

Journal of Law & Commerce

Vol. 43, CISG Symposium (2025) • ISSN: 2164-7984 (online)

DOI 10.5195/jlc.2025.310 • <http://jlc.law.pitt.edu>

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*Dr. Peter J. Mazzacano**

INTRODUCTION

This Article offers a narrow lens of analysis: it examines the essence of an interpretive provision in Article 7's mention of "Good Faith" in the United Nations Convention on Contracts for the International Sale of Goods¹ ("CISG" or "Convention") and considers how that article has become glorified, ultimately rising to the deified status of substantive law by way of oftentimes creative, interpretive incorporation techniques by various domestic courts and international arbitral tribunals. Borrowing from religious terminology, court treatment of good faith over the years has resulted in the elevation and exaltation of a universal trope to a divine honor, an apotheosis. This Article argues that this elevation to an apotheosis-like status was never the original intention of the drafters of the Convention; quintessence was never contemplated. The compromise worked out at the 1980 Vienna Conference confined good faith to the interpretation of the CISG only. Good faith did not incorporate any behavioral standards by which parties' performances under sales contracts were to be measured; it did not serve as a standard of conduct for contractual performance. There was nothing "divine" or even special about the incorporation of those words into the CISG. Good faith was to play only a modest and limited role. The plain meaning reference to it suggests it was of emblematic value, and its placement in a provision dealing with interpretation of the Convention is somewhat surprising and strange. This perplexity continues: one cannot find a definition or explanation of good faith in the CISG. It is a compromise

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¹ 1498 U.N.T.S. 3 (No. 25567); I.L.M. (1980), p. 671.

provision that merely formulates good faith as an interpretive device only. But this is a far cry from what it has become and the heights it has climbed.

The uncertain status and function of good faith by the drafters of the Convention appears to be deliberate: They imposed on contracting parties no substantive duty to act in good faith. Further, the placement of good faith in the CISG's general principles also suggests that the reference to it is directed to the courts rather than to contracting parties. This outlier treatment stands in stark contrast to other international instruments, such as the Principles of European Contract Law² and the UNIDROIT Principles of International Commercial Contracts,³ both of which explicitly impose a duty of good faith on the contracting parties.⁴ Nevertheless, in CISG cases, good faith is commonly referred to in judicial decisions but in such a way as not to make it clear what good faith means or to show why there is any need to invoke it outside of its interpretive purpose.

Thus, domestic courts, international tribunals, scholars, judges and arbitrators have, at times, conflated the CISG's interpretive provisions with its substantive ones, as this Article demonstrates with good faith. This comingling of an interpretive provision is problematic as it creates uncertainty among parties involved in international trade. The merging of different conceptions of the provision also reflects the scholarly discourse on the topic: some CISG scholars argue that the role of good faith is limited to the interpretation of the CISG only while others view good faith in the CISG as a general principle that must govern the conduct of the contracting parties. Distinctions between what is simply interpretive guidance and what is

² *Principles of European Contract Law, Parts I and II Combined and Revised* (Ole Lando & Hugh Beale eds.); *Principles of European Contract Law, Part III* (The Hague, 2000 and Ole Lando, Eric Clive, André Prüm & Reinhard Zimmermann eds.). The Hague. Part I was originally published in Dordrecht, 1995.

³ UNIDROIT Principles of International Commercial Contracts (Rome: International Institute for the Unification of Private Law, 2016).

⁴ Good faith is a comprehensive concept in the Principles of European Contract Law ("PECL"). At the outset, Article 1:201 of the PECL declares that "each party must act in accordance with good faith and fair dealing," and that this "duty" may not be excluded or limited by the parties. It is a substantive law provision. In near-identical language, Article 1.7 of the 2016 UNIDROIT Principles of International Commercial Contracts states: "(Good faith and fair dealing) (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." In both the PECL and UNIDROIT Principles good faith is considered a fundamental obligation on contracting parties. By stating in general terms that each party must act in accordance with good faith, these instruments make clear that the parties' behavior throughout the life of the contract, including the negotiation process, must conform to good faith (as well as fair dealing).

substantive law is of crucial importance to courts and tribunals in developing sound and principled jurisprudence regarding the proper application of the CISG. This Article argues that an expansive role for good faith was never contemplated by the drafters of the Convention, and a review of subsequent case law on it has neither clarified what good faith means in practice nor shown legal practitioners why it needs to be invoked when the cases can be settled by other means. The current confusion over good faith creates contractual ambiguity and this lack of clarity does not auger well for the future of the CISG as a uniform sales law in international transactions.

I. GENERAL PROVISIONS

CISG Chapter II of Part I contains Articles 7 to 13. These are the provisions that deal with general issues under the Convention. Two of these provisions concern interpretation: Article 7 deals with general interpretation under the Convention and Article 8 is narrower in scope, as it is confined to the interpretation of the parties' statements and conduct. Our focus is on Article 7(1), which is a highly controversial provision in the academic literature.⁵ It states: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."⁶

The first part of Article 7(1) specifies two items to take into account when interpreting the Convention. First is the CISG's "international character," and the second is the "need to promote uniformity in its application."⁷ Taken together, the first part of Article 7(1) instructs national courts and international tribunals to avoid recourse to domestic legal concepts. To this end, the opening part of Article 7(1) emphasizes the importance of having due regard for the international character of the CISG, as well as for the need to promote uniformity across all signatory states. Reliance on domestic law will inevitably lead to different, contradictory, and confusing rules, and would ultimately defeat the purpose of the CISG. Yet the introduction of good faith in the second part of the Article introduces

⁵ See, e.g., Benedict Sheely, *Good Faith in the CISG: The Interpretation Problems of Article 7* (Oct. 5, 2004); *Review of the Convention on Contracts for the International Sale of Goods (CISG)*, PACE INT'L L. REV. 153–96 (2007).

⁶ *Supra* note 1.

⁷ *Id.*

contentious and ambiguous terminology that is still the subject of much dispute. Does the general principle of good faith apply as an interpretive instrument only, or is it to govern the parties' behavior?

II. LEGISLATIVE HISTORY OF CISG GOOD FAITH

The CISG's *Travaux Préparatoires* must also be examined to clarify the ambiguity and vagueness of good faith in the Convention. Indeed, the Vienna Convention on the Law of Treaties allows for the reference to a convention's legislative history to be used as a supplementary means of interpreting it.⁸ The incorporation of a principle of good faith was an issue that was subject to extensive disputes in the Convention's drafting history. Even before the drafting process had begun, there was much discussion and disagreement. In the UN Commission on International Trade Law (UNCITRAL), "it was feared that there could be no general agreement on what 'good faith' might mean in international transactions [. . .] Opinions on the role to be played by good faith ranged from the idea that it should be viewed as an obligation present at all stages of the contracting process to the view that good faith should not be explicitly mentioned in any provision."⁹ As early as 1964, at the Hague Diplomatic Conference, explicit reference to good faith as a general principle proposed by the Belgian delegate was opposed by the French on the grounds that it might lead to divergent and even arbitrary interpretations by national courts.¹⁰ In 1977, at its ninth meeting on the new International Sale of Goods Convention, the UNCITRAL Working Group¹¹ observed that the majority of national representatives supported the inclusion

⁸ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. Article 32 reads: "Recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

⁹ Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443, 465–66 (1989).

¹⁰ Gyula Eorsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 348 (1983).

¹¹ The Working Group was established by the United Nations Commission on International Trade Law (UNCITRAL), which was composed from a number of United Nations members. Unlike the later Commission that would revise the draft, it was composed from all member states.

of a general concept of good faith and fair dealing, which had proved to be a useful regulator of commercial conduct in some legal systems.

The text, proposed by Hungary, read in part: “In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith.”¹² The Hungarian proposal might have been prompted by the Hungarian legal system, which recognizes good faith.¹³ As it read, the Hungarian proposal was a substantive law provision. The substantive provisions in the CISG, like the substantive law in any legal code, creates, defines and regulates rights and obligations, such as the common obligations of buyers and sellers. In defining rights and duties, it spells out what individuals may or may not do when negotiating an international sale of goods contract. Unlike procedural law, which can exist outside a legal context, substantive law is applicable exclusively within a legal context and has the power to offer a legal solution. As it stood, the proposal would have applied good faith to the parties during the period of contract formation. As a substantive law provision, this would have prescribed mandatory behavior on the parties to oblige them to deal with each other honestly and fairly during pre-contractual negotiations. Oftentimes, this forward planning phase of contractual formation involves complex drafting, give-and-take compromises and much back-and-forth communications and exchanges of draft documents. If the Hungarian proposal had been accepted, it would have allowed the courts to go behind the scenes and examine extrinsic evidence to discover an ambiguity that would not have been apparent in the final contract. This possibility would have introduced considerable commercial uncertainty as it would have allowed the courts to impose on contracting parties a contract that was not necessarily the contract to which they agreed.

However, there was considerable opposition to the Hungarian proposal.¹⁴ One concern was whether the inclusion of good faith would aid in uniformity of interpretation or whether it would not have much effect until

¹² United Nations Commission on International Trade Law, *Report of the Working Group on the International Sale of Goods on the Work of its Ninth Session*, 19–30, ¶ 70, U.N. Doc. A/CN.9/142 (Sept. 1977).

¹³ See section 4(1) of the Hungarian Civil Law which reads: “In the course of exercising civil rights and fulfilling obligations, all parties shall act in the manner required by good faith and fairness, and they shall be obliged to cooperate with one another.” See also John O. Honnold, *Documentary History of the Uniform Law for International Sales*, 298 (Kluwer Law & Taxation, 1989).

¹⁴ *Supra* note 12, ¶ 71.

it was interpreted by national courts over a long period of time.¹⁵ Indeed, one representative was opposed to the entire provision because it contained vague rules whose meaning would depend upon value judgements that vary greatly.¹⁶ As good faith is based on natural morals, its application would be hard to determine. Indeed, the task of giving meaning to good faith is likely even more difficult in an international context than it is in a domestic one because of differing conceptions of good faith in various legal systems. As Michael Bridge once stated, good faith is a “concept which means different things to different people in different moods at different times and in different places.”¹⁷

At the session it was also pointed out that since the draft did not specify the consequences of failure to observe this principle, remedial measures would be left to national laws, with the result that no uniformity of sanctions would be achieved.¹⁸ Not surprisingly, the stronger opposition was from common law delegates, who could not accept that a good faith principle would also cover the formation of contracts;¹⁹ in the United States good faith only applied to performance and enforcement.²⁰ To allow it to do so would be an incorporation of a substantive law provision that most common law jurisdictions eschewed. Indeed, the principle of good faith is antithetical to the value of certainty in commercial law in most common law systems. They also argued that, although many national systems recognized the concept, no uniform interpretation of it existed in the international commercial community, and this lack of consensus might lead to legal conflict in cases arising from the concept of good faith.²¹ Another problem with the proposal was its ambiguity, in that it would be difficult to specify the issues that might be covered by the principle.

By contrast, those national representatives who favored adopting the good faith principle asserted that the insertion of the provision would be

¹⁵ *Id.* ¶ 74.

¹⁶ *Id.* ¶ 76.

¹⁷ Michael G. Bridge, *Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?*, 9 CANADIAN BUS. L.J. 385, 407 (1984).

¹⁸ Michael J. Bonell, *Article 7*, in COMMENTARY ON THE INTERNATIONAL SALES LAW; THE 198 VIENNA SALES CONVENTION 69 (Cesare M. Bianca & Michael J. Bonell eds., 1987).

¹⁹ *Id.*

²⁰ See U.C.C. § 1-203 (AM. L. INST. & UNIF. L. COMM.'S 1977); see also RESTATEMENT (SECOND) OF CONTRACTS § 231 (AM. L. INST. 1981).

²¹ Honnold, *supra* note 13, at 298.

consistent with the aims of the new international economic order and that it would promote high standards of behavior in international trade transactions.²² The implication was that international traders are, or should be, of a higher moral calling than those who trade domestically. They argued that because of its widespread recognition, there would be little harm in including the principle of good faith in the Convention, which was of necessity vague even in national laws. It was also noted that the principle was recognized in other international conventions. Thus, despite some opposition, at the end of the session the Working Group approved the incorporation of good faith in the Article as originally proposed by the Hungarians.²³ However, the debate on good faith was to continue at future sessions.

While good faith survived the ninth session, at the tenth meeting of the Working Group, opinion among the national representatives was again sharply divided on the principle of good faith. The first proposal was to insert a provision before the existing one on fair dealing and good faith. This was to state that “in interpretation of the contract regard is to be had to the purpose of the contract and the interdependence of its various provisions.”²⁴ It was considered that incorporating the concept of good faith and fair dealing would make courts aware of the high standard of behavior required in international commercial conduct when examining the parties’ performance of the disputed contract. Despite this, the preamble to good faith failed to be adopted due to lack of sufficient support. Good faith was to be built into the interpretation of the CISG rather than being imposed upon the parties as a prescribed manner of conduct. As the English delegate stated, “[A]rticle 7(1) was directed towards the courts in the interpretation of the [C]onvention, and not towards the parties to a contract.”²⁵ Similarly, Felemegas saw this as a rejection of good faith as a substantive obligation on the part of the contracting parties. He stated: “The possibility of imposing additional obligations on the parties is clearly not supported by the legislative history of the CISG [A]rticle 7(1).”²⁶

²² Eorsi, *supra* note 10, at 349.

²³ United Nations Commission on International Trade Law, *supra* note 12, ¶ 87.

²⁴ Honnold, *supra* note 13, at 327.

²⁵ *Id.* at 408.

²⁶ John Felemegas, *Comparative Editorial Remarks on the Concept of Good Faith in the CISG and the PECL*, 13 PACE INT’L L. REV. 399, 404 (2001).

At the Vienna Conference in 1980, another attempt was made to transform good faith from an interpretive provision into a substantive one governing the sales contract, but this proposal was rejected.²⁷ After many debates, long discussions, and amendments, the delegates' approval of the Article was considered to be a final and clear rejection of any intention to impose good faith as an obligation on the parties.²⁸ The agreed-upon wording was intended to be a clear rejection of the earlier far-reaching proposals to apply "good faith" to the obligations and behavior of the contractual parties.²⁹ Thus, taken literally, the provision was to do no more than instruct the courts to *consider* the importance of good faith when *interpreting* the CISG. It was not to be a legal principle to be applied to contracts between parties. In the most generous reading of the words, it was more of a sentiment or "moral aspiration,"³⁰ or a "guide to thinking,"³¹ and not anything substantive that was to be applied by the courts when examining the parties' behavior. Perhaps it was for this reason that the provision was exiled to a remote location in the Convention that addresses general principles and the interpretation of the CISG.

Despite the provision's "troubled history,"³² good faith made it into the CISG's final form. As has been noted in the literature,³³ the inclusion of good faith in Article 7(1) represented a difficult compromise between two factions at the Vienna Conference that were divided along common law and civil law lines. The American delegate, Farnsworth, called this a "statesmanlike compromise" but others thought it was a strange one that buried a substantive

²⁷ U.N. Conference on Contracts for the International Sale of Goods, *Fifth Meeting of the First Committee*, ¶¶ 55, 62, U.N. Doc. A/CONF.97/C.1/SR/5 (13 Mar. 1980).

²⁸ See generally Felemegas, *supra* note 26.

²⁹ *Id.* at 401.

³⁰ Disa Sim, *The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods*, REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG), 19, 77 (Michael Maggi, 2002–2003 ed., 2004).

³¹ Benedict Sheehy, *Good Faith in the CISG: The Interpretation Problems of Article 7*, in (2007) *Review of the Convention on Contracts for the International Sale of Goods (CISG)* 153–96 (PACE INT'L L. REV. eds., 2004), <https://ssrn.com/abstract=777105> or <http://dx.doi.org/10.2139/ssrn.777105>.

³² The words are those of Farnsworth, one of the negotiators. E.A. Farnsworth, *Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 TUL. J. INT'L. COMP. L. 47, 55 (1995).

³³ See, e.g., Farnsworth, *supra* note 32, at 55; who quotes a number of CISG scholars that describe Article 7(1) "as a 'strange arrangement,' 'an awkward compromise,' 'a rather peculiar provision,' and, perhaps ironically, 'a statesmanlike compromise.'"

provision in an interpretive article that was essentially procedural in scope. This treatment of good faith suggests that the disagreement over it was not so much a compromise, but rather recognition of a lack of agreement on it among the delegates.³⁴ But the fundamental problem is not that good faith is treated in a vague manner in the CISG; the problem is that Article 7(1) does not prescribe any standard of good faith conduct that should govern contractual performance. This would not be problematic if good faith was incorporated into the CISG as an interpretive tool only, and the legislative history of it strongly suggests that this was the case. But if good faith was to be an undefined, substantive standard that was to govern the behavior of the contracting parties, it would potentially open the floodgates of uncertainty and ambiguity in the case law on the Article. Unfortunately, as a chronological review of key cases on CISG good faith demonstrates, this is precisely what has occurred, and the resulting judicial decisions on it has undermined the primary objective of the Convention, which is to promote certainty and predictability in international trade.

III. EARLY CASES ON CISG GOOD FAITH

The first reported case on good faith came in 1993, five years after the ratification of the Convention. *Eximin v. Textile and Footwear* involved a Belgian seller and an Israeli buyer.³⁵ In the case, denim boots were purchased for delivery to the United States. When the boots reached their destination, they were confiscated by customs because the design on them, a letter “V,” violated a trademark registered in the United States. The issue in the case was to determine which party was responsible for determining whether the design involved a breach of a registered trademark. For that analysis, the Israeli Supreme Court referred to the principle of good faith. In doing so, it did not apply the CISG directly but rather by analogy to uncover its substantive meaning. The court first examined domestic jurisprudence on the principle of good faith, then moved on to consider it in international sales law.³⁶ It

³⁴ A view supported by Eorsi, *supra* note 10, at 349.

³⁵ Israel August 22 1993 Supreme Court (*Eximin S.A. v. Textile and Footwear Italstyle Ferarri Inc.*), <https://iicl.law.pace.edu/cisg/case/israel-august-22-1993-supreme-court-eximin-sa-v-textile-and-footwear-italstyle-ferarri-inc>. Also available in Isr. L.R. 129 [1992-4], CA 3912/90 *Eximin SA v. Itel Style Ferarri* at 1.

³⁶ Isr. L.R. 129 [1992-4], *supra* note 35, at 13.

referred to good faith in both the Vienna Convention and the CISG. From this it determined that the “Failure to comply with the requirement of good faith amounts to a breach of contract, and since in our case each of the parties lacked good faith, we are speaking of reciprocal breaches of the contract.”³⁷ However, as already noted, there is no definition of good faith in the CISG (except to the extent that Article 7(1) defines its own scope of application with the statement that it applies to “the interpretation of the CISG” only). In this manner it is referred to once and was intended to serve only for interpretative purposes. Without a comprehensive definition, it is impossible to discern the meaning of those words therein, and the Supreme Court’s decision in this respect is a great logical leap. Further, with the lack of a definition of the good faith, the standard of good faith behavior and the scope of its obligation remain ambiguous. So, while good faith may be thought of as a substantive law principle that concerns the parties’ behavior, in the CISG it provides no guidance to assist judges with its application with respect to the parties’ contractual dealings. Furthermore, the inherent vague nature of the good faith concept adds more difficulty to its application. Thus, the ruling by the Israel Supreme Court is flawed in this respect. While the words “good faith” exist in the CISG, they do not reach the status of a general contractual obligation. Rather, it is restricted to a principle for interpreting the provisions of the Convention.

In the following year, two arbitral cases referred to Article 7 good faith. The first case required the arbitrator to consider the issue of defective goods sold by a German seller to an Austrian buyer.³⁸ The arbitrator rightly noted that the exact significance to be attached to good faith in the CISG was disputed. Nevertheless, in citing Article 7, the arbitrator invoked the principle of estoppel as a bar to the seller’s defense of late notice by holding that, while estoppel (“*venire contra factum proprium*”) was not expressly settled by CISG, it formed a general principle underlying the CISG. In other words, the prohibition of *venire contra factum proprium* was applicable as “a special application” of the general principle of good faith, as this was one of the “general principles on which the Convention is based.”³⁹ Using a “special

³⁷ *Id.* at 14.

³⁸ Austria 15 June 1994 Vienna Arbitration proceeding SCH-4318, <https://iicl.law.pace.edu/cisg/case/austria-june-15-1994-translation-available-0>.

³⁹ *Id.* ¶ 5.4.

application” of good faith in Article 7(2) to apply the principle of estoppel was a creative and expansive use of good faith that the drafters of the CISG had not envisioned.

The second arbitral case of 1994 that considered good faith was decided by the International Chamber of Commerce (ICC).⁴⁰ The intricate set of facts involved a third-party payment of cowhides (rather than currency) to a Russian seller by an Italian buyer. The cowhides, supplied by a Yugoslavian firm, were claimed to be defective. Subsequently the three parties held a meeting in Moscow to resolve the dispute and a memorandum was drafted. The issue decided by the ICC was whether the Moscow agreement amounted to a novation of the original obligation to pay, as the Russian supplier had assumed the debt, thereby releasing the Italian buyer. The tribunal correctly noted that while the CISG governed the substance of the dispute it was silent on the issue of novation. It stated:

general principles of international commercial practice, including the principle of good faith, should govern the dispute. [. . .] [F]or the present dispute, such principles and accepted usages are most aptly contained in the [CISG]. [. . .] [T]o the extent the [CISG] contains provisions relevant to the dispute, the tribunal shall consider [them].⁴¹

From this statement, the tribunal gave Article 7(1) a broad reading, and imposed an obligation of good faith conduct on the behavior of the contractual parties. In doing so, it failed to consider that the words “good faith” were meant to apply only to the *interpretation* of the Convention itself, and not to the interpretation of contracts governed by it. This important distinction has been lost on many more arbitral and court judgements that followed.

A number of cases on Article 7 followed in 1995. In *SARL BRI Production “Bonaventure” v. Societe Pan African Export*,⁴² a French seller of jeans contracted with an American buyer that required that the goods be sold in either South America or Africa. The buyer ignored this stipulation

⁴⁰ ICC Arbitration Case No. 7331 of 1994, <https://iicl.law.pace.edu/cisg/case/1994-icc-arbitral-award-no-7331-1994>; *see also* full text of the decision in The ICC International Court of Arbitration Bulletin Vol. 6/N.2, 73-76 (Nov. 1995), <https://www.unilex.info/cisg/case/140>.

⁴¹ *Id.*

⁴² *SARL BRI Production “Bonaventure” v. Societe Pan African Export*, Cour d’appel Grenoble [Court of Appeals], 22 Feb. 1995 (Fr.), <https://iicl.law.pace.edu/cisg/case/france-february-22-1995-court-dappel-court-appeals-sarl-bri-production-bonaventure-v>.

and sold the jeans in Spain, which caused harm to the seller's business in Europe. Based on this breach, the seller refused to sell the buyer any more goods and severed their commercial relationship. The seller's refusal triggered the court proceedings, which were initiated by the buyer. In deciding the case, the court relied on CISG Article 7(1)'s concept of good faith and ruled against the buyer. In doing so, the court stated that the buyer had acted contrary to "the principle of good faith in international trade promulgated by Article 7 of the Vienna Convention."⁴³ The court also awarded the sum of 10,000 francs to the seller for the buyer's abuse of process for initiating the legal proceedings. This is an unfortunate extension of good faith, as the CISG's version of good faith was never meant to govern matters related to civil procedure. Indeed, matters of procedural law fall outside the scope of the Convention. As Sim remarked on the case, "[i]n failing to maintain the distinction between [civil procedure and substantive law], the court inadvertently expanded the scope of the CISG to a staggering degree."⁴⁴ The court treated good faith as a substantive provision to gauge the behavior of the contracting parties; but Article 7(1) was not designed to impose positive duties upon the parties. This extension of the provision was never the intention of the drafters of the Convention.

In a similar vein, more cases are to be found with the view that Article 7(1) imposes duties directly on the parties. In that same year, in the *Mushroom* case, a Hungarian arbitral tribunal reached a similar ruling as that by the French court in *Bonaventure*.⁴⁵ In this case, the Hungarian tribunal declared that good faith in Article 7(1) was not simply a tool to be used in the interpretation of the Convention, but rather was a starting point to impose a duty to act in good faith on the parties themselves.⁴⁶ Thus, the arbitrator ruled that the buyer's issuance of a bank guarantee, which had already expired, was a breach of the principle of good faith. The tribunal justified its reference to CISG Article 7(1) by pointing out that, in its view, the observance of good faith is not only a criterion to be used in the interpretation of CISG but is also a standard of behavior to be observed by the parties in

⁴³ *Id.* Translated by Gary F. Bell.

⁴⁴ Sim, *supra* note 30, at 75.

⁴⁵ Arbitration Court of the Hungarian Chamber of Commerce and Industry, 17 Nov. 1995, Vb 94124 (Hung.), <https://iicl.law.pace.edu/cisg/case/hungary-november-17-1995> and <https://www.unilex.info/cisg/case/217>.

⁴⁶ *Id.*

the performance of the contract. Like the prior decisions on Article 7(1), this is another expansive interpretation of good faith that goes beyond the original intention of the drafters of the Convention.

In the *Automobile* case of 1995, the German Court of Appeal also considered the role of CISG good faith.⁴⁷ In this case the defendant, a German seller, and the plaintiff, an Italian buyer, had contracted for the sale of cars. Before the last delivery, the buyer informed the seller that exchange rate fluctuations made it impossible to receive the cars and asked for a delay. Despite the buyer's request the seller cancelled the orders. Nevertheless, the seller was paid via a bank guarantee that the buyer had previously provided to the seller. Since no further deliveries were made, the buyer claimed repayment of the money given in the bank guarantee, as well as damages. The court ordered the seller to repay the buyer's money but dismissed the latter party's claim for damages. Since the goods had been ready for delivery when the buyer asked for a postponement, there was no fundamental breach on behalf of the seller that would allow the buyer to avoid the contract for non-delivery. The court further pointed out that it would be contrary to the principle of good faith in Article 7(1) to allow the seller to declare the contract void for events that took place more than two years ago. In this way, the court used the principle of good faith in Article 7(1) to prevent the buyer from avoiding the contract. Thus, the rights and duties of the parties were affected due to the (mis-)application of the principle of good faith in CISG Article 7(1). CISG Article 7(1) was the result of extended negotiations between those, mostly from civil law jurisdictions, who embraced a broad application of good faith and those, primarily from the common law world, who strongly rejected it. To interpret the provision broader than what the drafters had put down in words, would be to challenge their expressed intention. Unfortunately, this early pattern laid the foundation for similar court and arbitral jurisprudence that was to follow.

In another German case in the following year, an Italian seller knowingly sold a motor vehicle that had a rolled-back odometer.⁴⁸ The seller resisted the German buyer's claim for compensation, on the basis of an exclusion clause in the warranty. The court applied the CISG stating that for

⁴⁷ Oberlandesgericht [Court of Appeal] München, 8 Feb. 1995 (Ger.), <https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-104>.

⁴⁸ Oberlandesgericht [Court of Appeal] Köln, 21 May 1996 (Ger.), <https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-59>.

a party to benefit from its provisions, it must first come to the court having acted in good faith. In this case the seller could not rely on the exclusion clause as it had not acted in good faith. The court applied CISG good faith substantively as a general principle to limit the right of the seller to invoke other legal rights. In this respect, good faith acted as a “gap-filler” to imply an obligation on one of the contracting parties. In doing so the court departed from the fidelity of the written text of the CISG and constructed a judgement that gave Article 7(1) a dynamic interpretation. This ignores the legislative record of the CISG and disregards the plain meaning of the words in the Convention. This case, like the others before it, invited commercial uncertainty into international sales transactions under the CISG, which is counterproductive in the quest for legal uniformity in international commercial law.

Another point of note is the frequency of German court decisions on CISG good faith. This should not be surprising as one study found German courts to be pre-eminent among the Convention’s signatory states in its treatment of the CISG generally, and the country has been the most active adjudicator of CISG issues (followed by Switzerland).⁴⁹ Another study from 2018 found that the pool of German decisions on the direct utilization of Article 7(1) amounted to 62% of all decisions on that provision (again, followed by Switzerland).⁵⁰ The term coined was the “germanification” of the pool of CISG good faith decisions.⁵¹ Perhaps this is not surprising as German courts are very familiar with the domestic concept of good faith (as is Switzerland) and have long traditions with its use in their domestic jurisprudence. This further suggests that courts that are already familiar with good faith in a domestic context are more likely to use the concept in international disputes.

Fortunately, good faith as an instrument of mere interpretation was applied in the *Industrial Equipment* case of 1997.⁵² A German seller and a Spanish buyer concluded an agreement whereby the buyer was to be the exclusive distributor in Spain of industrial equipment produced by the seller.

⁴⁹ Peter J. Mazzacano, *The Treatment of CISG Article 79 in German Courts: Halting the Homeward Trend*, 2 NORDIC J. COMM. L. 1, 5–6 (20 Dec. 2012), <https://ssrn.com/abstract=2192139>.

⁵⁰ Thomas Neumann, *The Roots and Fruits of Good Faith in Domestic Court Practice*, 31 PACE INT’L L. REV. 59, 75 (2018).

⁵¹ *Id.*

⁵² ICC Court of Arbitration, Paris, Case No. 8611, 23 Jan. 1997 (Fr.), <https://www.unilex.info/cisg/case/229>.

Several contracts were then concluded between the parties. Four years later the seller informed the buyer that due to the lack of sales by the buyer, it would sell its products in Spain through another company. However, the seller promised to continue supplying all the buyer's orders, but without an exclusive right of distribution.

The buyer then sued the seller for damages claiming that the seller had breached the exclusive contract, had failed to supply ordered goods, and did not supply the required replacement parts for sold machinery which, under the principle of good faith, the buyer had believed the seller was obliged to continue delivering. The buyer then refused to pay for some of the deliveries, and the seller filed arbitral proceedings. The buyer counterclaimed damages arising from a breach of the exclusive distributorship agreement as well as from lack of conformity of certain products and failure to deliver spare parts.

In principle, the tribunal supported the buyer's argument that, under good faith, the seller was obliged to supply the spare parts. However, the tribunal refrained from imposing such a duty because it was based on the good faith mentioned in Section 242 of the German Civil Law. More importantly, the arbitrator noted that good faith, mentioned in CISG Article 7(1), was applicable only to interpretation by the Convention and was not to be referred to as a source for the parties' legal rights and obligations. Therefore, while under German law a manufacturer of equipment is generally expected to provide spare parts according to the domestic principle of good faith, no implied secondary obligation of the parties derives from the principle of good faith when CISG is applicable, as was the case in this instance. Thus, the arbitrator concluded that the case was not to be settled entirely by the CISG, but also needed to be judged under the German Civil Code (BGB). Nevertheless, the arbitrator's statement eliminated the substantive role of good faith in the CISG and depicted it only as a device for interpreting the Convention itself, without any reference to its function for interpreting the contract or as an obligation that resulted from the parties' contractual agreement. But not surprisingly, the tribunal did not elaborate on how good faith functioned in interpreting the Convention. That lack of engagement is a silent but common feature in court and arbitral judgements.

One further observation about the *Industrial Equipment* case, relating to the interpretation of good faith, was that it was unique in its treatment of Article 7(1). It was a narrow but correct treatment of CISG good faith, and the case stands alone in the early CISG caselaw that clearly articulates the role of good faith is to be limited to the interpretation of the Convention only.

Unfortunately, this exceptional perspective on CISG good faith was not to be embraced in later decisions. Indeed, the more common approach to good faith was to expand its utility as a substantive standard to be observed by the parties in the performance of their contracts.

Two cases from 1998 illustrate this development. In a Russian arbitration, a German seller brought an action against a German buyer for the latter's refusal to pay for the goods.⁵³ The buyer claimed *force majeure*—that it did not have the required foreign currency license from the Bank of Russia to pay the seller. This is a weak argument: “The fact that a buyer does not have the hard currency, a foreign currency license, or ‘frozen’ funds will not excuse it from liability for non-performance.”⁵⁴ Not surprisingly, the Tribunal rejected this argument by stating that the buyer ought to have foreseen that it would need such a license in order to perform the contract. It further held that in accordance with “the principle of good faith in international trade enshrined in the Vienna Convention 1980 (Article 7)” the buyer's failure to fulfill its obligations under the contract or to communicate with the seller in a timely manner was a failure to act in accordance with good faith.⁵⁵ Here, the Tribunal gave good faith a substantive application to the facts of the case and the behavior of the buyer. In doing so, it was a broad and general use of Article 7(1).

The same expansive pattern of analysis on the CISG's good faith provision was applied in a number of cases that followed. In a Swiss arbitration between a German seller of textiles and a Swiss buyer, the issue arose as to whether the payment terms had been modified in the buyer's letter of confirmation, to which a check had been attached that was subsequently cashed by the seller.⁵⁶ The court found that the buyer was entitled to regard the seller's silence (and cashing of the check) as acceptance of the letter. The court reasoned that the seller had implicitly consented to the change because

⁵³ Tribunal of International Commercial Arbitration, Russian Federation Chamber of Commerce and Industry, Award 96/1998, 24 Nov. 1998, <https://iicl.law.pace.edu/cisg/case/russian-federation-november-24-1998-translation-available>.

⁵⁴ Peter J. Mazzacano, Exemptions for the Non-Performance of Contractual Obligations in CISG Article 79: The Quest for Uniformity in International Sales Law at 298 (Mar. 2013) (Ph.D. dissertation, Osgoode Hall Law School, York University).

⁵⁵ Tribunal of International Commercial Arbitration, *supra* note 53.

⁵⁶ Bezirksgericht [District Court] Sissach, 5 Nov. 1998, §§ 2–4 (Switz.), <https://iicl.law.pace.edu/cisg/case/switzerland-bg-arbon-bg-bezirksgericht-district-court-1>.

it did not object to the buyer's modification within a reasonable time. Using CISG's good faith as a "general principle," the court stated that "so long as the [buyer] was entitled under good faith to regard the silence as an acceptance" it could do so.⁵⁷ In this manner, the court used Article 7(1) good faith as a substantive provision to rule that the seller had silently agreed to a contract modification.

In a Russian arbitration, a Russian seller brought an action against a Cypriot company, the buyer, for failure to pay for the shipped goods.⁵⁸ The buyer claimed the seller had failed to deliver the shipping documents in the exact manner prescribed under the contract. Apart from this small deviation, the seller had otherwise delivered the goods in accordance with the contract terms. The tribunal found the CISG to be the applicable law. It ruled that a minor breach committed by the seller did not excuse the buyer's failure to make payment for the goods. In the tribunal's opinion, the buyer's ploy to avoid payment did "not fall within the principle of good faith in commercial relations."⁵⁹ Although the tribunal did not reference Article 7(1) directly, it used the principle of good faith as an objective standard to measure the behavior of the parties in their performance of contractual duties.

Another 1999 decision gave substantive meaning to Article 7(1). The case involved a French seller who had sold plastic granules to a Swiss buyer over many years.⁶⁰ Later, the buyer's company restructured and merged with a new parent corporation. However, the employees of the buyer continued ordering granulated plastic from the seller by using the pre-merger corporate stationery. The parent company refused to pay the invoices on the basis that they had been improperly ordered on its behalf, and that it was consequently not liable for the outstanding amounts. Thus, the seller brought an action against the parent company. The court based its decision, in part, on CISG Article 7. The court reasoned that the contract had to be interpreted by applying the principle of good faith and with regard to all relevant

⁵⁷ *Id.* ¶ 2.4.

⁵⁸ The International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry, Case No. 55/1998, 10 June 1999 (Russ.), <https://iicl.law.pace.edu/cisg/case/russian-federation-june-10-1999-translation-available>.

⁵⁹ *Id.* ¶ 3.5.

⁶⁰ Handelsgericht [Commercial Court] Aargau, 11 June 1999, § I (Switz.), <https://iicl.law.pace.edu/cisg/case/switzerland-handelsgericht-commercial-court-aargau-11>.

circumstances of the case.⁶¹ Good faith did not allow the buyer to refuse payment for a benefit that it had received under the contract. The court further noted that although the CISG did not contain any specific methods of interpretation, such interpretation must be based on CISG principles.⁶² In this way the court used good faith as a general principle that required the buyer to act with honesty and integrity in its dealings with the seller. In other words, like many of the cases already discussed herein, applying CISG good faith in a substantive manner requires that it be viewed, not as an interpretive provision, but rather as a moral or ethical benchmark. While moral behavior between international businesspersons may be a laudable goal, the codifying of CISG good faith for this objective was never the intention of the Convention's drafters.

IV. LATER CASES ON CISG GOOD FAITH

The pattern that was established in the early cases on CISG good faith was repeated, with a few notable exceptions, in later cases. The stage had been set, and by the year 2000 the proverbial horse was out of the barn. Once the words were introduced into CISG jurisprudence, good faith took on a life of its own and the courts continued to run with it. As an example is the decision by the Columbia Constitutional Court.⁶³ There, the court expanded on the principle of CISG good faith, and extended it beyond the commercial sphere to the Columbian Constitution. In the words of the court:

Equally, the exercise of the commercial activity that the individuals develop with other citizens of different States must fit the principle of good faith, just as the Convention stipulates in paragraph number one in Article 7. This principle should not only be observed in the contractual relationships or negotiations, but in the relationship between individuals and the State and in the procedural performances. Indeed, the Court pointed out: "Good faith, in conformity with Article 83 of the Magna Charta is presumed"⁶⁴

⁶¹ *Id.* § II, 2(a).

⁶² *Id.*

⁶³ Corte Constitucional [Constitutional Court], 10 May 2000 (Colom.), <https://iicl.law.pace.edu/cisg/case/colombia-may-10-2000-corte-constitucional>.

⁶⁴ *Id.* § 3.2.3.

From this perspective, good faith is not simply an interpretive tool to be used in the deciphering of the Convention; rather, it infuses all commercial dealings whether domestic or international.

This expansionist view of the role of CISG continued. In the following year a New Zealand Court of Appeal examined the issue of the termination of an exclusive, long-term distribution agreement.⁶⁵ The court rejected the traditional paradigm of contract law that viewed contracts as being individual, formalistic and discrete. That classical conception of contract law eschews a place for good faith. As such, the court found that commercial contracts are frequently relational, and that this view of contract law provides a place for the role of good faith. The court drew its inspiration from CISG Article 7(1) and Article 1.7 of the 1994 UNIDROIT Principles of International Commercial Contracts.⁶⁶ It stated that “the concept of good faith is the latent premise of much of the law of contract relating to the performance of contractual obligations”⁶⁷ and that “[g]ood faith is closely associated with notions of fairness, honesty and reasonableness which are already well recognized in the law.”⁶⁸ While these moral terms are worthy principles, they are also unhelpful as they rest on a subjective set of variables that are ultimately indeterminable. Even a superficial review of scholarly writings seeking to uncover the lowest common denominator meaning of good faith shows that no agreement exists.

In the Belgian appeal case of *NV A.R. v. NV I.*, a Belgian seller negotiated with a French buyer to produce the plastic holders for pagers.⁶⁹ The negotiations were set out in writing signed by the parties in a “letter of intent,” with execution of a final agreement to follow. In the absence of a final agreement, the parties began to perform. However, the seller was unable to deliver the products on time and the buyer then requested a refund of money. Further, the market for the product declined. Negotiations followed to resolve the situation. Taking an aggressive approach, the seller sought

⁶⁵ *Bobux Marketing Ltd v. Raynor Marketing Ltd.*, Court of Appeal, Wellington, 3 Oct. 2001 (New Zeal.), <https://iicl.law.pace.edu/cisg/case/new-zealand-october-3-2001-court-appeal-bobux-marketing-ltd-v-raynor-marketing-ltd>.

⁶⁶ *Id.* ¶ 39.

⁶⁷ *Id.* ¶ 40.

⁶⁸ *Id.* ¶ 41.

⁶⁹ *NV A.R. v. NV I.*, Appellate Court Gent, 15 May 2002 (Belgium), <https://iicl.law.pace.edu/cisg/case/belgium-may-15-2002-hof-van-beroep-appellate-court-nv-ar-v-nv-i-translation-available>.

ways to get out of the contract and denied the existence of a binding contract. It sued the buyer for breach of contract. The court ruled that the seller's behavior was not in good faith. In the words of the court, "Such a way of proceeding is clearly irreconcilable with the rule of good faith which, in international trade, should always be observed according to Article 7(1) CISG with the application and interpretation of the Vienna Sales Convention."⁷⁰ In this way, the court found CISG good faith to be a substantive provision that precluded the contracting parties from acting in self-interested ways that were detrimental to the other party.

A similar expansion of the principle of CISG good faith can also be found in a Dutch arbitral case of 2002. The case concerned the issue of product non-conformity due to excessive levels of mercury found in oil sold by Dutch companies to English refiners. The buyers refused to accept any further shipments, so the sellers sold their product to other buyers at a lower price and then commenced an arbitration proceeding against the English refiners to recover the price difference. In examining the issue of product non-conformity, the tribunal held that the "merchantability" standard under the common law and the civil law "average quality" rule did not apply under the CISG. Thus, the tribunal invoked CISG Article 7(2), the "gap filling" provision that provides that matters governed by CISG, but not expressly settled in it, are to be solved in conformity with the general principles on which CISG is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. In this way, the tribunal held that product conformity/non-conformity had to be measured against the observance of good faith in international trade, and this meant that the product quality standard to be applied in this case had to be one based on "reasonable quality."⁷¹ The end result was the determination that the oil was of a "reasonable" standard. As such, the tribunal ruled that the buyers had to pay the sellers for breach of contract as the reasonable quality test met the terms of CISG Article 7(1) good faith. Substantively, such an interpretation also leads to the equating of "good faith" with "reasonable." This is not in relation to the parties' behavior, but instead in relation to product conformity and quality. This stretches the concept of CISG good faith to places that the drafters had never envisioned.

⁷⁰ *Id.* ¶ 6.6.

⁷¹ *Id.* ¶ 118.

V. RECENT CASES ON CISG GOOD FAITH

The trend to interpret good faith with substantive meaning has continued in more recent Convention cases. A German case in 2004 involved an Italian tannery that sued a German manufacturer of upholstered furniture for the outstanding purchase price for a previous delivery of leather.⁷² The trial court had dismissed the seller's claim holding that the buyer was entitled to damages under CISG Articles 75 and 76. The seller appealed, arguing that, since the non-performing party had not avoided the contract, and that no market price existed for the goods at issue, Article 76 had been erroneously applied. The appeal court upheld the trial court's decision, but in doing so it spoke to the importance for the principle of an autonomous interpretation of the CISG. In this regard the court found that its view was in line with the principle of good faith as set forth in Article 7(1) CISG which allows for an autonomous interpretation of the Convention. This allows the court to take into account "the well-established principles of the national legal systems of Contracting States" created with the view of specifying the content of the good faith principle.⁷³ Included among these principles is the "*venire contra factum proprium*" principle.⁷⁴ In other words, that a party cannot set itself in contradiction to its previous conduct vis-à-vis another party, as that would not be in accordance with good faith.

Another German case the following year similarly bolstered the principle of good faith in the CISG and imbued its standards of conduct to govern party behavior.⁷⁵ The case involved a German buyer and a Belgian seller in the trade of fruit and vegetables. After a number of transactions between the parties, a dispute arose as to whether a sales contract had come into existence under the CISG. The seller invited the buyer to take further product deliveries referring to a purported agreement. In response, the buyer brought an action to obtain a declaration that no valid contract had been concluded between the parties. The seller argued, in part, that standard terms and conditions of the seller had been printed on the back of each invoice

⁷² Oberlandesgericht [Court of Appeal] 15 September 2004 (Ger.), <https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-106>.

⁷³ *Id.* at 9.

⁷⁴ *Id.*

⁷⁵ Landgericht [District Court], Entscheidungen des Bundesgerichtshofs in Zivilsachen, 3 Aug. 2005, 113-119 (Ger.), <https://iicl.law.pace.edu/cisg/case/germany-lg-aachen-lg-landgericht-district-court-german-case-citations-do-not-identify-169>.

which were delivered to and accepted by the buyer. One of the issues to be decided by the court was whether the seller's standard terms formed part of the contract. In the court's view, the incorporation of standard terms is governed by CISG general rules on contract formation and interpretation (as found in CISG Articles 8, 14, 18). Based on these provisions, the standard terms would only be binding on the buyer at the time the contract was concluded, not following product delivery and invoicing. The court could have settled the matter with this line of reasoning, but it continued to invoke CISG good faith. Even though it was not necessary to invoke Article 7(1), the court further stated that it also follows from the general principle of good faith in international trade (per Article 7(1) CISG). It elaborated on this point: that the parties have a duty to cooperate and to give information deriving therefrom that in an international sales contract the provider of standard terms has to make sure that the other party is in a position to know their content.⁷⁶

A welcome departure from this line of jurisprudence can be found in an ICC arbitral case from 2014.⁷⁷ The case involved the sale of industrial heaters from an American seller to a Chinese buyer. Following payment of deposits, the seller notified the buyer of its intent to suspend performance under the contracts due to its perception that continued performance would expose it to third-party liability for possible patent infringement (involving the buyer). The buyer assured the seller of its compliance with all applicable laws and requested that seller proceed with the manufacture and delivery of the heaters. Negotiations failed to resolve the matter, and the buyer called its bank guarantees. The seller then initiated arbitration proceedings and claimed damages for the buyer's breach of contract.

In its judgment in favor of the seller, the tribunal provided critical insight into the nature of good faith as incorporated in the CISG. It reflected on how the role of good faith in contractual relationships is one that divides the common law and civil law jurisdictions of the world.⁷⁸ It noted this issue had been discussed during the negotiations of the CISG. While civil law delegates favored imposing a duty of good faith on contracting parties, those

⁷⁶ *Id.* at 5.

⁷⁷ *Petro-Chem Dev. v. Pangang Group Int'l Econ. & Trading (U.S. v. China)*, ICC Case No. 19574/GFG Final Award (12 Dec. 2014), <https://iicl.law.pace.edu/cisg/case/december-12-2014-petro-chem-development-v-pangang-group-international-economic-trading-and>.

⁷⁸ *Id.* ¶ 179.

from common law countries opposed it. The final words that found their way into the Convention was a compromise between these competing visions. Referring to Article 7, the tribunal added, “[i]t states explicitly that ‘[i]n the interpretation of this Convention, regard is to be had to . . . the observance of good faith in international trade.’”⁷⁹ The next sentence drives home the point that so many other courts and tribunals have missed: “[t]he wording itself makes clear that the provision focuses on the interpretation of the Convention, not on the interpretation of contracts governed by the Convention.”⁸⁰ Elaborating on this point, the tribunal contrasted the reference to good faith in CISG Article 7(1) with the principle of good faith as found in the UNIDROIT Principles of International Commercial Contracts.⁸¹ While the tribunal did not elaborate on good faith as found in the UNIDROIT Principles, its incorporation there is expansive. Unlike in the CISG, good faith is considered to be one of the fundamental ideas underlying the UNIDROIT Principles. By stating in general terms that each party must act in accordance with good faith, Article 1.7 makes clear that even in the absence of special provisions in the UNIDROIT Principles the parties’ behavior throughout the life of the contract, including the negotiation process, must conform to good faith. By contrast, and as the tribunal concluded, “no duty of good faith directed to the parties of a commercial contract can be derived from Article 7(1) CISG since it concerns only the interpretation of the Convention.”⁸² To support this line of reasoning, the tribunal referred to the ICC *Industrial Equipment* case of 1997 (as discussed above).⁸³ It is unfortunate that so few cases on CISG good faith got it right.

The remaining cases on CISG good faith got it wrong. In Spain, in the 2016 case of *Depuradora Servimar, S.L. v. G. Alexandridis & CO.O.E.SC* the court of appeal applied a broad and purposive approach to Article 7(1).⁸⁴ It stated that there was an implied duty on contractual parties to act in good faith. The dispute involved a contract for the sale of live molluscs between a Spanish seller and a Greek buyer. In its judgement in favor of the seller (as

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ UNIDROIT Principles, *supra* note 3, art. 1.7.

⁸² Petro-Chem Dev. ICC Case No. 19574/GFG at ¶ 180.

⁸³ ICC Arbitration Case No. 8611, <https://www.unilex.info/cisg/case/229>.

⁸⁴ *Depuradora Servimar, S.L. v. G. Alexandridis & CO.O.E.SC*, 21 Jan. 2016 (R.G.D. Appeal No 80/2015) (Spain), <https://iic1.law.pace.edu/cisg/case/spain-january-21-2016-audiencias-provinciales-court-appeal-depuradora-servimar-sl-v-g>.

the buyer failed to examine the goods within a reasonable time), one question before the court was the starting date of the payment of interest. In its analysis, the court modified its judgement and applied the principle of good faith under Article 7(1) of the Convention, as the seller had delayed in filing the complaint for almost two years. In the court's view, it would not be in good faith to for the seller to claim interest from the buyer for that lengthy period. Utilizing this novel and expansive approach, the Court considered this application of Article 7(1) to be the best solution for ensuring that good faith remained of key importance in international trade.

A Brazilian appeal court in 2018 also considered the role of good faith in the CISG.⁸⁵ The case involved a payment dispute between a Venezuelan buyer and a Brazilian manufacturer. Due to foreign currency exchange controls, the buyer ended up paying twice for the engines it purchased from the seller. They negotiated an agreement to enable the buyer to receive a refund for the duplicate payment, but the Brazilian seller never returned the funds. The latter party advanced a number of arguments including the claim that the buyer did not prove that the payment was made twice and that the deal should be declared null, as it was performed in violation of Venezuelan law. The court reasoned that since the Convention is to be interpreted in accordance with its international character, according to its Article 7(1), it should not apply domestic laws, but provisions of the "*nova lex mercatoria*" and uniform law relevant to disputes of an international character.⁸⁶ Article 7(1) sets forth a duty of good faith as a fundamental legal standard for international trade, and this is not to be neglected by the parties. In its broad reading of CISG good faith, the court stated that it "plays a fundamental role in the 1980 Vienna Convention."⁸⁷ Therefore, the seller had no right under the CISG to claim avoidance of the contract and to argue that the buyer had no right to be refunded the paid amount. The court also noted that the Convention, aiming to create uniform rules applicable to international trade relationships, defines the concept of contract on the basis of two fundamental pillars, namely private autonomy and good faith. Furthermore, in conformity with these principles, the parties have a duty to act fairly in negotiations and

⁸⁵ T.J.R.G. Apelação Cível No. 70072090608 (CNJ 0419254-25.2016.8.21.7000), Relator: Des. Claudia Rosa Brugger, 20.05.2017, (Braz.), <https://icl.law.pace.edu/cisg/case/brazil-march-30-2017-appellate-court-voges-metallurgica-ltda-v-inversiones-metalmechanicas>.

⁸⁶ *Id.* at 11–17.

⁸⁷ *Id.* at 17–24.

international sale contracts must be understood as a cooperative relation between the parties. On this basis, the court held that the allegations of the seller should be rejected because they were contrary to the principles of contracts of international trade on which the Convention is based. Good faith here, as in many cases elsewhere, imposes a positive duty on the trading parties.

In a recent American case from 2022, a sales contract for Chinese-made COVID-19 personal protective equipment was entered into by a Canadian buyer and an American seller.⁸⁸ The seller made certain misrepresentations to induce the buyer to enter into the sales contract. Following release of a substantial payment, amounting to over U.S. \$8 million, the buyer failed to receive the goods. After negotiations, the seller agreed to a repayment schedule, but it was never fulfilled (apart from an initial repayment of U.S. \$250,000). Thus, the buyer sued the seller for damages on several grounds, including breach of an implied covenant of good faith and fair dealing. With respect to this breach, and citing domestic case law on the CISG, the U.S. District Court (W.D.N.Y.) found that Article 7(1) may be grounds for a cause of action. The implication is that good faith is not simply an interpretive tool to be used in deconstructing the CISG; rather, it is substantive law, the breach of which affords a party the opportunity to commence a lawsuit. Having considered this line of reasoning, the court ultimately denied the buyers claim for summary judgement for breach of good faith and fair dealing on the grounds that this was duplicative, and that breach of contract already covered this aspect of the law.⁸⁹

CONCLUSION

There is little doubt that CISG Article 7 is one of the most important provisions in the Convention. It is also one of the most contentious. A review of the key cases on CISG good faith since the ratification of the Convention has revealed that good faith plays a prominent role in CISG jurisprudence. However, courts and scholars have contested the meaning of the words therein ever since. Not surprisingly, the disagreement over the meaning of

⁸⁸ *Busrel Inc. v. Dotton*, No. 1:20-cv-01767, 2022 WL 16559446 (W.D.N.Y. 1 Nov. 2022), <https://iicl.law.pace.edu/cisg/case/united-states-november-1-2022-district-court-busrel-inc-v-dotton-et-al>.

⁸⁹ *Id.* at 11–12.

the words in Article 7(1) has been reflected in the jurisprudence on the provision. However, the role given to CISG good faith by the courts and tribunals is clearly lopsided. Of the twenty-one cases reviewed, a mere two⁹⁰ made it clear that Article 7(1) concerns only the interpretation of the Convention and ruled that it does not impose standard of behavior on the parties to an international sales contract. If the Convention's drafters crafted any standard of behavior, it was only for good faith to be assigned a limited and confined role in the process of CISG interpretation, and nothing more. Its function was simply to serve as a criterion for the evaluation of perceived ambiguities of the CISG's provisions. But from this modest and unassuming place, Article 7(1) has risen from its humble beginnings as a compromised, interpretive provision to its current lofty status as a substantive provision that imposes concrete legal obligations on parties. The development is not unlike an apotheosis—going from mere mortal status to godlike. In the jurisprudence of most courts and tribunals, CISG good faith now governs the behavior of parties involved in the international sale of goods and it imposes a positive duty on them to act in good faith. However, no international court or tribunal is able to authoritatively settle or define what constitutes CISG good faith. Yet, parties are obliged to pay homage to it.

All of this brings us to the issue of certainty in contracts, more specifically, international sale of goods contracts. The words of Lord Mansfield are instructive: “[i]n all mercantile contracts the great object should be certainty. And therefore, it is of more consequence that a rule should be certain, than whether it is established one way or the other. Because speculators in trade then know what ground to go upon.”⁹¹ How are contracting parties to assess their legal risks if they are subject to a lofty, broad standard that has never been subjected to a rigorous definition? How can they trust their fate to the law with so much uncertainty? An answer to these hard questions is what is needed, not a leap of (good) faith.

⁹⁰ ICC Arbitration Case No. 7331; *Petro-Chem Dev.*

⁹¹ *Vallejo v. Wheeler*, 98 ENG. REP. 1012, 1017 (1774).