obviously mandated by the requirement to interpret the CISG by having regard to its *international character*. Likewise, its purpose is not to emphasize that the CISG applies only to international commercial transactions, as that follows from the CISG's scope of application. A proposed functional approach reveals that the purpose of the reference is to consider subjects conducting their transactions in *international trade*. Such an approach is complementary to the fundamental purpose of the general principle of good faith itself, which is to ensure that parties to a transaction are discharging of their rights and obligations in a manner which is considered appropriate within a given legal framework. It is within these boundaries that the national judge (with the help of legal theory) will substantiate the meaning of the principle of good faith. However, when the given legal framework is the CISG, what constitutes such a standard of behavior must be answered by the subjects participating in international trade themselves. Criteria for such determination should focus on whether a critical number of subjects which participate in international trade perceive and recognize certain conduct as an appropriate standard of conduct in the respective trade. To draw parallels with international trade usages from Art. 9(2) of the CISG is an obvious and, in our opinion, welcoming next step. In

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addition, as there is no international commercial court able to authoritatively settle the issue of what constitutes good faith for the purposes of the CISG, and legal theory is far from reaching viable consensus, a proposed solution could provide the interpreter (national judge or arbitrator) with a precise enough frame of reference that can be employed in the process of determining what conduct is considered tantamount to acting in good faith in international trade.

Finally, we would certainly propose that an interpretative criterion of *observance of good faith in international trade* is used restrictively and with utmost caution. Its application must be done by keeping in mind that the drafters essentially used a standard of behavior (against which one must, by very definition, measure the conduct of contractual parties) and assigned it a role in the process of CISG interpretation. However, this does not mean that the good faith principle lost its basic characteristics of being an appropriate standard of parties' behavior. Good faith is not, in itself, a supreme value sought after by legal theory and practice in their search for just and equitable solutions. After all, if that were the case, one could (rather cynically) argue that the drafters of the CISG, in their search for optimal compromise solutions, were surely always mindful of the underlying values of good faith. In other words, the function of the good faith principle is simply not to serve as a criterion for evaluation of perceived ambiguities of legal provisions. It is rather a straightforward principle which mandates that parties to a transaction are performing their contractual rights and obligations in a manner considered appropriate by the specific legal system (or, in the case of the CISG, in a manner considered appropriate by subjects involved in international trade transactions). By placing it in Art. 7(1) of the CISG, i.e., in the provision on interpretation, drafters certainly did not help future interpreters. As previously mentioned, if there is but one conclusion that can be drawn with certainty from our analysis, it is that the process of interpretation which relies on *observance of good faith in international trade* will not come naturally to judges and/or arbitrators coming from either civil or common law countries. If the proposed solution seems artificial, circular, or (at least in some instances) inconsequential, such a result must be primarily attributed to the fact that Art. 7(1) of the CISG mandates that the standard of parties' behavior is used as an interpretative criterion. An alternative, at least in our opinion, would be to conclude that the requirement of an *observance of good faith in international trade* from Art. 7(1) of the CISG should be

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disregarded in an interpretation process entirely on account of it being functionally inoperable.

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