
THE MODEST ROLE OF GOOD FAITH IN UNIFORM SALES LAW

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ABSTRACT

Many of the conventions produced by the United Nations Commission on International Trade Law (“UNCITRAL”) since 1980 include a common directive: (1) a requirement that these conventions be interpreted in good faith; and (2) a requirement that cases arising under these conventions be settled in accordance with the conventions’ underlying general principles. Increasingly, courts and scholars are finding that “underlying principles” also include a requirement of good faith. Article 7 of the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) was the template for the good faith directive in subsequent UNCITRAL conventions. Focusing on the CISG, this article argues that good faith plays a limited role both in the CISG’s content and in its application by courts and arbitrators. In doing so, this article argues for three claims. First, the CISG does not include a principle of good faith that is binding on the contracting parties under Article 7(1)’s good faith directive. Second, the general principle underlying the provisions of the CISG is not one of good faith. That underlying principle instead is one of contracting cost reduction: a requirement that parties minimize the cost of negotiating and performing under contracts where feasible. Third, case law that elaborates on the CISG’s good faith directive or a general underlying principle of good faith in the CISG is relatively rare, and reliance by courts on either the good faith directive or an underlying good faith principle, where it occurs, is suspect. Together, these three claims suggest that good faith, whether as part of the directive or as a general, underlying principle, plays only a modest role in the CISG. After elaborating on and defending the three claims above, this article argues that good faith’s modest role in the CISG, although controversial, in fact is a good thing. The article concludes with a description of the implications of good faith’s limited place in contract interpretation and performance in UNCITRAL conventions generally.

INTRODUCTION

It has become routine for the United Nations Commission on International Trade Law (“UNCITRAL”) to include in the conventions and model laws it produces more or less the same directive: “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.”¹ This directive has appeared in six of eight UNCITRAL conventions produced between 1980

¹ See, e.g., Convention on Contracts for the International Sale of Goods art. 7, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

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and 2008, listed in the table below.

<u>UNCITRAL Convention</u>	<u>Status</u>	<u>Number of Ratifying or Acceding States</u>	<u>Good Faith Directive</u>
Convention on Contracts for the International Sale of Goods (1980)	In Force	83	Article 7(1)
Convention on International Bills of Exchange and International Promissory Notes (1988)	Not in Force	5	Article 4
Convention on Independent Guarantees and Stand-by Letters of Credit (1995)	In Force	8	Article 5
Convention on the Assignment of Receivables in International Trade (2001)	Not in Force	1	Article 7(1)
Convention on the Use of Electronic Communications in International Trade (2005)	In Force	3	Article 5(1)
Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea (2008)	Not in Force	3	Article 2

Table: UNCITRAL Conventions Incorporating the Good Faith Directive,
1980-2008²

The directive has two components: the first requires uniformity, and the second requires good faith. This article will refer to the latter requirement as the “good faith directive.” Early UNCITRAL conventions only contained the uniformity requirement.³ UNCITRAL’s good faith directive first appeared in the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), which served as a template for

² See United Nations Comm’n on Int’l Trade Law, UNCITRAL Texts and Status, http://www.uncitral.org/uncitral/en/uncitral_texts.html (last visited Oct. 4, 2014).

³ See, e.g., Convention on the Limitations Period in the International Sale of Goods art. 7, June 14, 1974, 1511 U.N.T.S. 3.

subsequent UNCITRAL conventions and model laws.⁴ After the CISG, UNCITRAL conventions included both the uniformity and good faith components.⁵ Another common provision among several UNCITRAL conventions and model laws that relates to the good faith directive requires that matters addressed but not expressly settled by a particular UNCITRAL convention are to be settled in accordance with that convention's underlying general principles.⁶ Courts and scholars increasingly agree that one of these underlying general principles is a requirement of good faith.⁷

⁴ *See id.*

⁵ *See, e.g.*, Convention on Contracts for the Carriage of Goods Wholly or Partly by Sea art. 2, Dec. 11, 2008, 48 I.L.M. 659; Convention on the Use of Electronic Communications in International Contracts art. 5(1), Dec. 9, 2005, G.A. Res. 60/21, U.N. Doc. A/Res/60/21 [hereinafter CUECIC], available at http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf; Convention on Independent Guarantees and Stand-by Letters of Credit art. 5, Dec. 11, 1995, 35 I.L.M. 740 [hereinafter CIGSLC]; Convention on International Bills of Exchange and International Promissory Notes art. 4, Dec. 9, 1988, 28 I.L.M. 177.

⁶ *See* CISG, *supra* note 1, art. 7(2); CUECIC, *supra* note 5, art. 5(2); Convention on the Assignment of Receivables in International Trade art. 7(2), Dec. 12, 2001, 41 I.L.M. 777 [hereinafter CARIT]. Article 7(2) of the CISG has also served as the template for identical provisions in UNCITRAL's model laws. Model Law on Electronic Commerce Adopted by the United Nations Commission on International Trade Law, G.A. Res. 51/162, art. 3, A/RES/51/162 (Jan. 30, 1997), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N97/763/57/PDF/N9776357.pdf?OpenElement>; Model Law on Electronic Signatures of the United Nations Commission on International Trade Law, G.A. Res. 56/80, art. 4(2), A/RES/56/80 (Jan. 24, 2002), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/490/26/PDF/N0149026.pdf?OpenElement>; *see* United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration, art. 2, June 21, 1985, 24 I.L.M. 1302 (1985); *see also* U.N. Comm'n on Int'l Trade Law, Third International Colloquium on Secured Transactions: Model Intellectual Property Contract Law, Concept Draft for Discussion Only, at 3, http://www.uncitral.org/pdf/english/colloquia/3rdSecTrans/Lorin_Brennan_Jeff_Dodd_2-IP.pdf (Article 7(b)); Int'l Inst. for the Unification of Private Law [UNIDROIT], *UNIDROIT Principles of International Commercial Contracts*, at 16 (2013), available at <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf> (modeling Article 1.6(2) on CISG Article 7(2)).

⁷ *See, e.g.*, Oberlandesgericht [OLG] [Appellate Court] July 9, 2009, INTERNATIONALES HANDELSRECHT [IHR] 81, 2010 (Ger.), available at <http://cisgw3.law.pace.edu/cases/090724g1.html> (Broadcasters case); Landericht Neurbrandenburg [LG] [District Court] Aug. 3, 2005, INTERNATIONALES HANDELSRECHT [IHR] 26, 2006 (Ger.), available at <http://cisgw3.law.pace.edu/cases/050803g1.html> (Pitted sour cherries case); *cf.* Kantonsgericht Wallis [Canton Appeal Court] May 27, 2005, C1 04 33 (Switz.), available at <http://cisgw3.law.pace.edu/cases/050527s1.html> (Welding devices case); *see also* Peter Schlechtriem, *Article 7*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 93, 100-01 (Peter Schlechtriem et al. eds., 2d ed. 1998) [hereinafter Schlechtriem, *Article 7*]; PETER SCHLECHTRIEM, UNIFORM SALES LAW 39 (1986) [hereinafter SCHLECHTRIEM, UNIFORM SALES LAW]; Ingeborg Schwenzer & Pascal Hachem, *Article 7*, in

This article focuses on a principle of good faith and UNCITRAL's good faith directive in the CISG. It argues that good faith in the CISG plays a limited role, both as a matter of the CISG's content and its application by courts. The CISG does not mandate that good faith be an implied term of agreements between parties governed by the CISG.⁸ A good faith principle may confirm an interpretation of a sales contract under the CISG or increase support for interpretations that are reached on other grounds. Good faith, however, does not impose obligations on the contracting parties unless their contract provides for good faith. Instead, if good faith governs the parties' agreement at all, it does so only under applicable domestic law.⁹ In explaining good faith's limited role in the CISG, this article makes three claims. First, the good faith directive of the CISG's Article 7(1) does not include a good faith principle that is binding on contracting parties.¹⁰ Second, although there is a more precise general principle that underlies a number of the CISG's provisions, it is not one of good faith. The principle instead is one of "contracting cost reduction," which requires contracting parties to reduce the cost of executing and performing under CISG contracts.¹¹ Third, cases implicating the interpretation of contracts under the CISG's good faith directive or on an underlying principle of good faith in the CISG arise infrequently, and the reliance on good faith in these cases is often suspect.¹² Together, these three claims suggest that good faith, whether as a directive or an underlying principle, plays only a modest role in the CISG. Parts I through III of this article defend each of the three

COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 120, 136 (Ingeborg Schwenzer ed., 3d ed. 2010); cf. Pilar Perales Viscasillas, *Article 7, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): COMMENTARY* 111, 121 (Stefan Kröll et al. eds., 2011).

⁸ Cf. CIGSLC, *supra* note 5, art. 13(1) (stating that an issuer of a standby letter of credit must act in good faith in discharging its obligations under the credit).

⁹ See CISG, *supra* note 1, art. 7(1); United Nations Conference on Contracts for the International Sale of Goods, Vienna, Austria, Mar. 10-Apr. 11, 1980, *Commentary on the Draft Convention on Contracts for the International Sale of Goods*, at 17, UN Doc. A/CONF.97/5 (1991) [hereinafter *Commentary on the Draft Convention*]. For other UNCITRAL conventions that contain provisions to the same effect, see *supra* note 6.

¹⁰ See CISG, *supra* note 1, art. 7.

¹¹ See *id.* art. 16(2)(b).

¹² See Cour d'appel [CA] [Regional Court of Appeal] Grenoble, *Chambre Commerciale*, Feb. 22, 1995, JDI 1995, 632 (Fr.), available at <http://cisg3.law.pace.edu/cases/950222fl.html>; Bundesgerichtshof [BGH] [Federal Supreme Court] Sept. 26, 2012, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] (Ger.), available at <http://cisgw3.law.pace.edu/cases/120926g1.html> (Clay case); Oberlandesgericht [OLG] [Provincial Appellate Court] Sept. 15, 2004, INTERNATIONALES HANDELSRECHT [IHR] 70, 2005, available at <http://cisgw3.law.pace.edu/cases/040915g2.html>; CA 7833/06 *Parmesa Ceramica v. Yisrael Mendelson Eng'g Technical Supply Ltd.* [2009] IsrLR 27 (Isr.).

claims identified above. Part IV briefly explains that the modest role of good faith in the CISG in fact might be a good thing. The article concludes by describing the implications of good faith's limited role in UNCITRAL conventions.

I. GOOD FAITH: A CONCEPT WITHOUT A STANDARD

The CISG has been ratified by eighty-three countries to date, including every major trading partner except the United Kingdom, South Africa, and India.¹³ It is estimated that over three quarters of world trade is presently governed by the CISG.¹⁴ By almost any measure, the CISG is the most successful of UNCITRAL's conventions.¹⁵ The CISG expressly refers to good faith in Article 7(1), which provides in relevant part that, in interpreting the CISG, regard is to be had for the need to promote "the observance of good faith in international trade."¹⁶ It is well known that this reference to good faith reflects a compromise among the delegates of the Vienna Conference.¹⁷ Some delegates hoped that a good faith requirement would be applicable to contract formation and performance under the CISG.¹⁸ Others worried that a good faith obligation on contracting parties would invite reliance on national conceptions of good faith in the interpretation of contracts.¹⁹ Read literally, Article 7(1) requires a regard for good faith only in the interpretation of the CISG's provisions.²⁰ It does not, however, impose a duty to act in good faith on contracting parties.²¹

Some scholars maintain that Article 7(1)'s good faith directive is merely an interpretative rule that imposes a duty on adjudicators to interpret CISG provisions in good faith. This requirement, which is not imposed by the Vienna Convention on the Law of Treaties ("VCLT"), makes sense.²²

¹³ See UNCITRAL Texts and Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), http://www.uncitral.org/uncitral_texts/sale_goods/1980CISG_status.html (last visited October 12, 2014).

¹⁴ See ULRICH MAGNUS, *CISG VS. REGIONAL SALES LAW UNIFICATION WITH A FOCUS ON THE NEW COMMON EUROPEAN SALES LAW 2-3* (2012).

¹⁵ *Id.* at 3.

¹⁶ CISG, *supra* note 1, art. 7(1).

¹⁷ United Nations Conference on Contracts for the International Sale of Goods, Vienna, Austria, Mar. 10-Apr. 11, 1980, ¶¶ 40-56, UN Doc. A/CONF.97/19 (1991) [hereinafter Conference on CISG].

¹⁸ MAGNUS, *supra* note 14, at 2-3.

¹⁹ See Conference on CISG, *supra* note 17.

²⁰ CISG, *supra* note 1, art. 7(1).

²¹ Cf. CIGSLC, *supra* note 5, art. 13(1) (stating that an issuer of a standby letter of credit must act in good faith in discharging its obligations under the credit).

²² See, e.g., JOHN O. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 134* (H. Flechtner ed., 4th ed. 2009); Michael Bonell,

Article 31(1) of VCLT requires that treaties be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaties in their context and in light of [the treaties’] object and purpose.”²³ The Article, however, does not incorporate the CISG’s restrictive rider, “in international trade.” This is likely because the VCLT applies not only to commercial treaties, but also to every other kind of international treaty.²⁴ The CISG is a commercial treaty, and Article 7(1) of the CISG instructs adjudicators to interpret its provisions to promote good faith in international trade—an objective that is inapplicable to non-commercial treaties.²⁵ Thus, Article 7(1)’s interpretive directive is not superfluous in light of Article 31(1) of the VCLT.²⁶ Rather, Article 7(1) adds to the VCLT’s own good faith directive and therefore has an independent purpose.

A significant number of scholars disagree about the purpose of the CISG’s good faith directive. They maintain that Article 7(1) is both an interpretive rule and a standard of conduct that applies to parties’ performance under sales contracts.²⁷ Additionally, and perhaps more importantly, the clear trend in case law has been to apply the CISG’s good faith directive to the conduct of the contracting parties.²⁸ Notwithstanding Article 7(1)’s language, it probably is too late to convince scholars and courts that the Article 7(1)’s good faith requirement is an interpretive rule only.

However, given this trend in the case law and scholarly commentary, it is worth asking exactly what good faith under Article 7(1) requires of contracting parties. If Article 7(1) mandates that contracting parties perform their contracts in good faith, the question remains as to what counts as good faith performance. Answering this question requires a good faith standard, and none is apparent in the text of Article 7(1). Good faith is a “portmanteau” or “compendium” concept. Thus, good faith merely connotes a certain kind of behavior without indicating the criteria that behavior must meet in order to be good faith behavior. In other words,

Article 7, in COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 65 (C. Massimo Bianca & Michael Bonell eds., 1987).

²³ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

²⁴ *See id.*

²⁵ *See* Conference on CISG, *supra* note 17, ¶ 44 (statement of an Italian representative to the Vienna Conference explaining that the former Article 6 required parties, courts, and arbitrators to interpret the CISG uniformly).

²⁶ *See id.*

²⁷ *See* Schlechtriem, *Article 7*, *supra* note 7, at 63; SCHLECHTRIEM, UNIFORM SALES LAW, *supra* note 7, at 39; Schwenger & Hachem, *supra* note 7, at 136; *cf.* Viscasillas, *supra* note 7, at 121 (a better view applies good faith to the parties’ rights and obligations despite the legislative history).

²⁸ *See supra* note 7.

“good faith,” by itself, does not incorporate any standard by which parties’ performances under sales contracts may be measured. To serve as a standard of conduct, good faith must refer to a principle which governs the parties’ performance. The principle need not precisely define what good faith requires in every possible circumstance. Nor must the principle deem certain sorts of conduct as being in bad faith. But, at a minimum, the principle must describe some sort of standard of behavior that qualifies as good faith. Otherwise, the concept of good faith has no content.

At times, national law supplies a principle in a statutory definition of good faith or in case law on good faith contracting behavior. For instance, Uniform Commercial Code (“UCC”) § 1-201(b)(20) defines good faith as “honesty in fact and the observance of reasonable commercial standards of fair dealing.”²⁹ “Standards of fair dealing” are opaque and possibly no clearer than the notion of good faith that they define. However, “fair dealing” at least provides some standard by which the good faith performance under a contract can be measured.

Article 7(1) says nothing about the principle of good faith that is applicable to contracting parties’ conduct under the CISG.³⁰ Additionally, the familiar ways in which a good faith standard may be identified and given content are unavailable under the CISG.³¹ Domestic law may import a standard that a statute does not state in order to give content to a term in the statute in either of two circumstances. The first occurs when the statute expressly allows for the incorporation of recognized principles of law that exist outside the statute’s scope. For instance, UCC § 1-103(b) allows the UCC’s provisions to be supplemented with principles of law and equity, except where another provision of the UCC would displace such principles.³² In this way, non-UCC law may supply an additional standard of good faith to supplement the UCC’s general definition of good faith as “honesty in fact and the observance of reasonable commercial standards of fair dealing.”³³

The second circumstance occurs when the standard accompanying a statutory term is articulated across a broad range of subject matters. Coherence among relatively similar areas of the law, or a common legislative understanding, may suggest that a specific standard will supply content to a particular statutory term, even when the statute is self-contained and does not provide its own standard.³⁴ Thus, a standard for good faith

²⁹ U.C.C. § 1-201(b)(20) (2014).

³⁰ CISG, *supra* note 1, art. 7(1)-(2).

³¹ *See id.*

³² U.C.C. § 1-103(b) (2014).

³³ *Id.* § 1-201(b)(20).

³⁴ *See, e.g.*, 11 U.S.C. §§ 109(c)(5)(B), 363(m), 364(e), 548(c), 550(b)(1), 1113(b)(2), 1126(e) (2012).

may be supplied if good faith is construed *in pari materia* with the term's other uses in different areas of law. The interpretation of the term "good faith" in the Bankruptcy Code illustrates this second content-supplying circumstance. "Good faith" appears in certain of the Bankruptcy Code's provisions, but is left undefined.³⁵ In supplying these Code provisions with a good faith standard, courts regularly rely on good faith standards operative under other commercial statutes. For instance, under § 548(c) of the Bankruptcy Code, a good faith transferee of a fraudulent transfer retains the interest in the transferred property to the extent that the transferee provided value to the debtor.³⁶ Section 550(b)(1) of the Code prevents the bankruptcy trustee from recovering fraudulently conveyed property or its value from an immediate or mediate transferee that has taken the property in good faith.³⁷ The Code, however, says nothing about when a transferee takes fraudulently transferred property in good faith.³⁸ Instead, case law tends to supply an objective standard to construe these Code provisions. According to this standard, good faith imputes to the transferee the knowledge that a reasonable person has or would have acquired, based on what the transferee actually knew at the time of the transfer.³⁹ The transferee acts in bad faith when he or she fails to inquire into the nature of a transfer where, given what the transferee knew at the time of the transfer, the transferee should have made an inquiry. At times, courts also apply an objective good faith standard to transferees under § 548(c) and § 550(b)(1) based in part on the UCC's general definition of good faith.⁴⁰ According to this definition, "good faith" under the UCC requires "honesty in fact and the observance of reasonable commercial standards of fair dealing."⁴¹ Courts in bankruptcy proceedings rely on the UCC's good faith principle of "reasonable commercial standards of fair dealing" in finding that an objective good faith standard governs the transferee's behavior generally.⁴²

The UCC's "standards of fair dealing" definition, however, is not available under the CISG. This is because the CISG, by its terms, requires that its provisions be construed in an "autonomous" manner, which means that interpretation of the treaty's substantive provisions must not rely on

³⁵ See *id.*

³⁶ *Id.* § 548(c).

³⁷ *Id.* § 550(b)(1).

³⁸ *Id.* §§ 109(c)(5)(B), 363(m), 364(e), 548(c), 550(b)(1), 1113(b)(2), 1126(e).

³⁹ See, e.g., *In re Nieves*, 648 F.3d 232 (4th Cir. 2011); *In re Drier*, 452 B.R. 391 (Bankr. S.D.N.Y. 2011); *In re Teleservices Grp.*, 44 B.R. 767 (Bankr. W.D. Mich. 2011); cf. *In re Ellingson MacClean Oil Co.*, 834 F.2d 599 (6th Cir. 1987) (relying on pre-2001 Article 1's definition of good faith).

⁴⁰ See *supra* note 39.

⁴¹ U.C.C. § 1-201(b)(20) (2014).

⁴² See *supra* note 39.

domestic law.⁴³ Nor does the diplomatic history surrounding the CISG's treatment of good faith allow for an understanding of good faith based on domestic law. The CISG's history, instead, reveals a compromise to leave the term "good faith" and its application unspecified and to exclude any reliance on domestic law that might supply meaning to the term.⁴⁴ During the CISG's drafting, one proposed Article would have required contracting parties to "observe the principles of fair dealing and act in good faith."⁴⁵ Although some participants in the drafting of the CISG optimistically believed that over time domestic law could provide a uniform interpretation of the proposed good faith provision, others worried that national courts would ignore uniformity and interpret the provision relying only on notions in their own domestic law.⁴⁶

Divided opinion among the UNCITRAL Commission led to the adoption of the language in Article 7(1).⁴⁷ Many considered Article 7(1) to be a "realistic compromise" between the drafters who wanted to retain the proposed good faith article and those who wanted no reference to good faith in the CISG at all.⁴⁸ After this compromise, provisions on contract formation, including the redrafted Article 7(1), were combined with a draft of the CISG's substantive provisions to form the 1978 draft of the CISG.⁴⁹ In its official commentary on the redrafted Article 7(1) (then Article 6), the UNCITRAL Secretariat noted that it was "especially important to avoid differing constructions of this Convention by national courts, each dependent upon the concepts used in the legal systems of the country of the forum."⁵⁰ This remark explicitly calls for an autonomous interpretation of the CISG's Article 7(1). Thus, Article 7(1)'s drafting history militates against the use of domestic law to supply meaning to good faith under the

⁴³ See CISG, *supra* note 1, art. 7(1). For other UNCITRAL conventions that contain provisions to the same effect, see *supra* note 5. The requirement of an autonomous interpretation is not peculiar to the CISG. European Community law also has been held to require an autonomous interpretation. See, e.g., C-151/02 Landeshauptstadt Kiel v. Jaeger, [2003] E.C.R. I-8389; C-287/98 Luxembourg v. Linster, [2000] E.C.R. I-6917; see also FRANCO FERRARI, *CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 12-13 (2012); PETER HUBER & ALASTAIR MULLIS, *THE CISG* 7 (2007).

⁴⁴ See Rep. of the U.N. Comm. on Int'l Trade Law on the Work of its Eleventh Session, Annex I, ¶ 42, UN Doc. A/33/17 (1978) [hereinafter Rep. of the U.N. Comm. on Int'l Trade Law].

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See Draft Convention on Contracts for the International Sale of Goods art. 6, in Rep. of the U.N. Comm. on Int'l Trade Law, *supra* note 44, ¶¶ 55-56.

⁴⁸ *Id.* ¶ 58; cf. Conference on CISG, *supra* note 17, ¶ 50 (statement of a U.S. representative to the effect that the existing text was a "useful compromise").

⁴⁹ See *Commentary on the Draft Convention*, *supra* note 9.

⁵⁰ See Rep. of the U.N. Comm. on Int'l Trade Law, *supra* note 44.

CISG. At most, domestic legal standards of good faith may only serve to confirm constructions of the CISG's provisions that do not rely on that domestic law. As a result, the CISG's preclusion of reliance on domestic law prevents the incorporation of a good faith principle into Article 7(1). Although Article 7(1)'s requirement of uniformity obligates adjudicators to take into account other adjudicator's constructions of CISG provisions, the CISG itself does not provide them with the legal materials required to develop a good faith standard.⁵¹

Similarly, adjudicators may not use the references to good faith in other UNCITRAL conventions and model laws to develop a standard of good faith under the CISG. As previously noted, other UNICITRAL conventions, including the Convention on the Assignment of Receivables in International Trade and the Convention on the Use of Electronic Communications in International Contracts, incorporate a requirement of good faith in the interpretation of their provisions.⁵² Additionally, the International Institute for the Unification of Private Law ("UNIDROIT") has incorporated a similar good faith requirement in some of the conventions that it has sponsored.⁵³ Although it might appear that the good faith requirements in other international treaties may be able to supply a good faith standard to the CISG's good faith directive, they cannot. True, the CISG's requirement that its terms be given an "autonomous" interpretation does not prevent the construction of those terms by resorting to other international conventions. Rather, the CISG only bars recourse to the meaning of good faith under domestic law.⁵⁴ Moreover, Article 7(1)'s directive that the CISG's provision be interpreted in light of the convention's international character also supports construing good faith in the CISG in light of references to good faith in other international conventions. However, the uniform interpretation of a term common among international conventions is generally an unsafe option. Typically there is no *in pari materia* rule of interpretation across international conventions.

One reason for this is that the construction of a term in one international convention is unlikely to be an accurate interpretation of the same term in another international convention. A convention is binding on a state only if it has ratified that convention. The ratifying state's reasonable understanding of a convention's provisions might not include the provisions in other international conventions or model laws that it has not ratified. Perhaps this is why recognized general rules of treaty interpretation

⁵¹ See CISG, *supra* note 1, art. 7(1)-(2).

⁵² See, e.g., CUECIC, *supra* note 5, art. 5(1); CARIT, *supra* note 6, art. 7(1).

⁵³ See, e.g., UNIDROIT Convention on International Financial Leasing, Fr.-It.-Nigeria, art. 4(1), May 28, 1988, 2321 U.N.T.S. 195.

⁵⁴ See CISG, *supra* note 1, art. 7.

acknowledge an *in pari materia* rule only for agreements between states parties to multiple treaties.⁵⁵ Furthermore, the understanding of a term in one convention will not extend to the same term in other conventions if the other conventions deal with an unrelated subject matter or contain other provisions that were incorporated into the convention after ratification. For example, the ratifying state might construe the meaning of “default” in a convention governing international security interests differently from its meaning in a convention that governs standby letters of credit. For both reasons, the construction of the same term in other international conventions likely does not accurately reflect the ratifying state’s understanding of a term in the convention it has ratified. Thus, a term in the CISG is not justifiably interpreted in light of a similar term that is common to UNCITRAL or UNIDROIT conventions.

A more important consideration against the use of a common construction of similar terms in different international conventions is that none of the UNCITRAL or UNIDROIT conventions that refer to “good faith” supplies a good faith principle.⁵⁶ UNCITRAL and UNIDROIT conventions incorporate the good faith directive in more or less the same terms as the good faith directive in the CISG.⁵⁷ Each convention’s good faith directive requires interpretation of the particular convention in a way that promotes “the observance of good faith” in international trade. None, however, purports to establish any articulated standard of good faith applicable to the particular convention.⁵⁸ Thus, even if the *in pari materia* interpretative rule were properly used to interpret international treaties, construing the good faith directive in the CISG *in pari materia* with other UNCITRAL or UNIDROIT conventions’ good faith directives still would not provide a workable standard for good faith under the CISG.

Because Article 7(1)’s good faith directive does not provide a behavioral standard for contractual performance, we are left to speculate about what good faith under the CISG’s good faith directive might mean.⁵⁹ Good faith could require cooperation between the contracting parties in performance of their contract. Or it could preclude parties from taking advantage of each other with respect to events that may occur over the course of a contract’s lifetime. Good faith might even contemplate a requirement that parties

⁵⁵ The general rules of interpretation recognized by the Vienna Convention on the Law of Treaties allow subsequent agreements between parties to a treaty to inform the meaning of the treaty’s terms. See Vienna Convention on the Law of Treaties art. 31(3)(b), May 23, 1969, 1155 U.N.T.S. 331. Article 31(3)(b) does not extend to treaties to which a state is not a party. See *id.*

⁵⁶ See *supra* note 6.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See CISG, *supra* note 1, art. 7.

further each others' interests in performance of their contract, even at their own expense. A preference for any one of these kinds of good faith behavior, however, cannot be found in Article 7(1).⁶⁰ Here, the problem is not that the operative notion of good faith is vague. Rather, it is that Article 7(1) does not articulate any standard of good faith that controls contractual performance. The absence of a standard is unsurprising in light of the diplomatic compromise that produced Article 7(1)'s language.⁶¹ The delegates who were unable to agree that good faith was to apply to the parties' performance of a sales contract also did not likely agree on a standard of good faith that would govern that performance.⁶²

At times, courts assume that Article 7(1) incorporates a standard of conduct.⁶³ For instance, a German trial court had to decide whether the seller's standard terms became part of the contract when they were not supplied to the buyer before the contract was concluded.⁶⁴ The court determined that the CISG did not bind a buyer to its seller's standard terms, when the terms were not otherwise known to the buyer or made reasonably available to it.⁶⁵ In doing so the court invoked good faith as an alternative basis for its decision.⁶⁶ Relying on Article 7(1)'s "general obligation [of good faith]," the court concluded that a contract incorporates the seller's standard terms only if the seller supplies the buyer with them before the contract's conclusion.⁶⁷ In so concluding, the court did not specify the principle, general or specific, which would require a seller to provide a buyer with its standard terms before concluding a contract.⁶⁸ The unspecified principle cannot be one of good faith in the performance of a contract because the court's ruling dealt with contract formation, not

⁶⁰ *Id.*

⁶¹ See Gyula Eorsi, *A Propos for the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 348-49 (1983) (describing the compromise made by the president of the Vienna Conference).

⁶² *See id.*

⁶³ See Landgericht Neubrandenburg [LG] [Neubrandenburg Trial Court] Aug. 3, 2005, INTERNATIONALES HANDELSRECHT [IHR] 26, 2006 (Ger.), available at <http://cisgw3.law.pace.edu/cases/050803g1.html>; see also Oberlandesgericht Celle [OLG] [Court of Appeals] July 24, 2009, INTERNATIONALES HANDELSRECHT [IHR] 81, 2010 (Ger.), available at <http://cisgw3.law.pace.edu/cases/090724g1.html>.

⁶⁴ Landgericht Neubrandenburg [LG] [Neubrandenburg Trial Court] Aug. 3, 2005, INTERNATIONALES HANDELSRECHT [IHR] 26, 2006 (Ger.), available at <http://cisgw3.law.pace.edu/cases/050803g1.html>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See id.*

contract performance.⁶⁹ In other words, the seller has an obligation to supply its standard terms to the buyer. However, for this obligation to be based on a “general obligation” of good faith, it must derive from a principle of good faith, and the court recited no principle of good faith that requires disclosure of standard terms.⁷⁰ Without such a principle, the court is simply declaring that the seller must disclose its standard terms. Its decision is therefore not based on an unstated principle.⁷¹

II. GOOD FAITH AS AN UNDERLYING PRINCIPLE

A good faith obligation of contracting parties that does not exist under Article 7(1) might possibly be found under Article 7(2). Article 7(2), in relevant part, provides that “[q]uestions concerning a matter governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based.”⁷² If good faith is one of the general principles on which the CISG is based, good faith may be used to supplement the CISG’s substantive provisions. The CISG’s substantive provisions govern both the formation and performance of the sales contract, and under Article 7(2) a general principle of good faith might underlie these provisions.⁷³ In fact, some scholars conclude that good faith is a general principle underlying the CISG.⁷⁴ I disagree. Although the CISG exhibits a general underlying principle, it is not one of good faith.

Initially, it is important to note how general principles are identified in Article 7(2). By Article 7(2)’s terms, two requirements are apparent.⁷⁵ First, Article 7(2) refers to questions that the CISG governs, but does not expressly address in its provisions.⁷⁶ Thus, for Article 7(2) to apply, an “internal gap” in the CISG’s provisions must be present. Second, the principle addressing the question about which there is an internal gap must be a general one that underlies the CISG.⁷⁷ The demand that the principle underlie the CISG plausibly requires that a number of the CISG’s provisions exhibit the principle. If this were not the case, the principle

⁶⁹ Landgericht Neubrandenburg [LG] [Neubrandenburg Trial Court] Aug. 3, 2005, INTERNATIONALES HANDELSRECHT [IHR] 26, 2006 (Ger.), available at <http://cisgw3.law.pace.edu/cases/050803g1.html>.

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² CISG, *supra* note 1, art. 7(2).

⁷³ See *CISG Database*, PACE LAW SCH., <http://www.cisg.law.pace.edu/cisg/cisgintro.html> (last visited Sept. 14, 2014).

⁷⁴ See JOSEPH LOOKOFKY, UNDERSTANDING THE CISG IN THE USA 34 (4th ed. 2012).

⁷⁵ CISG, *supra* note 1, art. 7(2).

⁷⁶ *Id.*

⁷⁷ *Id.*

identified would not be one on which the CISG is based, as the language of Article 7(2) requires. Thus, it is not enough that a principle be merely consistent with one or more of the CISG's provisions. For the principle to be one on which the CISG is based, a number of the CISG's provisions must reflect that principle.⁷⁸

This second requirement of Article 7(2) makes it difficult to find a good faith principle underlying the CISG. To illustrate, assume that the underlying principle of good faith is a general ethical obligation to act honestly and fairly. If this is what good faith in the CISG required, Article 7(2) would allow for the resolution of internal-gap questions under the CISG by reliance on principles of fairness and honesty.⁷⁹ Fairness or honesty, however, may not have any close connection or relevance to the CISG's provisions.⁸⁰ For instance, Article 21(2) deems a late acceptance to be effective if its dispatch normally would have reached the offeror in due time.⁸¹ In turn, Articles 85 to 88 impose on the buyer and seller obligations to preserve contract goods in the event of a late acceptance.⁸² It is unclear how a rule of contract formation or a remedial rule implicates good faith in a dispute under these CISG provisions. Would it be dishonest or unfair for a late acceptance to be ineffective, without regard to whether its dispatch normally would have reached the offeror? Similarly, would it be dishonest or unfair if an injured buyer in possession of goods had no duty to preserve those goods (without an agreement to this effect)? These CISG provisions, and others like them, do not seem to be based on principles of fairness and honesty. Of course, the CISG's substantive provisions are consistent with an abstract principle of fairness and honesty. But Article 7(2) requires more than consistency; it also requires that the CISG in its entirety or in a great number of its provisions be based on principles of fairness and honesty which, as assumed earlier, define good faith.

Scholars and the CISG's drafting history suggest that a principle of good faith might underlie the following CISG provisions⁸³:

1. Article 16(2)(b), which deems an offer irrevocable when the offeree reasonably relies on the offer being held open.⁸⁴

⁷⁸ The required number and importance of CISG provisions that must exhibit the principle is obviously a matter of judgment, however, and is not algorithmic.

⁷⁹ CISG, *supra* note 1, art. 7(2).

⁸⁰ *Id.*

⁸¹ *See id.* art. 21(2).

⁸² *See id.* arts. 85, 88.

⁸³ *Commentary on the Draft Convention, supra* note 9, ¶ 3; Franco Ferrari, *Articles 1-13*, in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 501, 537* (Franco Ferrari et al. eds., 2004).

⁸⁴ CISG, *supra* note 1, art. 16(2)(b).

2. Article 21(2), which deems a late acceptance to be effective if its dispatch normally would have reached the offeror in due time.⁸⁵
3. Article 29(2), which precludes a party from relying on a “no oral modification” clause in a contract when its conduct precludes it from doing so.⁸⁶
4. Articles 37 and 46, which respectively allow the seller to cure a non-conformity in goods delivered before the date of delivery and require the seller to remedy by repair non-conformities in goods delivered, unless cure or repair is unreasonably inconvenient or expensive to the injured party.⁸⁷
5. Article 40,⁸⁸ which precludes the seller from relying on the buyer’s failure to give notice of non-conformity in the goods in accordance with Articles 38 and 39⁸⁹ if the seller knows or ought to know of the non-conformity and does not disclose it to the buyer.
6. Articles 47(2), 64(2) and 82, which limit the injured party’s right to avoid a contract.⁹⁰
7. Article 80, which bars a party from relying on the other party’s breach to the extent that the party caused the breach.⁹¹
8. Articles 85 to 88, which impose on injured buyers and sellers the obligation to take steps to preserve goods.⁹²

The problem, however, is that good faith does not fit with these articles as an underlying principle in the way Article 7(2) requires.⁹³ Describing an article as reflecting a good faith principle simply repeats the article’s requirements in a way that is no more general than the article’s language. For example, if good faith requires acting reasonably, then Article 16(2)(b)

⁸⁵ *Id.* art. 21(2).

⁸⁶ *Id.* art. 29(2).

⁸⁷ *Id.* arts. 37, 46.

⁸⁸ *Id.* art. 40.

⁸⁹ *Id.* arts. 38-39.

⁹⁰ *Id.* arts. 47(2), 64(2), 82.

⁹¹ *Id.* art. 80.

⁹² *Id.* arts. 85-88.

⁹³ *Id.* art. 7(2).

makes an offer irrevocable when the offeree acts reasonably in reliance on it being irrevocable.⁹⁴ But rather than showing that Article 16(2)(b) incorporates a principle of good faith, in this case the principle merely repeats what Article 16(2)(b) already provides. On the other hand, a more general description of the operative principle behind good faith would greatly exceed the scope of the content of the articles listed. As a result, the CISG would not seem to be based on that operative principle. For instance, good faith might require the disclosure of material information between the contracting parties during both the negotiation and performance of the contract.⁹⁵ The principle is broad, requiring the disclosure of information in negotiations that might reduce the value of the contract to the disclosing party. However, it goes beyond the scope of Article 8(3), which requires less: that the intent of the parties be determined, taking into account statements made by them during negotiations.⁹⁶ For this reason, a principle requiring disclosure does not underlie the CISG.

A principle that does in fact underlie the CISG asks whether a party's act or omission would likely reduce the costs of contracting for most contracting parties, either in executing a contract or performing it.⁹⁷ Under this principle, a party is obligated to act or refrain from acting if doing so would reduce the parties' cost of contracting.⁹⁸ Taking measures to reduce contracting costs and therefore increase the net value of the contract is something that both contracting parties generally would prefer. The contracting cost reduction principle is broad, applying to all stages of contractual relations: formation, performance and even after a breach of the contract.⁹⁹ For instance, where mutual performance is sequential rather than simultaneous, the first performer risks being exploited by the party performing later. Although contractual devices, such as liquidated damages clauses, guarantees, or a sheer reduction in investment, are available to protect the first performer, these devices are costly for both parties. Instead, treaty provisions that provide for these protections save the parties the costs of having to negotiate for them in their contracts. Also, after breach, the injured party sometimes can take measures to reduce its loss. The contracting cost reduction principle relieves the parties, who do not know which party may breach first, of the expense of having to provide for these measures.

The CISG provisions listed above all reflect this contracting cost

⁹⁴ *Id.* art. 16(2)(b).

⁹⁵ See John Klein, *Good Faith in International Transactions*, 15 LIVERPOOL L. REV. 115, 126-29 (1993).

⁹⁶ CISG, *supra* note 1, art. 8(3).

⁹⁷ See PACE LAW SCH., *supra* note 73.

⁹⁸ See *id.*

⁹⁹ See *id.*

reduction principle. The principle also arguably underlies Article 16(2)(b)'s irrevocability rule.¹⁰⁰ By making an offer irrevocable under prescribed circumstances, the rule increases the value of the offer to the offeree. This is because the offeree can rely on the offer remaining open while it investigates the suitability of the offer's terms for its purposes. True, the rule may increase the offeror's cost of making its offer, because—unless the offeror provides otherwise—the offeree's reliance renders the offer irrevocable. This in turn increases the offeror's liability should changed circumstances reduce the value of making the offer to the offeror. Nonetheless, the drafters of Article 16(2)(b) appear to have judged that the net benefits of the article's rule favor irrevocability.¹⁰¹ The irrevocability rule arguably saves parties the costs of contracting for an irrevocable offer.

Article 80 also reflects this same cost reduction principle.¹⁰² Article 80 bars a party from relying on a breach of a contract by the other contracting party to the extent that the party caused the breach.¹⁰³ Thus, no remedy is available to the injured party if the injured party was responsible for the counterparty's breach. Article 80 prevents an exploitative strategy of "first cause breach, then seek a remedy for breach."¹⁰⁴ This saves the contracting parties the expense of having to take defensive measures, contractual or otherwise, to avoid being the victim of such a strategy. Another example of the contracting cost reduction principle may be found in Article 77.¹⁰⁵ Article 77's mitigation requirement reduces the damages recoverable by an injured party if it could have taken measures to avoid excessive damages after a breach.¹⁰⁶ Thus, Article 77 effectively prevents an injured party from increasing its damages when that party could otherwise take cost-effective measures ("reasonable" measures) to avoid them.

In a case decided in 2001, the German Supreme Court made use of the contracting cost reduction principle without directly acknowledging it.¹⁰⁷ In that case, the Court determined that a buyer who was unaware of a seller's standard terms and conditions before entering into a contract was not bound by those terms and conditions.¹⁰⁸ The Court noted that requiring the buyer to inquire into the seller's standard terms would delay the

¹⁰⁰ CISG, *supra* note 1, art. 16(2)(b).

¹⁰¹ Ferrari, *supra* note 83, at 537.

¹⁰² CISG, *supra* note 1, art. 80.

¹⁰³ *Id.* art. 80.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* art. 77.

¹⁰⁶ *Id.*

¹⁰⁷ Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 31, 2001, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 370, 2001 (Ger.), available at <http://cisgw3.law.pace.edu/cases/011031g1.html>.

¹⁰⁸ *Id.*

conclusion of the contract.¹⁰⁹ By comparison, according to the Court, the seller easily could disclose these terms to the buyer before entering into the agreement.¹¹⁰ Based on these considerations, the Court concluded that principles of good faith in international trade as well as principles of cooperation and disclosure prevented undisclosed standard terms from being included in an executed contract.¹¹¹ The reference to good faith in the German Supreme Court's decision, however, is unnecessary, as is the reference to principles of cooperation and disclosure. Without loss, the Court's decision could have easily been reached on the basis of the cost reduction principle. Based on the facts it recited, the Court could have found that the seller and buyer's aggregate contracting costs are reduced when the seller is required to disclose its standard terms to the buyer. This finding comfortably supports the Court's conclusion that the buyer is not bound by the seller's standard terms that are not disclosed to it and of which it is unaware before the contract is concluded.

Critics might argue that the principle of contracting cost reduction exhibited in the CISG's provisions is a principle of good faith and not a principle that competes with good faith. In one respect, not much turns on the label given to the principle. The only question for Article 7(2)'s purposes is whether the principle underlies the CISG.¹¹² In substance, however, the contracting cost reduction principle does not seem to be one of good faith. For one thing, it differs from the general ethical obligations to act honestly and fairly that we would typically associate with good faith behavior. Nothing in the CISG's articles listed above suggests that failure to adhere to those articles would be dishonest or unfair. The offeror who fails to disclose its standard terms to the offeree, for instance, might innocently but mistakenly believe that the offeree is familiar with them. Or an injured party might, through oversight, fail to preserve the goods after a breach when it easily could have done so. The cost-reduction principle, however, still applies in both of those cases.

Furthermore, invocation of good faith in judicial decisions indirectly confirms that the contracting cost reduction principle is not just good faith in another guise. Adjudicators that mention good faith merely refer to the need to promote good faith in international trade.¹¹³ But they do not say what good faith under the CISG might entail.¹¹⁴ The reasoning in these cases therefore does not make the reduction of contracting costs even

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² CISG, *supra* note 1, art. 7(2).

¹¹³ *See infra* Part III.

¹¹⁴ *See id.*

relevant to good faith.¹¹⁵ For instance, the cases do not hold that good faith requires a party to perform in the way in which the parties intended, as evidenced by their agreement. Nor do they find that good faith prohibits a party from acting opportunistically to avoid an unprofitable contract or renegotiating the distribution of gains from performance of a profitable one. Requiring performance as intended or the avoidance of opportunistic behavior would affect contracting costs, as both requirements save parties the cost of negotiating for these protections or taking further precautions during the contract's performance. Mention of these duties as requirements of good faith would signal the relevance of contracting costs. Courts that invoke good faith, however, appear to understand the notion to refer to a vague ethical standard of conduct rather than behavioral evidence bearing on contracting costs. None of the judicial references to good faith suggests that courts believe that its underlying principle requires that parties reduce the cost of negotiating and performing a contract.¹¹⁶ Finally, contracting cost reduction provides a rationale for the obligations that the CISG imposes on contracting parties. Thus, even if a standard of good faith underlies the CISG and obligates contracting parties to act in good faith, that standard is one in which good faith means making an effort to reduce the costs of contracting. Beyond this, good faith does not have any meaning under the CISG.

III. GOOD FAITH IN THE COURTS AND ARBITRAL TRIBUNALS

However good faith is understood, some courts and arbitral tribunals apply good faith both in the interpretation of the CISG and the determination of contracting parties' obligations to each other under a sales contract. In doing so, adjudicators often do not specify whether they are relying on Article 7(1) or 7(2).¹¹⁷ Whichever provision of the CISG that the courts or arbitral tribunals rely on, the frequency of their references to good faith is misleading. It overestimates the importance of good faith in the decisions in which the notion is invoked. In fact, adjudicators seldom rely on good faith even if they mention it in their decisions.¹¹⁸ The clearest example of this occurs when a court mentions good faith while avoiding reliance on the notion as a ground for the court's result.¹¹⁹ A recent illustration of this "mention and avoid" tactic can be found in *Citgo Petroleum Corp. v. Seachem*.¹²⁰ In that case, a sales contract that was

¹¹⁵ *See id.*

¹¹⁶ *See id.*

¹¹⁷ *See id.*

¹¹⁸ *See id.*

¹¹⁹ *See id.*

¹²⁰ *Citgo Petroleum Corp. v. Seachem*, 2013 U.S. Dist. LEXIS 72898, at *15 (S.D. Tex.

governed by the CISG contained a Cost and Freight (“CFR”) delivery term.¹²¹ The buyer suffered a loss resulting from a delay in the delivery of the contract goods due to a breakdown in the carrier’s vessel while the goods were in transit.¹²² The seller knew in advance that the vessel that the carrier had selected to transport the goods had broken down in the past.¹²³ In the buyer’s suit against the seller, the buyer argued that the seller had breached its obligation to act reasonably and in good faith under Article 32(2) of the CISG in the selection of its vessel.¹²⁴ In its defense, the seller argued that the parties had opted-out of Article 32(2) by incorporating the CFR delivery term, defined by International Commercial Terms (“Incoterms”), in the contract. The Incoterms definition required the seller to arrange for a carriage contract on the “usual terms.”¹²⁵ According to the seller, the definition did not require it to make a reasonable contract of carriage in good faith.¹²⁶

The court split the difference, as it were, between the buyer and the seller’s arguments.¹²⁷ It agreed with the buyer that Article 32(2) applied, in part, to the seller’s delivery obligations despite the fact that the agreement incorporated a CFR delivery term.¹²⁸ However, the court limited the seller’s obligation to the terms of Article 32(2).¹²⁹ Under Article 32(2), where the contract requires that the seller arrange for the carriage of the contract goods, the seller must make an arrangement for transportation that is “appropriate in the circumstances.”¹³⁰ Accordingly, the court held that, under Article 32(2), the seller was required to arrange for an appropriate contract of carriage.¹³¹ Because a material issue of fact remained as to the appropriateness of the carriage contract that the seller had arranged, the court denied the seller’s motion for summary judgment.¹³² It is important to note that the court did not find that a carriage contract is appropriate only

May 23, 2013).

¹²¹ *Id.*

¹²² *Id.* at *3.

¹²³ *Id.*

¹²⁴ *Id.* at *21.

¹²⁵ *Citgo Petroleum Corp. v. Seachem*, 2013 U.S. Dist. LEXIS 72898, at *22 (S.D. Tex.

May 23, 2013).

¹²⁶ *Id.*

¹²⁷ *Id.* at *24.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ CISG, *supra* note 1, art. 32(2).

¹³¹ *Citgo Petroleum Corp. v. Seachem*, 2013 U.S. Dist. LEXIS 72898, at *24 (S.D. Tex.

May 23, 2013).

¹³² *Id.* at *24-25.

if the seller arranges it in good faith.¹³³ The court instead merely acknowledged the buyer's argument that Article 32(2) required good faith without relying on good faith in determining that the seller was obligated to make an appropriate contract of carriage.¹³⁴

Good faith may figure in an adjudicator's resolution of a dispute under a contract that is governed by the CISG in four different ways: (1) as dicta; (2) as an alternative ground for a result that is supported on another basis; (3) as an additional consideration bolstering a result that is supported by other considerations; and (4) as a basis for a result. None of these four uses of good faith, however, establish an important role for the principle of good faith in the case law. In fact, true reliance on good faith occurs only in cases in the fourth category. Cases in this category, however, are few in number, and the reliance on good faith in those cases is questionable. The following sections elaborate on each of the four different ways in which tribunals invoke the notion of good faith under the CISG.

A. *Dicta*

At times, tribunals refer to Article 7(1)'s good faith directive while deciding cases on different grounds. This is similar to the "mention and avoid" strategy used by the court in *Citgo Petroleum Corp.*¹³⁵ However, unlike that strategy, the tribunals invoking good faith in dicta often endorse good faith as a readily available basis for their decisions but choose instead to support those decisions on different grounds. The Spanish Supreme Court did just this in *Improgress GmbH v. Canary Islands Car, LS and Autos Cabrera Medina, SL*.¹³⁶ There, the buyer took a delivery of cars that allegedly did not conform to the contract but gave, according to the Supreme Court, untimely notice of the alleged nonconformities.¹³⁷ As a result, the Court concluded that the buyer was not entitled to a remedy. The cars were in good condition even with the damage alleged by the buyer.¹³⁸ In addition, the Court found that the buyer was aware of defects in the cars when it concluded the contract.¹³⁹ Based on both of these considerations, the Court concluded that the seller had not breached its agreement with the

¹³³ *Id.* at *24.

¹³⁴ *Id.*

¹³⁵ *Id.* at *15.

¹³⁶ S.T.S., Jan. 17, 2008 (R.A.J., No. 133) (Spain), available at <http://cisgw3.law.pace.edu/cases/080117s4.html>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*; see CISG, *supra* note 1, art. 35(2) (stating that a seller is not liable for nonconformity of the goods under Article 35(b) if, at the conclusion of the contract, the buyer knew or could not have been unaware of the nonconformity).

buyer.¹⁴⁰ Finally, the Court determined that the buyer's notice of the alleged nonconformities in the cars came too late and without excuse.¹⁴¹ According to the Court, Article 39(1)'s period for giving notice of a breach had passed by the time that the buyer had notified the seller that it had received and inspected the goods.¹⁴² Notice that nothing in the court's reasoning depends on a finding of bad faith on the part of the buyer.¹⁴³ The buyer had no remedy against the seller either because the cars delivered were not defective, because the buyer was aware of the defects when it concluded the contract, or because its tardy notice of the defects was unexcused. Although the Court noted that the need to observe good faith in international trade "should be highlighted in resolving the present appeal," good faith does not appear anywhere else in the Court's reasoning.¹⁴⁴ Thus, at most, the Court's reference to good faith is dictum.

B. Alternative Basis

Some tribunals have used Article 7(1)'s reference to good faith as an alternative ground for a result supported by application of the CISG's substantive provisions. In these cases, good faith serves as an independent basis for a result that finds sufficient support on different grounds. A 2005 German trial court decision is one such alternative basis case.¹⁴⁵ As previously mentioned, that case involved a seller that entered into a contract with a buyer without providing the buyer with its standard terms.¹⁴⁶ In a subsequent dispute between the buyer and the seller, the court had to decide whether the contract incorporated the seller's standard terms.¹⁴⁷ In line with other courts that have considered this question, the German court concluded that the terms of an offer that were not presented to the buyer and to which the buyer did not expressly agree could not be incorporated into the contract.¹⁴⁸ In reaching this conclusion, the German court relied on Article 8(2).¹⁴⁹ Under Article 8(2), the seller's offer must be interpreted

¹⁴⁰ S.T.S., Jan. 17, 2008 (R.A.J., No. 133) (Spain), *available at* <http://cisgw3.law.pace.edu/cases/130701s4.html>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Landgericht Neubrandenburg [LG] [Neubrandenburg Trial Court] Aug. 3, 2005, INTERNATIONALES HANDELSRECHT [IHR] 26, 2006 (Ger.), *available at* <http://cisgw3.law.pace.edu/cases/050803g1.html>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*; *accord* Roser Techs., Inc. v. Carl Schreiber GmbH, 2013 U.S. Dist. LEXIS

according to the understanding of a reasonable person in the buyer's circumstances. A reasonable person in the buyer's circumstances who was unaware of the seller's standard terms would not have interpreted the seller's offer to include them. Thus, the court concluded that the seller's offer did not include its standard terms and these terms therefore did not become part of the final agreement.¹⁵⁰ Other tribunals have used the same reasoning to support this conclusion.¹⁵¹

The court offered an alternative ground for the same conclusion based on a requirement of good faith.¹⁵² Good faith in international trade, according to the court, did not allow the offeree to be burdened with terms in an offer that it did not receive before the conclusion of the contract.¹⁵³ The offeree was therefore not obligated to inform itself of the offeror's unstated standard terms.¹⁵⁴ This conclusion was not based on Article 8's rules of interpretation as applied to offers.¹⁵⁵ Instead, the conclusion derived from the court's ideas about the responsibility of a party to inform itself of contractual terms that are not stated in an offer.¹⁵⁶ Good faith, according to the court, did not require the offeree to inquire into the seller's standard terms when a reasonable person in the offeree's position would not understand an offer to incorporate additional standard terms.¹⁵⁷ Other courts that have concluded that an offeree is not bound by standard terms of which it is reasonably unaware have not proposed good faith as an alternative ground for their conclusion.¹⁵⁸

129242, at *1 (W.D. Pa. Sept. 10, 2013); *CSS Antenna, Inc. v. Amphenol-Tuchel Elecs., GmbH*, 764 F. Supp. 2d 745 (D. Md. 2011).

¹⁵⁰ Landgericht Neubrandenburg [LG] [Neubrandenburg Trial Court] Aug. 3, 2005, INTERNATIONALES HANDELSRECHT [IHR] 26, 2006 (Ger.), available at <http://cisgw3.law.pace.edu/cases/050803g1.html>.

¹⁵¹ See, e.g., *Roser Techs., Inc.*, 2013 U.S. Dist. LEXIS 129242, at *1; *CSS Antenna, Inc.*, 764 F. Supp. 2d at 745.

¹⁵² Landgericht Neubrandenburg [LG] [Neubrandenburg Trial Court] Aug. 3, 2005, INTERNATIONALES HANDELSRECHT [IHR] 26, 2006 (Ger.), available at <http://cisgw3.law.pace.edu/cases/050803g1.html>.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Landgericht Neubrandenburg [LG] [Neubrandenburg Trial Court] Aug. 3, 2005, INTERNATIONALES HANDELSRECHT [IHR] 26, 2006 (Ger.), available at <http://cisgw3.law.pace.edu/cases/050803g1.html>.

¹⁵⁸ See, e.g., *Roser Techs., Inc. v. Carl Schreiber GmbH*, 2013 U.S. Dist. LEXIS 129242, at *1 (W.D. Pa. Sept. 10, 2013); *CSS Antenna, Inc. v. Amphenol-Tuchel Elecs., GmbH*, 764 F. Supp. 2d 745 (D. Md. 2011).

C. Additional Support

Occasionally tribunals invoke good faith to support a result that other CISG provisions already support. Good faith may also be used to confirm the correctness of a result that was decided on other grounds. For example, a Spanish trial court used good faith as additional support for its refusal to enforce a forum selection clause in a sales contract.¹⁵⁹ The clause in question appeared on the back side of the contract, not on the front.¹⁶⁰ The court added that enforcement of the buried clause in these circumstances would violate the principle that parties must act in good faith in entering into agreements that are governed by the CISG.¹⁶¹ The decision is unclear as to whether the refusal to enforce the clause could have been based either on the CISG's provisions or applicable domestic law.¹⁶² However, the court clearly invoked good faith as a separate consideration to support its conclusion.¹⁶³ In refusing to enforce the forum selection clause, the court did not rely on a finding of bad faith on the part of the seller.¹⁶⁴ Instead, the fact that enforcement of the clause would violate the CISG's principle of good faith simply confirmed the court's decision to refuse to enforce the forum selection clause.¹⁶⁵

D. Grounds for the Result

In some cases, tribunals rely on good faith exclusively as a basis for their decisions; good faith does not serve merely as an alternative ground for the decision or to confirm a decision supported on another independent basis. However, in many (but not all) of these cases, reliance on good faith is questionable. The principle either does not support the result or is inconsistent with a provision of the CISG. In *SARL BRI Production "Bonaventure" v. Société Pan African Export*, a well-known early case, a buyer breached a contract by selling purchased goods in a country in which it had agreed not to make sales.¹⁶⁶ The French appellate court awarded

¹⁵⁹ S.A.P., Dec. 27, 2007 (Spain), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/1798.html> (describing the lower court's disposition of the case).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ S.A.P., Dec. 27, 2007 (Spain), available at <http://www.globalsaleslaw.org/content/api/cisg/urteile/1798.html>.

¹⁶⁵ *Id.*

¹⁶⁶ Cour d'appel [CA] [Regional Court of Appeal] Grenoble, Chambre Commerciale, Feb. 22, 1995, JDI 1995, 632 (Fr.), available at <http://cisg3.law.pace.edu/cases/950222fl.html>.

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damages, including supercompensatory damages, under the CISG.¹⁶⁷ It based the supercompensatory damages award on the buyer's violation of Article 7(1)'s good faith directive.¹⁶⁸ However, Article 74 of the CISG allows only for the award of compensatory damages.¹⁶⁹ It does not permit a damage award in excess of loss from a breach. Thus, the court's imposition of supercompensatory damages was inconsistent with the CISG's provisions.

In another case, a German appellate court wrongfully relied on the CISG's good faith directive in allowing an injured party to avoid a contract without expressly declaring its avoidance.¹⁷⁰ The court reasoned that Article 7's good faith directive barred the breaching party, who unambiguously refused to perform, from insisting that the injured party have made a declaration as a condition of avoiding the contract.¹⁷¹ The court's position was inconsistent, however, with Article 26's express requirement that the avoiding party give notice of its avoidance.¹⁷² Without such notice, a party may not avoid a contract.¹⁷³ The article's terms do not permit an exception to the notice requirement where the counterparty acts in bad faith.¹⁷⁴ Because the court's good faith exception is inconsistent with the express terms of Article 26, it is hard to argue convincingly that the court, in invoking good faith, was using Article 7(2) to fill a gap in the CISG.¹⁷⁵ Instead, the court's decision clearly contradicted the express terms of a CISG provision: Article 26.¹⁷⁶

Even on its own terms, the good faith principle that the court invoked is questionable. The court maintained that the party's unambiguous breach prevented it from relying on Article 26's requirement that the buyer give

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See CISG, *supra* note 1, art. 74 ("Damages for breach of contract . . . consist of a sum equal to the loss. . .").

¹⁷⁰ See Oberlandesgericht [OLG] [Provincial Appellate Court] Munchen, Sept. 15, 2004, INTERNATIONALES HANDELSRECHT [IHR] 70, 2005 (Ger.), available at <http://cisgw3.law.pace.edu/cases/040915g2.html>.

¹⁷¹ *Id.*

¹⁷² Compare Oberlandesgericht [OLG] [Provincial Appellate Court] Munchen, Sept. 15, 2004, INTERNATIONALES HANDELSRECHT [IHR] 70, 2005 (Ger.), available at <http://cisgw3.law.pace.edu/cases/040915g2.html>, with CISG, *supra* note 1, art. 26.

¹⁷³ CISG, *supra* note 1, art. 26.

¹⁷⁴ *Id.*

¹⁷⁵ Oberlandesgericht [OLG] [Provincial Appellate Court] Munchen, Sept. 15, 2004, INTERNATIONALES HANDELSRECHT [IHR] 70, 2005 (Ger.), available at <http://cisgw3.law.pace.edu/cases/040915g2.html>.

¹⁷⁶ *Id.*

notice of avoidance.¹⁷⁷ This is a kind of estoppel argument: The seller who “denies” its delivery obligations by breaching the contract cannot insist on receiving notice.¹⁷⁸ The argument is weak on its own terms. A seller who definitively (and fundamentally) breaches an agreement may doubt that the buyer wishes to avoid the contract. The seller might therefore incur expense in remaining ready to perform should the buyer seek specific performance or to renegotiate the contract. Notice of avoidance is a clear and cheap signal from the buyer that it does not want to pursue either of these alternatives. On receipt of notice, the seller can reduce its expenses by reallocating resources associated with performing under the contract while remaining liable to the buyer for damages. In these circumstances, the seller is not acting in bad faith in insisting on a notice of avoidance. Nor is the seller “denying” its delivery obligations. Instead, the seller is insisting on the means that allow the seller to reduce its liability from a breach while compensating the buyer for its loss. Considered in this light, Article 26’s requirement of notice is similar to a mitigation requirement.¹⁷⁹ Article 77 reduces the damages recovered by an injured buyer to the extent that the buyer fails to take reasonable measures to reduce its loss.¹⁸⁰ The buyer’s failure to give notice of avoidance can increase the seller’s expenses from breach without increasing the buyer’s loss. Article 26’s notice requirement can be viewed as a reasonable measure that the buyer can take to reduce the seller’s cost of breach, even when the buyer’s loss from a breach is unaffected by its failure to give the seller notice.

A recent case decided by the German Supreme Court relied on a principle of good faith that the Court found in Article 7.¹⁸¹ There, a seller knowingly delivered nonconforming goods without informing the buyer of the nonconformity.¹⁸² For its part, the buyer later failed to ascertain whether the goods conformed to the contract before it used them.¹⁸³ The Court determined that the buyer had a contractual duty of due care with respect to the goods and that the duty required the buyer to verify that the goods were conforming.¹⁸⁴ The buyer did not ensure that the goods were conforming when it could have done so fairly easily.¹⁸⁵ Thus, the Court concluded that

¹⁷⁷ *See id.*

¹⁷⁸ *See id.*

¹⁷⁹ CISG, *supra* note 1, art. 26.

¹⁸⁰ *Id.* art. 77.

¹⁸¹ *See* Bundesgerichtshof [BGH] [Federal Supreme Court] Sept. 26, 2012, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] (Ger.), *available at* <http://cisgw3.law.pace.edu/cases/120926g1.html>.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

both the seller and the buyer had breached their contractual obligations.¹⁸⁶

According to the Court, it had to decide how much damages the buyer could recover under the CISG when the buyer's loss resulted from both the buyer and the seller's breach of contract.¹⁸⁷ Relying on the principle of good faith underlying Articles 77 and 80, the Court concluded that the respective causal contributions of each party to the breaches had to be taken into account.¹⁸⁸ Because the seller and buyers' breaches were both of a similarly serious nature, damages were to be divided equally, so that the buyer could recover half of its loss.¹⁸⁹ Because none of the CISG's provisions applies to allocate damages in these circumstances, good faith is an independent and necessary basis for the result in this case.

Both the result and the Court's reliance on good faith are questionable. The seller delivered goods that neither conformed to their contract description nor were suitable for the use to which an average buyer would put them.¹⁹⁰ Thus, the delivered goods breached both an express warranty by description under Article 35(1) and an implied warranty of fitness for ordinary purposes under Article 35(2)(a), as the Court determined.¹⁹¹ A warranty allocates the risk that the quality of the goods does not conform to the contract to the seller and away from the buyer. The warranty therefore relieves the buyer of the duty to ascertain that the delivered goods conform to the contract. Thus, the seller is liable if the delivered goods are nonconforming even if the buyer could have avoided loss by ascertaining that the goods were nonconforming after their delivery. However, in finding that the buyer breached its duty of care by not confirming that the goods conformed to the contract, the Court left the risk of nonconformity on the buyer.¹⁹² This is inconsistent with its previous finding that the seller

¹⁸⁶ Bundesgerichtshof [BGH] [Federal Supreme Court] Sept. 26, 2012, *ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN* [BGHZ] (Ger.), available at <http://cisgw3.law.pace.edu/cases/120926g1.html>.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See Bundesgerichtshof [BGH] [Federal Supreme Court] Sept. 26, 2012, *ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN* [BGHZ] (Ger.), available at <http://cisgw3.law.pace.edu/cases/120926g1.html>.

¹⁹¹ See CISG, *supra* note 1, art. 35(1), (2)(a). Although Articles 35(1) and 35(2)(a) do not refer to the obligations imposed on the seller in these circumstances as "warranties," the obligations imposed by both articles are warranties in everything but name. For a discussion of warranties under the CISG, see CLAYTON P. GILLETTE & STEVEN D. WALT, *THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: PRACTICE AND THEORY* § 6.01 et seq. (2013).

¹⁹² Bundesgerichtshof [BGH] [Federal Supreme Court] Sept. 26, 2012, *ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN* [BGHZ] (Ger.), available at <http://cisgw3.law.pace.edu/cases/120926g1.html>.

had warranted the goods against the relevant nonconformity.¹⁹³

In concluding that the buyer breached its duty of care with respect to the delivered goods, the Court misunderstood the economic function of a warranty. A warranty responds to the problem of asymmetric information about the quality of the contract goods: The seller usually is better informed about the quality of the goods that it is selling than the buyer.¹⁹⁴ By allocating the risk of nonconformity of the goods to the contract to the seller, the warranty credibly signals to the buyer qualities of the goods that are unobservable to it. The signal increases the buyer's value for the goods and therefore the price it is willing to pay for them. Article 35(3) makes the warranties created by Article 35(2) inapplicable to nonconformities that the buyer knew or ought to have known at the conclusion of the contract.¹⁹⁵ This allocation of risk to the buyer is consistent with the rationale for warranties based on asymmetric information. Where the buyer knows or ought to know of nonconformities at the contract's conclusion, the buyer knows or is in a position to know as much about the relevant qualities of the goods as the seller. As a result, there is no informational asymmetry to which a warranty need respond. By imposing a duty of reasonable care on the buyer, the Court puts the risk of nonconformity on the buyer even when it has less information about the quality of the goods than the seller at the conclusion of the contract. In this way, the Court undermines the economic purpose of a warranty that animates Article 35.

The Court was also wrong in the way that it framed the question that it answered. As noted above, the Court asked how much the buyer could recover in damages under the CISG when both the seller and buyer's breaches contributed to the buyer's loss.¹⁹⁶ However, given the Court's finding that the seller had created warranties under Article 35(1) and Article 35(2)(a), the buyer had no contractual duty to ascertain whether the delivered goods were fit for the ordinary purposes to which they would be put. The contract did not impose the duty on the buyer, and the CISG does not supply that duty as an implied term. Article 38 requires that the buyer examine the goods as soon as practicable.¹⁹⁷ However, that requirement does not impose a duty of examination because the seller does not have a remedy against a buyer who fails to examine the goods in a timely

¹⁹³ *Id.*

¹⁹⁴ See GILLETTE & WALT, *supra* note 191, § 6.04. For the role of warranties as signals about product quality, see Sanford J. Grossman, *The Informational Role of Warranties and Private Disclosure about Product Quality*, 24 J.L. & ECON. 461 (1981).

¹⁹⁵ See CISG, *supra* note 1, art. 35(2)-(3).

¹⁹⁶ Bundesgerichtshof [BGH] [Federal Supreme Court] Sept. 26, 2012, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] (Ger.), available at <http://cisgw3.law.pace.edu/cases/120926g1.html>.

¹⁹⁷ See CISG, *supra* note 1, art. 38(1).

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manner.¹⁹⁸ Although Article 39(1) bars a buyer who fails to notify its seller promptly of a nonconformity from a remedy, this consequence imposes only a sanction of sorts on the buyer.¹⁹⁹ It does not, however, impose a duty on the buyer to give timely notice. This is because the buyer does not commit a breach by failing to notify the seller of the nonconformity in a timely manner.²⁰⁰ Only the seller therefore breached its warranty obligations by delivering nonconforming goods. Thus, the Court should have asked a different question: How much could the buyer recover in damages when the buyer's loss resulted from the seller's breach of warranty? Article 74 of the CISG addresses and answers this question, allowing the buyer party to recover damages for the foreseeable loss resulting from the seller's breach.²⁰¹ There is therefore no "gap" in the CISG that requires a principle of good faith to fill.

Even if the case did present the question that the Court formulated, the Court's reliance on good faith to answer that question would have been misplaced. The Court reasoned that Articles 77 and 80 reflected a principle of good faith that was binding on the contracting parties.²⁰² These articles support the general principle that a party should not recover for a loss to the extent that it could have avoided the loss²⁰³ or benefit from a breach to the extent that that it caused the breach.²⁰⁴ According to the Court, this general principle was one of good faith recognized by Article 7(2) and applicable to questions governed but not expressly settled by the CISG.²⁰⁵ The Court concluded that this principle applied in instances where damages were the

¹⁹⁸ Some courts refer to Article 38's requirement as creating a "duty" of examination. *See, e.g.*, Trib. de Reggio Emilia, 12 aprile 2011, n. 505 (It.), *available at* <http://cisgw3.law.pace.edu/cases/110412i3.html>. Strictly speaking, Article 38 imposes a burden on the buyer, not a duty. *Cf.* Stefan Kröll, *Article 38, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): COMMENTARY 557, 560* (Stefan Kröll et al. eds., 2011).

¹⁹⁹ *See CISG, supra* note 1, art. 39(1).

²⁰⁰ Under Article 40, neither Article 38 nor 39 apply when the seller is aware or could not have been unaware of the nonconformity and fails to disclose this fact to the buyer. CISG, *supra* note 1, art. 40. In the case, Articles 38 and 39 were inapplicable because the seller was aware at the time of delivery that the goods were nonconforming and did not disclose this fact.

²⁰¹ *See CISG, supra* note 1, art. 74.

²⁰² Bundesgerichtshof [BGH] [Federal Supreme Court] Sept. 26, 2012, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] (Ger.), *available at* <http://cisgw3.law.pace.edu/cases/120926g1.html>.

²⁰³ CISG, *supra* note 1, art. 77.

²⁰⁴ *Id.* art. 80.

²⁰⁵ Bundesgerichtshof [BGH] [Federal Supreme Court] Sept. 26, 2012, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] (Ger.), *available at* <http://cisgw3.law.pace.edu/cases/120926g1.html>; CISG, *supra* note 1, art. 7(2).

result of both contracting parties' independent breaches. Applied to the case, the principle divided damages according to the causal contribution of each breach to the aggrieved party's loss. The trouble with this reasoning is that the principle relied upon is not necessarily one of good faith. An aggrieved party that incurs damages that it reasonably could have avoided might still have acted in good faith, making an innocent mistake or through sheer inadvertence. Nonetheless, even in these circumstances, Article 77's requirement of mitigation would reduce the aggrieved party's damages.²⁰⁶

For its part, Article 80's preclusion rule may also apply to a party who has acted in good faith.²⁰⁷ Article 80 bars an aggrieved party from relying on a remedy to the extent that it caused the other party's breach.²⁰⁸ This bar takes into account only causation, not the mental state of the aggrieved party or the ethical quality of its actions.²⁰⁹ Because Article 80 makes no exception for good faith, the article bars even an aggrieved party who has acted in good faith from a remedy when it innocently caused the other party's breach.²¹⁰

The indifference of both articles to good faith shows that neither Article 77 nor Article 80 reflects a principle of good faith. Instead, the operative principle underlying both articles is one that requires the reduction of contracting costs.²¹¹ Article 77's mitigation requirement minimizes the breaching party's liability for damages when the aggrieved party is in a superior position to reduce the breaching party's damages. By not allowing for the recovery of mitigable loss, Article 77 incentivizes the aggrieved party to take measures to reduce its damages when it is in a better place to do so than the breaching party. Without Article 77, both contracting parties (because neither party knows in advance whether it will breach) would have to take costly measures either before or after the breach to prevent the aggrieved party from racking up damages. Article 80's preclusion rule prevents strategic behavior by an aggrieved party who regrets entering into a contract from inducing its counterparty to breach.²¹² By preventing the aggrieved party from benefitting from its "cause a breach in order to obtain a remedy" strategy, Article 80 removes the party's incentive to cause a breach. Without Article 80's preclusion rule, both parties would have to incur contracting or performance costs to avoid the aggrieved party from causing the other party to breach. For these reasons, the principle that the

²⁰⁶ CISG, *supra* note 1, art. 77.

²⁰⁷ *Id.* art. 80.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *See supra* Part II.

²¹² CISG, *supra* note 1, art. 80.

Court relies on in fact is one of contracting cost reduction, and has nothing to do with good faith or the ethical nature of contracting parties' behavior.

IV. GOOD FAITH AND VAGUE DEFAULT RULES

Good faith's limited role in the CISG might not be a bad thing. A good faith directive without an identifiable standard to govern the conduct of contracting parties is arguably inefficient. The objective of the CISG's default rules is to reflect what most contracting parties would do on their own to reduce contracting costs if the rules did not apply to their contract. Default rules that supply terms that most contracting parties prefer save them the cost of providing those terms. Parties with atypical preferences or in special circumstances must incur additional costs to displace these default rules and select terms that are suitable for their own contracts. If the cost of displacing default rules is the same for all contracting parties, default rules that provide the terms that most parties desire reduce the aggregate contracting costs to contracting parties in bargaining for the terms that they want to apply to their contracts.

From this majoritarian perspective, most parties would not want a good faith term to apply to their contracts governed by the CISG.²¹³ Good faith in the CISG is a vague term. It provides no precise standard that an adjudicator can apply in litigation and the parties can forecast in advance. Instead, good faith gives the adjudicator considerable discretion to determine what good faith might require under a contract. Because good faith has no predictable standard, the contracting parties must incur expenses in litigation to obtain a finding as to how good faith requires (or does not require) them to act. Even before a lawsuit, the vague standard of good faith encourages strategic behavior by the parties. The contracting parties each will therefore tailor their performance to their own prediction of how an adjudicator would determine good faith behavior in their circumstances. The vague standard of good faith makes these predictions uncertain. As a result of this uncertainty, the other contracting party must invest additional resources to prevent a potential breach or gather evidence in advance of litigation that will establish good faith. In the extreme, a party may even breach a contract if it believes that an adjudicator *ex post* will interpret the breach to be not in bad faith. To defend itself in these circumstances, the other party must invest additional resources to prevent the party's breach or gather evidence in advance of litigation that will establish that the breaching party has acted in bad faith. Thus, a vague default rule of good faith may save contracting parties the cost of developing their own precise performance standards. However, the

²¹³ For further explanation on Article 7 as a default rule, see GILLETTE & WALT, *supra* note 191, § 4.03[3].

litigation and performance expenses that they would incur under a good faith default rule arguably far exceed those savings. Most contracting parties therefore would not select a rule of good faith to apply to their contracts.

To be sure, in certain agreements, a good faith term can be useful. Parties sometimes write contracts that include both precise and vague terms. The precise terms reduce uncertainty about the required performance under the contract while the vague terms cover unforeseeable contingencies that cannot feasibly be provided for by more specific provisions. For example, a buyer might agree to purchase a seller's goods on the condition that the buyer will take observable measures in good faith to obtain financing for the goods. Or, initially, a buyer might agree to order a smaller quantity of goods on the condition that it will act in good faith to purchase additional quantities of those goods in the future. When combined with a liquidated damages clause or a choice-of-forum provision that would make liability more likely or litigation more costly, a good faith term may incentivize each contracting party to take greater care in meeting contractual obligations. This is because, if the adjudicator is more likely to detect a breach, which may result in high liability and litigation costs, a breaching party's potential gain from failing to meet its contractual obligations would be less than the liability or litigation costs that it might incur by breaching. In such a case, the injured party could make a more credible threat to sue the other party in the event of a breach. More generally, parties may write vague terms into their contracts, trading off the increase in expected litigation costs that result from those vague terms against the benefit of a reduced probability that a court will find a breach.²¹⁴

However, the possibility of designing an efficient contract with vague terms does not show that a default rule of good faith is optimal for most contracts. A default rule of good faith, by its nature, applies when contracting parties have not agreed on an alternative standard of performance. Good faith therefore becomes a term of both contracts that embed a good faith term with precise terms that control expected enforcement costs and contracts that do not. Many sales contracts are of the latter sort. Contracting parties are not likely to spend significant time engineering provisions to obtain the optimal mix of precise and vague terms given that sales contracts typically are not of substantial value. An ordinary sales contract instead contains a few precisely engineered terms that the contracting parties supplement with applicable, off-the-rack default rules. In such contracts, vague default terms do not increase the incentive to

²¹⁴ See Albert Choi & George Triantis, *Strategic Vagueness in Contract Design*, 119 YALE L.J. 149 (2010); see also Robert E. Scott & George Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006).

perform as they might were they embedded with precise terms in carefully designed performance clauses. For the ordinary sales contract, the good faith default rule raises expected enforcement costs more than it reduces the costs of contracting for a more specific standard of performance.

Finally, even if good faith were an underlying principle of the CISG that bound all contracting parties, it would be a default rule only, not a mandatory rule. The reason is simple. Article 6 allows contracting parties to derogate from almost all of the CISG's provisions, including Article 7.²¹⁵ CISG provisions that parties can opt out of by agreement are considered default terms. Thus, because the CISG can only incorporate a good faith principle through either Article 7(1) or 7(2), good faith, if it were required, would be a default term only. This is unlike the domestic law of many countries, which makes a duty of good faith between contracting parties mandatory in all agreements.²¹⁶ Additionally, Article 6 allows contracting parties to derogate from the CISG in its entirety, not just from its individual provisions.²¹⁷ If parties can opt out of the entire treaty, they should be able to opt out of individual CISG provisions, such as Article 7, while otherwise retaining the CISG's application to their contract.²¹⁸

CONCLUSION

Courts and scholars disagree as to whether the CISG's good faith directive is merely an interpretive rule or an implied term that governs the conduct of all contracting parties under the treaty. This debate over the role that good faith plays in CISG contracts, however, is in one respect misplaced. It ignores the question of the standard of good faith that would govern contracting parties' conduct. Article 7(1) does not articulate a standard of good faith that governs the behavior of contracting parties. In addition, a principle of good faith, although often said to underlie the CISG, is difficult to discern from the treaty's provisions. Instead, the CISG's provisions reflect a different principle: that contracting parties should act in a way that reduces the costs of contracting. Finally, case law does not reveal any rational or consistent approach to the CISG's good faith principle in its resolution of CISG contract disputes. Taken together, these considerations suggest that the good faith directive in the CISG does not play more than a modest role.

This conclusion has two implications for the incorporation of a good faith directive in commercial law treaties. The first, fairly obvious implication is that the directive does not aid in the uniform application of UNCITRAL

²¹⁵ CISG, *supra* note 1, art. 6.

²¹⁶ *See, e.g.*, U.C.C. § 1-304(a) (2014).

²¹⁷ CISG, *supra* note 1, art. 80.

²¹⁸ *Id.*

and UNIDROIT treaties. UNCITRAL and UNIDROIT conventions are interpreted and applied by national courts and arbitrators, not by a supranational tribunal. Thus, to apply these treaties consistently and predictably across different fora, their provisions must consist of workable standards. Because UNCITRAL and UNIDROIT conventions must be interpreted autonomously, a good faith standard cannot be supplied by domestic legal terms and concepts.²¹⁹ Nor does the good faith directive in the UNCITRAL and UNIDROIT conventions provide a principle of good faith by which contracting parties' performances can be measured. Strong evidence of the absence of any good faith standard in the CISG may be found in the loose and unexplained invocation of good faith in case law that interprets the CISG's substantive provisions. The conclusion that the good faith directive is unhelpful because it lacks a defined standard has influenced the drafting of other treaties. For instance, the Convention on International Interests in Mobile Equipment (the "Cape Town Convention") omits the directive, suggesting that its drafters find the directive's application unpredictable.²²⁰

The modest role of good faith in the CISG also has a normative implication for the coordination of commercial law treaties. UNCITRAL's good faith directive has become a model provision that is now included almost verbatim in many other UNCITRAL and UNIDROIT conventions and model laws.²²¹ The presence of this boilerplate good faith provision in multiple treaties raises a general question concerning the interpretation of provisions and terms common to UNCITRAL and UNIDROIT conventions: Should these similar provisions be construed in the same way across different conventions, unless an individual convention provides for a particular construction? The answer to this question depends on how most parties would want their contract to be governed under each particular UNCITRAL or UNIDROIT convention. From this majoritarian perspective, terms defining a convention's scope, such as "party," "place of business," and "goods," are no different from the provisions in the parties' contract. Contracting parties likely have preferences as to how both their contract terms and the conventions' provisions should be interpreted.

²¹⁹ See *supra* note 43 and accompanying text.

²²⁰ Convention on International Interests in Mobile Equipment, Nov. 16, 2001, available at <http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf>; cf. ROY GOODE, CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT AND LUXEMBOURG PROTOCOL THERETO ON MATTERS SPECIFIC TO RAILWAY ROLLING STOCK: OFFICIAL COMMENTARY 159 (2008) ("Paragraphs 1 and 2 express what has become standard principles of interpretation as exemplified by Article 7(1) of the [CISG] except that predictability has been substituted for good faith, which in high value cross-border financing transactions is considered to create unacceptable uncertainty.").

²²¹ See *supra* notes 5-6.

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Commercial parties presumptively desire rules of interpretation that will maximize the net value of their contracts. Whether most contracting parties want an interpretive rule of uniformity that treats one convention's provisions in the same way as similarly worded provisions in other conventions may depend on the subject matter of those conventions. Nonetheless, the boilerplate good faith directive does not supply a common good faith standard even if contracting parties desired such a standard.

Initially, there is reason to believe that most commercial parties would prefer the uniform interpretation of similar provisions across multiple conventions that govern their contracts. For one thing, shared interpretation avoids inconsistency and increases the value of transactions.²²² If similar provisions across multiple conventions are not interpreted uniformly, contracting parties would have to draft additional contractual language to ensure consistency. A shared interpretation of similar terms saves the parties the trouble of doing this additional work. For example, assume that a debtor grants its creditor a security interest in its aircraft, where the security interest is regulated by the Cape Town Convention.²²³ Assume also that the debtor's obligations to the creditor are backed by a standby letter of credit in the creditor's favor. The credit entitles the creditor to draw on it in the event that the debtor "defaults" on its secured obligations to the creditor. Finally, assume that the letter of credit is governed by the Convention on Independent Guarantees and Stand-by Letters of Credit (the "Convention on Independent Guarantees").²²⁴ The Cape Town Convention defines "default," where "default" is otherwise undefined by the parties' agreement, as a substantial deprivation of what the party would be entitled to except under the security agreement. By contrast, the Convention on Independent Guarantees has no definition of "default." Default instead is defined by the terms of the standby letter of credit that the convention generally governs. The parties presumably would prefer a consistent interpretation of "default," so that the debtor's default under the security agreement entitles the creditor to draw on the standby letter of credit.²²⁵

²²² See generally MARCO TORSSELLO, COMMON FEATURES OF UNIFORM COMMERCIAL LAW CONVENTIONS: A COMPARATIVE STUDY BEYOND THE 1980 UNIFORM SALES LAW (2004); Franco Ferrari, *The Relationship Between International Uniform Contract Law Conventions*, 5 UNIF. L. REV. 69 (2000).

²²³ See *supra* note 220.

²²⁴ CIGSLC, *supra* note 5.

²²⁵ The construction of "default" that makes its meaning consistent between the two conventions is a further question. Two alternative interpretations of the term are possible. "Default" under the Convention on Independent Guarantees, read in light of the Cape Town Convention, might roughly mean "breach of the security agreement that substantially deprives the creditor of what the agreement entitles it to." This construction entitles the creditor to draw on the credit only if there is a substantial default under the security

Otherwise, the credit does not serve its purpose in backing up the debtor's obligations under the security agreement.

More generally, a shared interpretation reduces the cost to parties and adjudicators in construing undefined terms and provisions in each commercial convention case-by-case. A common interpretation increases the predictability of how similar terms and provisions in multiple conventions will be interpreted. Based on the appearance of provisions common across conventions, the parties and adjudicators can predict the meaning of those provisions whichever convention with those provisions may apply to their transactions. In this way, uncertainty in the meaning of similar provisions across multiple conventions is reduced. As a result, parties and adjudicators are less likely to err in the interpretation of those provisions. Shared interpretation also saves the contracting parties the burden of taking costly measures to avoid the impact of an erroneous interpretation of similar conventional provisions, such as opting out of an individual convention.

Is the same true of the good faith directive? The benefits of shared interpretation do not apply to UNCITRAL's good faith directive because the directive does not articulate a discernible standard of good faith. Without an articulated good faith standard, the directive provides no tools for the interpretation and application of similar directives that appear in other conventions. In these conventions, as in the CISG, good faith remains undefined and may reflect any number of principles. The good faith directive in the CISG therefore provides no helpful means to interpret similar directives in any other commercial convention.

agreement. Alternatively, "default" under the Cape Town Convention can be read in light of the Convention on Independent Guarantees. Read in this way, "default" means "any breach of the security agreement." Article 11(1) of the Cape Town Convention allows the parties to define "default" in a written agreement, and arguably the security agreement, given its unqualified reference to the term, defines default as "any breach." Convention on International Interests in Mobile Equipment art. 11(1), Nov. 6, 2001, *available at* <http://www.unidroit.org/english/conventions/mobile-equipment/mobile-equipment.pdf>.

A court that finds that the first interpretation of "default" across the two conventions threatens the independence of the standby letter will prefer the second interpretation.