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The Roots and Fruits of Good Faith in Domestic Court Practice

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THE ROOTS AND FRUITS OF GOOD FAITH IN DOMESTIC COURT PRACTICE

Thomas Neumann*

ABSTRACT

Good faith—most lawyers have an opinion on these two words. While the notion of good faith may play specific roles at domestic and regional levels, it remains an elusive siren at the international level. The concept was subject to controversy at the birth of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) and has been debated by scholars ever since. Considering that the Convention has now been in force for over thirty years, it is agreed that time is ripe for “a call to arms for further research into a uniform standard of good faith. This Article contributes to such further research as it unravels the life of good faith in court practice on a scale never before seen.

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I. PURPOSE: TO SURVEY THE USE OF GOOD FAITH BY COURT

Based on the controversial drafting history (Section II.A), the subsequent scholarly discourse (Section II.B), and resting on the premise that no common domestic core of good faith exists (Section II.C), this Article extracts some salient features of both the roots and the fruits of the concept of good faith. These features are then used to survey domestic court decisions with the purpose of teasing out how these features have developed in practice (Section III).¹ A previously conducted cursory study of nearly 300 domestic court decisions from Germany and China showed differences in both how often the concept of good faith was referred to, how it was justified, and how it was utilized.² This Article aims to provide a more nuanced picture of the use of good faith in practice and to shed light whether a uniform approach to it has developed among courts.

II. MORE THAN THIRTY YEARS OF CONTROVERSY AND DEBATE

A. *Drafting and Definition*

Article 7(1) of the 1980 United Nations Convention on Contracts for the International Sale of Goods (“CISG” or “Convention”) states that the Convention text is to be interpreted in good faith. The provision reads:

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.

This is the only article in which good faith is mentioned in the Convention and the concept is not defined any further. A plain reading of the words “good faith” adds very little to the

¹ Camilla Andersen, *Good Faith? Good Grief!*, 17 INT’L TRADE & BUS. L. REV. 310, 321 (2014) (noting where the need for reconsidering the utility of good faith is called for).

² See Thomas Neumann, *Is the Albert Kritzer Database Telling Us More Than We Know?*, 27 PACE INT’L L. REV. 119 (2015).

understanding of it and so a further interpretation is needed to fully understand the concept.³ From a literal interpretation of the words “[i]n the interpretation of this Convention . . .” the concept of good faith could be seen strictly as a tool for interpreting the Convention text; however, it has also been asserted that subsequent development shows that the concept reaches further than that insofar as it governs also the rights and duties of the trading parties.⁴ This is echoed in the UNCITRAL Secretariat’s commentary on the draft of the Convention that stated the provision which later became article 7(1) should be interpreted and applied in a way that promotes good faith.⁵ Though the literal interpretation could suggest this too, as this would *promote* the observance of good faith, such a positive standard of behavior imposed on the trading parties is at least not spelled out as it is for example in instruments like the Principles of European Contract Law,⁶ the UNIDROIT Principles,⁷ or the Translex-Principles.⁸

³ See, e.g., *Good Faith*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one’s duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.”); *good faith*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/good%20faith#legalDictionary> (last visited Nov. 20, 2018) (“[H]onesty, fairness, and lawfulness of purpose : absence of any intent to defraud, act maliciously, or take unfair advantage.”).

⁴ Bruno Zeller, *The Observance of Good Faith in International Trade*, in CISG METHODOLOGY 148 (Andre Janssen & Olaf Meyer eds., 2009).

⁵ U.N. GOAR, proposals, reports, and other documents, J, part I, art. 6, ¶ 1, U.N. Doc. A/CONF.97/19, Part One, J, annex 1 (Mar. 10, 1980–Apr. 11, 1980).

⁶ COMM. ON EUROPEAN CONTRACT LAW, THE PRINCIPLES OF EUROPEAN CONTRACT LAW 113, art. 1:201 para. 1 (Ole Lando & Hugh Beale eds., 2000) (“Each party must act in accordance with good faith and fair dealing.”).

⁷ UNIDROIT PRINCIPLES OF INTERNATIONAL CONTRACTS 17, art. 1.7 para. (2016) [hereinafter UNIDROIT] (“Each party must act in accordance with good faith and fair dealing in international trade.”).

⁸ TRANSLEX-PRINCIPLES, *Principle No. 1.1.1 - Good faith and fair dealing in international trade*, <https://www.trans-lex.org/901000> (last visited Dec. 15, 2018) (“Parties to international business transactions must act in accordance with good faith and fair dealing in international trade. This standard applies to the negotiation, formation, performance and interpretation of international contracts.”).

The historical context adds very little to interpretation as the predecessors of the Convention did not contain an article with a general obligation for the parties to behave in good faith thus making the concept novel to the Convention.⁹ The Secretariat did note that several of the CISG's provisions are manifestations of good faith,¹⁰ meaning there is support for the view that good faith is a principle underlying the Convention, especially when the Secretariat also pointed out that good faith is a concept broader than the sum of the all its manifestations and that it applies to all aspects of the Convention's interpretation and application.¹¹

However, the existence of a positive standard of behaviour imposed on the parties does not echo in all parts of the drafting history of the Convention as the delegates discussed, but never reached agreement, on the further utilization of good faith. Some delegates suggested that it would be useful to include a provision on good faith as an express example of good faith in commercial contracts¹² and others supported the view, but stated that a similar rule would be achievable under the concept of good faith contained in the current text of article 7.¹³ While other delegates had their reservations in this regard,¹⁴ numerous scholars have subsequently noticed a connection between some of the provisions in the Convention and the concept of good faith,¹⁵ as also pointed out by

⁹ Good faith is mentioned merely once in the two instruments, being in article 5(2) of the Uniform Law Formation regarding revocation of offer. CESARE MASSIMO BIANCA & MICHAEL JOACHIM BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW 68 (1987).

¹⁰ See, e.g., United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980 art. 16, ¶ 2(b), 21 ¶ 2, art. 29, ¶ 2, arts. 37, 38, 40, art. 49, ¶ 2, art. 64, ¶ 2, arts. 82, 85, 88, 1489 U.N.T.S. 3 [hereinafter CISG].

¹¹ U.N. GOAR, *supra* note 5, proposal reports and other documents, art. 1, ¶¶ 1-4, 17-18.

¹² U.N. GOAR, *supra* note 5, 28th plen. mtg. ¶¶ 56 (It.), 61 (Rom.).

¹³ *Id.* ¶ 55 (Switz.).

¹⁴ *Id.* ¶ 58 (Den.); *id.* ¶ 59 (Neth.).

¹⁵ See, e.g., ROLF HERBER & BEATE CZERWENKA, INTERNATIONALES KAUFRECHT: KOMMENTAR ZU DEM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11. APRIL 1980 ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF [INTERNATIONAL SALE OF GOODS: COMMENTARY TO THE UNITED NATIONS CONVENTION OF APRIL 11, 1980 ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS] 359 (2010); Ingeborg Schwenzer, *Article 80*, in SCHLECHTRIEM &

the Secretariat. However strong the opinion was to include an obligation for the parties to act in good faith, suggestions to revise the wording of article 7(1) with the purpose of making this clear was rejected.¹⁶ The ambiguous wording of article 7(1) remained in the final version and it has later been described that the deliberations resulted in a “statesmanlike compromise”¹⁷ in which the controversy of good faith was given “an honorable burial.”¹⁸ Since the drafters made no clear decision regarding the content and role of the concept, it is impossible to say whether the “potentially mischievous concept is part of the final product” or not.¹⁹ Thereby a great deal of discretion is left with the interpreter—which would be the domestic court judges unless the parties have agreed otherwise. The concept’s utility in practice must be the most important for the

SCHWENZER: COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 1088 (Ingeborg Schwenzer ed., 3rd ed. 2010); JOHN FELEMEGAS, AN INTERNATIONAL APPROACH TO THE INTERPRETATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 246, 506 (1980) AS UNIFORM SALES LAW (2007); MARÍA DEL PILAR PERALES VISCASILLAS, EL CONTRATO DE COMPRAVENTA INTERNACIONAL DE MERCANCIAS (CONVENCIÓN DE VIENA DE 1980) [CONTRACT FOR THE INTERNATIONAL SALE OF GOODS (VIENNA CONVENTION OF 1980)] (2001), <https://www.cisg.law.pace.edu/cisg/biblio/perales1.html> (original Spanish version); M. KAROLLUS, KOMMENTAR ZUM UN-KAUFRECHT: ÜBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF (CISG) [COMMENT ON THE UN SALES CONVENTION: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG)] 994–95 (Heinrich Honsell ed., 1997); FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS 335 (1992); BERNARD AUDIT, LA VENTE INTERNATIONALE DE MERCHANDISES [INTERNATIONAL SALE OF GOODS] 179 (L.G.D.J. ed., 1990).

¹⁶ BIANCA & BONELL, *supra* note 9, at 71.

¹⁷ Allan E. Farnsworth, *Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 TUL. J. INT’L & COMP. L. 47, 55 (1995).

¹⁸ Troy Keily, *Good Faith and The Vienna Convention on Contracts for the International Sale of Goods (CISG)*, 3 VINDOBONA J. INT’L COM. L. & ARB. 15, 20 (1999).

¹⁹ Arthur Rosett, *Critical Reflections on The United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 290 (1984).

trading parties, hence the survey of domestic court practice could be fruitful in understanding the development of good faith thirty years after the entry into force of the Convention and the controversial concept contained in article 7(1).

Most will probably agree that any attempt to define good faith would result in rather vague descriptions and it is tempting to tie good faith to a standard of morality.²⁰ Such standards may change over time and be heavily dependent on the interpreter, hence such morality standards have been considered impossible or at least ill-suited for being controlled by law.²¹ Though one could at least see the duty imposed by a good faith standard as demanding absence of bad faith,²² we often end up concluding that any attempt to define good faith is in vain. Again, the discretion of the judge becomes salient if we attempt to advise an internationally trading client.

One thing is more certain—that in the search of the meaning of good faith within the Convention, one must observe the autonomous interpretation method, prohibiting alignment of the Convention's concepts with domestic ones.²³ Any domestic definition or understanding of good faith thus has no place within the Convention. While there may not be any autonomous source of good faith, it is possible to observe it in international principles, case law, usages, and standard contracts, but eventually it is up to the adjudicator to evaluate whether they are expressions of good faith.²⁴

Considering that the goal of the Convention is to establish a uniform sales law, it is persuasive when it is argued that the

²⁰ Keily, *supra* note 18, at 15.

²¹ JOHN PETER ANDERSEN, OM AT LOVGIVE FOR MORALEN [TO LEGISLATE FOR MORALITY], in HYLDESTSKRIFT TIL JØRGEN NØRGAARD [FESTSCHRIFT FOR JØRGEN NØRGAARD] (Torsten Iversen, et al., eds., 2003).

²² Paul J. Powers, *Defining the Undefinable: Good Faith and The United Nations Convention on Contracts for the International Sale of Goods*, 18 J.L. & COM. 333, 350 (1999) (“Good faith is defined by what it is not. The concept of bad faith can be relied upon to show what is not good faith performance.”).

²³ See Bruno Zeller, *Good Faith —The Scarlet Pimpernel of the CISG*, 6 INT’L TRADE & BUS. L. ANN. 227 (2001).

²⁴ See, e.g., Schwenger, *supra* note 15, at 128–29 (Ingeborg Schwenger ed., 3rd ed. 2010); SCHLECHTRIEM & SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 100–01 (Ingeborg Schwenger ed., 2nd ed. 2005) [hereinafter SCHLECHTRIEM & SCHWENZER 2005].

Convention should not be confined to its historical vacuum, but be understood autonomously and be allowed to reflect an internationally recognized concept of good faith.²⁵ Thus, it is curious to see whether the default dispute resolution mechanism of the Convention—the domestic courts—in fact openly utilise good faith (frequency), how they justify its use (roots), and in which way they use it (fruits).²⁶ Before turning to the survey of domestic court practice it is necessary to address two points. First, the two schools of thought: those in favour of reading the CISG in a way that imposes a positive duty for the trading parties to act in good faith and those against it. The discourse sparks the desire to see whether any of these schools have support in domestic court practice at a general level. Second, the survey rests on the premise that no common global core of good faith has developed since the conclusion of CISG. Both these points are elaborated below.

B. The Ongoing Debate

The controversy during the drafting of article 7 was between those in favour of adopting a general good faith obligation applicable to the parties and their contract, and those against it. Granted that the debate is more nuanced than that, the decade long debate can be simplified in terms of two schools of thought. One is the opponents of good faith. They argue that the Convention does not impose on the parties an obligation to act in good faith. The essence of the opponents' view can be recapitulated along the lines of it being “a perversion of the compromise to let a general principle of good faith in by the back door.”²⁷ They argue that while good faith was discussed in the working group²⁸ with most of the

²⁵ Keily, *supra* note 18, at 39–40; *see also* BIANCA & BONELL, *supra* note 9, at 84 (discussing how the Convention should be autonomous); JOSEPH LOOKOFKY, UNDERSTANDING THE CISG: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 37 (3rd ed. 2008); ENDERLEIN & MASKOW, *supra* note 15, at 56–57 (discussing uniform sales law and an internationally recognized concept of good faith).

²⁶ *See infra* Sections III.B., III.C.

²⁷ Farnsworth, *supra* note 17, at 56.

²⁸ U.N. GOAR, *supra* note 5, 5th plen. mtg. ¶ 40.

members being in support of an obligation of good faith and fair dealing, the actual wording was a controversial topic.²⁹ The vague notion of good faith and fair dealing would require a long period of judicial interpretation, would be applied to varying effect, and have no consequences for its breach.³⁰ No general good faith obligation can be found when interpreting the text of article 7(1) literally, and neither can it be extracted from underlying principles. Instead, any duty to act in good faith must follow from the applicable domestic law.³¹ Article 7(1) and its mention of good faith is a tool for courts to avoid reaching inequitable results and it does not extend to the individual contract.³²

The other group is the proponents. They argue that good faith governs both the Convention's provisions as well as the parties' contract and their conduct towards each other³³ since it is "logically impossible to apply good faith to the Convention as a whole without influencing or affecting the behavior of the parties."³⁴ Though suggestions made during the drafting to clarify that good faith should apply to both the interpretation and performance of the parties were in vain, the drafting history is of mere historical interest.³⁵ Interpretation of the Convention's provisions in a way that promotes good faith as called for by article 7(1) makes it inconsistent to permit parties to speculate at the other party's

²⁹ U.N. COMM'N ON INT'L TRADE L., at 27, 28, U.N. Doc. A/CN.9/SER.A/1978, U.N. Sales No. E.78.v.7 (1978). The members of the working group were Austria, Brazil, Czechoslovakia, France, Ghana, Hungary, India, Japan, Kenya, Mexico, Philippines, Sierra Leone, Soviet Union, United Kingdom, Northern Ireland and USA, *see id.* at 61.

³⁰ *Id.* at ¶¶ 67, 74–76; U.N. GOAR, *supra* note 5, 6th plen. mtg. ¶ 47 (U.K.), ¶ 50 (U.S.); JOHN HONNOLD & HARRY M. FLECHTNER, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 133–34 (Harry M. Flechtner, ed., 4th ed. 2009).

³¹ CISG, *supra* note 10, art. 7, ¶ 2; Farnsworth, *supra* note 17, at 56.

³² SCHLECHTRIEM & SCHWENZER 2005, *supra* note 24, at 95.

³³ *See, e.g.*, BRUNO ZELLER, THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: A METHODOLOGY FOR ITS INTERPRETATION AND APPLICATION 255–56 (2001); BIANCA & BONELL, *supra* note 9, at 84; FELEMEGAS, *supra* note 15, at 45–46.

³⁴ ZELLER, *supra* note 33, at 102.

³⁵ *Id.*

expense³⁶ and warrants that a party may be stopped from asserting rights and remedies in some situations.³⁷ While both sides of the debate can provide court decisions supporting their view, it is curious to see whether domestic court practice actually utilises good faith, and if it does—whether the concept of good faith has crystallised in one form or another as one author puts it.³⁸ The survey further below rests on the presumption that no common domestic core of a good faith obligation exists since this could allow the introduction of such a, now no longer controversial, concept into the Convention.

C. *No Common Domestic Core of Good Faith*

A lot can happen in thirty years, and in those thirty years a common domestic core of a good faith obligation could possibly be developed. Considering the possibility of a domestic core is relevant since “[i]f the domestic law . . . is changing to now recognise good faith in contractual relations, should this change be reflected in CISG?”³⁹ Assuming that it should, the question is, therefore, whether the domestic laws position on good faith has changed since the drafting of the CISG in a way that common law courts and scholars increasingly recognize good faith.⁴⁰ If we posit that a common core of good faith exists in domestic legal systems, it should be unproblematic to apply such a common concept to international disputes governed by CISG since the Convention’s uniformity requirement only prohibits reading domestic concepts into the Convention.⁴¹ However, upon closer examination of domestic law, two problems appear. First, that the historical reticence of common law countries towards the notion of good faith has not developed to such extent that it resembles the concept generally utilized in civil law jurisdictions. Second, that even though good faith is generally embraced by civil law jurisdictions,

³⁶ HONNOLD & FLECHTNER, *supra* note 30, at 135–36.

³⁷ BIANCA & BONELL, *supra* note 9, at 84.

³⁸ FELEMEGAS, *supra* note 15, at 14.

³⁹ Keily, *supra* note 18, at 17.

⁴⁰ *Id.* at 36.

⁴¹ HONNOLD & FLECHTNER, *supra* note 30, at 134–35.

it is not clear that a common core of the concept exists among civil law legal systems at all.

1. Common Law Development is Insufficient

In English law, we see a very narrow view on good faith requiring absence of bad faith which does not hinder a party pursuing harm-inflicting self-interest.⁴² This narrow view on the concept of good faith is tied to the fact that the United Kingdom historically has been the center of international commodity trade in which the certainty of English law is well-suited and uncertain concepts like good faith are therefore frowned upon.⁴³ Even though the United Kingdom is not a CISG state, it is part of the common law family from which other common law countries have developed. Some common law countries have developed to accept good faith, while others still await the confirmation of such a concept.⁴⁴ The point being—the common law countries are developing differently from the traditional English approach, thus undermining the position that a common core exists among domestic common law systems.

In U.S. law, good faith is adopted by inspiration from Germany, but the concept in the U.S. is predominantly applicable

⁴² See, e.g., *Union Eagle Ltd. v. Golden Achievement Ltd.* [1997] AC 514 (PC) (appeal taken from the Court of Appeal of Hong Kong); Ole Lando, *Is Good Faith An Overarching General Clause in the Principles of European Contract Law?*, in LIBER AMICORUM GUIDO ALPA: PRIVATE LAW BEYOND THE NATIONAL SYSTEMS 608 (Mads T. Andenæs et al. eds., 2007); Alberto M. Musy, *The Good Faith Principle in Contract Law and The Precontractual Duty To Disclose: Comparative Analysis of New Difference in Legal Cultures*, in 1 *Global Jurist Advances* 10 (2001); Ewan McKendrick, *The Meaning of 'Good Faith,'* in LIBER AMICORUM GUIDO ALPA: PRIVATE LAW BEYOND THE NATIONAL SYSTEMS 698 (Mads T. Andenæs et al., eds., 2007); H.C. GUTTERIDGE, *COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH* 96–97 (1946) (stating that, rather, good faith translates to English law into honesty and fair dealing).

⁴³ Alstair Mullis, *Twenty-Five Year On – The United Kingdom, Damages and the Vienna Sales Convention* in Reinhard Zimmermann, *Symposium: CISG—the 25th Anniversary: Its Impact in the Past and its Role in the Future*, *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABEL J. COMP. & INT'L PRIV. L.]* 36–37 (2007).

⁴⁴ See Keily, *supra* note 18, at 37–38 (referring to US and Canada).

only to the performance of the contract and does not extend, for example, to the negotiation period.⁴⁵ While the concept can be found in the U.S. Uniform Commercial Code⁴⁶ and the U.S. Second Restatement of Contracts,⁴⁷ there is no clear consensus on its function since courts and scholars have developed various approaches to the concept.⁴⁸ This is probably due to the U.S. legal tradition which still prefers more narrow doctrines,⁴⁹ whereas the German concept of good faith is a wide one.⁵⁰

In Australia, the concept of good faith is still being debated.⁵¹ While it is often seen as an implied duty⁵² and several state courts have considered it,⁵³ the concept still has no backing by

⁴⁵ Allan E. Farnsworth, *The Concept of Good Faith in American Law*, Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Center for Comparative and Foreign Law Studies] (Apr. 1993) (transcript available at <https://www.cisg.law.pace.edu/cisg/biblio/farnsworth3.html>).

⁴⁶ U.C.C. § 2-103, <https://www.law.cornell.edu/ucc/2/2-103> (last visited Feb. 7, 2019) (“Good faith . . . means honesty in fact and the observance of reasonable commercial standards of fair dealing[.]”).

⁴⁷ RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”); see BRIAN A. BLUM, *CONTRACTS: EXAMPLES AND EXPLANATIONS* 30–31 (4th ed. 2007) (stating that the Restatement may be derived from case law, but may also express rules as the drafters would like to see them).

⁴⁸ See, e.g., Farnsworth, *supra* note 45.

⁴⁹ Harry Flechtner, *Comparing the General Good Faith Provisions of The PECL and the UCC: Appearance and Reality*, 13 PACE INT'L L. REV. 295, 336–37 (2001).

⁵⁰ See *id.* at 308 (noting “robust application of the good faith principle”).

⁵¹ See, e.g., Bruno Zeller & Camilla Baasch Andersen, *Good Faith—The Gordian Knot of International Commerce*, 28 PACE INT'L L. REV. 1, 10 (2016); Justice Robert McDougall, *The Implied Duty of Good Faith in Australian Contract Law*, 108 AUSTRALIAN CONSTRUCTION LAW NEWSLETTER, 28, 36 (May/June 2006).

⁵² Zeller, *supra* note 23, at 229–234; Zeller & Andersen, *supra* note 51, at 10.

⁵³ See, e.g., *Hughes Aircraft Sys Int'l v. Airservs Austl.* [1997] 76 FCR 151 (Austl.) (stating the existence of an implied pre-contractual duty of good faith reasoned by it being recognised in foreign jurisdictions and in international contract according to UNIDROIT Principles), *aff'd*, *Aiton v Transfield* [1999] 153 FLR 236 (Austl.); see also *GEC Marconi Sys Pty Ltd. v. BHP Info Tech. Pty Ltd*

either the Australian legislature or the highest court of the country. While case law and some scholars suggest that good faith is part of Australian law, others argue that the country still has “[t]o adopt a definitive principle of good faith in contract law[.]”⁵⁴ The fact that good faith is debated in both scholarship and case law underlines the difficulty in extracting a common good faith core among common law countries, let alone it being similar to a core found in civil law countries.

2. No Common Core Among the Civil Law Countries

One may generally be of the impression that civil law countries all embrace the concept of good faith, but this is not entirely true. This makes it even harder to imagine a common domestic law core. First, not all continental codes utilise the good faith concept in the same way and some CISG jurisdictions do not even rely on civil codes, such as the Nordic ones.⁵⁵

Both the civil code of France⁵⁶ and the civil code of Germany⁵⁷ contain a general provision of good faith. However, where the French courts are generally suspicious towards judicial discretion being too broad⁵⁸ and would rather give preference to party autonomy,⁵⁹ the German courts have embraced the domestic good faith concept (*Treu und Glauben*). Over a century, the concept

[2003] 128 FCR 1 (Austl.) (stating with reference to Principles of European Contract Law and UNIDROIT Principles that an implied duty of good faith and fair dealing exist in Australian law); Zeller & Andersen, *supra* note 51, at 10 (containing a recent analysis of case law).

⁵⁴ *National Monographs—Australia*, INT’L ENCYCLOPAEDIA FOR CONTRACTS 1, 38 (Oct. 2016).

⁵⁵ GUTTERIDGE, *supra* note 42, at 97; Musy, *supra* note 42, at 2.

⁵⁶ CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1134 (Fr.) (“They must be performed in good faith”), *translated in* https://www.legifrance.gouv.fr/content/download/1950/13681/version/3/.../Code_22.pdf.

⁵⁷ BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 242, *translated in* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0731 (last visited November 19, 2018).

⁵⁸ Musy, *supra* note 42, at 3.

⁵⁹ Lando, *supra* note 42, at 606.

has been developed to perform several functions not clearly dealt with in the German civil code.⁶⁰

Consequently, it would be too hasty to conclude that a common domestic core regarding good faith exists, since the controversy arising out of different domestic views at the drafting does not seem to have been overcome. Admittedly though, the present preliminary research is not sufficient to finally refute the thesis that a common core exists, though it appears unlikely. Hence, this Article rests on the presumption that no common domestic core of a good faith obligation exists.

III. SURVEY OF COURT PRACTICE

A. *Sample and Survey*

Based on the drafting history and subsequent scholarly discourse, this Article aims to unravel the frequency, justification, and utilization of the concept of good faith in domestic court practice. More than a decade ago, a study of all publicly available court decisions relating to article 7 concluded that no pattern had developed in court practice and that the concept still needed time to crystallise.⁶¹ The present author's own cursory study of court decisions from two countries in 2015 suggested the same, but included only the decisions rendered in two countries.⁶² As a result, the desire for a large-scale survey was born. In order to conduct such a survey, it is necessary to have a large sample of domestic court decisions and know what to look for.

The sample already exists. As has been accounted for extensively elsewhere, the court decisions collected in the Albert H.

⁶⁰ Peter Schlechtriem, *Good Faith in German and Uniform Laws*, Lecture at Saggi, Conferenze e Seminari, Centro di Studi e Ricerche di Diritto Comparato e Straniero [Center for Comparative and Foreign Law Studies] (Feb. 1997) (transcript available at <https://cisgw3.law.pace.edu/cisg/biblio/slechtriem16.html>); Lando, *supra* note 42, at 604; Musy, *supra* note 42, at 4–5.

⁶¹ Benedict C. Sheehy, *Good Faith in the CISG: Interpretation Problems in Article 7* 1, 3 (Berkeley Coll. Elec. Press (BEPRESS) Legal Series, Working Paper No. 339, 2004), <http://law.bepress.com/cgi/viewcontent.cgi?article=1815&context=expresso>.

⁶² Neumann, *supra* note 2, at 147–60.

Kritzer Database may serve as the sample.⁶³ Hence, the more than 3,000 decisions reported to the database form the initial sample of the present Article. However, not all decisions are relevant. As the present survey relates to domestic court practice, the sample must be stripped from all arbitration awards. Furthermore, the sample has been stripped from all decisions not applying the CISG, not rendering a final decision for technical reasons, and decisions not translated or rendered in the English language. These criteria render a sample of 793 domestic court decisions, which have all been surveyed for the frequency, justification, and utilisation of good faith.⁶⁴ Though the concept's utilisation in arbitration would be both relevant and interesting, it is beyond the scope of the present survey to compare the utilisation across dispute resolution mechanisms. Hence, it is confined to the default mechanism of domestic court litigation.

Each of the 793 domestic court decisions have been surveyed for the court's open reference to good faith, its justification (roots), and its utilisation (fruits). For this purpose, a coding form has been used according to which each court's decision has been indexed. The registration encapsulates the various possibilities extrapolated from the drafting and scholarly discourse of the concept. The extrapolation of characteristics to be surveyed have also been accounted for extensively elsewhere⁶⁵ and in short, they rely on the development accounted for above in this Article. Therefore, the frequency of the use of the concept of good faith required registration of the jurisdiction of the decision and whether open reference to good faith was made by the court as opposed to legal counsel. In cases where the court referred to the concept of good faith, it was registered whether a justification for doing so was made. If so, it was registered whether the concept's application was justified as a principle underlying the Convention,⁶⁶ a domestic

⁶³ *Id.* 135–47.

⁶⁴ *See infra* Appendix 2 for a list of decisions forming part of the sample.

⁶⁵ Neumann, *supra* note 2, at 134–60.

⁶⁶ *See, e.g.*, BIANCA & BONELL, *supra* note 9, at 80, 85; SCHLECHTRIEM & SCHWENZER 2005, *supra* note 24, at 106 (explaining that good faith is a justified principle, and one that is required to prevent an “all too hasty resort to domestic regulations and legal custom”); ENDERLEIN & MASKOW, *supra* note 15, at 56

principle gap-filling the Convention,⁶⁷ or an internationally recognised principle⁶⁸ of trade being read into the Convention or a combination of such justifications—all possibilities extrapolated from the drafting and scholarly discourse accounted for above. In decisions where good faith was referred to by the court, its utility was registered as either being used to impose a positive duty of behaviour on the trading parties,⁶⁹ being used as merely requiring absence of bad faith,⁷⁰ being used as a tool to interpret the Convention text,⁷¹ being used in another way, or in a combination of ways. Registering these characteristics has provided a novel view of the patterns of good faith in the Convention as seen by the domestic courts both in regard to how often the concept is being referred to by domestic courts, how it is justified, and the form in which it is being used. The results of the survey are accounted for immediately below. The registrations made on each jurisdiction are to be found in Appendix 1 and a list of court decisions forming part of the sample used is found in Appendix 2.

B. Observations and Frequency

The sample consists of court decisions from 13 domestic court systems, and in this lies a limitation, since the sample does not indicate any trends regarding countries not forming part of it. Looking at the sample of 793 domestic court decisions available, it can be observed that the domestic courts openly utilize good faith in 79 decisions, meaning one decision out of 10. However, there are large variations in the frequency of the use of good faith when

(explaining that the provisions of the Convention themselves are an expression of good faith and have been interpreted as such); *see also infra* Sections II.A., II.B.

⁶⁷ *See, e.g.,* HONNOLD & FLECHTNER, *supra* note 30, at 134–35; *see infra* Sections II.A., II.B.

⁶⁸ *See, e.g.,* UNIDROIT, *supra* note 7; *see infra* Sections II.A., II.B.

⁶⁹ Keily, *supra* note 18, at 24; ZELLER, *supra* note 33, at 102; *see also infra* Sections II.A., II.B.

⁷⁰ *See, e.g.,* Powers, *supra* note 22, at 350–51; *see infra* Sections II.A., II.B.

⁷¹ MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 426 (2009) (discussing how good faith is used to interpret the Convention text); *see infra* Sections II.A., II.B.

looking across jurisdictions. One group (consisting of Russia and Slovakia where 22 and 58 decisions were surveyed respectively) has never openly utilised good faith (0%). On the other end of the scale, we find a group with more than one out of ten court decisions openly utilizing good faith. The group consists of Austria with 6 out of 59 (10%) decisions referring to good faith, Germany with 32 out of 247 (13%), Italy with 4 out of 26 (15%), Switzerland with 17 out of 109 (16%), and Netherlands with 4 out of 25 (16%) decisions. In the middle group, we find China with 1 out of 42 (2%) decisions openly referring to good faith, United States of America with 5 out of 94 (5%), France with 4 out of 56 (7%), and Belgium with 4 out of 44 (9%) decisions. The jurisdictions of Argentina and Mexico have contributed less than ten court decisions each to the sample surveyed, thus making it unreliable to speak of a proportion of decisions openly referring to good faith. They have been excluded from the overview in this regard, but the observations made in these jurisdictions can still be seen in Appendix 1.

Already on this basis can it be concluded that the concept of good faith by no means is dead. Being referred to in one out of ten cases it does seem to play a role. However, it is curious that there are large local variations and one would immediately think that courts familiar with good faith from domestic legislation might be more likely to utilise a similar concept in international disputes. In this regard, it is worth pointing out that most of the decisions in which the courts openly utilised good faith are rendered by German or Swiss courts. Their share of the pool of decisions openly utilizing good faith is 49 out of the total of 79 (62%). One could perhaps speak of a ‘germanification’ of the pool of CISG decisions. One might also think that it confirms a homeward trend—that German and Swiss courts are likely to utilize good faith since they are very much familiar with such a concept in domestic law.⁷²

It could be said against this proposition that China, Slovakia, and Russia have a concept of good faith that imposes a positive duty on the trading parties in domestic law, yet, at the same time

⁷² See generally CORINNE WIDMER LÜCHINGER, SWITZERLAND, *reprinted in* INTERNATIONAL SALES LAW—A GLOBAL CHALLENGE 3, 468 (Larry A. DiMatteo ed. 2014).

rendering no CISG decisions to this effect.⁷³ But then again, the domestic laws of these states are reasonably young and do not carry a long and well-established tradition of developing the concept as in Germany and Switzerland—so perhaps what we do see in regard to good faith in CISG disputes is a homeward trend. On another note, the concern that domestic courts will escape into the general clauses since it is easier to justify a decision relying on general terms rather than specific ones⁷⁴ cannot be affirmed for the jurisdictions of China, Slovakia, and Russia.⁷⁵ Thus, the lack of delivery of justice otherwise indicated in large surveys carried out by the World Justice Project⁷⁶ and the World Bank's Governance Indicators⁷⁷ cannot be reaffirmed at present. According to these general large-scale surveys, Germany and Switzerland should be more reliable in the delivery of justice,⁷⁸ but perhaps this is not true when it comes to the specific issue of applying good faith. However, this would of course depend on the justification made by the courts.

⁷³ See generally JOSEF FIALA ET AL., CONTRACT LAW IN SLOVAK REPUBLIC 26 (2010); see MARIA YEFREMOVA ET AL., CONTRACT LAW IN RUSSIA 46 (2014); MO ZHANG, CHINESE CONTRACT LAW THEORY AND PRACTICE 76 (2006).

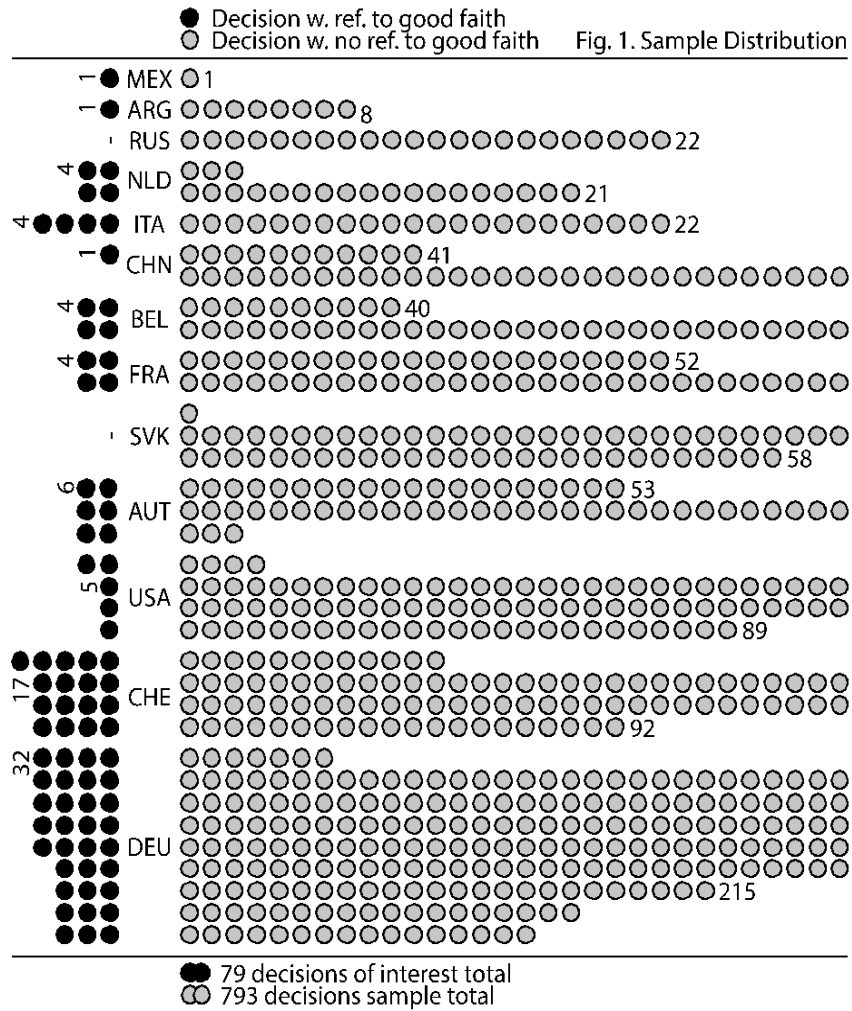
⁷⁴ JUSTUS WILHELM HEDEMANN, DIE FLUCHT IN DIE GENERALKLAUSELN. EINE GEFAHR FÜR RECHT UND STAAT [THE FLIGHT TO THE GENERAL CLAUSES. A DANGER TO LAW AND STATE] 66–73 (1933) (pointing out that the comfort of using generally worded clauses leads to uncertainty and arbitrariness in the application of the law).

⁷⁵ See Appendix I and II.

⁷⁶ WORLD JUSTICE PROJECT, WJP RULE OF LAW INDEX 2017–2018 69, 130.

⁷⁷ *Worldwide Governance Indicators*, THE WORLD BANK (last visited Dec. 28, 2018), http://databank.worldbank.org/data/reports.aspx?Report_Name=WGI-Table&Id=ceea4d8b (compiling 2017 aggregate and individual governance indicators for six dimensions of governance: Voice and Accountability; Political Stability and Absence of Violence/Terrorism; Government Effectiveness; Regulatory Quality; Rule of Law; Control of Corruption).

⁷⁸ WORLD JUSTICE PROJECT, *supra* note 76.



C. Observations on Justification (Roots)

The use of good faith is not always justified by the courts. When courts justify their use of good faith, the survey shows that it is most often done by referring to good faith as an underlying principle of the Convention. This was the case in 49 of the decisions (62%) where the court openly utilized good faith. In 26 decisions (33%), the justification was made by referring to good faith as an applicable domestic principle, and in 3 decisions (4%) the justification was made by reference to good faith as an

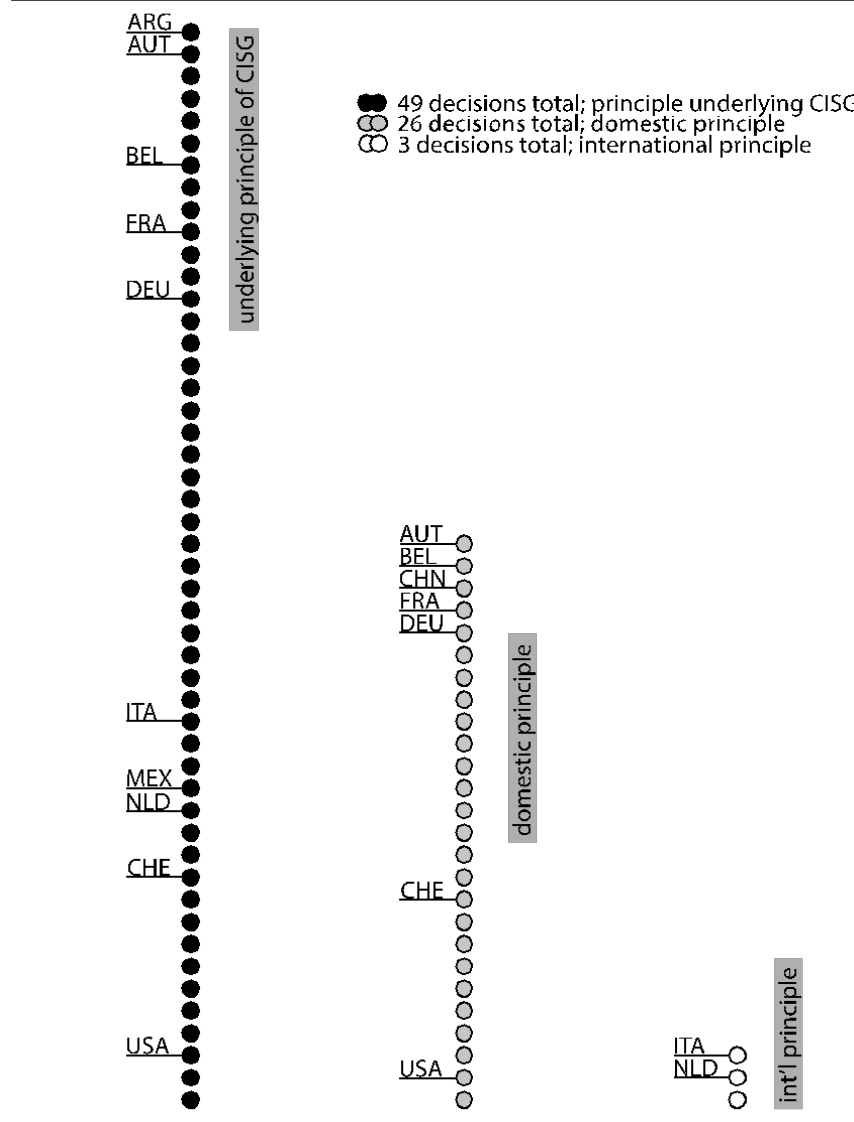
internationally accepted principle. Consequently, there is a strong pattern in practice of good faith being rooted in a principle underlying the Convention. However, once again we see that Germany and Switzerland dominate more than half of the decisions where good faith is considered an underlying principle. 27 (55%) of the 49 decisions justifying good faith as being a principle underlying the Convention are rendered by these two countries alone. Either the courts of these two countries are good at applying the Convention's underlying principles or they (perhaps subconsciously) read such a principle into the Convention because this is what judges are trained to do when applying domestic law. If the latter is the case, an inappropriate homeward trend has been detected, though the present survey can neither confirm nor reject this. It can however be established that it is by no means far-fetched to say that good faith is a principle underlying the Convention when one considers domestic court practice.

One should be careful jumping to the conclusion that the influence from German and Swiss courts is inappropriate as this of course depends on the specific circumstances of each decision. While it is a fact that Germany and Switzerland contribute with many good faith decisions to the sample, it is also a fact that they contribute the most decisions to the sample in general. The sample contains approximately 200 and 100 decisions respectively from the two countries and hence these two countries are expected to contribute with more decisions on good faith too.

Looking at the proportionate contribution, it is curious to see that Germany and Switzerland are finding good faith relevant more often than other jurisdictions. With between 50 and 100 decisions in the sample, Germany and Switzerland has rendered decisions using good faith in 41% and 22% of decisions respectively. Out of those decisions, good faith was considered an underlying principle in 59% and 47% respectively. By comparison, in almost 100 decisions by US courts, reference to good faith was made in merely 6% of decisions, but still around half (60%) of those decisions considered good faith a principle underlying the Convention. This roughly matches the average across all jurisdictions where it is seen that 62% of all decisions find good faith to be a principle underlying the Convention. In sum, the decisions from Germany and Switzerland use good faith more often than any other jurisdiction.

However, in all jurisdictions the application of good faith is justified as a principle underlying the Convention and to a lesser extent by reference to domestic law and almost never by reference to internationally accepted principles.

Fig. 2. The Roots of Good Faith



D. Observations on Utilisation (Fruits)

Looking at the sample of 793 domestic court decisions, it is possible to observe that domestic courts refer to the concept of good faith in 79 of these decisions, amounting to 10% of the total decisions surveyed. When domestic courts utilize the concept of good faith they most often impose a standard of behaviour on the parties. This happened in 43 of the decisions, constituting 54% of the decisions in which good faith was relied upon by the court. In another 9 decisions (11%), the courts utilized the concept of good faith to demand absence of bad faith. In 5 decisions (6%), the courts utilized the concept for another purpose, *e.g.*, to assist in interpreting the parties' contract or to find the parties' intentions, and in merely 1 decision (1%) the court referred to the concept of good faith as an aid to interpret the Convention text itself. This shows that the literal interpretation of the Convention's article 7(1), which favours a narrow utility of good faith, has very little support in domestic court practice. In fact, the most common utilization of good faith is to impose a standard of behaviour on the trading parties, and knowing that most decisions justify doing so with reference to good faith as an underlying principle of the Convention, the proponents of good faith as accounted for above do find some support in domestic court practice.

It is interesting to see that in 21 decisions (27%) where good faith is openly referred to, the court does not clearly indicate a particular use of the concept. One may wonder whether courts refer to good faith without a particular utilization perhaps as an additional justification of a particular interpretation of a specific provision of the Convention. It has not been possible to decipher any particular use of good faith in these decisions, hence they are not indexed as "other".

The concept of good faith is most commonly used to impose a standard of behaviour on the parties and it can be observed that Germany and Switzerland contribute heavily to this pool of decisions with 16 (37%) and 10 (23%) decisions respectively. Considering that the standard of behaviour imposed on the parties is not defined in the Convention and only vaguely defined elsewhere,

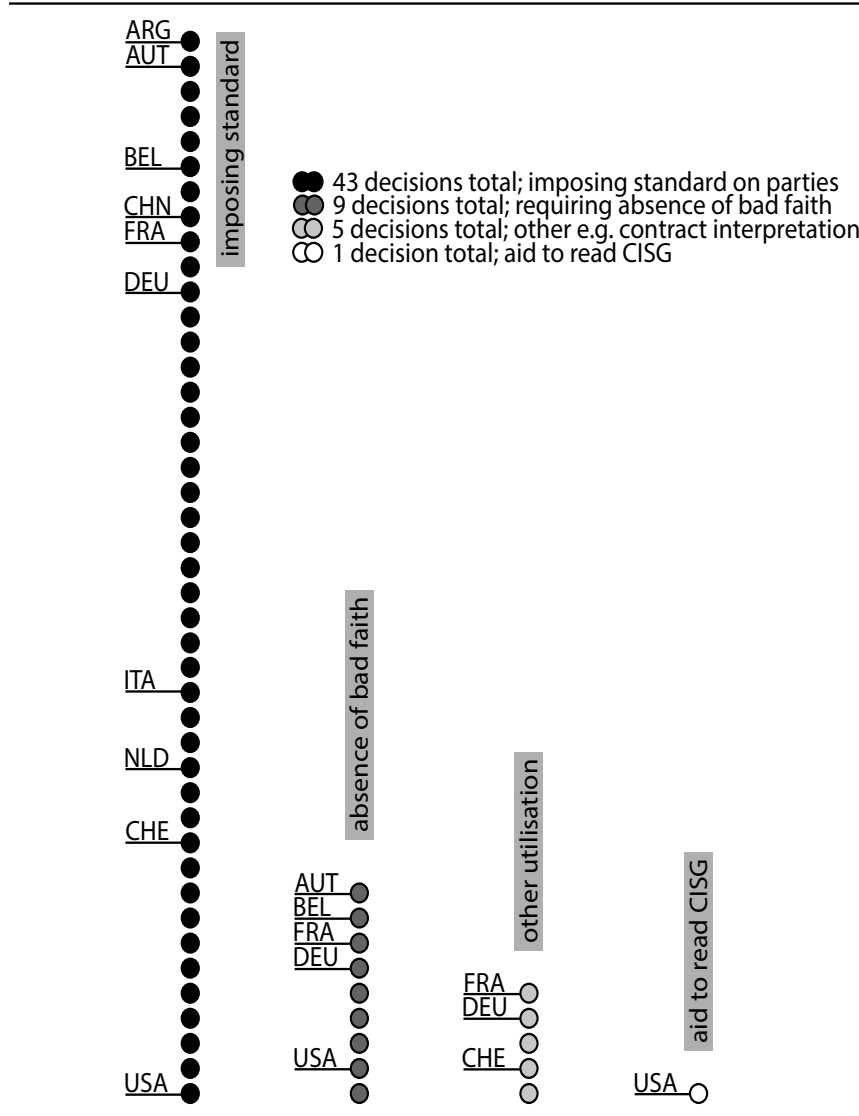
as accounted for above, the discretion of the judge is salient.⁷⁹ One can only hope that German and Swiss judges are not subconsciously reading their very developed and long-standing domestic equivalents into the Convention. The value of these decisions as an interpretational aid under the judicial dialogue required by article 7 would depend on the extent to which each decision expressly indicates observation of the autonomous interpretation rule itself. It is beyond the scope of the survey to go into detail about every decision made since the purpose of the survey is to detect general patterns. As also pointed out in regards to the roots of the concept, it cannot be rejected that some degree of unconscious homeward trend is taking place when taking into account that the domestic legal systems in Germany and Switzerland rely on a heavily developed concept of good faith according to which duties can be imposed on contracting parties.⁸⁰ By contrast, we know that the U.S. prefers a narrower doctrine of good faith and that French law is critical towards wide judicial discretion.⁸¹ It is therefore interesting to observe that the U.S. and France have contributed only 1 (2%) and 2 (4%) decisions respectively out of the 43 decisions that impose a positive standard of behaviour on the parties. This may point to some degree of homeward trend in the German and Swiss decisions. Both the U.S. and French courts generally utilise the concept of good faith less than the German (41%) and Swiss (22%) ones. The US contributed 5 (6%) decisions and France contributed 4 (5%) decisions in the total pool of decisions relying openly on good faith.

⁷⁹ See *supra* Section II.A.

⁸⁰ See generally LÜCHINGER, *supra* note 72, at 468; Schlechtriem, *supra* note 60; Lando, *supra* note 42, at 604; Musy, *supra* note 42, at 6.

⁸¹ See generally Farnsworth, *supra* note 45; Musy, *supra* note 42.

Fig. 3. The Fruits of Good Faith



While it cannot be rejected that some degree of “germanification” of the practice on good faith is taking place, it cannot be concluded that the trend is inappropriate. Neither can it be conclusively stated whether the US and French courts are in the wrong or it is the German and Swiss courts that are in the wrong, so to say.

IV. CONCLUSION

It can safely be concluded that the large-scale survey has unravelled good faith in domestic court practice in a novel way. While good faith has not firmly crystallised, and may never do so, it is possible to see some strong patterns. A general observation is that the concept of good faith is openly referred to by domestic courts in one out of ten decisions. Though it is possible that the general view on good faith is tainted by a particular German/Swiss style due to the judges’ unconscious imputation of domestic concepts into the CISG, it is not possible to either confirm or reject such a thesis by relying on the current study. Such conclusion would require further research of how persuasive the arguments are in each decision and whether the autonomous interpretation method has been used in the specific German and Swiss decisions. Regardless of whether a certain ‘germanification’ of good faith is taking place and regardless of whether this is perceived as appropriate or not, it is important for the trading parties to know that this is the reality. The practice of the court is after all what has the most impact on a dispute.

It would be wrong to say that good faith is not utilized by domestic courts and as such there is little support in favour of the opponents of good faith. With good faith being applied in one out of ten decisions (though sometimes with clear justification and sometimes without justification), good faith does play a role in disputes governed by the CISG. The concern by jurisdictions like the United Kingdom that adopting the CISG would introduce the unwanted concept of good faith seems to be correct to some degree insofar as the persuasive character of the already established court practice should influence the courts of any state having adopted CISG—also U.K. ones.

The argument that good faith is restricted to the interpretation of the Convention text (made during drafting) does not echo in domestic court practice since merely one decision openly

uses good faith in this regard. Most other decisions impose a standard of behaviour on the parties. As such, there is support in court practice for the proposition that the historical background of the concept is of historical and not legal interest.

To say that the concept of good faith has clearly crystallised in court practice would be wrong. The general trend is that good faith is most often justified as being an underlying concept of the CISG and it is most often used to impose a standard of behaviour upon the parties. However, the concept of good faith is still a multifaceted stone being utilized differently, *e.g.*, as a narrower doctrine demanding absence of bad faith or as an interpretation tool. It can also be seen that the justification of the use of good faith by courts vary, *i.e.* sometimes justification is lacking, sometimes justification is by way of domestic law and sometimes with several justifications being used at once.

Whether the multifaceted character of the concept of good faith is the concept's strength or weakness is very much in the eye of the beholder. On the one hand, domestic court practice could be taken as confirmation that good faith truly is a vague non-uniform concept that disturbs predictability of the law. In the interest of uniformity, it would be better if the concept of good faith was left behind, instead of insisting on continuing the decade-long debate based on a desire to find a uniform concept of good faith embodied in the Convention. Let the dead bury the dead.⁸² Such view would also avoid any future 'escape into the general clauses', though the survey shows little sign that this is taking place. Leaving the concept of good faith altogether could help not muddle the waters if similar results could be achieved through other means and at the same time perhaps encourage adoption by states who may be critical towards the concept.

On the other hand, domestic court practice may also be seen as confirmation that the subsequent development of the Convention favours a good faith standard imposed on the parties by way of an

⁸² ELIZABETH KNOWLES, *LITTLE OXFORD DICTIONARY OF PROVERBS* (2nd ed. 2016) (“[O]ften used to mean that the past should be left undisturbed; English proverb, early 19th century (see Matthew 8:22).”).

underlying principle. This would be in line with the Secretariat's commentary at the drafting.

To say that good faith is not part of the Convention is not rooted in the reality that trading parties face when they rely on domestic courts to solve their disputes. It would be interesting to see how the concept of good faith is utilized in the arbitration practice. If stronger patterns in the use of the concept is seen in arbitration, this could be of interest to the trading parties when choosing their dispute resolution forum.

As mentioned, the beauty of good faith is very much in the eye of the beholder. Hence it is not surprising to see that it is often utilized by the German, Swiss, and Austrian courts as their domestic legal systems have long traditions of using concepts similar to that of good faith. Search and ye shall find.

The question of whether the current patterns are appropriate or not or perhaps tainted by a homeward trend by any of the surveyed domestic court systems is beyond the scope of this Article to answer. A solid unravelling of domestic court practice has been provided for the benefit of trading parties and future scholarship. Thus, yet another contribution to the discourse of good faith in international trade has been made.

V. APPENDIX 1—OBSERVATIONS MADE

Argentina (ARG)

Number (proportion) of decisions in sample:	9 (1%)
Number (proportion) of decisions openly referring to good faith:	1 (1%)
Number of decisions using good faith as an aid to read the CISG:	-
Number of decisions using good faith to impose a positive duty on the parties	1
Number of decisions using good faith to demand absence of bad faith	-
Number of decisions using good faith in another way than above	-
Number of decisions justifying good faith as an underlying principle of the CISG	1
Number of decisions justifying good faith as a domestic principle	-
Number of decisions justifying good faith as an internationally recognized principle	-

Austria (AUT)

Number (proportion) of decisions in sample:	59 (7%)
Number (proportion) of decisions openly referring to good faith:	6 (8%)
Number of decisions using good faith as an aid to read the CISG:	-
Number of decisions using good faith to impose a positive duty on the parties	4
Number of decisions using good faith to demand absence of bad faith	1
Number of decisions using good faith in another way than above	-
Number of decisions justifying good faith as an underlying principle of the CISG	5
Number of decisions justifying good faith as a domestic principle	1
Number of decisions justifying good faith as an internationally recognized principle	-

Belgium (BEL)

Number (proportion) of decisions in sample:	44 (6%)
Number (proportion) of decisions openly referring to good faith:	4 (5%)
Number of decisions using good faith as an aid to read the CISG:	-
Number of decisions using good faith to impose a positive duty on the parties	2
Number of decisions using good faith to demand absence of bad faith	1
Number of decisions using good faith in another way than above	-
Number of decisions justifying good faith as an underlying principle of the CISG	3
Number of decisions justifying good faith as a domestic principle	1
Number of decisions justifying good faith as an internationally recognized principle	-

China (CHN)

Number (proportion) of decisions in sample:	42 (5%)
Number (proportion) of decisions openly referring to good faith:	1 (1%)
Number of decisions using good faith as an aid to read the CISG:	-
Number of decisions using good faith to impose a positive duty on the parties	1
Number of decisions using good faith to demand absence of bad faith	-
Number of decisions using good faith in another way than above	-
Number of decisions justifying good faith as an underlying principle of the CISG	-
Number of decisions justifying good faith as a domestic principle	1
Number of decisions justifying good faith as an internationally recognized principle	-

France (FRA)

Number (proportion) of decisions in sample:	56 (7%)
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Number (proportion) of decisions openly referring to good faith:	4 (5%)
Number of decisions using good faith as an aid to read the CISG:	-
Number of decisions using good faith to impose a positive duty on the parties	2
Number of decisions using good faith to demand absence of bad faith	1
Number of decisions using good faith in another way than above	1
Number of decisions justifying good faith as an underlying principle of the CISG	3
Number of decisions justifying good faith as a domestic principle	1
Number of decisions justifying good faith as an internationally recognized principle	-

Germany (DEU)

Number (proportion) of decisions in sample:	247 (31%)
Number (proportion) of decisions openly referring to good faith:	32 (41%)
Number of decisions using good faith as an aid to read the CISG:	-
Number of decisions using good faith to impose a positive duty on the parties	16
Number of decisions using good faith to demand absence of bad faith	4
Number of decisions using good faith in another way than above	2
Number of decisions justifying good faith as an underlying principle of the CISG	19
Number of decisions justifying good faith as a domestic principle	12
Number of decisions justifying good faith as an internationally recognized principle	-

Italy (ITA)

Number (proportion) of decisions in sample:	26 (3%)
Number (proportion) of decisions openly referring to good faith:	4 (5%)
Number of decisions using good faith as an aid to read the CISG:	-
Number of decisions using good faith to impose a positive duty on the parties	3

Number of decisions using good faith to demand absence of bad faith	-
Number of decisions using good faith in another way than above	-
Number of decisions justifying good faith as an underlying principle of the CISG	3
Number of decisions justifying good faith as a domestic principle	-
Number of decisions justifying good faith as an internationally recognized principle	1

Mexico (MEX)

Number (proportion) of decisions in sample:	2 (.25%)
Number (proportion) of decisions openly referring to good faith:	1 (1%)
Number of decisions using good faith as an aid to read the CISG:	-
Number of decisions using good faith to impose a positive duty on the parties	-
Number of decisions using good faith to demand absence of bad faith	-
Number of decisions using good faith in another way than above	-
Number of decisions justifying good faith as an underlying principle of the CISG	1
Number of decisions justifying good faith as a domestic principle	-
Number of decisions justifying good faith as an internationally recognized principle	-

Netherlands (NLD)

Number (proportion) of decisions in sample:	25 (3%)
Number (proportion) of decisions openly referring to good faith:	4 (5%)
Number of decisions using good faith as an aid to read the CISG:	-
Number of decisions using good faith to impose a positive duty on the parties	3
Number of decisions using good faith to demand absence of bad faith	-
Number of decisions using good faith in another way than above	-
Number of decisions justifying good faith as an underlying principle of the CISG	3

Number of decisions justifying good faith as a domestic principle	-
Number of decisions justifying good faith as an internationally recognized principle	2

Russia (RUS)

Number (proportion) of decisions in sample:	22 (3%)
Number (proportion) of decisions openly referring to good faith:	0 (0%)
Number of decisions using good faith as an aid to read the CISG:	-
Number of decisions using good faith to impose a positive duty on the parties	-
Number of decisions using good faith to demand absence of bad faith	-
Number of decisions using good faith in another way than above	-
Number of decisions justifying good faith as an underlying principle of the CISG	-
Number of decisions justifying good faith as a domestic principle	-
Number of decisions justifying good faith as an internationally recognized principle	-

Slovak Republic (SVK)

Number (proportion) of decisions in sample:	58 (7%)
Number (proportion) of decisions openly referring to good faith:	0 (0%)
Number of decisions using good faith as an aid to read the CISG:	-
Number of decisions using good faith to impose a positive duty on the parties	-
Number of decisions using good faith to demand absence of bad faith	-
Number of decisions using good faith in another way than above	-
Number of decisions justifying good faith as an underlying principle of the CISG	-
Number of decisions justifying good faith as a domestic principle	-
Number of decisions justifying good faith as an internationally recognized principle	-

Switzerland (CHE)

Number (proportion) of decisions in sample:	109 (14%)
Number (proportion) of decisions openly referring to good faith:	17 (22%)
Number of decisions using good faith as an aid to read the CISG:	-
Number of decisions using good faith to impose a positive duty on the parties	10
Number of decisions using good faith to demand absence of bad faith	-
Number of decisions using good faith in another way than above	2
Number of decisions justifying good faith as an underlying principle of the CISG	8
Number of decisions justifying good faith as a domestic principle	8
Number of decisions justifying good faith as an internationally recognized principle	-

United States of America (USA)

Number (proportion) of decisions in sample:	94 (12%)
Number (proportion) of decisions openly referring to good faith:	5 (6%)
Number of decisions using good faith as an aid to read the CISG:	1
Number of decisions using good faith to impose a positive duty on the parties	1
Number of decisions using good faith to demand absence of bad faith	2
Number of decisions using good faith in another way than above	-
Number of decisions justifying good faith as an underlying principle of the CISG	3
Number of decisions justifying good faith as a domestic principle	2
Number of decisions justifying good faith as an internationally recognized principle	-

VI. APPENDIX 2—LIST OF DECISIONS IN SAMPLE

1. Argentina: Juzgado Comercial Nacional de Primera Instancia [Com. 1a Inst.] [National Commercial Court of First Instance], 23/10/1991, “Aguila Refractorios S.A. / Conc. Preventive,” *translated in* <http://cisgw3.law.pace.edu/cases/911023a1.html>.
2. Argentina: Juzgado Comercial Nacional de Primera Instancia [Com. 1a Inst.] [National Commercial Court of First Instance], 20/5/1991, “Elastar Sacifia c. Bettcher Industries Inc.,” *translated in* <http://cisgw3.law.pace.edu/cases/910520a1.html>.
3. Argentina: Juzgado Comercial Nacional de Primera Instancia [Com. 1a Inst.] [National Commercial Court of First Instance], 6/10/1994, “Bermatex s.r.l c. Valentin Rius Clapers S.A. v. Sbrojovka Vsetin S.A.,” *translated in* <http://cisgw3.law.pace.edu/cases/941006a1.html>.
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