



AN ANALYSIS ON THE PRINCIPLE OF GOOD FAITH IN THE CISG

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Title page

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Abstract

Dette projekt omhandler omfanget af muligheder og eventuelle begrænsninger ved anvendelsen af good faith i international handel. Good faith er et kontroversielt koncept i forbindelse med handelskontrakter, især på et internationalt niveau. Dets anvendelsesomfang står skrevet i Art. 7 (1) af den internationale købelov (CISG), uden yderligere forklaring til hvad konceptet indebærer. Grundet CISG ønsker at fremstå som en uafhængig international lovgivning, ses der bort fra de allerede eksisterende forståelser af good faith i nationale lovgivninger, i udførelsen af Konventionens lovbestemmelser. Ifølge disse nationale forståelser af good faith, er der en pligt blandt kontraktparterne til at udvise en vis fornuftig opførsel under udførelsen af deres forpligtelser. Ikke desto mindre, så er teksten i Art. 7 (1) specifikt rettet mod domstolene til at udføre de lovbestemmende forpligtelser i denne internationale lovgivning. Selvom dette er tilfældet, er der visse modsigende holdninger som vil påstå, at disse forpligtelser også er bestemt til kontraktparterne. Dette vil med al sandsynlighed føre til yderligere forpligtelser for parterne i samarbejdet med hinanden, selvom det ikke står nedskrevet ordret i Konventionens bestemmelser. Denne analyse forsøger derfor ved hjælp af retspraksis at skabe en forståelse af retstilstanden indenfor dette område. I tidligere retspraksis fra den spæde begyndelse af CISG, benyttes konceptet overflødig, uden begrundelse for dets anvendelse. Det fremstår som en række ukendte variabler, der på en eller anden måde favoriserer den ene part over den anden i kontraktuelle konflikter. I og med denne retstilstand er dannet flere år tilbage, kan den med berettigelse ikke anvendes under nuværende omstændigheder. Ved undersøgelsen af retspraksis fra nyere tid, er det muligt at se en udvikling i anvendelsen af good faith. Konceptets anvendelsesmønster i praksis fremstår tydeligere, med fokus på opførelsen i parternes kontraktforhold. Det er derved muligt at uddrage principper om specifik adfærd, som skal overholdes blandt kontraktparterne, hvilket kan anses som værende fornuftig opførsel, for at undgå legale konsekvenser. Good faith udviser dermed en vis indflydelse på hvordan kontraktparterne skal efterleve lovbestemmelserne i CISG, for at opnå et gensidigt succesfuldt samarbejde med sin medkontrahent. Parterne er derfor nødsaget til at tilpasse sig disse forhold, eftersom good faith anses for at være et af de mange principper som CISG er baseret på, og skal derfor respekteres i overensstemmelse med dette.

På baggrund af dette, har good faith etableret et bredt anvendelsesomfang, der kan anvendes i flere sammenhænge angående adfærd, uden nødvendig understøttelse fra andre lovbestemmelser. Dette er en vis indikation på en parallel anvendelse af de to lovbestemmelser indenfor Art. 7 i CISG, hvorfor der ses en ændring i holdningen til anvendelsen af good faith i praksis. Det kan derfor udledes, at good faith har en vis indflydelse på udfaldet af kontraktuelle konflikter, og kan derfor anses som værende en direkte forpligtelse for parterne i kontraktforholdet med sin medkontrahent.

Indholdsfortegnelse

Title page	1
Abstract	2
1. Introduction	6
2. Problem.....	7
3. Method	9
3.1 <i>The legal dogmatic method</i>	9
3.2 <i>Interpretation of the CISG</i>	10
3.3 <i>Good faith</i>	11
3.4 <i>The application of good faith in practice</i>	12
3.5 <i>Is good faith more than a tool of interpretation?</i>	13
3.6 <i>Uniformity</i>	14
4. CISG.....	15
4.1 <i>An introduction to the CISG</i>	15
5. Interpretation of the CISG.....	16
5.1 <i>Introduction to Art. 7</i>	16
5.2 <i>Art. 7 (1)</i>	17
5.2.1 <i>General application</i>	17
5.2.2 <i>Principles of interpretation</i>	18
5.3 <i>Art. 7 (2)</i>	21
5.3.1 <i>General application</i>	21
5.3.2 <i>Matters governed by the CISG</i>	22
5.3.3 <i>General principles of the CISG</i>	22
5.4 <i>How to differ the application of Art. 7 (1) and 7 (2)?</i>	23
6. Good faith	25
6.1 <i>What is good faith?</i>	25
6.2 <i>Common law vs. civil law</i>	26
7. The application of good faith in practice	28
7.1 <i>Introduction to court practice</i>	28
7.2 <i>Examination of court practice</i>	29
7.2.1 <i>Case 1</i>	29

7.2.2 Case 2	31
7.2.3 Case 3	32
7.2.4 Case 4	33
7.2.5 Case 5	35
7.2.6 Case 6	36
7.2.7 Case 7	37
7.3 How do courts use good faith in practice?.....	39
8. Is good faith more than a tool of interpretation?.....	42
8.1 The evolution of court practice.....	42
8.2 Parallel application	43
8.3 Schlechtriem vs. Ferrari	45
8.4 The influence on the parties' behavior.....	47
8.5 What is the current legal status of good faith?	49
9. Uniformity.....	51
10. Conclusion.....	53
11. Bibliography	54
11.1 Books.....	54
11.2 Articles.....	54
11.3 Websites.....	55
11.3.1 Examined case law.....	55
11.3.2 Other	55

1. Introduction

One of the most difficult parts of creating a uniform law, is for the drafters to incorporate different legal systems and make them work together.¹ Attention must be given to differing legal systems, in order for such a law to be applicable and respected as a uniform law, all around the world. The reason for the domestic legal systems to be differing of each other, is because of their incorporated legal principles, which have been developed over a long period of time. This is not something which domestic legal systems wish to shy away from, because it makes each of their own understanding of justice unique, compared to others. These principles are the foundation of domestic court practice in each individual legal system and the reason for specific outcomes in contractual conflicts. However, it is not possible for a uniform law to adopt all of these principles into one law, or at least all of the differing connotations which comes along with such principles, depending on the legal system. There is not enough room for that many connotations of various legal principles in one uniform law, and if it was possible, it would no longer be a uniform law. Instead, it would be a blurry collection of legal principles, without a united direction as to what sort of rules are legally binding. A uniform law is meant to unify these differing principles, by acknowledging their origins respectfully, in order to create the proper guidance for international cooperation. Such a uniform law is able to be respected by many, but as mentioned earlier, it does come with its challenges.

¹ Andersen, 2014, p. 310

2. Problem

Good faith is one of these principles, which is heavily used by multiple legal systems, all around the world.² Because of this, each legal system has developed their own understanding of the concept and what it legally implies in its application, both theoretically and in practice.³ Even though good faith might be specified in some type of way, in certain legal systems on a domestic level, but the concept is far more elusive on a global scale, in terms of a uniform law.⁴ This creates issues for the purpose of a uniform law, when a popular legal principle does not have a universal definition, regarding its application. Cross-border transactions can be annulled or lead to disputes between parties, because of certain misunderstandings on what can be expected from one's counterpart, in terms of good faith, based on one's preconception of it. The differing notions of the concept hinder the possibility for its uniform application, because of the lack of a common interpretation.⁵ In Germany they use the term, *Treu und Glauben*, which is an idea of good will and good belief, with the ability to decide contractual conflicts.⁶ An unwritten norm of danish law has a similar idea of good faith, which is called *god tro*. It means that one must not act contrary to good faith and righteous intentions, or else it will cause consequences.⁷ In jurisdictions that are heavily favored by Muslim culture and religion, the Sharia is an essential part of the law, which associate good faith with morality and proper behavior.⁸ In the United States of America there is a certain duty, when engaging in transactions with one another, to uphold good faith in conduct.⁹

Even though these multiple legal systems show indications of having a similar idea to the concept of good faith, it is not ensured to have the same meaning in its application. This can influence the possibility of good faith having a certain impact on a contractual conflict, and thereby directly determine the outcome of such dispute.¹⁰ By having such uncertainties to a heavily used legal

² Andersen, 2014, p. 311

³ Andersen, 2014, p. 311

⁴ Andersen, 2014, p. 311

⁵ Andersen, 2014, p. 312

⁶ Andersen, 2014, p. 312

⁷ Andersen, 2014, p. 313

⁸ Andersen, 2014, p. 313

⁹ Andersen, 2014, p. 314

¹⁰ Andersen, 2014, p. 314

principle, creates issues in its incorporation of an international law, that is meant for uniform application.

This thesis attempts to unravel what the concept of good faith entails on an international level, within The United Nations Convention on Contracts for the International Sale of Goods (CISG). Good faith is stated in Art. 7 of the CISG, as a tool to interpret the many articles of the Convention, to ensure their proper application. However, with the notions of good faith from various domestic legal systems, regarding the parties to show a certain behavior in the fulfillment of their obligations, it is interesting to investigate whether this has had an influence on a uniform law. If this is the case, it is likely to have an impact on the behavior of parties, when interacting with each other, during their dealings in a CISG governed agreement. But since good faith is not stated in the Convention as more than a tool of interpretation, it is difficult to determine if a possible influence from domestic legal systems, has affected the concept within the Convention, which has led to the following question:

Does Art. 7 place any direct or indirect obligations upon the contracting parties, regarding good faith?

3. Method

The method of approach is divided into paragraphs in accordance with the chapters of this thesis, to properly explain their purpose, in the attempt to answer the academical question. There is no need to divide it otherwise, because each of these chapters presupposes the next, and one cannot read a chapter in this thesis without reading the previous one. Each paragraph has its own way of acquiring new knowledge towards the common cause of this thesis, and based on that knowledge, the approach of the next chapter is created. The specific approach is also determined by the choice of material used in each of the chapters, as well as these materials' possibilities and limitations in their application. To discover the true application and legal status of good faith within the Convention, the legal dogmatic method is chosen to accomplish this. This thesis applies this specific method, to systematically analyze the provisions associated with good faith, and its application in court practice.¹¹ The following paragraphs goes into detail on how all of these considerations cooperate, to achieve the common goal of answering the academical question.

3.1 The legal dogmatic method

The method of legal dogmatic is of great importance within the world of jurisprudence, which examines no more than the applicable law, also called *de lege lata*.¹² This method is not one that is static, regardless of its purpose to analyze current legal rights and obligations. Instead, it is a way to discover new knowledge about the examined applicable law with a systematic, methodical, and transparent approach.¹³ The method of legal dogmatic discovers new knowledge by examining a multitude of different sources of material. The significance of these materials can vary, depending on the jurisdiction and their origin, compared to others.¹⁴ In search of answers to the academical question at hand, this thesis uses materials with significant importance to matters regarding the Convention. The books, which have been applied in this thesis, are written by well renowned authors on the topic of the CISG, alongside with a few articles as well. Other than that, the legal

¹¹ Munk-Hansen, 2018, p. 64

¹² Munk-Hansen, 2018, p. 64

¹³ Munk-Hansen, 2018, p. 64

¹⁴ Munk-Hansen, 2018, p. 65

dogmatic method is connected to the application of law in practice,¹⁵ which is why this thesis also relies heavily on preceding case law. Furthermore, this method does not seek to attempt to solve certain specific problems, but instead describe the legal status within a specific area of jurisdiction.¹⁶ The key elements of this method, is to clarify the systematics behind the involved legal rules and describe the uncertainties, regarding this legal matter.¹⁷ It is important to understand the systematics of rules, within the examined area, in order to properly understand its legal status. A large aspect of the jurisprudence is the legal terms it uses to carry out its provisions, which at times can be quite abstract. The systematic approach enables the possibility for a better understanding of these terms and their legal application. To create this understanding, these terms must be combined with physical phenomena, which is an action called the legal subsumption.¹⁸ Besides from the legal dogmatic method to have a connection to the execution of legal rules in practice, it also revolves around legal values. It is important to get an understanding of these legal values and principles that are part of legal justice, in order to use the full extensive legal dogmatic method.¹⁹

3.2 Interpretation of the CISG

Firstly, the CISG is presented as the applicable law in which this thesis revolves around. Despite of this, the concept of good faith is not only a part of the CISG, but is also used by various other legal systems, as mentioned in Chapter 2. However, this thesis is purely focused on the international application of good faith, which is why there is no significant interest in its impact on a domestic level. In regard to this, because this thesis is strictly focused on good faith, there will not be given an entire introduction to all the different articles within the Convention. Instead, the thesis focuses on Art. 7 of the CISG, which is where the concept of good faith is stated, and therefore there will be given a thorough analysis of the systematics, regarding this article. It will create an understanding of the context in which good faith is used internationally and what it entails in such application. This will work as a foundation, for the establishment of the legal status of good faith within the CISG, in the next chapter. Multiple well renowned authors and their books are applied to create this understanding on how to use Art. 7, but it is fairly noticeable one source is referred to more than

¹⁵ Munk-Hansen, 2018, p. 66

¹⁶ Munk-Hansen, 2018, p. 66

¹⁷ Munk-Hansen, 2018, p. 66

¹⁸ Munk-Hansen, 2018, p. 66

¹⁹ Munk-Hansen, 2018, p. 67

others. The book; *Commentary on the UN Convention on the International Sale of Goods*, by Peter Schlechtriem and Ingeborg Schwenzer, is used as the primary source to create the understanding of Art. 7. Lots of other commentators, including the ones being used in this thesis, often refer to the knowledge of Schlechtriem and Schwenzer on this subject, especially the knowledge of Schlechtriem. This gives reasoning to classify this book as a respected take on the CISG and apply it heavily throughout this thesis.

3.3 Good faith

As stated in Chapter 2, good faith is one of these legal principles which have been incorporated over time in various legal systems, with a certain value. It is a quite abstract concept that must be clarified to the best ability, to fully understand what it implies in its application by the Convention. This is done by the primary reference to an article written by Benedict Sheehy, who explains the concept of good faith, and its application in preceding case law from the early days of the Convention's existence. The article is primarily used as a point of reference to create an understanding of how to interpret the abstract concept of good faith. Lots of preceding case law is being reviewed throughout the article, which does not necessarily revolve around one specific rule of application, but instead the same elements. Such compilation of analyzed case law enables for a certain pattern to be created, from which principles can be drawn from.²⁰ It gives a more thorough examination of good faith, by viewing it theoretically, as well as its application in practice, to understand its legal status at this particular moment in time. However, it is possible to collect such an amount of preceding case law independently of this article by Benedict Sheehy, for examination in this thesis. The Case Law On UNCITRAL Texts (CLOUT) is a database that enables this, with a collection of international preceding court practice, which purpose is to give courts the ability to exchange their experiences.²¹ Regardless, the reason for not retrieving case law independently, is to avoid the discovery of knowledge which has already been established by others. This is not the purpose of the legal dogmatic method, which is to discover new knowledge on a given subject. The article provides a foundation for the legal status of good faith, which enables a comparison of its conclusion to current court practice, to review possible changes in the application of good faith. Despite of this, it

²⁰ Munk-Hansen, 2018, p. 323

²¹ Schlechtriem & Schwenzer, 2016, p. 319

has not been possible to retrieve the original materials used in the article to create this foundation, beside the preceding case law, which is why the article's conclusion may be biased.

3.4 The application of good faith in practice

After an understanding of good faith has been created, alongside with the establishment of its legal status in the early days of the Convention, the legal dogmatic method entitles for new knowledge on this matter. As mentioned in paragraph 3.1, this dogmatic method of analysis, focuses on the given subject's impact in practice, which is why this chapter is an examination of court practice. The reason for this, is because there cannot be discovered new knowledge, regarding the legal status of good faith, by merely reviewing its legal status from the early days of the Convention. This chapter will therefore be an examination of current case law, regarding the application of good faith, to achieve new knowledge on this given subject. The analyzed cases in Chapter 7 are retrieved from the trustworthy database of CLOUD, which was mentioned in the previous paragraph. However, it has not been possible to access the original texts of court practice, which is why Chapter 7 is an examination of the various available summaries of these cases. With that notion in mind, there are possibilities for missing information and arguments, that could have an impact on the establishment of the current legal status of good faith. This is the reason why, the analysis of each case will not be in much detail and will purely focus on the application of good faith by the courts and arbitral tribunals. Neither will there be any significant analysis of articles used by the courts, other than the application of Art. 7, as to the reasoning behind their applicability. This has to do with the fact, that any legal reasonings with no connection to good faith, has been neglected. However, the summary of each case will be significant, in order to understand the context, in which the concept of good faith, is being used, to discover if it is applied as an obligation for the parties to act in accordance with. Despite it is only the summary of each case which is available, there is no need for the analysis of certain details in every single case. The purpose of this chapter is to create a similar pattern of court practice, as mentioned in the previous paragraph. This can enable a comparison, to the application of good faith from the early days of the Convention, which has the possibility to establish new knowledge and rediscover its legal status. If done correctly, it can create principles of requirements associated with the usage of good faith in practice. It has been attempted to find case law regarding this matter, from all over the globe, to discover whether the same

tendencies of application are reflected across the world. By doing so, there is no guaranties as to the quality of these decisions, regardless of which court it is. In this regard, it is not possible to retrieve enough trustworthy information, to compare the hierarchical status of the different courts and arbitral tribunals used in Chapter 7, which is why this has been neglected. Therefore, it is not possible to determine the impact, each of these court decisions have on this subject, regarding good faith. Furthermore, there is a gap of 12 years in between the fifth and the sixth case of Chapter 7, and it has not been possible to find any case regarding good faith, from within this period of time. It creates uncertainties as to the possible existence of unknown cases in this time period, which may have had an influence on the legal status of good faith.

3.5 Is good faith more than a tool of interpretation?

In this chapter, the legal statuses of good faith from the article by Benedict Sheehy and the examined case law of this thesis, are to be compared with one another. The reasoning for this, is because of the possibility which the article by Benedict Sheehy gives, to discover a possible development, in terms of the application of good faith, as mentioned in the two previous paragraphs. Chapter 7 of this thesis is purposefully created to execute this unique possibility, to examine today's application of good faith, compared to the early days of the Convention. This chapter is divided into five paragraphs, which increasingly dives deeper into the possible development, regarding the application of good faith. Each paragraph analyzes a different aspect of the evolving practice of good faith by the courts, and how it has affected its legal status. Other than relying on the principles, which can be drawn from court practice, the opinions of Schlechtriem and Ferrari on this matter are compared to each other. The possible reflection of their opinions in the examined case law, can provide an extra certainty to the possible solution of the academic question this thesis revolves around. However, the preceding case law of this thesis goes beyond the lifetime of Schlechtriem, who possibly could have changed his opinion, based on these outcomes. Even though Ferrari has not yet passed away, he is in a similar position as Schlechtriem, because his book, in which his opinions are stated, is older than some of the examined court practice. This could potentially lead to the application of an opinion, which is possibly outdated.

3.6 Uniformity

This paragraph explores the impact of court practice, in the Convention's pursuit to achieve uniformity in its application. Well knowing that this given matter has already briefly been mentioned in Chapter 5 of this thesis, there is a need to dive deeper into how court practice can settle the obligation of uniformity. By the knowledge, which has been established in paragraph 5.2.2.2, it is possible to examine what is required by the courts and arbitral tribunals to create uniformity.

4. CISG

4.1 An introduction to the CISG

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is an international sales law with worldwide recognition.²² The CISG was opened for signature in 1980, at the Vienna Convention, and came into force in 1988.²³ It is a collection of 101 articles, which are divided into four parts.²⁴ The first part is about the Convention's sphere of application and general provisions, whereas the second part are rules for the formation of the contract between parties.²⁵ The third part is a list of rules, regarding rights and obligations that comes along with these contracts of sale, and the fourth part includes the final public international law provisions.²⁶ In the world of trading goods, the CISG potentially governs more than 80 percent,²⁷ and as of today, 94 countries are a part of the Convention.²⁸ This includes countries from every range of the economical scale, in terms of most developed countries, as well as all major legal traditions are represented amongst them.²⁹ The purpose for the creation of the CISG was to unify the law on the international sale of goods.³⁰ *"The Convention has made the rights and obligations of parties to international export and import of goods remarkably transparent – easy to ascertain and easy to understand by parties from different legal systems – and in step with evolving international contract practices."*³¹ Other than that, there is usually an expectation of certain transaction costs in international trade, but the unification of sales law is presumably the reason for a potential reduction in these cross-border transaction costs.³² In order to ensure this, the Convention's text must be interpreted in a way that makes it capable of uniform application.³³ The method on how to reach the goal of a uniform way of interpretation, is stated in Art. 7 of the CISG.³⁴

²² Schlechtriem & Schwenzer, 2016, p. 138

²³ Sheehy, 2004, p. 3

²⁴ Schlechtriem & Schwenzer, 2016, p. 140

²⁵ Schlechtriem & Schwenzer, 2016, p. 140

²⁶ Schlechtriem & Schwenzer, 2016, p. 140

²⁷ Schlechtriem & Schwenzer, 2016, p. 138

²⁸ https://uncitral.un.org/en/texts/saleofgoods/conventions/sale_of_goods/cisg/status

²⁹ Brand & Ferrari & Flechtner, 2004, p. 1

³⁰ Schlechtriem & Schwenzer, 2016, p. 138

³¹ Brand & Ferrari & Flechtner, 2004, p. 1

³² Schlechtriem & Schwenzer, 2016, p. 143

³³ Brand & Ferrari & Flechtner, 2004, p. 1

³⁴ Brand & Ferrari & Flechtner, 2004, p. 2

5. Interpretation of the CISG

5.1 Introduction to Art. 7

Art. 7

“(1) 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.”

“(2) Questions concerning matters 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 or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.”³⁵

The CISG regulates different aspects of the contractual relationship between parties, but not all of them can be solved by the expressly written articles in the Convention's text. Art. 7 of the CISG provides the necessary tools to regulate all aspects of that relationship, by the application of principles and certain methods of interpretation. The application of the principles in the Convention was a controversial matter, when drafting the CISG.³⁶ United Nations Commission On International Trade Law (UNCITRAL) wanted the gaps in the Convention's text to be filled according to its general principles, which would be an independent interpretation, compared to the different ways of interpretation according to various domestic laws.³⁷ It was then considered to be too unrealistic, because of the lack of definitive general principles within the Convention.³⁸ After multiple attempts had failed, trying to make more definite principles, it was then decided only to write down the need of attention to the international character of the Convention's provisions, when using them.³⁹ An extensive debate was had during the New York Draft in 1978, regarding whether good faith was effective enough for the interpretation of an international convention. The result of this debate, led

³⁵ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 42

³⁶ Schlechtriem & Schwenzer, 2016, p. 316

³⁷ Schlechtriem & Schwenzer, 2016, p. 316

³⁸ Schlechtriem & Schwenzer, 2016, p. 316

³⁹ Schlechtriem & Schwenzer, 2016, p. 316

to the addition of the wording; *observance of good faith in international trade*.⁴⁰ Furthermore, it was decided at the Diplomatic Conference to add an additional rule to the article, because a small majority of delegations were convinced of the need for certain rules regarding gap-filling.⁴¹ As it is clearly stated in the beginning of this paragraph, Art. 7 is divided into two parts, with two different approaches in terms of application.⁴² The purpose of Art. 7 (1) is to ensure an autonomous interpretation for the application of rules and principles of the Convention, while Art. 7 (2) is capable of solving the issue of gap-filling.⁴³ Even though the two rules have different applications, they can both be used to evolve the general application of the Convention, when facing challenges that the drafters was not able to foresee, in terms of technological and economic development.⁴⁴ Overall, Art. 7 is designed to reach the goal of uniformity in the application of the Convention, which was the intention by its drafters.⁴⁵

5.2 Art. 7 (1)

5.2.1 General application

As already mentioned, the purpose of Art. 7 (1) is to give the tools for the interpretation of the Convention.⁴⁶ There are three principles to be used in the interpretation of the Convention; *international character, promote uniformity and the observance of good faith in international trade*.⁴⁷ When stated in Art. 7 (1); *regard is to be had*, it is not merely a suggestion for the application of these three principles of interpretation. Instead, it is a direct command for the courts and arbitral tribunals to follow when interpreting the Convention's text.⁴⁸ This means, that the wording of the article is specifically directed at these courts, in terms of the interpretation of the Convention, and cannot be applied to the contractual relationship between parties.⁴⁹

⁴⁰ Schlechtriem & Schwenzer, 2016, p. 316

⁴¹ Schlechtriem & Schwenzer, 2016, p. 316

⁴² Schlechtriem & Schwenzer, 2016, p. 317

⁴³ Schlechtriem & Schwenzer, 2016, p. 317

⁴⁴ Schlechtriem & Schwenzer, 2016, p. 317

⁴⁵ Brand & Ferrari & Flechtner, 2004, p. 139

⁴⁶ Schlechtriem & Schwenzer, 2016, p. 317

⁴⁷ Schlechtriem & Schwenzer, 2016, p. 317

⁴⁸ Schlechtriem & Schwenzer, 2016, p. 317

⁴⁹ Schlechtriem & Schwenzer, 2016, p. 317

5.2.2 Principles of interpretation

5.2.2.1 International character

The first principle of interpretation is regarding international character. This means that the courts and arbitral tribunals must consider the character of the Convention's rules, when interpreting the CISG.⁵⁰ This reference to the Convention's international character also means that the CISG must be interpreted autonomously.⁵¹ An autonomous method of interpretation means that the terms which are included in the Convention's text, must be interpreted independently and not in the light of any preconceptions from domestic legal systems.⁵² Nonetheless, when countries becomes a part of the Convention, the Convention becomes a part of their domestic legal system.⁵³ Though it is not convenient to look for solutions in domestic law, regarding interpretation issues within the CISG. Therefore, terms like; avoidance, reasonable etc., that are used both by the CISG and domestic legal systems with the same textual expression, must not be confused with each other, in terms of their preconceptions. Instead, these terms must be interpreted independently by the Convention, without any preconceptions from these domestic legal systems, because expressions used by a uniform convention, like the CISG, are meant to be neutral.⁵⁴ Different legal systems must be able to accept the solutions provided by the CISG, regardless of their diverse legal traditions.⁵⁵ Furthermore, there are documents from the legislative history of the Convention, which expressly states the importance of avoiding the influence of domestic preconceptions.⁵⁶ This concept is known as the homeward trend, and the statements regarding this were clearly made to ensure that this trend was to be restrained in the application of the Convention.⁵⁷ Keep in mind that the Convention was made through negotiations between many different countries with different legal systems, that each tried to convince the others of what to include into the Convention's text, in regard to legal principles etc.⁵⁸ A lot of compromises were made, especially because of how the negotiations took place with a mix of different languages, and therefore intentions and meanings could have been lost

⁵⁰ Schlechtriem & Schwenzner, 2016, p. 317

⁵¹ Brand & Ferrari & Flechtner, 2004, p. 140

⁵² Schlechtriem & Schwenzner, 2016, p. 317

⁵³ Brand & Ferrari & Flechtner, 2004, p. 141

⁵⁴ Brand & Ferrari & Flechtner, 2004, p. 141-142

⁵⁵ Schlechtriem & Schwenzner, 2016, p. 317

⁵⁶ Komarov, 2005, p. 77

⁵⁷ Komarov, 2005, p. 77

⁵⁸ Schlechtriem & Schwenzner, 2016, p. 317

in translation.⁵⁹ But also because of the requirements set forth by each individual country, to include a minimum of legal principles from each of their own domestic legal system into the CISG, in conformity with their interest.⁶⁰ Therefore, the Convention must be interpreted carefully, but not just in terms of the homeward trend, but also because of the intentions and meanings that possibly have been lost in translation. Especially considering that the CISG is officially written in six different languages and all of them are equally authentic. However, the terminology in the different versions of the CISG can vary because of the translations, which can be an issue without any help to be found in Art. 7 (1).⁶¹

5.2.2.2 Promote uniformity

The purpose of the Convention is its uniform application through the promotion of uniformity in Art. 7 (1), which is a duty bestowed upon the courts and arbitral tribunals.⁶² In order to achieve this, courts and arbitral tribunals needs to pay close attention to other decisions made in contractual conflicts, regarding the CISG. This is due to the fact, that there is no such thing as an international superior court to handle these difficulties, as well as differing interpretations.⁶³ By doing this, it automatically creates a uniform way of handling contractual conflicts and interpretation difficulties, when respecting court decisions, regarding the CISG in other countries, just as it is done domestically.⁶⁴ It is therefore clear, that in order for the Convention to function as it was meant to be, it presupposes the need for court practice to be available to other courts and arbitral tribunals in other countries.⁶⁵ Such a system has already been established, as mentioned in paragraph 3.3, to make uniform decision making easier for the individuals of different courts and arbitral tribunals.⁶⁶ Even though this is the case, debates are being had regarding whether or not courts and arbitral tribunals are obliged to follow preceding outcomes of contractual conflicts which was governed by the CISG.⁶⁷ Nowhere is it stated as an obligation to follow preceding case law, but nonetheless, they

⁵⁹ Schlechtriem & Schwenzer, 2016, p. 317

⁶⁰ Schlechtriem & Schwenzer, 2016, p. 317

⁶¹ Schlechtriem & Schwenzer, 2016, p. 317

⁶² Schlechtriem & Schwenzer, 2016, p. 317

⁶³ Schlechtriem & Schwenzer, 2016, p. 317-319

⁶⁴ Schlechtriem & Schwenzer, 2016, p. 319

⁶⁵ Schlechtriem & Schwenzer, 2016, p. 319

⁶⁶ Schlechtriem & Schwenzer, 2016, p. 319

⁶⁷ Schlechtriem & Schwenzer, 2016, p. 319

must not be ignored either. “Several courts have expressly stated that foreign court decisions have merely persuasive, non-binding authority.”⁶⁸ However, this is not the path to achieving uniform application for the Convention. If preceding court decisions are persuasive to follow, because of their great arguments towards a certain cause, then these should be followed by other courts and arbitral tribunals.⁶⁹ Instead of just referring to these preceding decisions, they should be used actively in order to achieve uniformity.⁷⁰ Paying close attention to preceding case law should be an evaluation of its usefulness, when needed in a specific matter, and not merely a notification of its existence.⁷¹ By analyzing the specific arguments made by other courts and arbitral tribunals and also use these same arguments in future cases, that is the proper path to uniformity. If the reference to preceding case law is only an acknowledgement of its existence, chances are that without an analysis of the arguments being made in similar preceding cases, then it may perpetuate wrong reasonings for specific outcomes in the future.⁷² It is important to include the language barriers as well in the promotion of uniformity. By the application of different language versions of the CISG, there are possibilities for preceding cases from various corners of the world to use different terms with different meanings, which can be problematic.⁷³

5.2.2.3 Good faith

The last principle of interpretation in Art. 7 (1) is *the observance of good faith*. Even though the CISG is not the only convention or uniform project dealing with good faith, it is still a quite controversial matter.⁷⁴ Good faith is used by the Convention as a tool of interpretation, but despite this fact, some authors are convinced that the phrase implies something more than that. Regardless of the statement in paragraph 5.2.1, about Art. 7 (1) only being an obligation for the courts and arbitral tribunals, others believe that the parties in contract are obliged to observe good faith as well.⁷⁵ This means that there is a need for some determination, as to whether or not *the observance of good faith* is only applicable to the courts, in terms of interpretation, or if it also applies to the parties in

⁶⁸ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 42

⁶⁹ Schlechtriem & Schwenzner, 2016, p. 319

⁷⁰ Schlechtriem & Schwenzner, 2016, p. 319

⁷¹ Schlechtriem & Schwenzner, 2016, p. 319

⁷² Schlechtriem & Schwenzner, 2016, p. 319

⁷³ Schlechtriem & Schwenzner, 2016, p. 319

⁷⁴ Schlechtriem & Schwenzner, 2016, p. 319

⁷⁵ Brand & Ferrari & Flechtner, 2004, p. 153

contract.⁷⁶ The issue with it however, is that there are not expressly written any specific standards of good faith, which can be quite difficult to determine.⁷⁷ It is certainly not an option to use the standards of good faith from domestic legal systems, but nonetheless these standards of good faith may be reflected in the CISG through the usage of Art. 9 (2).⁷⁸ Art. 9 (2)⁷⁹ is about the general principles of international trade, which are impliedly applicable in the specific agreement between parties, that they knew or ought to have known. However, these standard principles of trading are not often referred to as standards of good faith.⁸⁰ It is then up to the courts and arbitral tribunals to refer to these standard principles as standards of good faith in international trade, when using Art. 7 (1).⁸¹ By continuously doing so more often, it will then create a clear specific vision as to what is required from the concept of good faith in international trade.⁸²

5.3 Art. 7 (2)

5.3.1 General application

Like mentioned in paragraph 5.2 about the application of Art. 7 (1), it is neither possible for Art. 7 (2) to find solutions to its provisions by searching through domestic law. Instead, courts and arbitral tribunals must, to the best of their abilities, distance themselves from the usage of domestic law and find solutions within the CISG.⁸³ This gap-filling rule is a two-step procedure. If it is possible to fill the gaps in the CISG by using principles on which it is built upon, then it is called internal gaps. However, if this is not possible, then courts and arbitral tribunals must go through domestic laws to find the solutions in order to fill the gaps, which are called external gaps.⁸⁴ Though it is only possible to use these gap-filling rules, if the question is regarding a matter which is governed by the Convention.⁸⁵ It is possible to be somewhat doubtful of which matters are governed by the

⁷⁶ Schlechtriem & Schwenzer, 2016, p. 319-321

⁷⁷ Schlechtriem & Schwenzer, 2016, p. 321

⁷⁸ Schlechtriem & Schwenzer, 2016, p. 321

⁷⁹ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 63

⁸⁰ Schlechtriem & Schwenzer, 2016, p. 321

⁸¹ Schlechtriem & Schwenzer, 2016, p. 321

⁸² Schlechtriem & Schwenzer, 2016, p. 321

⁸³ Brand & Ferrari & Flechtner, 2004, p. 157-158

⁸⁴ Schlechtriem & Schwenzer, 2016, p. 326

⁸⁵ Schlechtriem & Schwenzer, 2016, p. 326

Convention, which makes it even more difficult to determine if a dispute, that is not expressly settled in the Convention, is still governed by it.⁸⁶

5.3.2 Matters governed by the CISG

Art. 4⁸⁷ of the CISG presents the matters governed by the CISG, which is the formation of the contract, as well as the rights and obligations in upholding this agreement.⁸⁸ However, even though these matters have not been written down thoroughly, the scope of them are influenced by the principles of the Convention in which one would find the solutions for a specific case of gap-filling.⁸⁹ If there are not any principles existing that can be used to make new rules, then these matters must be considered not to be governed by the CISG. The same thing goes for principles that are too vague, in terms of allowing rules to be used in specific situations.⁹⁰

5.3.3 General principles of the CISG

There are multiple principles the Convention is based on, that commentators have mentioned on the topic of the CISG.⁹¹ These principles can be more persuasive when used by courts and arbitral tribunals in disputes governed by the Convention, whether it is in a general matter or in a specific contractual conflict.⁹² Parties' autonomy in Art. 6⁹³ of the CISG is one of these principles, which is about the priority of the parties' agreement over other legal systems.⁹⁴ Another principle is Art. 11⁹⁵, which is the freedom of form. Art. 11 states that there are no requirements as to which form the contract must be in, whether it is in writing, speech etc.⁹⁶ Yet another principle is, that it is not allowed to act in a contradictory way.⁹⁷ As it was mentioned in paragraph 5.2.2.3, there is a certain amount of support for *the observance of good faith* to be an obligation for the parties in contract. Even though good faith is presented as a tool of interpretation in Art. 7 (1), multiple commentators

⁸⁶ Schlechtriem & Schwenzer, 2016, p. 326

⁸⁷ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 24

⁸⁸ Brand & Ferrari & Flechtner, 2004, p. 157

⁸⁹ Schlechtriem & Schwenzer, 2016, p. 326

⁹⁰ Schlechtriem & Schwenzer, 2016, p. 326

⁹¹ Schlechtriem & Schwenzer, 2016, p. 328

⁹² Schlechtriem & Schwenzer, 2016, p. 328

⁹³ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 33

⁹⁴ Schlechtriem & Schwenzer, 2016, p. 328

⁹⁵ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 71

⁹⁶ Schlechtriem & Schwenzer, 2016, p. 328

⁹⁷ Schlechtriem & Schwenzer, 2016, p. 328

has now stated it as one of the general principles of the Convention.⁹⁸ The principle is supported as an obligation to observe good faith in conduct and dealings, within the contractual relationship.⁹⁹ Because of this, good faith is no longer merely a tool of interpretation, but also viewed as a general principle of the Convention, which is capable of gap-filling.¹⁰⁰ While the aforementioned principles are cemented in the Convention, there are some that are not, even though they are often mentioned as such principles and used in gap-filling issues.¹⁰¹ According to the wording of Art. 7 (2), principles used in gap-filling issues must be principles on which the Convention is based, otherwise they are not viable.¹⁰² The Convention was a valuable inspiration for the principles of The International Institute for the Unification of Private Law (UNIDROIT),¹⁰³ which is an independent intergovernmental organization.¹⁰⁴ However, the principles set forth by UNIDROIT may only be used as an additional argument to gap-filling issues regarding internal gaps.¹⁰⁵ It is only possible though, for the UNIDROIT Principles to be used in matters regarding external gaps, where no general principles of the CISG is available.¹⁰⁶

5.4 How to differ the application of Art. 7 (1) and 7 (2)?

Art. 7 (1) is for the interpretation of the Convention's text in cases of hardship and tentative decisions, regarding the provisions of the Convention. However, Art. 7 (1) cannot provide additional obligations to the CISG, other than the interpretation of its provisions. Nevertheless, it is possible to modify the provisions of the Convention, regarding the requirements of certain articles in the CISG.¹⁰⁷ It is then possible to remove expressly stated provisions or expand them to cover the circumstances which was not foreseeable to the drafters of the Convention, as mentioned in paragraph 5.1.¹⁰⁸ This makes it possible for Art. 7 (1) to expand the provisions of for example Art. 13¹⁰⁹, in regard to which methods of modern communication can be considered to be writing,

⁹⁸ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 43

⁹⁹ Schlechtriem & Schwenzer, 2016, p. 328

¹⁰⁰ Lookofsky, 2017, p. 37

¹⁰¹ Schlechtriem & Schwenzer, 2016, p. 330

¹⁰² Schlechtriem & Schwenzer, 2016, p. 330

¹⁰³ Schlechtriem & Schwenzer, 2016, p. 321

¹⁰⁴ <https://www.unidroit.org/about-unidroit/>

¹⁰⁵ Schlechtriem & Schwenzer, 2016, p. 330

¹⁰⁶ Schlechtriem & Schwenzer, 2016, p. 330

¹⁰⁷ Schlechtriem & Schwenzer, 2016, p. 321

¹⁰⁸ Schlechtriem & Schwenzer, 2016, p. 321

¹⁰⁹ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 76

alongside with telegram and telex.¹¹⁰ However, this is also possible in the application of Art. 7 (2), because it is regarding an issue which is governed but not expressly settled by the Convention.¹¹¹ The issue can then be settled by the application of certain general principles of the Convention and reach the same conclusion as an extensive interpretation.¹¹² The line between the application of Art. 7 (1) and 7 (2) can be difficult to judge, because in certain cases where there is a need for modification on the Convention's text, both of them can lead to similar conclusions.¹¹³ In this regard, it is important to notice that Art. 7 (2) has no application to issues that are governed and expressly settled by the Convention. Instead, the right thing to do is to rely on the expressly written articles.¹¹⁴ This concerns articles, which uses general terms in the Convention, such as *reasonable period of time* in Art. 39 (1),¹¹⁵ and *substantial detriment* in Art. 25.¹¹⁶ These provisions must be settled by the application of extensive interpretation and not gap-filling.¹¹⁷ So even though some issues are not expressly settled in the CISG, that does not necessarily mean that they should be solved by the application of gap-filling, when it is possible to create such interpretations.¹¹⁸

¹¹⁰ Schlechtriem & Schwenzer, 2016, p. 321

¹¹¹ Lookofsky, 2005, p. 88-89

¹¹² Lookofsky, 2005, p. 89

¹¹³ Schlechtriem & Schwenzer, 2016, p. 326

¹¹⁴ Lookofsky, 2005, p. 89

¹¹⁵ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 171

¹¹⁶ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 114

¹¹⁷ Schlechtriem & Schwenzer, 2016, p. 326

¹¹⁸ Schlechtriem & Schwenzer, 2016, p. 321

6. Good faith

6.1 What is good faith?

Firstly, it must be decided whether good faith is merely a moral principle or a legal principle.¹¹⁹ While good faith very well may be based on a moral principle, commentators conclude it as being “*more than a moral principle and is in fact a legal principle*”.¹²⁰ Secondly, it must be identified what good faith implies. Purely based on the two words, good faith, it does imply somewhat of a formalism in contractual interpretation, which creates flexibility for the adjudicators to make sure that the integrity of the agreement is upheld.¹²¹ Amongst the commentators who believe there is a precontractual liability between parties of a CISG governed contract, have not come to an agreement on what this entitles.¹²² There is no certainty on whether it requires specific duties or behavior, between the parties before, during and after the contractual agreement. According to some of these commentators, it promotes the exchange of information, mitigate damages, and prevent parties from unreasonable benefits beyond what is stated in the contract.¹²³ Others use it synonymously with phrases like; “*fairness, reasonable, an ethical sense, and solidarity*”.¹²⁴ As mentioned in paragraph 5.2.2.1, documents were written during the drafting of the Convention, which expressly stated the importance of avoiding the homeward trend in the interpretation of the Convention. The CISG was never meant to be a complementary law to domestic laws, but instead a fully comprehensive regulation.¹²⁵ But in this regard, there is a difference to what the principle of good faith implies depending on how it is interpreted. In Art. 7 (1) of the CISG, it says; *promote the observance of good faith*, which means the notion of good faith must be accounted for by courts, in the interpretation of the Convention’s text.¹²⁶ There is no wording in the Convention that oblige the contracting parties to act according to good faith. Therefore Art. 7 (1) differs from the concept of good faith that is created by domestic laws, which is an obligation for the contracting parties to act

¹¹⁹ Sheehy, 2004, p. 6

¹²⁰ Sheehy, 2004, p. 6-7

¹²¹ Sheehy, 2004, p. 7

¹²² Sheehy, 2004, p. 7

¹²³ Sheehy, 2004, p. 7

¹²⁴ Sheehy, 2004, p. 7

¹²⁵ Komarov, 2005, p. 77

¹²⁶ Lookofsky, 2017, p. 37

in good faith.¹²⁷ Furthermore, the Convention also takes distance from the obligation, regarding good faith, that is stated by the UNIDROIT Principles, which works as a supplement to the CISG.¹²⁸ According to article 1.7 (1) of the UNIDROIT Principles; “*Each party must act in accordance with good faith and fair dealing in international trade.*”¹²⁹ Earlier it was mentioned in paragraph 5.1 that discussions took place amongst the drafters of the CISG, in regard to the formation of Art. 7. The lack of definitiveness was the issue, because some drafters were convinced that good faith was too vague of a concept.¹³⁰ The notion of good faith is such a broad concept, which is why it can be considered to be vague, and therefore take on multiple different meanings in different legal systems.¹³¹ This may compromise the ultimate goal of the Convention, which is its uniform application.¹³² To some authors it is still considered to be a vague concept and therefore it can create difficulties for courts to develop a common definition.¹³³ This can very well lead to differing interpretations and thereby inconsistent results in contractual conflicts, because of the lack of knowledge on how and when to use the concept of good faith correctly.¹³⁴

6.2 Common law vs. civil law

The common law and civil law jurisdictions are the ones that make up the majority of the worlds legal systems, and these two legal systems have a different opinion on the conception of good faith.¹³⁵ Through time, the common law system has rejected the notion of good faith, while on the other hand, “*in the civil law systems, it is a broad, general and far-reaching concept.*”¹³⁶ When dealing with the common law system in regard to English law, the notion of good faith allows parties to be unreasonable and negligent, as long as they act honestly towards each other.¹³⁷ Across the Atlantic Ocean, the United States has adopted good faith into their Uniform Commercial Code through the German, *Treu und Glauben*, doctrine.¹³⁸ In the United States, they are using good faith

¹²⁷ Lookofsky, 2017, p. 37

¹²⁸ Lookofsky, 2017, p. 37

¹²⁹ <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/>

¹³⁰ Komarov, 2005, p. 83

¹³¹ Komarov, 2005, p. 83

¹³² Brand & Ferrari & Flechtner, 2004, p. 152

¹³³ Brand & Ferrari & Flechtner, 2004, p. 152

¹³⁴ Brand & Ferrari & Flechtner, 2004, p. 152

¹³⁵ Sheehy, 2004, p. 4

¹³⁶ Sheehy, 2004, p. 4

¹³⁷ Sheehy, 2004, p. 20-21

¹³⁸ Sheehy, 2004, p. 21

in three different ways. Firstly, it can be used to indicate the implied terms of the contract, and secondly, it can be used to define certain types of behavior that are to be excluded from the contract, because they are considered as bad faith.¹³⁹ Thirdly, “*it limits the exercise of legal discretion where to so exercise it would undo the benefits surrendered in the development of the contract.*”¹⁴⁰ So even though the notion of good faith for a long time has been rejected by the common law systems, it is starting to gain some ground outside the UK.¹⁴¹ When it comes to the civil law system, the German law has been thorough with its statements on the concept of good faith, by writing 500 pages of discussion on the subject.¹⁴² In German law it is considered to be a legal obligation, by trusting the contractual relationship between the parties, and act reasonably in order not to breach this relationship.¹⁴³ This doctrine of duty, as mentioned before, is called *Treu und Glauben*, which means truth and believing.¹⁴⁴ Other words that are used to describe this duty are good morals and fairness,¹⁴⁵ which is quite similar to how good faith has been described by some commentators in paragraph 6.1. According to Italian law, the notion of good faith is very similar, in the belief of it being a legal obligation that is built upon social solidarity and fairness, which is why in Italy it is a broader ethical idea.¹⁴⁶ “*In general, the civil law tradition looks at Good Faith as a broad, comprehensive principle which includes many concepts considered in the common law tradition to be discrete matters.*”¹⁴⁷ Nonetheless, the differences between the two legal systems does not shy away from the fact, that none of them have a true definition on the concept of good faith.¹⁴⁸

¹³⁹ Sheehy, 2004, p. 22

¹⁴⁰ Sheehy, 2004, p. 22

¹⁴¹ Sheehy, 2004, p. 22

¹⁴² Sheehy, 2004, p. 22

¹⁴³ Sheehy, 2004, p. 22

¹⁴⁴ Sheehy, 2004, p. 22-23

¹⁴⁵ Sheehy, 2004, p. 23

¹⁴⁶ Sheehy, 2004, p. 23

¹⁴⁷ Sheehy, 2004, p. 23

¹⁴⁸ Sheehy, 2004, p. 23

7. The application of good faith in practice

7.1 Introduction to court practice

There are clearly some differing applications regarding the principle of good faith. Not only is the principle lacking a common definition, but there are also different opinions as to whether good faith is an obligation merely directed at the courts and arbitral tribunals, or at the parties in contract as well. As mentioned in paragraph 5.2.1, the wording of Art. 7 (1) states obligations, in terms of interpretation, specifically directed at the courts, and not the parties' contractual relationship. However, there is a certain support for good faith to also be an obligation directed at the parties, even though it is stated as a tool of interpretation. The ones who favor good faith as being more than a tool of interpretation, may determine that such provisions would impose the parties to act in good faith during the formation of the contract, as additional obligations.¹⁴⁹ This leads to the question: What can be expected from one another in a contractual relationship? It might be difficult to determine what such obligations implies, because of good faith being a principle which is broad and lacks definitiveness. Furthermore, if good faith indeed is an additional obligation for the parties to uphold, are such provisions regulated by Art. 7 (1) or Art. 7 (2), since good faith is considered to be a general principle of the Convention as well.

This chapter intends to figure out how the concept of good faith is being used in practice, by courts and arbitral tribunals in contractual conflicts. Such analysis will make it possible to review if courts impose any additional obligations, regarding good faith, upon the contractual relationship between parties. As mentioned in paragraph 3.4, multiple court decisions will be analyzed from different countries throughout the recent years, in order to see if courts impose the same kind of obligations across the world.

¹⁴⁹ Brand & Ferrari & Flechtner, 2004, p. 155

7.2 Examination of court practice

7.2.1 Case 1

CLOUD Case: 1105¹⁵⁰

Country: China

Court: China International Economic & Trade Arbitration Commission (CIETAC)

Decision: 06/11 – 2000

7.2.1.1 Summary

This case from a Chinese arbitration in 2000 was regarding a Chinese buyer and a Singaporean seller, who formed a contract of sales of marble stone. After receiving the goods, the Chinese buyer noticed a lack of certain quality to the goods, compared to what was stated in the contract, and therefore intentionally delayed an amount of the agreed payment. After countless discussions with no positive outcome, the seller decided to initiate arbitration proceedings in accordance with the contract. The Singaporean seller asked for the arbitral tribunal to order the buyer to pay the agreed amount of payment, alongside the interest. On the contrary, the Chinese buyer wanted the seller to replace the goods, because of their lack of quality, but also requested a compensation for the damages it had caused. During the formation of the contract, there had not been established any agreement as to which law would govern it. It was then up to the arbitral tribunal to figure out this issue. The domestic law of China was then applied, because of the contract's close connection to the country, in terms of the buyer's place of business, as well as the place for delivery of goods. Furthermore, because the parties in contract had both of their places of business situated in states included in the Convention, the CISG was then prioritized over the domestic law of China. According to the contract, the payment method was a letter of credit which was a bill of lading. The seller handed over the original copy to the buyer, on the condition that the buyer promised to take upon himself all risks, in order to be allowed to take delivery of the goods. The arbitration used Art. 53¹⁵¹ as an argument for the immediate payment of the goods, as soon as they were received by the buyer, alongside with the original bill of lading. In support of this notion, good faith is mentioned as well, by the reference to Art. 7 (1). The arbitration then decided to use Art. 38 (3)¹⁵² in the ruling of

¹⁵⁰ Long, 2011, p. 10

¹⁵¹ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 246

¹⁵² UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 156

the buyer's counterclaim. It was decided that the buyer had failed to inspect the goods at the port of destination, before their onward journey to Shanghai, within reasonable time. Because of this, it was difficult to determine whether the damages were caused prior to delivery at the port of destination, or during the transportation to Shanghai. The final ruling of the arbitration was that the buyer had to pay the seller for the delivered goods plus interest, in accordance with Art. 78.¹⁵³ The payment, however, was reduced because of seller's responsibility to deliver goods in agreed quality.

7.2.1.2 Comments on outcome

Nevertheless, good faith has been advocated as a duty to display proper conduct in the contractual relationship between parties. The Chinese arbitration acknowledges this, by viewing the agreed promise between the two parties as a serious commitment and therefore punishing the buyer for ignoring this promise, because of the missing payment. Also, the arbitration states that the seller is still responsible for the delivered goods, no matter what is promised, which shows it is not proper conduct to stray away from one's responsibilities. Indeed, this is true, but because the seller has signed off on these responsibilities and the buyer has agreed to take them upon himself. Then one could consider it to be reasonable to rely on the buyer paying the agreed amount. It shows the importance of being able to rely on your counterpart, throughout the entirety of the contractual relationship, in terms of reasonable and proper conduct in international trade. Good faith is then ultimately used as a supportive argument in the application of Art. 53, to ensure the proper ruling of this contractual conflict. Even though good faith is mentioned as a principle in this regard, the arbitration still refers to Art. 7 (1) in the application of the concept, which supports the argument of it being an obligation directed at the parties as well.

¹⁵³ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 364

7.2.2 Case 2

CLOUD Case: 1258¹⁵⁴

Country: New Zealand

Court: Court of Appeal of New Zealand

Decision: 03/10 – 2001

7.2.2.1 Summary

An agreement was made between a supplier and a distributor. The agreement was for the supplier to deliver babies' leather booties to the other party, because the distributor had exclusive right to distribute these goods in the UK. A falling out occurs between the two parties, which made the supplier wanting to terminate the agreement and therefore gave a nine months' notice of this to the distributor. The dispute was regarding a misunderstanding of what was allowed for the distributor to buy as a minimum of goods to keep the contract intact, otherwise the supplier would be able to terminate it. Furthermore, it was stated in the contract that such termination could only be done if a reasonable notice was given, and according to the distributor, those nine months were not reasonable notice. The distributor argued that the nine months' notice was an implied term of notice given by the supplier and therefore the contract could not be terminated. Even though the distributor kept meeting the required minimum of goods to buy from the supplier, the court decided to impose an obligation of good faith, for the parties to complete the performance of the contract. The judge supported this obligation by referring to Art. 7 (1) and 1.7 of the UNIDROIT Principles. It was concluded by the court, that the distributor was in breach of the contract, because of the lack to perform the required good faith.

7.2.2.2 Comments on outcome

This shows how the conduct in the contractual relationship can impact the outcome of a dispute, when there is no specific rule of application for good faith to support. Even though Art. 7 (1) is a tool for interpretation, it is mentioned as an argument for the parties to act in good faith, while being a part of the contractual relationship. However, it is mentioned alongside Art. 1.7 of the UNIDROIT Principles, which is a direct obligation for the parties to act in accordance with good faith. This works

¹⁵⁴ Butler, 2013, p. 7

merely as a supportive argument for the application of Art. 7 (1), as mentioned in paragraph 5.3.3, because the CISG was an important role model in the creation of the UNIDROIT Principles. The combination of the two articles makes good faith a direct obligation, in terms of conduct between parties, which can be used as a rule of application in contractual conflicts.

7.2.3 Case 3

CLOUT Case: 1017¹⁵⁵

Country: Belgium

Court: Hof van Beroep Gent

Decision: 15/5 – 2002

7.2.3.1 Summary

Negotiations were going on between a Belgian seller and a French buyer, regarding the production and supply of pagers. During these negotiations, a very specified letter of intent was created by the parties before the finalized agreement, which included the quantity of units, the price for each unit, as well as the time of delivery. However, the parties never executed the final agreement, but carried on with the negotiations, until the contract seemed doubtful to ever be executed. Afterwards, the parties attempted to come up with solutions, which was drafted by the buyer and sent to the seller. Two months later, the seller responded by stating the buyer had failed to fulfill his obligations, because of the cancellation of an order on 30.000 pagers. The seller claimed payment for the goods, while the buyer argued such an order had never been finalized. CISG was applied to this dispute, because of the parties' mutual agreement, during the negotiations, for the finalized contract to be governed by French law. For a contract to be made, there must be stated an offer and acceptance, which is not the case in this conflict. Nonetheless, an agreement can be made based on the negotiations between parties without clearly stating offer and acceptance, according to the parties' autonomy in Art. 6. Because the parties had agreed on specific points in the letter of intent and kept on going with the negotiations, it was considered to be an agreement, even though the finalized contract had never been executed. In the solutions drafted by the buyer, the possibility of cancelling the agreement was included, but the seller did not react to it within a reasonable time.

¹⁵⁵ Panov, 2010, p. 3

An act of silence is in international trade considered to be an action of agreement, and according to articles 29 (1)¹⁵⁶ and 11 in the CISG, a contract can be modified or terminated through the agreement of the parties by mere behavior such as silence. It was ruled that the disputed order had been annulled, and it was considered to be in contrary of good faith for the buyer to uphold the agreement, in terms of buying the goods.

7.2.3.2 Comments on outcome

In this case, good faith is used as an argument for the respect of upholding a proper conduct in dealings with others. It is not acceptable to impose claims against your counterpart when you have not conformed with good faith yourself, by not replying to important information within a reasonable time. This means that in a way, good faith is used as a supportive argument, like in paragraph 7.2.1, to more specified rules of application, because the seller did not respect the possible applicability of articles 29 (1) and 11. Furthermore, the courts refer to Art. 7 (1) once more in the application of good faith.

7.2.4 Case 4

CLOUT Case: 595¹⁵⁷

Country: Germany

Court: Oberlandesgericht München

Decision: 15/09 – 2004

7.2.4.1 Summary

This dispute was regarding an Italian tannery, who claimed payment for leather delivered to a German manufacturer. The first instance failed to meet the request from the Italian, because of the defendant's compensation defense. In the result of that, the Italian refused to deliver further goods to the German manufacturer, which was stated as a fundamental breach by the first instance. The case was then appealed, regarding the question of whether the buyer was required by the CISG to

¹⁵⁶ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 123

¹⁵⁷ Bitterich, 2006, p. 9

deliver a declaration of avoidance of the contract, according to articles 49 (1A)¹⁵⁸ and 76 (1).¹⁵⁹ These articles makes it possible for the German manufacturer to recover the payment, because the actions by the Italian is considered to be a fundamental breach, which is why the appellate ruled an declaration of avoidance to be dispensable. Even though it is not possible for an equitable application of good faith according to Art. 7 (1), it allows for the court to apply established principles of good faith from the domestic laws of member states in the Convention. The conduct in which the Italian shows with regard to his serious refusal to perform, is contravening with an established principle of good faith, which leads to the appellate decision of honoring the decision by the first instance.

7.2.4.2 Comments on outcome

In this case, Art. 7 (1) is not applicable, because of the lack of definitiveness regarding the principle of good faith in the CISG. As it was mentioned earlier in Chapter 6, there is no proper establishment of what the concept implies within the CISG, which is why it can be difficult to use as a specific application. The German court shows this by not relying on the principle of good faith in the CISG, and instead uses the domestic ideas of good faith in order to apply the concept properly. Nonetheless, it is still used as a general principle which is applicable in legal decisions, regarding conduct in the contractual relationship. This shows however, that even though good faith does not have a true definition within the Convention, it is still respected as a legal principle throughout international trade, capable of having an impact on the outcome of contractual conflicts.

¹⁵⁸ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 230

¹⁵⁹ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 352

7.2.5 Case 5

CLOUD Case: 1193¹⁶⁰

Country: Mexico

Court: Primer Tribunal Colegiado en Materia Civil del Primer Circuito

Decision: 10/03 – 2005

7.2.5.1 Summary

An American buyer and a Mexican seller, initiated negotiations regarding a sales contract of Mono Ethylene Glycol fiber over the phone. Shortly after, a series of e-mails were exchanged between the two parties, regarding the trade terms of the contract, which was acknowledged by both of them. At the same time, the Mexican seller notified the buyer about the uncertainty as to whether the loading terminal was available or not, and that the seller would give final confirmation when it was known. The American buyer was unclear about the message regarding the terminal and asked for the seller to call back on the phone, to give further information. There was no response from the seller, and then after more than two weeks, the buyer wrote an email to notify the seller about the designation of the ship to carry the goods. The seller did not respond to this e-mail either, but instead replied later on with an e-mail saying the contract could not be concluded on the terms they had agreed upon. On top of that, the seller suggested an increase of payment for the goods, in order to avoid any loss of money. The American buyer went to the court and claimed that the seller was obliged to perform in accordance with the contract and pay for damages as well. The first instance court ruled there was not concluded any contract, in favor of the seller, because the date and place of delivery had not yet been agreed. Nonetheless, the buyer appealed the case to the second instance court, The Superior Court for the Federal District, which agreed on the same conclusion from the first instance. The American buyer appealed the case further to The Appellate Court, which was not successful either. The court agreed on the lower courts' reasoning for the applicability of Art. 19 (3)¹⁶¹ in the CISG and stated that a contract had never been concluded. This was due to the lack of acceptance to essential terms, such as date and place of delivery, which is crucial for the CISG. Furthermore, The Appellate Court and The Superior Court for the Federal District, agreed that

¹⁶⁰ Panov, 2012, p. 9

¹⁶¹ UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 98

the principle of good faith in Art. 7 (1) had not been breached. Because the negotiations were not finished, no contract was ever concluded and therefore no principle of good faith could be breached.

7.2.5.2 Comments on outcome

Even though the lack of responses from the Mexican seller is likely a violation of good faith, it is not considered to be, because no contract had been concluded. No final agreement was concluded in paragraph 7.2.3 either, but because an agreement was considered to have been made, good faith was then applicable. The reason for this conclusion is because of the many essential specifications that were included in the letter of intent in paragraph 7.2.3, which is not settled in this case regarding date and place of delivery. Art. 11 states there is no requirement in terms of form when drafting contracts governed by the CISG, which supports the argument for an agreement to be made by a detailed letter of intent. These specified details determines whether an agreement has been made or not, and thereby if it is possible for the application of good faith.

7.2.6 Case 6

CLOUT Case: 1733¹⁶²

Country: Brazil

Court: Appellate Court of the State of Rio Grande do Sul, 12th Private Law Chamber

Decision: 14/02 – 2017

7.2.6.1 Summary

A buyer had in 2014 agreed to buy 135 tons of frozen chicken feet from a Brazilian seller. The delivery of goods never happened, even though the buyer had paid for part of the goods, which is why the buyer sued the seller. The court decided to favor the buyer in terminating the agreement and restitution of the paid amount. Because of this ruling, the Brazilian seller appealed to a higher court. The Appellate Court of the State of Rio Grande do Sul ruled that the CISG was applicable to the case. Despite there was no written agreement, Art. 11 of the CISG ruled there indeed was an agreement between the two parties, because of the invoices and proofs of payment. It was ruled

¹⁶² Milani, 2018, p. 3

by the court that the buyer's obligations were fulfilled in accordance with Art. 53, and the seller had not fulfilled the agreed obligations of delivery of goods according to Art. 30.¹⁶³ It was then possible for the buyer to declare avoidance of the contract and demand restitution according to articles 49 (1B)¹⁶⁴ and 81 (2).¹⁶⁵ Furthermore, the buyer tried multiple times to get in contact with the seller, regarding the date of delivery, which gave the seller additional time to perform its obligations according to Art. 47 (1).¹⁶⁶ In addition to this notion, both Art. 7 (1) of the CISG and Art. 1.7 of the UNIDROIT Principles were applied by the court, because the seller did not respect the principle of good faith in the proceeded dealings.

7.2.6.2 Comments on outcome

Once again, the principle of good faith is used as a supportive argument for a specific rule of application within the Convention, which in this case is Art. 47 (1). Good faith is not only being applied by referring to Art. 7 (1), but the court also refers to Art. 1.7 of the UNIDROIT Principles. The two articles support the notion of upholding a certain conduct in the contractual relationship of the parties, by having the ability to hold each other accountable for one's behavior.

7.2.7 Case 7

CLOUT Case: 1714¹⁶⁷

Country: Brazil

Court: Rio Grande do Sul Court of Justice, 12th Commercial Division

Decision: 30/03 – 2017

7.2.7.1 Summary

A buyer from Venezuela made a deal with a Brazilian manufacturer to buy 16 engines, which had to be paid in advance. This was not possible, due to the control of currency exchange in Venezuela regarding import, and therefore the payment had to be made a second time when the goods arrived

¹⁶³ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 126

¹⁶⁴ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 230

¹⁶⁵ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 390

¹⁶⁶ UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW, 2016, p. 225

¹⁶⁷ Júnior, 2017, p. 9

at the port of destination. It was agreed between the parties that the seller had to pay back the second payment, but it never happened. The Venezuelan buyer claimed return of the second payment, while the seller was convinced that the agreement was null. The dispute was appealed to the Rio Grande do Sul Court of Justice, but since the CISG does not apply to the validity of contracts, according to Art. 4 in the CISG, then the dispute would be decided by the application of UNIDROIT Principles. However, regardless of Art. 4, the court acknowledges the provisions of Art. 7 (1) in the Convention, which “sets forth a duty of good faith as a fundamental legal standard for international trade, which shall not be neglected by the parties.”¹⁶⁸ Because of this, the seller is not in a position of power to declare avoidance of the contract and refuse to return the payment. Furthermore, the court acknowledges the Convention’s goal of creating uniform rules, which can be applied to international trading by respecting the principles of private autonomy and good faith. In addition to these principles, parties are obliged to act fairly in negotiations and respect these contracts of sale as a mutually cooperative relationship. Considering these reasonings, the court ruled in favor of the buyer, because the seller’s allegations were against the principles on which the Convention is built.

7.2.7.2 Comments on outcome

The notion of good faith within Art. 7 (1) is now for the first time in this chapter applied to a contractual conflict entirely on its own. It shows the importance of the provisions of the Convention, regarding its general principles and their impact on disputes in international trade. There is a mutual obligation for the parties to act fairly in the contractual relationship, without any exceptions. If there is a breach of proper conduct, there will be consequences, regardless of the applicability of other more specific legal rules. It shows that the principle of good faith is capable of applying binding legal consequences on its own by the application of Art. 7 (1), without the support of other rules within the Convention.

¹⁶⁸ Júnior, 2017, p. 10

7.3 How do courts use good faith in practice?

By the analysis of seven cases from the UNCITRAL CLOUD, there is certainly something to be said about the principle of good faith being advocated in conduct and dealings between parties in contract, as mentioned in paragraph 5.3.3. One must uphold a proper conduct within the contractual relationship, otherwise it can cause legal consequences. Regardless, it proves to be quite difficult to state any specifics as to what proper conduct is in this regard. However, the examined case law shows that the parties involved must fulfill their obligations without complaint. The terms and conditions of the agreement have been written in the contract, which assumably have been agreed upon between the parties and therefore cannot be ignored, unless there is a breach of contract. Other than that, one's availability to the other party in the attempt to successfully complete the contract is important as well. The communication between the parties must not be neglected, because of the possibility to be missing out on key information, which can be crucial to the other party. All of the above are expectations of conduct which one could consider to be reasonable, in the fulfillment of the obligations within the contractual relationship. The conduct between the parties must be in accordance with the strive to complete a successful cooperation. Contrary behavior is a result of a dysfunctional contractual relationship and is clearly not tolerated, which is showcased in the analyzed case law. A certain amount of respect must be shown towards each other, in order for the contract to reach a successful outcome and be mutually beneficial for the parties. Without these sorts of respected actions, it is not possible to rely on one's counterpart, which will lead to a non-successful outcome. Therefore, one must uphold the agreement in conformity with good faith, by respecting the agreed terms of the contract and show reasonable behavior in doing so. Though references are made to Art. 7 (1) in the application of good faith, it is not once used according to the provisions of the article in terms of interpretation, as mentioned in paragraph 5.4. Instead, it is used as a supportive certainty to the application of a specific rule of application. Even in paragraph 7.2.6, when Art. 47 (1) is applied, which includes a general term of the Convention; *period of time of reasonable length*, there is no sign of a direct interpretation of this provision. Instead, it is used as an additional argument for the application of Art. 47 (1), by providing a supportive certainty as to why there is a lack of performance. The first case of the analysis in paragraph 7.2.1 showcases this too, but not by the application of a specific rule which includes general terms for interpretation. Nevertheless, good faith does impose a

certainty to the court's decision, by noticing the lack of proper conduct in the performance of one's obligations. It shows the importance of being able to rely on your counterpart to perform the agreed obligations, in conformity with a proper conduct of good faith. The case in paragraph 7.2.2 is a result of that, in which the court imposes consequences for the lack of a certain requirement of good faith. In this regard, there is no specific rule of application, other than Art. 7 (1), alongside with Art. 1.7 of the UNIDROIT Principles. Because the court's decision does not include any other articles, the combination of the two articles from CISG and UNIDROIT works as mutual support for each other to impose legal consequences for the lack of proper conduct. Good faith imposes certain expectations of conduct for the parties to respect, in terms of reasonable behavior, to ensure the reliability of one's counterpart. But in paragraph 7.2.4, one court exposes the expectations which can be associated with the principle of good faith in the Convention, because of its lack of definitiveness. Nevertheless, good faith is still being used as a tool of measurement to ensure the fulfillment of one's obligations is performed by respecting the conduct of the contractual relationship. The same thing goes for the application of Art. 7 (1), which proves to be viable according to the ongoing pattern throughout the years of case law in paragraph 7.2. Even though paragraph 7.2.4 does not use the concept of good faith from the CISG, it still shows signs of progression, alongside with paragraph 7.2.2, 7.2.3 and 7.2.7, for the principle of good faith to be even more impactful in international trade. It does not however, impose further legal obligations in terms of conduct, other than a reasonable behavior in the performance of one's obligations. Nonetheless, it does show a certain progression for the application of good faith to be more independent in its legal application. Not to state that good faith is not capable of supporting other specific rules of application, but the statements in paragraph 7.2.7 is worth noticing. Another statement worth noticing, is that which is stated in paragraph 7.2.5. This case states that it is not possible to apply good faith unless an agreement has been made, which means good faith is useless without the establishment of a contractual relationship. No trustworthy statement can be made in regard to this by the examination of one incident, because in order to verify this, there must be more examples of the same outcome to create such a statement. It does make sense however, that there cannot be no dispute regarding negotiations which have not been finalized in some type of way.

Regardless, a continuous pattern throughout the years of displayed case law, shows the impact of good faith in international trade by the application of Art. 7 (1). The principle of good faith does impose certain expectations of reasonable conduct upon the parties, in the performance of each other's obligations within the contractual relationship. It also shows the courts' ability to hold parties accountable with legal consequences, if the aforementioned expectations are not performed in conformity with good faith. This could possibly be a viable reasoning to consider good faith as an obligation directed at the parties in contract as well.

8. Is good faith more than a tool of interpretation?

8.1 The evolution of court practice

Despite good faith being one of the general principles of the Convention, no uniform definition of the concept has yet been determined. Neither is there an explanation to what the principle implies, in terms of expectations of conduct, when being applied. Therefore, it is likely difficult to hold someone accountable for something which has no true definition. This, however, did not stop courts and arbitral tribunals from using the principle in contractual conflicts. Case law from the early days of the Convention shows tendencies to applying good faith without explaining its meaning of application.¹⁶⁹ Instead, it was used as a principle with no specific meaning, that somehow favors one party over the other.¹⁷⁰ One could argue that these tendencies were attempts from the courts and arbitral tribunals to apply fairness over legalism.¹⁷¹ It shows uncertainty as to the knowledge on how to use good faith correctly, neither improving justice or fairness.¹⁷² Back then, the Convention was still in development and therefore had not truly proved to stand the test of time yet. The certainty of the Convention's provisions improves over time, in terms of application, in conformity with the amount of case law being established and collected on the specific subject. That is why there was no certainty in the early days of the Convention as to how good faith was meant to be applied according to its provisions, because there was no significant amount of case law on this matter. With various differing concepts of good faith from different legal systems across the world, has possibly made it difficult to interpret and clarify a proper autonomous application of the principle. It is very likely that no principle of interpretation can be established over the duration of such short time. This is showcased to be true, by the assemblance of various disputes regarding the matter of good faith, from the birth of the Convention. There was not even a reported case, regarding this matter, up until the early 90's. One could argue the reasoning for this, is because of the lack of confidence in the applicability of good faith to govern international provisions of such magnitude, as mentioned in paragraph 5.1. Nevertheless, this does not mean that the legal status of good faith is not capable of evolving over the course of time. The application of good faith, like

¹⁶⁹ Sheehy, 2004, p. 44

¹⁷⁰ Sheehy, 2004, p. 44-45

¹⁷¹ Sheehy, 2004, p. 45

¹⁷² Sheehy, 2004, p. 45

all other legal practices, evolves continuously due to the growing amount of court practice. Different scenarios of contractual conflicts enable the courts and arbitral tribunals to review the different aspects as to the possible applications of good faith, alongside its possibilities and limits. Over time, it is possible to change the narrative of its application without shying away from the concept's key elements. However, with a concept as broad as this one and often considered to be vague, it is difficult to have the efficient decisiveness in its application. Back then, the concept was considered to be used superfluously according to Schlechtriem,¹⁷³ without the necessary decisiveness to indicate what good faith implied. Regardless, by the examination of current case law, it is possible to see the development in the application of good faith, which is still staying true to its values. Regarding those values of good faith, there has not been much change, but there has certainly been a change to its application in terms of its decisiveness. Nowadays, there is a more precise approach to the usage of good faith, which specifically targets the conduct between the parties. The fact that there is no uniform definition to the concept of good faith, results in the nonexistence of a specific approach to follow in its application. However, current court practice does limit the possibilities for unknown variables to influence the outcome of a contractual conflict. There is now a viable legal reasoning to even out the fairness of a dispute between parties, regarding the conduct in the contractual relationship, compared to the disputes which was governed by the Convention in its early days.

8.2 Parallel application

It is showcased in Chapter 7 of this thesis that the courts and arbitral tribunals only use Art. 7 (1) in the application of good faith, but it is not directly used as a tool of interpretation, as mentioned in paragraph 7.3. It does seem to be a contrary application of the concept, compared to the article's purposefully provision, by not interpreting the general terms of the Convention, as mentioned in paragraph 5.4. Like it was mentioned in paragraph 5.2.1, the obligations within Art. 7 (1) were purely directed at the courts and arbitral tribunals, for the interpretation of the Convention's text. Instead, the courts use it to review and judge the conduct of the contractual relationship between parties, in order for them to justify their decision making. Even though, there is no statement in Art. 7 (1) directed at the parties in contract, domestic legal systems and the UNIDROIT Principles still consider

¹⁷³ Sheehy, 2004, p. 45

good faith to be a provision which is directed at the parties as well. Furthermore, as mentioned in paragraph 6.1, the narrative of this provision is different in domestic legal systems and the UNIDROIT Principles, compared to what is stated in the CISG. Domestic legal systems and the UNIDROIT Principles uses good faith as a statement to oblige the parties in contract to act in accordance with good faith. In regard to this, it is not merely justifiable enough to be in observance of good faith, but one must take actions accordingly to uphold a certain conduct. However, there is no clear vision as to an expressly determined measurement of expectations in terms of conduct, other than what one might consider to be reasonable. Regardless, the autonomous interpretation method integrated within Art. 7 (1), ensures that the Convention is not influenced by provisions from other legal systems. This supports the Convention's purposefully status of independence, which is why the narrative of the Convention's provisions does not change in accordance with established legal principles from other legal systems. Even though good faith cannot be used directly to the contractual relationship, it is still able to influence the parties indirectly, because on how it is meant to specify their obligations by interpreting the provisions of the Convention.¹⁷⁴ In that regard, good faith is able to modify and provide certainty in the application of articles which lacks specification of parties' obligations. Furthermore, there are multiple examples in the analyzed case law, of courts using the notion; *principle of good faith*, in the application of the concept.¹⁷⁵ Others refer to it as a rule or a duty.¹⁷⁶ This shows that the courts acknowledge good faith as one of the general principles of the Convention, which can be used in situations where there is a need for gap-filling. In despite of this, there is no reference to Art 7 (2) in the examined case law. Still, the courts and arbitral tribunals does not only use good faith to be an additional argument for the application of a specific rule within the CISG. They also use it in certain situations where there apparently is no applicable rule, which showcases the diversity in which good faith can be used, even if courts only refer to Art. 7 (1) in the application of good faith. This proves good faith can be used to ensure certainty in the courts' decisions, by way of extensive interpretation and gap-filling, which ever application seems fit, as mentioned in paragraph 5.4. A possible reasoning for the courts not to refer to Art 7 (2), is because of good faith not being mentioned in this article, but purely stated in Art. 7 (1). Regardless, the examined case law showcases the possibilities for a parallel application of Art 7

¹⁷⁴ Schlechtriem & Schwenzer, 2016, p. 321

¹⁷⁵ Paragraph: 7.2.1, 7.2.4, 7.2.5

¹⁷⁶ Paragraph: 7.2.3, 7.2.7

(1) and 7 (2), in terms of good faith. With the ability of such diverse application to one of the provisions of the Convention, it is difficult to find limitations as to how good faith can be used. The contractual conflict merely has to be governed by the Convention and also be regarding the lack of proper conduct between parties. The duty of the courts, in regard to good faith, is certainly easier with a wide range of application to this provision, due to the ability to apply good faith in almost every sort of dispute. This sort of wide application is perhaps the reasoning for Schlechtriem to change his opinion over the years, in terms of the application of good faith in international trade. From being convinced that the principle was used in an indecisive matter, to consider it to have an impact on the parties' behavior, by respecting the interpretation of the Convention's provisions.

8.3 Schlechtriem vs. Ferrari

The development in which good faith has been through, in terms of its application, is significant. There are now clarified reasonings for the application of good faith, which was not noticeable throughout the first many years of the Convention's existence. Due to a clarification as to what kind of expectations there are with the reference to good faith, regarding the relationship between contracting parties, its impact is now more decisive. Other than that, the application of good faith is also more trustworthy because of this clarification, as opposed to when there was no knowing what variables that shifted the court's judgement and favored one party over the other. Despite this evolution of the application of good faith, there is still no expressly stated rules for one's behavior in the contractual relationship between parties. Furthermore, there is still disagreement as to the impact in which good faith brings to this equation of conduct, in terms of what actions can be tolerated compared to others. In conformity with the evolution of court practice, as mentioned in paragraph 8.1, narratives have the possibility to change over time by the expansion of a more diverse collection of scenarios, regarding a given subject. As these narratives change, the opinion on these matters changes as well. The perfect example of this, is regarding Peter Schlechtriem, who was a well renowned author within the world of international trading and the CISG. It has already been stated in the previous paragraph, but over time he changed his opinion on the application of good faith. This proves that even experts on a given subject accepts the need to change their own opinion, in respect of the changing narratives within court practice. Nevertheless, Schlechtriem was still convinced that there are no direct indications for the parties in contract to act in accordance

with good faith. In other words, he does not agree with the notion set forth by domestic legal systems and the UNIDROIT Principles, on the application of good faith. However, as it was mentioned in paragraph 8.2, Schlechtriem did believe that good faith has somewhat of an influence on parties, when forming contracts under the CISG, because of the interpretation provisions within Art. 7 (1). Regardless, Schlechtriem merely considered good faith to be an indirect obligation for the parties to uphold and not a direct one. This is presumably because there is no expressly statement of rules to respect, in terms of one's behavior within the contractual relationship. Surely there are some underlying statements in regard to this notion, including one's dedication to fulfill the obligations of the contract and availability in doing so, which have been mentioned in paragraph 7.3. Though these notions have not been expressly stated by the Convention, neither have the courts and arbitral tribunals done the same in the application of good faith. But as mentioned earlier in this paragraph, there is a certain respect to the outcome of cases in court practice. These outcomes can change the narrative on a given subject and determine future cases, based on former outcomes regarding the same matter. This certainly changed the opinion of Schlechtriem, but not to the extent as another well renowned author on the subject of CISG, Franco Ferrari. In his opinion, good faith is already considered to be an obligation parties must respect, in the fulfillment of their obligations. To ensure this, a standard of good faith must be used as a tool of measurement, in the performance of these obligations.¹⁷⁷ Ferrari is convinced that there is need for the creation of a bonus pater idea of conduct, to be followed between parties in the contractual relationship. For this to be applicable, there must be a certain clarification regarding the expectations of conduct, which is associated with this tool of measurement. But the courts do not apply good faith in such a way, by the comparison of a general standard of conduct, or necessary explain the expectations there are associated with its application. Nonetheless, such a tool of measurement must be developed within the evolution of court practice, by the assemblage of actions in terms of conduct, which are not tolerated in disputes between parties. In that way, a certain standard of behavior can be established to be used in the application of good faith. Even though it is possible to draw principles of expectations from preceding case law, as showcased in paragraph 7.3, it is not something which have been done by the courts or the Convention. Regardless, there are possibilities for the creation of such standard of conduct, but it has to be universally recognized, like the rest of the Convention's

¹⁷⁷ Brand & Ferrari & Flechtner, 2004, p. 155

provisions. Despite there has not yet been established a standard of conduct between parties, the continuous development of court practice can pave the way for such a standard to be created. Court practice, as mentioned earlier in this paragraph, has the ability to change the narrative about justified decisions by courts and arbitral tribunals, which must be respected in the sphere of international trading of goods. However, since such standard of conduct has yet to be established by the provisions of court practice, it is difficult to determine if it is viable or not. Nevertheless, Ferrari already consider an obligation to act in good faith to be in existence, regardless of the establishment of such standard of conduct. Paragraph 7.3 shows, certain expectations of conduct have an impact on the outcome of the disputes which have been examined in this thesis. This supports the notion set forth by Ferrari, that good faith imposes an underlying obligation for parties to uphold a certain behavior in the performance of their obligations within the Convention. It is fairly noticeable that such obligation could be in existence, in light of the examined case law in Chapter 7. But since nothing in regard to this has been expressly stated, Schlechtriem could be right in the notion of it being an indirect obligation instead of a direct one. Though Schlechtriem was convinced about this notion, at this particular moment in time, his opinion changed over the years, simultaneously with the evolving practices of case law, regarding the application of good faith. It brought him closer to the statement by Ferrari on this matter, and because court practice is in constant development, it is not impossible to assume that the narrative set forth by Schlechtriem can change once more. The same thing goes for the statement by Ferrari, which means there is a possibility for the two, somewhat diverse opinions, to encounter one another. By reaching agreement on the application of good faith, would be a supportive notion to the progression of court practice and the importance of reaching uniformity. But for now, good faith certainly affects the way in which courts judge certain contractual conflicts, but whether it has a direct or indirect influence on the parties' behavior, is difficult to determine.

8.4 The influence on the parties' behavior

There is no doubt that good faith is associated with certain expectations of behavior in the contractual relationship, and with the uncertainty as to what can be tolerated, parties are likely worried about what kind of actions can cause legal consequences. This can cause an influence in the parties' approach, when engaging in the formation of a contract which is governed by the

Convention. The judgement of courts, when imposing the provisions of good faith, may change the parties' behavior in the performance of one's obligations, in order not to be struck with legal consequences. This could possibly be the indirect obligation of good faith which Schlechtriem alluded to, in the previous paragraph. But without the proper expressly statement from the courts or the Convention, there is no knowing as to the best form of adaption for the parties to avoid a nonbeneficial outcome. This means there is somewhat of a need for the parties to adapt themselves, in terms of proper conduct, because of the uncertainties about the provisions in which good faith imposes in its application by the courts. One could argue that these uncertainties can be removed from the equation, if the parties uphold what can be considered to be a reasonable behavior. However, this notion is necessarily not interpreted in the same way throughout the world, and therefore differences can occur in one's understanding of such conduct. In order for cross-border transactions to be successful, the parties must have a mutual understanding of the Convention's provisions, because it affects the provisions of the contract. If all of these uncertainties ascend to an amount which the parties consider to be unfathomable, there is a possibility to neglect them entirely. According to Art. 6 in the CISG, it is possible for the parties to relieve themselves of provisions imposed by the Convention. For the parties to be able to apply such an article to their contract, with such an amount of impact to the provisions of the Convention, shows the Convention's respect to the parties' autonomy. By the application of Art. 6, the parties are able to exclude certain obligations from within the Convention's text and replace them with their own. This allows for the possible exclusion of the provision of good faith, within Art. 7 (1) of the CISG, which would make it a non-obligation in the contractual relationship. It showcases the provisions of good faith affecting the parties in one way or another, in terms of their need to adapt to its unknowing expectations of conduct. With the possibility to exclude such provisions from the contract, good faith may not be an obligation directed at the parties. One could argue that this means good faith is not any different from any of the other articles in the CISG, which simply can be overruled by the parties' autonomy. However, as mentioned previously in paragraph 5.3.3, good faith is one of the general principles of the Convention and its principles must be respected in contracts governed by it. It would seem very unlikely for Art. 6 to enable parties to exclude the principles of the Convention, especially because parties' autonomy is part of these principles as well, which also was mentioned in paragraph 5.3.3. Equally respect must be given to both of these principles, which is why it can be

difficult to determine if there is a possibility for one principle to overrule the other. It certainly provides options for the parties in contract to adapt to the possible imposing legal consequences, regarding good faith. The mutually beneficial outcome of the parties' agreement depends on their adaptation to this notion and willingness to do so. Thereby good faith has a certain impact on the parties' actions, and by having such an influence, one could argue that good faith imposes somewhat of an obligation for the parties to respect its provisions.

8.5 What is the current legal status of good faith?

There is no doubt that the legal status of good faith has changed since the birth of the Convention and its provisions. Back then, good faith was an inconsistent factor in terms of the provisions associated with the concept, in its application in contractual conflicts. Since then, there has been progression regarding the application of good faith, due to the ever-evolving court practice, which ensures the proper execution of the Convention's provisions. The improvement of consistency in which good faith is used, is significant and leads to more specific guidelines as to what can be expected by its application. Courts around the world notice the same variables, in the application of good faith, regarding the lack of a certain proper conduct in the contractual relationship. It clarifies the reasoning for the usage of good faith, because it creates an idea of what type of behavior is tolerated, within the provisions of the Convention. Despite there has been an alignment of the courts' execution of the provisions of good faith, there is still yet to be determined an expressly statement about it. There is still no specific rule of application, that provides the certainty as to how the principle of good faith exactly is supposed to be used. However, the examination of preceding case law shows the ability for the provisions of good faith to affect the outcome of contractual disputes on its own, and in support of a specific rule of application as well. Even though good faith had the same ability in the early days of the Convention, there was no clarification regarding its application and reasoning for a specific outcome. Due to the alignment in court practice, one could consider good faith to be a specific provision directed at the parties in contract as well, regardless of the statement in paragraph 5.2.1. Ferrari is certainly convinced of this notion, who consider good faith to be an obligation which must be respected in the contractual relationship. It seems very likely to be a true obligation, by the way court practice has progressed over the years, and therefore justifiable, despite there is no explicit rule about it. These legal consequences, which

can be imposed by courts due to the lack of proper conduct by the parties, is a result of modifications to the provisions of the Convention, by the application of good faith. This forces the parties to adapt accordingly to these modified provisions, as it has been stated by Schlechtriem, in order not to be struck with legal consequences. It results in a behavioral change in the contractual relationship, because of how the lack of such adaptation can impact a successful cooperation between parties. It all showcases enforcements upon the parties to adapt their conduct in the contractual relationship to avoid legal consequences, which is why one could consider good faith to be an obligation directed at the parties as well.

9. Uniformity

As it has been mentioned before in paragraph 5.2.2.2, the purpose of the Convention is its uniform application, which requires uniformity in the execution of its provisions. Since the Convention does not have its own independent international court to ensure the fulfillment of its purpose, the pursuit of achieving uniform application very much depends on domestic courts and arbitral tribunals. Even though the Convention has created a uniform sales law, which have been adopted by many countries across the globe, the execution of its provisions must be in proper alignment for it to be successful. A strong reliance must be established between the Convention and the courts to achieve uniformity. This is the reasoning for the statement in Art. 7 (1); *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.* The article includes an obligation to promote uniformity in the application of the CISG, which must be respected by courts when executing the provisions of the Convention, as mentioned in paragraph 5.2.1. Contradicting actions will likely be considered to be a breach of such obligations, if there are no indications of willingness to comply with the provisions of uniformity within the Convention. In order for this to be possible, a collection of preceding case law must be assembled for the courts to align with each other's judgements. It is mentioned in paragraph 5.2.2.2, that such action has already been made in the form of the UNICTRAL CLOUT. However, as mentioned in that same previous paragraph, there is no obligation for the courts to follow preceding case law. Even though paragraph 7.3 shows an alignment of how the courts apply the principle of good faith, there is no reference to previous cases in paragraph 7.2, when doing so. By not referring to preceding case law, the outcome of the specific dispute becomes less persuasive for courts to follow in the future, regarding a similar dispute. This means that courts have the ability to modify the provisions of court practice, in regard to a specific matter, like good faith, by the reference to preceding case law. In that way, it is possible to create legal principles, which courts and arbitral tribunals are obliged to follow in future contractual conflicts, in respect of the Convention's purpose to develop uniformity in its application. However, there is no showing of this in the examined case law of this thesis, which can cause the possibility of courts not creating the proper uniformity in its decision making, that is capable of holding others accountable. In a situation like this, where there is no superior international court and no justifiable hierarchical system of courts, it is only possible

to create uniformity by cross-border cooperation between domestic courts and arbitral tribunals. They are all governed by the same provisions of the CISG and therefore must strive for uniformity as a collective community, by the incorporation of each other's experiences. Nevertheless, there must be a justifiable reasoning, regarding the outcome of a specific dispute, in order for it to be persuasive enough to follow by other courts. It is worrying there is no indication of such collaboration in Chapter 7, which possibly could affect the application of good faith. Regardless, as mentioned earlier in this paragraph, the examined case law shows alignment, when applying good faith as a legal argument. Though it is possible for considerations, regarding the persuasiveness of preceding case law, has happened without using it as a direct argument in the judgement by the courts. Though it could possibly be more effective in the future with such reference. With an already uncertain principle, such as good faith, that has no unified definition as to how it is meant to be applied in practice. There are possibilities for such a principle to benefit from the courts' ability to make references to each other's decisions, on what conduct to associate with good faith and how to legally apply it. By the usage of such references, it is possible to establish a proper clarification on how to apply good faith internationally and thereby support the provision of promoting uniformity. This can ultimately lead to a unified definition of the principle within the Convention, which can create a standard of behavior to properly examine the conduct in the contractual relationship between parties.

10. Conclusion

Good faith is a principle of the Convention that lacks a unified definition, which has developed over the course of time to create a considerable idea of what it implies. This idea of good faith has been created through the continuous evolving court practice, in which courts have followed a similar pattern in the application of the principle. Certain expectations of conduct in the contractual relationship arise in the application of good faith, which require the parties to uphold a reasonable behavior in the performance of their obligations. The examination of court practice shows that the lack of respect to fulfill one's obligations in accordance with good faith can cause legal consequences, even though there is not stated a standard of behavior within the Convention. This creates further requirements for the parties to adapt to these expectations of conduct which has no true rule of application. Instead, the courts apply Art. 7 (1) when using good faith, because that is where the principle is stated in the Convention. Despite the principle is not directly used as a tool of interpretation, as stated in the CISG, it is still able to impact the outcome of contractual disputes, due to its parallel application. Even though there is no statement of a reasonable standard of behavior, the courts show indications of a certain alignment in their execution of the Convention's provisions, regarding good faith. This creates similar expectations of conduct in the application of good faith throughout the world, which must be respected, as one of the general principles of the Convention. Furthermore, the considerable uniformity, which is shown by the almost identical execution of provisions associated with good faith, is reasoning for these provisions to be considered direct obligations. Parties in contract must respect the establishment of these obligations, regarding good faith, and follow them in order to successfully achieve a mutual beneficial cooperation with one's counterpart.

11. Bibliography

11.1 Books

- Brand, Ronald A. & Ferrari, Franco & Flechtner, Harry – *The Draft UNCITRAL Digest and Beyond: Cases Analysis and Unresolved Issues in the U.N. Sales Convention* – Sellier European Law Publishers, 2004 – E-book (page numbers may differ from the physical book)
- Lookofsky, Joseph – *Understanding the CISG, Fifth (Worldwide) Edition* – DJØF Publishing Copenhagen, 2017 – E-book (page numbers may differ from the physical book)
- Munk-Hansen, Carsten – *Retsvidenskabsteori, 2. udgave* – Djøf Forlag, 2018
- Schlechtriem, Peter & Schwenzer, Ingeborg – *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), FOURTH EDITION* – The several contributors, 2016 – E-book (page numbers may differ from the physical book)
- UNITED NATIONS COMISSION ON INTERNATIONAL TRADE LAW – *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* – United Nations, 2016 – E-book (page numbers may differ from the physical book)

11.2 Articles

- Andersen, Camilla Baasch – *GOOD FAITH? GOOD GRIEF!* – Social Science Research Network, 2014 – Accessed 18/05-2022
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2675008
- Komarov, Alexander S. – *INTERNATIONALITY, UNIFORMITY AND OBSERVANCE OF GOOD FAITH AS CRITERIA IN INTERPRETATION OF CISG: SOME REMARKS ON ARTICLE 7(1)* – UNCITRAL, 2005 – Accessed 18/05-2022
https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/viac_joint_conference
- Lookofsky, Joseph – *WALKING THE ARTICLE 7(2) TIGHTROPE BETWEEN CISG AND DOMESTIC LAW* – UNCITRAL, 2005 – Accessed 18/05-2022
https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/viac_joint_conference

- Sheehy, Benedict – *GOOD FAITH IN THE CISG: THE INTERPRETATION PROBLEMS OF ARTICLE 7* – bepress Legal Repository, 2004 – Accessed 18/05-2022
<https://law.bepress.com/expresso/eps/339/?fbclid=IwAR28bDJJA1V6EE2DAitbBZrkE2s16sbGx4XcbxrvteOoRVvNMtzZwFGH4wY>

11.3 Websites

11.3.1 Examined case law

- Bitterich, Klaus & Magnus, Ulrich – *CLOUD Case 595* – UNCITRAL CLOUD, 2006 – Accessed 18/05-2022
https://www.uncitral.org/clout/clout/data/deu/clout_case_595_leg-1382.html
- Butler, Petra – *CLOUD Case 1258* – UNCITRAL CLOUD, 2013 – Accessed 18/05-2022
https://www.uncitral.org/clout/clout/data/nzl/clout_case_1258_leg-3020.html
- Júnior, Orlando José Guterres Costa – *CLOUD Case 1714* – UNCITRAL CLOUD, 2017 – Accessed 18/05-2022
https://www.uncitral.org/clout/clout/data/bra/clout_case_1714_300317.html
- Long, Weidi – *CLOUD Case 1105* – UNCITRAL CLOUD, 2011 – Accessed 18/05-2022
https://www.uncitral.org/clout/clout/data/chn/clout_case_1105_leg-2823.html
- Milani, Naíma Perrella – *CLOUD Case 1733* – UNCITRAL CLOUD, 2018 – Accessed 18/05-2022
https://www.uncitral.org/clout/clout/data/bra/clout_case_1733_140217.html
- Panov, Andrey A. – *CLOUD Case 1017* – UNCITRAL CLOUD, 2010 – Accessed 18/05-2022
https://www.uncitral.org/clout/clout/data/srb/clout_case_1020_leg-2752.html
- Panov, Andrey A. – *CLOUD Case 1193* – UNCITRAL CLOUD, 2012 – Accessed 18/05-2022
https://www.uncitral.org/clout/clout/data/mex/clout_case_1193_leg-2865.html

11.3.2 Other

- UNIDROIT – *About UNIDROIT* – Accessed 18/05-2022
<https://www.unidroit.org/about-unidroit/>
- UNIDROIT – *UNIDROIT Principles 2016* – Accessed 18/05-2022
<https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/>

- United Nations – *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)* – Accessed 18/05-2022
https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status