Good Faith in International Commercial Arbitration

Its Application by Arbitral Tribunals to the Parties' Contract and the Arbitration Agreement

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IMPRIMATUR POUR LA THESE

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Summary

Arbitrators frequently have recourse to good faith in their arbitral awards out of a desire to 'do justice' in a given case. Notwithstanding the pervasive use of good faith in international arbitral awards, its application by arbitral tribunals remains elusive and creates a significant and unwelcome degree of uncertainty.

This thesis accordingly aims to address some of the uncertainties relating to the application of good faith by arbitral tribunals by (i.) studying how this notion is applied by arbitral tribunals in international commercial arbitration to both the parties' contract and the arbitration agreement and (ii.) proposing guidelines for the future application of good faith by arbitral tribunals.

Les arbitres ont souvent recours à la bonne foi dans leurs sentences arbitrales par souci de «rendre justice» dans une affaire donnée. Malgré l'utilisation généralisée de la bonne foi dans les sentences arbitrales internationales, son application par les tribunaux arbitraux reste difficile à cerner et crée un degré d'incertitude important et indésirable.

Cette thèse vise donc à répondre à certaines des incertitudes liées à l'application de la bonne foi par les tribunaux arbitraux en (i) étudiant la manière dont cette notion est appliquée par les tribunaux arbitraux dans l'arbitrage commercial international à la fois au contrat des parties et à la convention d'arbitrage et (ii) en proposant des lignes directrices pour l'application future de la bonne foi par les tribunaux arbitraux.

Keywords

Good Faith; *bonne foi* ; *bona fides ; Treu und Glauben*; International Commercial Arbitration; arbitral tribunals; arbitration agreement; parties' contract.

Bonne foi ; *bona fides* ; *Treu und Glauben* ; Arbitrage commercial international; tribunaux arbitraux; convention d'arbitrage; contrat des parties.

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Dedication

For Stefan, Zahra and Amira

Table of abbreviations

AAA	American Arbitration Association (US)
AAT	Administrative Appeals Tribunal (Australia)
ABA	American Bar Association
ABCA	Alberta Court of Appeal [Neutral Citation] (Canada)
AC	Law Reports, Appeal Cases (Third Series) (England & Wales)
ACICA	Australia Center for International Commercial Arbitration
A.D.	*anno domini*
AD	New York Supreme Court Appellate Division Reports (US)
ADR	Alternative Dispute Resolution
ADR LR	Alternative Dispute Resolution Rules (US)
AFA	*Association Française d'Arbitrage* (French Arbitration Association)
AFSA	Arbitration Foundation of Southern Africa
AIA	Italian Arbitration Association
ALI	American Law Institute
All ER	All England Law Reports (England & Wales)
All ER (Comm)	All England Law Reports (Commercial Cases) (England & Wales)
App Cas	Law Reports, Appeal Cases (Second Series) (England & Wales)
App Div	Appellate Division (US)
Am Rev Intl Arb	American Review of International Arbitration (US)
Arb Intl	Arbitration International (UK)
Art./Arts.	Article/Articles

ASA Bull	Bulletin of the *Association suisse de l'arbitrage* (Swiss Arbitration Association) (Switzerland)
B.C.	Before Christ
BCCA	British Columbia Court of Appeal [Neutral Citation] (Canada)
BCSC	British Columbia Supreme Court [Neutral Citation] (Canada)
BGB	*Bürgerliches Gesetzbuch* of 1900 (Civil Code of Germany)
BGH	*Bundesgerichtshof* (Germany Federal Supreme Court)
BGHZ	*Amtliche Sammlung des Bundesgerichtshofes in Zivilsachen* (Germany)
BIT	Bilateral Investment Treaty
BLR	Building Law Reports (England & Wales)
BPIR	Bankruptcy and Personal Insolvency Reports (England & Wales)
Bull Civ	*Bulletin civil de la cour de cassation* (France)
Burr	Burrow's King's Bench Reports tempore Mansfield (England & Wales)
c.	*considérant* (recital)
CA	*Cour d'Appel* (France)
CAIP	*Chambre Arbitrale Internationale de Paris*
(CA)	Court of Appeal (England & Wales)
Cal Ct App	California Court of Appeals (US)
Cal Rptr	California Reporter (US)
CAM	The Chamber of Arbitration of Milan
Cam L J	Cambridge Law Journal (UK)
CanLII	Canadian Legal Information Institute
CartA	Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (Switzerland)
Cass ch mixte	*Cour de cassation*, mixed chamber (France)
Cass civ 1re /2e	*Cour de cassation*, first/second civil chamber (France)
Cass com	*Cour de cassation*, commercial chamber (France)
CAS	Court of Arbitration for Sport
CCC	Chinese Civil Code (effective as of 1 January 2021)

CCIR	Chamber of Commerce and Industry Romania
CCL	Chinese Contract Law (PRC)
CEDR	Centre for Effective Dispute Resolution
CEPANI	Belgium Center for Arbitration and Mediation
Cf.	*Confer* (latin: compare)
(Ch)	High Court, Chancery Division (England & Wales)
CIETAC	China International Economic and Trade Arbitration Commission
Cir	Circuit (US)
CISG	United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CJ	Chief Justice (England and Wales)
(Comm)	High Court, Queen's Bench Division, Commercial Court (England & Wales)
CRCICA	Cairo Regional Centre for International Commercial Arbitration
D	*Dalloz* (France)
D.	Digest of Justinian
D Ariz	District of Arizona (US)
D Neb	District of Nebraska (US)
DAB	Dispute Adjudication Board
DCFR	Draft Common Frame of Reference
Dept	Department (US)
DH	*Dalloz hébdomadaire* (France)
DIAC	Dubai International Arbitration Centre
DP	*Dalloz périodique* (France)
DNJ	District of New Jersey (US)
DNM	District of New Mexico (US)
EAA	English Arbitration Act 1996
EC	European Communities
ECICA	European Convention on International Commercial Arbitration of 21 April 1967
ECL	Economic Contract Law of 13 December 1981 (PRC)
ED Tenn	Eastern District of Tennesee (US)
eds	editors

edn	edition
EDNY	The United States District Court for the Eastern District of New York (US)
e.g.	for example
EG	Estates Gazette (England & Wales)
EGLR	Estates Gazette Law Reports (England & Wales)
Eng Rep	English Reports (England & Wales)
et seq	and following
EU	European Union
Eur Rev Priv L	European Review of Private Law
EWCA Civ	England and Wales Court of Appeal Civil Division [Neutral Citation] (England & Wales)
EWHC	England and Wales High Court [Neutral Citation] (England & Wales)
F	Federal Reporter (US)
FAA	Federal Arbitration Act, Title 9, US Code, Section 1-14, first enacted 12 February 1925 (43 Stat. 883), codified 30 July 1947 (61 Stat. 669), and amended 3 September 1954 (68 Stat. 1233) (US)
FCA	Federal Court of Australia (Australia)
FCAFC	Federal Court of Australia: Full Court (Australia)
Fed Appx	Federal Appendix (US)
FEI	*Fédération Equestre Internationale*
FIDIC	International Federation of Consulting Engineers
fn	footnote
FrCC	French Civil Code of 21 March 1804 as amended (France)
FrCCP	French Code of Civil Procedure (previously the *Nouveau code de procédure civile* (NCPC)) of 5 December 1975 as amended (France)
FRD	Federal Rules Decisions (US District Court) (US)
FSupp	Federal Supplement (US)
GPCL	General Principles of Civil Law (PRC)
HCA	High Court of Australia (Australia)
HCMP	High Court Miscellaneous Proceedings (Hong Kong)

HFA	Hamburg Friendly Arbitration
HKAO	Hong Kong Arbitration Ordinance (Hong Kong)
HKC	Hong Kong Case (Hong Kong)
HKCA	Hong Kong Court of Appeal (Hong Kong)
HKCFI	Hong Kong Court of First Instance (Hong Kong)
HKDC	Hong Kong District Court (Hong Kong)
HKLRD	Hong Kong Law Reports & Digest (Hong Kong)
(HL)	House of Lords (England & Wales)
IBA	International Bar Association
Ibid	*Ibidem*, in the same source
ICAC at the RFCCI	International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry
ICC	International Chamber of Commerce
ICC Bull	ICC Bulletin
ICC Disp Res Bull	ICC Dispute Resolution Bulletin
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for Settlement of Investment Disputes
Idem	the same
i.e.	*id est* (in other words)
Ind Ct App	Indiana Court of Appeal (US)
Intl & Comp L Q	International and Comparative Law Quarterly (UK)
J	Justice (England & Wales)
JA	Justices/Judges of the Appeal (Hong Kong, Australia)
JAMS	Judicial Arbitration and Mediation (US)
JCAA	Japan Commercial Arbitration Association
JDI	*Journal de droit international* (France)
JCP G	*Semaine juridique édition Générale* (France)
JdT	*Journal des Tribunaux* (Switzerland)
J Intl Arb	Journal of International Arbitration (UK)
JW	*Juristische Wochenschrift* (Germany)
LCIA	London Court of International Arbitration
LGDJ	*Librairie générale de droit et de jurisprudence* (France)
Lloyd's Rep	Lloyd's Law Reports (England & Wales)

Lloyd's Rep IR	Lloyd's Law Reports Insurance and Reinsurance (England & Wales)
LJ	Lord Justice (England & Wales)
LR	Law Reports (1st series) (England & Wales)
ME/Me	Maine (US)
Minn.Stat.Ann	Minnesota Statutes Annotated (US)
Misc	New York Miscellaneous Reports (US)
MT	Montana (US)
NAI	Netherlands Arbitration Institute
NBCA	New Brunswick Court of Appeal [Neutral Citation] (Canada)
ND Cal	Northern District of California (US)
NDNY	US District Court for the Northern District of New York (US)
NE	North Eastern Reporter (US)
NJ Super Ct App Div	New Jersey Superior Court, Appellate Division (US)
NJW-RR	*Neue Juristische Wochenschrift-Rechtsprechungs-Report Zivilrecht* (Germany)
NLCA	Newfoundland and Labrador Court of Appeal [Neutral Citation] (Canada)
No(s)	Number(s)
NPC	New Property Cases (England & Wales)
NSWCA	New South Wales Court of Appeal (Australia)
NSWLR	New South Wales Law Reports (Australia)
NSWSC	Supreme Court of New South Wales (Australia)
NY	New York Reports (US)
NY App Div	New York Supreme Court, Appellate Division (US)
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958
NYS	New York State Reporter (US)
NYUCC	New York Uniform Commercial Code (US)
Obs	*Observations* (France)
OGH	*Oberste Gerichtshof* (Austrian Supreme Court)
OHADAC	Organization for the Harmonization of Business Law in the Caribbean

Ohio St.	Ohio State (US)
Ohio St LJ	Ohio State Law Journal (US)
OLG	*Oberlandesgericht* (German Court of Appeal)
ONCA	Ontario Court of Appeal [Neutral Citation] (Canada)
ONSC	Ontario Superior Court of Justice [Neutral Citation] (Canada)
P	Pacific Reporter (US)
P&CR	Property, Planning and Compensation Reports (England & Wales)
Para.	Paragraph of the present thesis
(Pat)	Patents Court (England & Wales)
Peake	Peake's Nisi Prius Reports (England & Wales)
PECL	Principles of European Contract Law
PICC	Unidroit Principles of International Commercial Contracts 2016
PILA	Swiss Private International Law Act of 18 December 1997
PLACL	Principles of Latin American Contract Law
PRC	People's Republic of China
(QB)	High Court, Queen's Bench Division (England & Wales)
QSC	Supreme Court of Queensland (Australia)
RDC	*Revue de droit des contrats* (France)
Rev Arb	*Revue de l'arbitrage* (France)
RG	*Reichsgericht* (Germany)
RGZ	*Amtliche Sammlung des Reichsgerichts in Zivilsachen* (Germany)
S	Sirey (France)
SAA	Swedish Arbitration Act 2019
SAcLJ	Singapore Academy of Law Journal
SASC	Supreme Court of South Australia (Australia)
S Ct	Supreme Court (US)
SCC	Stockholm Chamber of Commerce
SchiedsVZ	German Arbitration Journal (Germany)

SDNY	US District Court for the Southern District of New York (US)
SFSCD	Swiss Federal Supreme Court Decision (Switzerland)
SGCA	Singapore Court of Appeal (unreported judgments) (Singapore)
SGHC	Singapore High Court (unreported judgments) (Singapore)
SIAA	Singapore International Arbitration Act 1994 as amended
SIAC	Singapore International Arbitration Centre
SIMC	Singapore International Mediation Centre
Sing JLS	Singapore Journal of Legal Studies (Singapore)
SJ	*La Semaine Juridique* (Switzerland)
SLR	Singapore Law Reports (Singapore)
SMA	Society of Maritime Arbitrators
SW	South Western Reporter (US)
SwCC	Swiss Civil Code of 10 December 1907
SwCCP	Swiss Code of Civil Procedure of 19 December 2008
SwCO	Swiss Code of Obligations of 30 March 1911
TASSC	Supreme Court of Tasmania (US)
(TCC)	Technology and Construction Court (England & Wales)
TDM	Transnational Dispute Management
Tex App	Texas Court of Appeal (US)
Tex Ct App	Texas Court of Appeal Reports (US)
TI	*Tribunal d'instance* (France)
TJ	*Tribunal judiciaire* (France)
TR	Durnford & East's Term Reports, King's Bench (England & Wales)
Trav. Com. fr. DIP	*Travaux du Comité français de droit international privé* (France)
Tul Eur & Civ L F	Tulane European and Civil Law Forum (US)
UAE	United Arab Emirates
UCC	Uniform Commercial Code 1952, as revised (US)
UCC Rep Serv	Uniform Commercial Code Reporting Service (US)
UGCADER	Uganda Center for Arbitration and Dispute Resolution

UK	United Kingdom of Great Britain and Northern Ireland
UKSC	United Kingdom Supreme Court [Neutral Citation] (UK)
ULFC	Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods of 1 July 1964
ULIS	Convention relating to a Uniform Law on the International Sale of Goods of 1 July 1964
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	The International Institute for the Unification of Private Law
Unif L Rev	Uniform Law Review (UK)
U Penn L Rev	University of Pennsylvania Law Review (US)
US	United States of America
VIAC	Vienna International Arbitration Centre
Vol	Volume
VSCA	Victoria Court of Appeal (Australia)
W Arb & Med Rev	World Arbitration and Mediation Review (US)
WAR	Western Australian Reports (Australia)
WASCA	Western Australian Court of Appeal (Australia)
WDNY	Western District of New York (US)
WD Pa	Western District of Pennsylvania (US)
WIPO	World Intellectual Property Organization
WL	Westlaw (US)
WLR	Weekly Law Reports (England & Wales)
WM	*Zeitschrift für Wirtschafts- und Bankrecht, Wertpapiermitteilungen* (Germany)
YB Comm Arb	Yearbook of Commercial Arbitration
YB UN Comm'n on Intl Trade L	Yearbook of the United Nations Commission on International Trade Law
ZPO	*Zivilprozessordnung* (Code of Civil Procedure) (Switzerland/Germany)
ZSS	*Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (Germany)

§	paragraph
2d	2nd series
3d	3rd series

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Part I: Introduction

1. The first Part of the present thesis presents the topic of this thesis, namely the application of good faith by arbitral tribunals in international commercial arbitration (Chapter 1). This Part will then address the aims and scope of the present thesis (Chapter 2) and outline the structure of the present thesis (Chapter 3).

Chapter 1: Setting the Scene: The Application of Good Faith By Arbitral Tribunals in International Commercial Arbitration

2. Prior to exploring in depth the topic of the present thesis, it is first necessary to briefly examine the concept of good faith (I.).

3. As we shall see, in international commercial arbitration, arbitral tribunals often have recourse to good faith in order to "do justice" (II.). However, this recourse has been the subject of certain objections (III.) and significant uncertainties surround the application of good faith by arbitral tribunals (IV.).

I. What is Good Faith?

4. When examining the concept of good faith, it is first necessary to distinguish between objective and subjective good faith (A.).

5. Objective good faith is a concept which imports morality into contractual relationships by imposing a standard of conduct (B.). It is an altruistic concept with the goal of equality (C.) which is both in line with, and contrary to, the parties' expectations (D.)

6. Good faith is incapable of a simple or general definition (E.). Indeed, it is an open concept (F.) as well as an elastic, and thus uncertain, notion (G.) which endows the decision maker with discretion (H.).

7. It is important to distinguish good faith from other related concepts (I.). Finally, as well shall see, many attempts have been made to rationalize the application of good faith (J.).

A. Objective versus subjective good faith

8. Good faith can be understood in a subjective or objective sense. Good faith, in the objective sense of the term, refers to an objective standard or norm of conduct which is used to import morality into contractual relationships.[1] In its subjective sense, good faith means a lack of knowledge of a certain fact or event[2] or a mistaken belief in the lawfulness of, *inter alia*, one's possession.[3] In the Netherlands, for instance, the legislator has employed the terms "reasonable and equity" (*redelijkheid en billijkheid*) for objective good faith in order to distinguish it from "good faith" (*goede trouw*) in the subjective sense.[4] Similarly, in Germany, the term "*Treu und Glauben*" is employed for objective good faith whilst the term "*Guter Glaube*" is employed for subjective good faith.[5] For the purposes of the present thesis, the reference to good faith should be read as a reference to good faith in the objective sense.

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1 ASSOCIATION HENRI CAPITANT/SLC, good faith, 156, 167; HESSELINK, Good Faith, 619–620; WHITTAKER/ZIMMERMANN, surveying the landscape, 30. See also in this regard LITVINOFF, 1648 who calls this the ethical component of good faith.

2 HESSELINK, Good Faith, 619.

3 See ASSOCIATION HENRI CAPITANT/SLC, good faith, 156; WHITTAKER/ZIMMERMANN, surveying the landscape, 30. See also in this regard LITVINOFF, 1648 who calls this the psychological component of good faith.

4 ASSOCIATION HENRI CAPITANT/SLC, good faith, 196–197.

5 WHITTAKER/ZIMMERMANN, surveying the landscape, 30.

B. A concept importing morality by imposing a standard of conduct

9. Good faith is a moral concept.[6] Indeed, as stated by JARROSSON: "Good faith stems from morality, as much as it refers to it. It often appears as the vessel that the law uses to draw morality from."[7]

10. Good faith imports morality into contractual relationships by imposing a standard of behaviour.[8]

C. An altruistic concept with the goal of equality

11. Good faith is often associated with the notion of altruism and is opposed to the notion of individualism.[9]

12. Indeed, on one side lies the principle of private autonomy promoting individualism and self-reliance where good faith plays no, or a very minimal, role. On the other side lies the principle of social justice and fairness promoting interpersonal responsibility where good faith plays a much larger role.[10]

13. The individualist viewpoint argues that the parties should have the freedom to frame their rights and duties in their contract. The altruist viewpoint argues that good faith safeguards the rights of each party to receive the fruits of the contract.[11] Indeed, as we shall see below, there is an ongoing tension between the concepts of good faith and party autonomy, in particular, in many of the non-national law instruments.[12]

14. The goal of good faith is to achieve some form of equality, or at least proportionality, between the interests of the parties. Indeed, as will be explored further below, MUNUKKA is of the view that contractual proportionality is the common denominator of the differing views on good faith.[13] According to his view, good faith is employed to ensure that the obligations of each party are proportional to

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6 CHENG, 118; SIPIORSKI, 14, §1-49.

7 JARROSSON, *bonne foi*, 192, §16 and 186, §5 (informal English translation of the French original): "*La bonne foi procède de la morale, tout autant qu'elle y renvoie. Elle apparaît souvent comme l'outre que le droit utilise pour puiser dans la morale*."

8 ASSOCIATION HENRI CAPITANT/SLC, good faith, 156, 167.

9 AUER, 288–293.

10 AUER, 288–292.

11 AUER, 292.

12 See below, e.g., paras. 271, 291, 888, 964, 976 et seq., 1054 et seq., and 1063.

13 See below paras. 998–1001.

each other taking into account all the circumstances and the stage of the contract.[14]

D. A concept both in line with, and contrary to, the parties' expectations

15. It is debated whether the application of good faith is in line with the parties' expectations.

16. On the one hand it is argued that the parties' expectations are safeguarded by applying good faith and interpreting their contract in line with custom and social norms. On the other hand, it is argued that the parties' expectations are safeguarded by sticking to the wording of the parties' contract.[15] Again, this argument brings to light the reoccurring tension that arises between the concepts of good faith and party autonomy.[16]

E. A concept incapable of a simple or general definition

17. Good faith is incapable of a simple or general definition[17] let alone one that is acceptable.[18] However, it can be stated that good faith is a concept which embodies and enforces, *inter alia*, the community standards values of honesty,[19] sincerity,[20] decency,[21] loyalty,[22] diligence,[23] integrity,[24] transparency,[25]

14 *Ibid.*

15 AUER, 292–293.

16 See below, e.g., paras. 271, 291, 888, 964, 976 et seq., 1054 et seq., and 1063.

17 ASSOCIATION HENRI CAPITANT/SLC, good faith, 156; CHENG, 105; SIPIORSKI, 22, §2-09. See also JUENGER, 1254 stating that "the term […] lacks a fixed meaning […] because [it] is loose and amorphous."

18 LEW, 245; WEBER/MARTINEZ, 112.

19 HENRIQUES, good faith, 515; O'CONNOR, 102; POWERS, 351; ROBIN, 695; SIPIORSKI, 45, §2-101; STEYN, 51.

20 HENRIQUES, good faith, 515.

21 KOTUBY/SOBOTA, 138.

22 HENRIQUES, good faith, 515; MAYER, *bonne foi*, 544; ROBIN, 712.

23 HENRIQUES, good faith, 515.

24 HENRIQUES, good faith, 515.

25 See e.g., PEDRO J MARTINEZ-FRAGA, King or Arbitrator: Exploring the Inherent Authority of Arbitrators to Impose Sanctions within the Framework of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (2011) 12 Spain Arbitration Review 57; DCFR Official Commentary, 136.

confidentiality,[26] reasonableness,[27] cooperation,[28] solidarity,[29] fairness,[30] justice,[31] and fair dealing[32].

18. The functions of good faith have evoked more interest than its definition.[33] Indeed, the application of good faith is considered to be the best way to be able to understand the character of good faith.[34] In this regard, many attempts have been made to rationalize the application of good faith.[35]

F. An open concept

19. Good faith is an open concept.[36] This means that its content cannot be ascertained in advance but only when it is applied to a set of facts.[37]

20. The open nature of the concept of good faith is linked to the debate whether it is better to apply the general principle of good faith or specific rules implementing the principle of good faith.

21. On the one hand, the application of specific rules is more certain and predictable, thus enhancing justice in a given case. Conversely, the application of a general principle is much less certain and predictable and leaves room for arbitrariness in its application.[38] On the other hand, negotiating a complex web of specific set of rules could be less predictable and certain than applying a general principle. In addition, if decision makers are bound by a specific set of rules,

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26 With respect to the PLACL, see LANNI, 245–246; with respect to Swiss law, see RISKE, 241, §§609–610; SCHÖNLE, 199; STEINAUER, 205, §554; TERCIER/PICHONNAZ, 164, §686; with respect to the law of the PRC, see LEONHARD, 310; MATHESON, 354–355 stating that good faith at the post-contractual stage requires an employee to maintain the confidentiality of its former employer's trade secrets; NOVARETTI, 975–976; with respect to the TransLex Principles, see Article IV.6.13 'Duty of confidentiality' of the TransLex Principles.

27 KOTUBY/SOBOTA, 138; O'CONNOR, 102; POWERS, 352; STEYN, 51.

28 HENRIQUES, good faith, 515.

29 ROBIN, 702–703, 712–713. See also STORME, 4 stating that good faith obliges parties to take into account the legitimate interests of the other party.

30 KOTUBY/SOBOTA, 138; O'CONNOR, 102; POWERS, 351; SIPIORSKI, 45, §2-101; TETLEY, 4.

31 TETLEY, 4.

32 KOTUBY/SOBOTA, 138.

33 ASSOCIATION HENRI CAPITANT/SLC, good faith, 156.

34 ASSOCIATION HENRI CAPITANT/SLC, good faith, 157; HESSELINK, Good Faith, 623 (stating that "what really matters is the way in which good faith is applied by the courts: the character of good faith is best shown by the way in which it operates").

35 See para. 32 below.

36 AUER, 294–296; ASSOCIATION HENRI CAPITANT/SLC, good faith, 157; WHITTAKER/ZIMMERMANN, surveying the landscape, 30 et seq.

37 ASSOCIATION HENRI CAPITANT/SLC, good faith, 157.

38 AUER, 294.

they may attempt to take into account the particular circumstances of a case by distorting the rule in question.[39] Indeed, the lack of flexibility of a specific set of rules means that they cannot be molded to fit the particular circumstances of a case. Conversely, a general principle is flexible and allows the taking into account of the circumstances of a particular case into the equation and thus allows justice to be realized in a particular case.[40]

22. This debate has been raised in the specific context of the obligation to arbitrate in good faith and is examined in more detail below.[41]

23. The open nature of good faith is also associated with a debate concerning the efficiency of good faith. On one side of the coin, it is argued that a general principle of good faith is efficient as it avoids additional contracting costs caused by having to understand the mechanics of a complex web of specific rules.[42] On the other hand, it is argued that a general principle of good faith is inefficient because its application to a party's activity is uncertain and such uncertainty discourages investment.[43]

G. An elastic and thus uncertain concept

24. Good faith is an elastic concept. This means that its content can change depending on the surrounding social-ethical context[44] and the contract in question. Indeed, the role of good faith will be more demanding in certain contracts, for example, long-term contracts, where it generally imposes duties of information and cooperation, as compared to one-off transactions.[45]

25. Due to its flexibility, many view good faith as a wildly uncertain concept. Some go so far as to epitomize it as a principle of magical potency.[46] Uncertainty is caused by the fact that one does not know in advance how a particular decision

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39 AUER, 295.

40 AUER, 294.

41 See below, paras. 1977–1986.

42 BURTON, Good Faith, 393.

43 AUER, 293–294.

44 For the stark example of where good faith was employed to infiltrate the prevailing Nazi values into the law, see JALUZOT, 48, §165; LOOSCHELDERS/OLZEN, §66 et seq.

45 PECL Official Commentary, Chapter I, 114; with respect to English law, see *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526, [142]; with respect to French law, see PICOD, §45; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 678–679, §599.

46 GEISINGER, 803 stating that good faith "is viewed […] by many as some kind of overarching principle of magical potency, which, because of its haziness and fuziness, trumps (no pun intended) the black letter of both the law and of the contract, rendering impossible any ex ante legal analysis or risk assessment."

maker will apply it.[47] In addition, one does not know which moral standards will be applied.[48]

H. A concept endowing the decision maker with discretion

26. As we shall see, good faith endows the decision maker with discretion to fashion a 'just' solution to a case. Good faith imports flexibility into the application of the law, allowing the decision maker to derogate from the parties' contract and the law in order to achieve a just solution in light of the circumstances of the case.[49]

27. With respect to national courts, this raises the issue of whether the judges are exceeding their mandate and acting as legislators.[50] With respect to arbitral tribunals, this raises the issue of whether an arbitrator has ruled in equity when it was not given the power by the parties to rule as *amiable compositeur* or *ex aequo et bono*.[51]

I. Related concepts

28. Good faith should first of all be distinguished from the broader notion of equity or *aequitas*. The notion of equity or *aequitas* is a moral or legal term meaning fairness and justice[52] which is considered to be much more general than the concept of good faith which is deemed to be limited to the notion of loyalty and fair dealing in contractual relationships.[53]

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47 SIPIORSKI, 23, §2.13.

48 ANDREW GRUBB/MICHAEL FURMSTON, The Law of Contracts (2nd edn, Lexis Nexis UK 2003) 73.

49 See below in Part II concerning the historical origins of good faith, paras. 162 et seq., and paras. 298 et seq.

50 AUER, 296–297.

51 See discussion in MAYER, *bonne foi*, 549.

52 See KAIUS TUORI, Aequitas in Roger Bagnall/Kai Brodersen/Craige Champion/Andrew Erskine/Sabine Huebner (eds), The Encyclopedia of Ancient History (1st edn Blackwell Publishing Ltd 2013) 132–133. See also Bryan Garner (ed.), Black's Law Dictionary (11th edn, 2019) defining equity as, *inter alia*, "The body of principles constituting what is fair and right; natural law."

53 See e.g., paras. 181–184 with respect to Roman law, where *aequitas* or equity was considered to be broader than the notion of *bona fides* or good faith.

29. Good faith should secondly be distinguished from the concept of reasonableness.[54] Indeed, reasonableness forms part of the much broader concept of good faith.[55] A party may be acting reasonably but contrary to good faith and fair dealing and vice versa. An example is the case where one party leads the other party to believe that a certain right would not be exercised and then exercises that right. In such a case, although such conduct is contrary to good faith and fair dealing, the exercise of the right might be reasonable in the absence of inconsistent conduct. A further example given of conduct which is unreasonable but is not contrary to good faith and fair dealing is the case where a party insists on a severe penalty clause being inserted into a contract, warns the other party about the dangers of accepting the clause and the other party accepts such clause freely.[56]

30. Good faith should thirdly be distinguished from the concept of "fair dealing" which is also derived from good faith.[57] The term "fair dealing" is an objective concept requiring the objective observance of fairness. The phrase "fair dealing" was added to the notion of good faith in the PICC in order to ensure that US, Canadian and Australian lawyers would consider the notion of "good faith" to also encompass the notion of fair dealing.[58] The addition of "fair dealing" to "good faith" in the PECL is also said to distinguish it from "good faith" in the subjective sense as discussed above.[59]

31. Good faith should finally be distinguished from the narrower concept of fairness which it is deemed to encompass.[60] As will be explored further below, the distinction between good faith and fairness has been discussed, in particular, by the Chinese legal doctrine.[61]

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54 With respect to the concept of reasonableness, see OLIVIER CORTEN, Reasonableness in International Law, Oxford University Press, 2009, available at SSRN: https://ssrn.com/abstract=2247976, accessed 1 March 2023.

55 KEILY, 30. See in this regard Netherlands 5 January 1978 Appellate Court Amsterdam (*Amran v. Tesa*), available at <https://iicl.law.pace.edu/cisg/search/cases>, accessed 1 March 2023, a case applying the ULIS which held that: " "reasonableness" is of the same character as "buona fede" in art. 1375 of the Italian Code Civil and "goede trouw" (good faith) in art. 1374 of the Dutch Civil Code, according to which a contract has to be executed in good faith." SIM, 59–60.

56 DCFR Official Commentary, 138.

57 KEILY, 30.

58 VOGENAUER, Article 1.7, 214, §19.

59 PECL Official Commentary, Chapter I, 116. With respect to the subjective meaning of good faith, see para. 8.

60 See above, para. 17. See also Bryan Garner (ed.), Black's Law Dictionary (11th edn, 2019) defining fairness as "1. The quality of treating people equally or in a reasonable way. 2. The qualities of impartiality and honesty."

61 See para. 609.

J. Rationalizing good faith

32. Many attempts have been made to rationalize the application of good faith through various theories which will be examined in more detail below. These include the excluder theory,[62] the foregone opportunities theory,[63] the commutative justice approach,[64] the community standards approach,[65] the tripartite functional theory,[66] the *Fallgruppen* methodology,[67] the contractual proportionality approach,[68] the cooperation theory,[69] the theory of micro and macro good faith[70] and the pretext theory.[71]

62 See below, para. 409 et seq.
63 See below, para. 413 et seq.
64 See below, para. 417 et seq.
65 See below, para. 419 et seq.
66 See below, para. 593 et seq.
67 See below, para. 598 et seq.
68 See below, para. 998 et seq.
69 See below, para. 1003 et seq.
70 See below, para. 1006 et seq.
71 See below, para. 1011 et seq.

II Frequent Recourse to Good Faith by Arbitral Tribunals in Order to "Do Justice"

33. In international commercial arbitration, arbitral tribunals often have recourse to good faith.

34. As observed by one eminent commentator:

> […] it is difficult to find any international arbitration award not based on, or that does not at least mention, good faith.[72]

35. Another renown commentator has confirmed that:

> [t]he tendency of international commercial arbitrators to resort to the principle of good faith is well known.[73]

36. Yet another commentator has noted that:

> […] good faith is at the centre and heart of the majority of arbitral awards.[74]

37. This popular use of good faith by arbitrators is said to be due to the natural tendency of arbitrators to give a greater place to equity (or justice and fairness) than national judges in a given case:

> [t]he first reason [for the frequent recourse to good faith by arbitrators] lies in the natural tendency of arbitrators, judges of an isolated dispute, to give to equity a place that State courts refuse […].[75]

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72 CREMADES, 761.

73 MAYER, *bonne foi*, 543 (informal English translation of the French original): "*La propension des arbitres du commerce international à recourir au principe de bonne foi est notoire*."

74 GUY HORSMANS, *L'interprétation des contrats internationaux*, in *L'arbitrage commercial international, L'apport de la jurisprudence arbitrale* (ICC Publication 1986) 153, §45 (informal English translation of the French original): "[…] *la bonne foi est, en tout cas, au centre et au cœur de la majorité des sentences arbitrales*." See also DE FONTMICHEL, 106 and LALIVE, *bonne foi*, 432 (referring to the frequent references made to good faith in international arbitral awards), 435 (stating that arbitral practice has constant recourse to good faith), 437 (stating that the recourse to good faith by arbitrators to judge the performance of the contract and the parties' liability is practically the rule).

75 MAYER, *bonne foi*, 543 (informal English translation of the French original): "*La première réside dans la tendance naturelle des arbitres, juges d'un litige isolé, à donner à l'équité une place que les tribunaux étatiques se refusent* […]." See also WEBER/MARTINEZ, 113 stating that good faith allows arbitrators to redirect a decision that might have been formally correct, but would also have been contrary to general legal sentiments of fairness, correctness and reasonableness. See further OSMAN, 18 stating that good faith is the "*clef de voûte de la justice arbitrale*" or the cornerstone of arbitral justice.

38. In this respect, it has been noted that the large majority of the applications of good faith in international commercial relationships, by both arbitrators and judges alike, has been spurred by the goal of moralization.

> It is unquestionable that the vast majority of […] applications and developments [of good faith] are linked to the concern for morality pursued by judges and arbitrators, over and above the application of more precise or more technical rules.[76]

39. Indeed, as compared to a set of specific rules, a general principle, such as the general principle of good faith allows for equitable flexibility and, accordingly, for individual justice to be achieved taking into account the specific circumstances of the case.[77]

40. In this regard, it has been argued that good faith is required in order to enable the international arbitrator to deal with the significant variety of contractual situations that it has to face:

> How could the international arbitrator "deal with the very great variety of contractual situations" which may arise if he could not resort to a general principle such as that of good faith? [78]

[76] JARROSSON, *bonne foi*, 202, §32 (informal English translation of the French original): "*Il est incontestable que la grande majorité de ses applications et ses développements est liée au souci de moralisation que poursuivent les juges et les arbitres, au-delà de l'application de règles plus précises ou plus techniques*."

[77] AUER, 294. See also DUNCAN KENNEDY, Form and Substance in Private Law Adjudication (1976) 89 Harvard Law Review 1685, 1688–1689.

[78] LALIVE, *bonne foi*, 436 (informal English translation of the French original): "*Comment l'arbitre international pourrait-il en effet "faire face à la très grande variété des situations contractuelles" qui peuvent se présenter s'il ne pouvait recourir à un principe général comme celui de la bonne foi* […]".

III. Objections to the Recourse to Good Faith by Arbitral Tribunals

41. The frequent recourse to good faith has given rise to certain objections. The first objection is that arbitral tribunals are disregarding the applicable law when having recourse to good faith (A.). The second objection is that the recourse to good faith leads to a risk of arbitrariness (B.).

A. Disregard of the applicable law

42. Some users of international arbitration have raised objections to the frequent recourse to good faith, on the grounds that arbitrators are too flexible and are disregarding the rules of the governing law.[79]

43. Indeed, it has been noted that arbitrators lay emphasis on "doing justice" at the cost of the applicable national law. As stated by one commentator:

> [t]he concern of arbitrators […] is to arrive at a just solution, rather than the strict application of the law of a given national State.[80]

44. This tendency has been confirmed by a survey of US arbitrators in 2014 in which a quarter of respondents were said to "feel free to follow [their] own sense of equity and fairness in rendering an award even if the result would be contrary to applicable law," at least some of the time.[81]

45. This inclination is supported by the fact that arbitrators' decisions are subject to a more restricted form of appeal than those of national judges. As stated by one author:

> Arbitrators, who do not have to worry about appeals, may feel even less constrained by formal rules. Good faith, in effect, tells these decision-makers "just do it".[82]

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79 FABIO BORTOLOTTI, Introduction, in Dossier of the ICC Institute of World Business Law: The Application of Substantive Law by International Arbitrators (2014) 7.

80 RENÉ DAVID, *L'arbitrage dans le commerce international* (Paris 1982) 568, §453. See also MAYER, Reflections, 237 stating that some arbitrators believe that justice is to be preferred over a strict application of the law; see further MAYER, Justice, 509–510.

81 THOMAS J. STIPANOWICH, Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals (2014) 25 Am Rev Intl Arb 297, 327–328. For an older empirical study, see SOIA MENTSCHIKOFF, Commercial Arbitration (1961) 61 Columbia Law Review 846, 861: "Eighty per cent of the experimental arbitrators thought that they ought to reach their decisions within the context of the principles of substantive rules of law, but almost 90 per cent believed that they were free to ignore these rules whenever they thought that more just decisions would be reached by so doing."

82 JUENGER, 1256.

46. Notwithstanding, it has been submitted by one commentator that an arbitrator has a professional duty to comply with the law and to treat it with respect and this is what arbitration users expect.[83] In addition, arbitration users want certainty rather than justice and this can only be achieved by applying the rules of the applicable law.[84] Moreover, failing to apply the law discredits the arbitrator in the eyes of the parties and also discredits the arbitral process.[85] Indeed, "the law has many positive aspects […] it is neutral and predictable; it guards against arbitrariness and is reassuring for the parties; it takes into account the general interest of the community."[86]

47. If an arbitral tribunal employs good faith and disregards the applicable law, it may be the case that an arbitrator has in fact ruled in equity when it was not given the power by the parties to rule as *amiable compositeur* or *ex aequo et bono*.[87] This scenario of arbitrators applying general notions of justice, fairness and equity instead of strictly applying the law has been referred to as the case of the "hidden amiable compositeur".[88] In this regard, it should be underlined that if an arbitral tribunal does in fact rule *ex aequo et bono* without the parties' agreement, the award eventually rendered risks being set aside on the grounds of an excess of authority.[89]

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83 MAYER, Reflections, 247. See also MAYER, Justice, 510.

84 MAYER, Reflections, 243. See also MAYER, Justice, 510.

85 MAYER, Reflections, 243.

86 MAYER, Reflections, 247.

87 See discussion in MAYER, *bonne foi*, 549. See also BORN, 3591: "[…] if a tribunal deliberately ignores the applicable law or contract, and reaches a conclusion based entirely on its own view of the equities, then there may be very narrow circumstances in which an award may properly be annulled. In these cases, however, the award is not annulled because the tribunal makes a substantive mistake, which implies that the arbitrators were seeking to apply the relevant legal rules and erred, but because the tribunal deliberately chose to ignore its mandate to apply the law and instead effectively acted ex aequo et bono. Any such analysis must be conducted with great circumspection, to avoid encroaching on the arbitrators' mandate and violating the rule against substantive review of the arbitrators' decision; nonetheless, where an arbitrator does ignore his or her mandate, annulment is generally both appropriate and necessary." See further BERGER, Precedents, 19.

88 ANYA GEORGE, The Hidden Amiable Compositeur, Kluwer Arbitration Blog, 20 April 2015, available at < http://arbitrationblog.kluwerarbitration.com/2015/04/20/the-hidden-amiable-compositeur/>, accessed 1 March 2023.

89 See below, paras. 1159–1160. See also in this regard BORN, 2990 noting, however, that national courts appear reluctant to set aside an arbitral award on the ground that the arbitrators impermissibly ruled *ex aequo et bono*. With respect to the position under Swiss law, the Swiss Federal Supreme Court has held that if an arbitral tribunal usurps the power to adjudicate *ex aequo et bono*, this does not affect the jurisdiction of the arbitral tribunal and therefore can only be set aside if the result of the award is contrary to public policy pursuant to Article

48. However, it has been argued that the specific objection to the recourse to good faith as allowing an arbitrator to rule in equity without being authorized to do so, is not convincing given that there are many other general concepts and standards employed by arbitrators which, in theory, would also face the same criticism.[90]

B. Risk of arbitrariness

49. As an open norm, the content of good faith cannot be spelled out in an abstract way.[91] The content of good faith must be established by applying it to the facts and will depend on the circumstances of the case.[92] Accordingly, as compared to the application of specific rules, whose application is more certain and predictable, the application of good faith, is much less certain and predictable and leaves room for arbitrariness.[93]

50. As stated by one commentator:

> [w]hen an arbitrator decides on specific claims based on a legislative text he enjoys an interpretative precision that he lacks when basing his decisions on the general principles of law, specifically on the principle of good faith. Therefore, the logical hesitation that exists in practice and in doctrine makes recurring to good faith replete with legal insecurity or, in a worst case scenario, leads to a risk of arbitrariness.[94]

51. Despite the perceived risk of arbitrariness, it has been argued that arbitrators have invoked this principle judiciously[95] and that they exercise extra caution when applying good faith.[96]

190(2)(e) PILA. See SFSCD 4A_525/2017 of 9 August 2018 c. 3.3.1, SFSCD 4A_40/2017 of 8 March 2017 c. 3, SFSCD 4A_14/2012 of 2 May 2012 c. 3.2.2.

90 LALIVE, *bonne foi*, 435.

91 HESSELINK, Good Faith, 622. See also above para. 19 et seq.

92 *Ibid*.

93 AUER, 294.

94 CREMADES, 785; See also MAYER, *bonne foi, 548* et s*: "D'un principe aussi vague que celui de la bonne foi peuvent être tirées des conséquences plus ou moins radicales. […] Il en résulte pour les parties une insécurité particulièrement grande, à laquelle peut même succéder, la sentence une fois rendue, une impression d'arbitraire."* ("From a principle as vague as that of good faith can be drawn more or less radical consequences. . […] This results in a particularly high degree of uncertainty for the parties, which may even give the impression of arbitrariness once the award has been made.") (Informal English translation of the French original). See further JARROSSON, *bonne foi*, 202, §32 who submits that good faith is a source of uncertainty as it endows the arbitrators with significant room for interpretation.

95 LALIVE, *bonne foi*, 450.

96 CREMADES, 786.

IV. Uncertainties Surrounding the Application of Good Faith by Arbitral Tribunals

52. In addition to the above objections to an arbitral tribunal's recourse to good faith, there are also uncertainties surrounding the application of good faith by arbitral tribunals.[97]

53. Indeed, notwithstanding the pervasive use of good faith in international arbitral awards,[98] its application remains elusive:

> [t]he omnipresence of good faith does not mean (rather quite the contrary) that it is clearly understood, that we know how to use it, or that we are able to predict how an arbitral tribunal may apply good faith in a particular case.[99]

54. Indeed, it has been submitted that whilst both the existence and applicability of good faith in international arbitration are not the subject of great debate, the difficulty lies in determining the requirements for its application and how it should be applied in a particular case:

> […] its existence and applicability do not seem to be contested by anyone; the "only" difficulty, if one can express oneself in this way, lies in the determination of the requirements for its application and how it should be applied in a particular case and conditions of application.[100]

55. Uncertainty with respect to the application of good faith firstly arises due to the varying legal backgrounds of the members of the arbitral tribunal (A.). Additional uncertainty arises when a State party is involved in the arbitration (B.). Finally, certain specific uncertainties arise when good faith is applied by arbitral tribunals to the substantive contract between the parties (C.) and to the arbitration agreement (D.).

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97 In this regard, see SAINTIER, 442 stating that the most important thing to understand about good faith is the way it is applied by the courts and not attempting to define the notion.

98 See above, para. 33 et seq.

99 CREMADES, 761. See also with respect to good faith in general, LITVINOFF, 1650 stating that "the words good faith, which are so frequently used in common parlance and in the written text of the law on the apparent assumption that everybody understands what they mean, prove in fact truly difficult to understand."

100 LALIVE, *bonne foi*, 450 (informal English translation of the French original): "*son existence et son applicabilité ne semblent pas contestées par personne; la «seule» difficulté, si l'on peut ainsi s'exprimer, réside dans la détermination de ses conditions et modalités d'application in concreto*."

A. Varying legal backgrounds of the members of the arbitral tribunal

56. Compared to a bench of judges sitting in a national court, the composition of an arbitral tribunal differs significantly in terms of the nationality and legal background of its members.

57. First – in contrast to national judges who will usually be applying their own national law – it is often the case that the arbitrators in question will be applying a national law which is different from the law in which they were trained.[101]

58. In this regard, it has been questioned whether international arbitrators are influenced by their own national legal background when applying good faith.

59. As stated by one commentator:

> [w]hen specifying the content of good faith, the arbitrator runs the risk of being unconsciously influenced by her own legal tradition. Will, for example, an Entire Agreement clause (providing that the contract contains the whole agreement between the parties and supersedes any prior agreements) be interpreted literally, thus excluding the applicability of product specifications that the parties may have agreed on during the negotiations, but not formalized in the contract? Or will it be overridden by the underlying principle of good faith, preventing a party from taking advantage of it if it has created expectations in the other party? Different legal systems may have different approaches, and even the UPICC are not interpreted uniformly. The arbitral tribunal's understanding of how far the principle of good faith permits interfering with the clear language of the contract, depends on how the arbitral tribunal specifies the legal standard i.e., it depends on the arbitral tribunal's set of values regarding the function of contract terms, the role of the interpreter and the degree to which he may interfere with the terms of the contract. The arbitral tribunal's own specification of these standards may or may not be faithful to the assumptions and principles underlying the applicable law. This specification may have a considerable impact on the effects of the contract and consequently the outcome of the dispute.[102]

60. Whether an international arbitrator is influenced by his or her legal background when applying good faith is of particular importance to users as underlined by one commentator:

> […] when a case arises in which good faith may play a material role, the major question is whether or not the legal culture and training of the potential arbitrators might condition

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101 MAYER, Reflections, 238. It is noted, however, that in many cases at least one of the arbitrators will be applying a national law in which they were trained.

102 GIUDITTA CORDERO-MOSS, Science and Arbitration, Psychology in Arbitration: How Your legal Imprinting Impacts on Contract Construction in Christian Klausegger/Peter Klein (eds), Austrian Yearbook on International Arbitration 2020, 497–511, 508 and 510 stating that: "it seems plausible that it is legal reflexes, i.e. the result of a legal imprinting, that inspire the arbitrator's own understanding of, e.g., how the principle of good faith interacts with the contract terms […]."

> their ultimate decision" and "[w]hat is truly important is to know whether or not, when we appoint an arbitrator from one cultural background or the other, we can predict any tendency in that arbitrator's decision.[103]

61. In this regard, it has been submitted that – with respect to the application of a national law by an arbitrator – when there is an uncertainty with respect to the interpretation of the law, an arbitrator will subconsciously look to what his or her own law provides.[104] In addition, if an arbitrator comes across a rule in the applicable law that it considers unreasonable, such arbitrator will attempt to moderate its effects.[105]

62. It is therefore unclear whether arbitrators will revert (subconsciously) to their understanding of good faith in the law in which they were trained, when applying good faith on the basis of another law, in particular, given the uncertainty over the meaning of this notion.[106] In addition, in a case where the role and scope of good faith is much more extensive under the applicable law than under the law in which a given arbitrator was trained, it is unclear whether such arbitrator may be inclined to mitigate the effects of this notion. It is furthermore unclear whether arbitrators will be influenced by their own understanding of good faith in the law in which they were trained when applying good faith on the basis of a non-national source, as a result of the lack of precedent and increased uncertainty surrounding the notion of good faith under such a source.[107]

63. In this respect, it has been suggested that parties should carefully choose their arbitrators in order to ensure that their arguments based on good faith are more likely to be successful.[108]

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103 See CREMADES, 766. See also MAYER, *bonne foi*, 549 stating that the diverse legal cultures of the arbitrators will shape their view on the principle of good faith and DE FONTMICHEL, 106.

104 MAYER, Reflections, 238.

105 *Ibid*.

106 The role and scope of good faith under national law is explored below, see Part III, Chapter one.

107 The role and scope of good faith under non-national law is explored below, see Part III, Chapter two.

108 JULIA GROTHAUS, DIS Autumn Conference 2014: Global Pond or Single Playing Field: How international should international arbitration really be? (2015) 13 SchiedsVZ 37 referring to the talk made by EDUARDO SILVA ROMERO concerning arbitration in Latin America. In this talk, he reportedly stated as follows: "Other than in Europe, the parties consider these [good faith] arguments to be valid and strong – and are disappointed if they are not accepted by the tribunals. Yet, arbitrators, in general, tend to uphold the contractual agreement (*pacta sunt servanda*) and are extraordinarily cautious when confronted with arguments based on the principle of good faith, […]. For Latin American parties, it means, however, that they must carefully choose and nominate their party-appointed arbitrators to have a decent chance of prevailing with their good faith arguments."

64. Second, unlike in a national court setting, the arbitrators composing an arbitral tribunal do not usually all have the same nationality or legal background. In this regard, a harmonized approach will often be adopted where there are arbitrators with different legal backgrounds and the approach taken by the two national laws diverges.[109] In an arbitral panel composed of arbitrators from different legal backgrounds, it is accordingly unclear how, and to what extent, each of their legal backgrounds will influence the application of good faith.

65. Finally, as compared to national judges, arbitrators will usually have had more exposure to different national laws and will be more familiar with transnational rules or laws. In this respect, it has been suggested that an arbitral tribunal composed of arbitrators with different legal backgrounds will naturally adopt a comparative approach.[110] Furthermore, it has been noted that arbitrators often take a comparative or transnational approach in order to bolster the solution reached by applying the applicable national law.[111] Indeed, "arbitrators have an inclination to 'transnationalise' the rules they apply, either because they are subject to no meaningful controls when it comes to the merits, they act in a transnational environment, or they are themselves very often from different legal cultures."[112] As a result, it is unclear whether it is more likely that an arbitral tribunal will take a comparative or transnational approach when applying good faith.

B. Involvement of State parties

66. As noted by one commentator: "States have been participating in international arbitration since the dawn of the modern era and continue to do so, both in their

109 KAUFMANN-KOHLER, *contrat*, 367 referring to the example of Swiss law which takes a more liberal approach with respect to interpretation whilst English law adopts an approach which is more attached to the text of the contract and noting that in a case where there is a Swiss arbitrator and an English arbitrator on the panel, they will tend to take a middle path between these two approaches.

110 MEIER, 127–128.

111 KAUFMANN-KOHLER, *contrat*, 366 noting that in order to justify the solution upheld under the applicable national law, arbitral tribunals often refer to general principles, notably the PICC and that arbitral tribunals frequently have recourse to a comparative analysis in order to show that the solution upheld under the applicable national law is the same under another national law.

112 KAUFMANN-KOHLER, Precedent, 364.

public and private capacity."[113] Indeed, almost twenty per cent of ICC international commercial arbitrations now involve State parties[114].[115]

67. The role that good faith will play in arbitrations involving State parties is unclear. As stated by one commentator:

> [t]his principle [of good faith], does it apply, and if so in what way, to the recent international practice and to the difficulties arising from the specific ambiguity of the «state» party? [116]

68. On the one hand, good faith is even more required in cases where State parties are involved as a counterbalance to the arbitrary administration and public interest of the State party, as well as the other risks inherent in relationships with State parties.[117] As an example, good faith may require a State company to inform the other private party of the potential risk that the State may take over the company.[118] Good faith may also prevent a State party from relying on a *force majeure* event, not only when it instigated this event, but also when it omitted to use all the means at its disposal to obtain the withdrawal or cancellation of the event.[119] In this regard, the risk of contracting with a State party, which a private party is aware of, is tempered by the private party's belief that such a risk is limited, or at least reduced, by good faith.[120]

69. On the other hand, the non-State party's obligation to inform (which flows from good faith) would be enhanced, in particular, when the other contracting party is a State party which is acquiring a technology necessary for its development.[121]

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113 VEIJO HEISKANEN, State as a Private: The Participation of States in International Commercial Arbitration (2010) 7 TDM 1.

114 A State or a state agency/entity will both hereinafter be referred to as "State party".

115 ICC Dispute Resolution 2020 Statistics, p.11 (19.8% in 2020); ICC Dispute Resolution 2019 Statistics, p.10 (20% in 2019); ICC Dispute Resolution 2018 Statistics, p. 9 (15% in 2018); This has risen from the average of ten per cent, see Report of the ICC Commission on Arbitration and ADR Task Force on Arbitration Involving States or State Entities (2015), 2, §7, available at <http://www.icc-portugal.com/images/publicacoes/documentos_gratuitos/Arbitragem/ICC_Arbitration_Commission_Report_on_Arbitration_Involving_States_and_State_Entities_under_the_ICC_Rules_of_Arbitration_(2015).pdf>, accessed 1 March 2023.

116 See LALIVE, *bonne foi*, 427 (informal English translation of the French original): "*Ce principe* [de bonne foi] *s'applique t-il, et de quelle manière, dans la pratique internationale récente, aux difficultés que fait naître l'ambiguïté spécifique de la partie «étatique»*?"

117 *Idem*, 448–449.

118 *Idem*, 443.

119 *Idem*, 449.

120 *Idem*, 429.

121 MAYER, *règle morale*, 385, §11.

C. Application of good faith to the parties' contract

70. Specific uncertainties arise in connection with the application of good faith to the parties' contract. First, uncertainties arise – in case a national law is applicable to the parties' contract – due to the arbitrators' lack of strong ties with such law (1.). In the event that a non-national law or rules are applicable, uncertainties also arise due to the unclear role and content of good faith, and the lack of precedent with respect to the role and scope of good faith under such instruments (2.).

1. Arbitrators' lack of strong ties with the applicable national law

71. Compared to a national court judge, an arbitrator's relationship with the applicable national law is much weaker. The decisions of national court judges are subject to control by higher courts and, as organs of the State, they are aware of their duty to uphold the law. Conversely, an arbitrator is not part of a legal system. If an arbitrator does not apply the law, this may well violate the parties' expectations but it will not damage the very integrity of the law.[122]

72. Therefore, while a national court judge will follow the established case law in order to reduce the risk that the judgment will be reversed, there is much less pressure on arbitrators to follow the case law in the national legal system chosen.[123] This is largely because the *lex arbitri* does not usually impose constraints on the arbitral tribunal's application of the national law.[124]

73. Moreover, the arbitral tribunal's mission is temporary.[125] As a result, the arbitral tribunal's attention is focused on resolving the immediate dispute before it rather than developing a coherent body of case law.[126] Indeed, an arbitrator is only concerned with the case before it and becomes *functus officio* once it has performed its mandate.[127]

74. In light of this lack of strong ties with the applicable law, it is unclear how arbitrators will apply good faith under the relevant applicable national law. In particular, it is not clear to what extent they will adhere to the approach taken

122 MAYER, Reflections, 237.
123 DE BOISSÉSON, 123.
124 DE BOISSÉSON, 123; MAYER, Reflections, 237; see also KAUFMANN-KOHLER, *contrat*, 363–365.
125 DE BOISSÉSON, 124.
126 *Ibid*.
127 BERGER, Precedents, 12.

by the case law of the national courts and legal doctrine in the country of the chosen law.

2. Unclear role and content of good faith under the applicable non-national law

75. Good faith has been defined as "the Magna Carta of international commercial law"[128] and as a "fundamental and essential ingredient in international commerce."[129]

76. In spite of the importance of this principle in international commerce, there is, however, "no international consensus on the scope, the function, and the content of the standard of 'good faith and fair dealing'" in international commerce.[130]

77. Indeed, the role and scope of good faith, which requires contractual solidarity, loyalty and cooperation is unclear in an environment where fierce competition reigns.[131] In addition, good faith would seem to require more from parties to international commercial transactions given the risks and high costs of such transactions.[132]

78. If good faith is applied to the parties' contract on the basis of an international codified source, such as the CISG or the PICC, further uncertainties are caused due to the fact that there is no centralized higher adjudication system in place, determining how good faith should be applied under these instruments and, in particular, the content of good faith and the remedies available in the event of a failure to act in accordance with good faith.[133]

79. In the absence of such a centralized higher adjudication system, it is unclear to what extent arbitrators will look to see how other arbitral tribunals and national courts have applied good faith under these instruments and to what extent they will follow such approaches. Although databases have been created with

128 BERGER, Creeping Codification, 165.

129 LEW, 247.

130 VOGENAUER, Art. 1.7, 208, §4; see also LEW, 247 stating that it has no clear definition.

131 ROBIN, 726.

132 LOQUIN, *règles anationales*, 98–99, §38.

133 See in this regard, DE BOISSÉSON, 124. See also MAYER, *bonne foi*, 549 who underlines that whilst in national court proceedings, a coherent and expansive case law forms over time with respect to good faith which guides a judge and increases predictability, in international commercial arbitration, it is less likely that such an expansive body of case law will form given the lack of a supreme court.

extracts of arbitral awards and court judgments applying these instruments,[134] very few arbitral awards in fact refer to other arbitral awards.[135]

80. This uncertainty with respect to the role and meaning of good faith is exacerbated in the case that the CISG is applicable, as the very role of good faith under the CISG is the subject of intense debate with varying approaches being adopted by both national courts and commentators alike.[136]

81. Equally, the role and meaning of good faith under international uncodified sources, such as the *lex mercatoria*/general principles of law is also unclear.[137] Indeed, good faith under the *lex mercatoria* could be invoked to justify the recourse to the majority of rules of the law of obligations.[138] It is therefore uncertain what role and meaning arbitrators will attribute to good faith under such sources although arbitrators have tended to attribute an extensive role to good faith when applying it on this basis.[139]

D. Application of good faith to the arbitration agreement

82. Good faith has been applied to many different issues surrounding the arbitration agreement including: (i.) the formal validity of the arbitration agreement; (ii.)

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134 For example, <www.unilex.info>, accessed 1 March 2023 provides a database of court judgments and arbitral awards applying the CISG and the PICC. Pace Law School has also set up a database of court judgments and arbitral awards applying the CISG at <http://iicl.law.pace.edu/cisg/cisg>, accessed 1 March 2023.

135 See KAUFMANN-KOHLER, Precedent, 362 stating with respect to awards applying the CISG: "Out of 500 cases, only about 100 were available in sufficient detail to make a finding possible, and out of these, only six referred to past awards."

136 See below, Part III, Chapter 2, Section IIA.

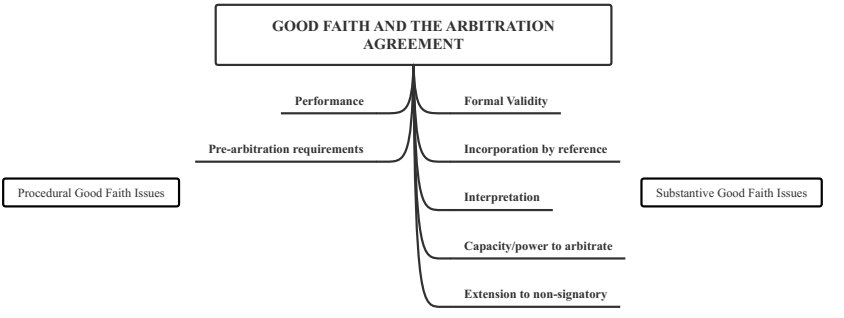
137 See below, Part III, Chapter 2, Section I. See also MAYER, *bonne foi*, 556: "*Cependant, lorsque le principe de la bonne foi est appliqué au nom de la lex mercatoria, le flou de l'une s'ajoute à celui de l'autre, ce qui ne va pas dans le sens de la prévisibilité*." ("However, when the principle of good faith is applied on the basis of the lex mercatoria, the vagueness of one adds to the vagueness of the other, which is not conducive to predictability.") (informal English translation of the French original).

138 MAYER, *bonne foi*, 554: "*Il n'y a en fait guère de règles de la théorie générale des obligations qu'on ne puisse justifier par un recours similaire à la notion de bonne foi*." ("There are, in fact, few rules of the general theory of obligations that cannot be justified by a similar recourse to the notion of good faith.") (informal English translation of the French original).

139 MAYER, *bonne foi*, 543–544: "[*la lex mercatoria*] *ne se borne pas à recevoir en son sein les solutions consacrées par les droits étatiques; elle donne au principe de bonne foi un rôle plus dynamique, inconnu (ou invisible) dans le droit des Etats*." ("[the lex mercatoria] is not limited to receiving solutions created by State law; it gives the principle of good faith a more dynamic, unknown (or invisible) role in the law of States.") (informal English translation of the French original). See also MAYER, *règle morale*, 389, §17.

the incorporation of the arbitration agreement by reference; (iii.) the interpretation of the arbitration agreement; (iv.) the capacity or power/authority of a party to arbitrate; (v.) the extension of the arbitration agreement to a non-signatory; (vi.) the pre-arbitration requirements to negotiate or mediate; as well as to (vii.) the performance of the arbitration agreement.[140]

83. These issues can be split into substantive good faith issues (the formal validity of the arbitration agreement; the incorporation of the arbitration agreement by reference; the interpretation of the arbitration agreement; the capacity or power of a party to arbitrate; and the extension of the arbitration agreement to a non-signatory) and procedural good faith issues (pre-arbitration requirements to negotiate or mediate and the performance of the arbitration agreement) as set out in the diagram below.[141]



84. With respect to the application of good faith to the arbitration agreement, uncertainties arise, first of all, due to the unclear potential source of good faith

140 A search for the term "good faith" in GARY BORN's leading treatise on International Commercial Arbitration shows that good faith has been invoked in relation to these seven issues concerning the arbitration agreement: good faith and the formal validity of the arbitration agreement (BORN, 733–734, 752–753); good faith and the incorporation of the arbitration agreement by reference (BORN, 888); good faith and the interpretation of the arbitration agreement (BORN, 1428); good faith and the capacity/power of a party to arbitrate (BORN, 777–780); good faith and the extension of the arbitration agreement to a non-signatory (BORN, 1484 et seq); good faith and the pre-arbitration requirements to negotiate or mediate (BORN, 977–979 and 986–988) and good faith and the performance of the arbitration agreement (BORN, 1350 et seq).

141 An arbitration agreement has a hybrid nature. Whilst its source is of a contractual nature, its object is of a jurisdictional nature; see KLEIMAN/SALEH, 113, §40.

(1.). Additional uncertainties arise due to the unclear role, function and content of good faith (2.).

1. Unclear potential source of good faith

85. With respect to the application of good faith to the arbitration agreement, the potential source of good faith is unclear.

86. First, the application of good faith to the arbitration agreement is complicated due to the unclear stance taken by arbitral tribunals, national courts and commentators alike with respect to the determination of the law which should apply to the substantive validity of the arbitration agreement.[142]

87. This uncertainty is further exacerbated by the fact that different laws may apply to different issues arising with respect to the arbitration agreement.[143] Thus, for example, as compared to the substantive validity of the arbitration agreement, different laws may be applicable to the issue of formal validity of the arbitration agreement and to the issue of the capacity of a party to enter into the arbitration agreement.[144]

88. Second, as with the law applicable to the parties' contract,[145] the arbitration agreement may be governed not only by a national law, but also by a non-

[142] BORN, 508–509: "Identifying the law that governs a separable international arbitration agreement – since it is not necessarily the law governing the parties' underlying contract – has often proved to be a complex and confusing process. Different national courts, arbitral tribunals and commentators have developed and applied a multiplicity of choice-of-law rules to the substantive validity of international arbitration agreements, ranging from the law chosen by the parties to govern their underlying contract, to the law of the arbitral seat, to the law of the judicial enforcement forum, to the law of the state with the "closest connection" or "most significant relationship." These various choice-of-law rules, and the absence of any meaningful consensus with respect to any of these rules, has often produced unfortunate uncertainty about the choice of the law governing international arbitration agreements." See also MARC BLESSING, The Law Applicable to the Arbitration Clause in Albert Jan van den Berg (ed), Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series, Vol 9 (Kluwer Law International 1999) 168–188 pointing to nine different solutions to the issue of the law applicable to the arbitration agreement and LEW/MISTELLIS/KROLL, 109, §6.26.

[143] BORN, 509.

[144] *Ibid*.

[145] With respect to the application of good faith to the parties' contract on the basis of national law, see above, para. 75 et seq.

national law, such as the CISG,[146] or the PICC.[147] Indeed, some national courts have taken the view that the arbitration agreement should not be governed by a national law but by autonomous rules.[148] Hence, there is a multitude of potential substantive sources of good faith to the arbitration agreement.

89. Third, due to the procedural nature of the arbitration agreement, there are additional procedural sources of good faith. These may be found, for example, in the *lex arbitri* or institutional mediation/arbitration rules chosen by the parties, and apply, most notably, to the issues of the performance of the arbitration agreement and pre-arbitration requirements.

2. Unclear role, function and content of good faith

90. Additional uncertainties arise, first of all, with respect to the application of good faith to the substantive issues surrounding the arbitration agreement.

91. Indeed, what role and function does good faith play in the context of the formal validity of the arbitration agreement, the capacity or power/authority to arbitrate, the incorporation of an arbitration agreement by reference, the interpretation of the arbitration agreement and the extension of the arbitration agreement to a non-signatory?

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146 ROBERT KOCH, The CISG as the Law Applicable to Arbitration Agreements? in Camilla B. Andersen/Ulrich G. Schroeter (eds), Sharing International Commercial Law across National Boundaries: Festschrift For Albert H Kritzer on the Occasion of his Eightieth Birthday 2008, 270–271 stating that the majority of legal writers agree that the arbitration agreement in an international sales contract is governed by the CISG but only with respect to its formation and not with respect to its form. See also ALEKSANDRS FILLERS, Application of the CISG to Arbitration Agreements (2019) European Business Law Review 663–694.

147 SCHERER, 147, §84 noting that "in practice, arbitral tribunals sometimes apply the PICC to arbitration clauses."

148 This is the approach taken by the French courts (see *Dalico* decision of the *cour de cassation*, Cass civ 1re, 20 déc. 1993, no. 91-16828 (1994) Rev Arb 116 obs HÉLÈNE GAUDEMET-TALLON, holding that the existence and validity of an arbitration agreement should be determined by reference to the parties' common intention without having recourse to a national law; *Zanzi* decision, Cass civ 1re, 5 janv. 1999 no. 91-21430; *Soerni* decision, Cass civ 1re, 8 juillet 2009, no. 08-16025; *Kout Food* decision, Cass civ 1re, 28 sept. 2022 no. 20-20.260) and will therefore be the case for arbitral tribunals seated in France. See also Judgment of 9 May 1996, *Société Arabe des Engrais Phosphates et Azotes & Société Industrielle d'Acide Phosphorique et d'Engrais v. Gemanco Srl* (1997) 32 YB Comm Arb 737, 741 (Italian *Corte di Cassazione*) (1997): "The law governing the arbitration clause – that is, the law governing the arbitration agreement either by agreement of the parties or as *lex fori* – is not Tunisian law directly but, according to the arbitral award, *lex mercatoria*, a body of 'rules of law' based on the usages of international commerce."

92. Second, further uncertainties are engendered by the unclear content of the obligation to negotiate or mediate in good faith prior to resorting to arbitration.

93. As aptly put in one commentary with respect to an obligation to negotiate in good faith prior to resorting to arbitration:

> The problem is that an obligation to negotiate 'in good faith' is nebulous. Who is to open negotiations? How long are they to last? How far does a party need to go in order to show 'good faith'? Is a party obliged to make concessions, even on matters of principle, in order to demonstrate good faith? [149]

94. Another commentary has raised the same issue:

> And when is an attempt not made in good faith? Might a party whose negotiators sit grumpily at the settlement meetings (smiling through clenched teeth, staring at the ceiling, while mentally humming 'Rule Britannia') and refuse to accept anything less than 100 per cent of the claim, not still be acting 'in good faith', and even if the tribunal awards the claim in full? In other words, does acting 'in good faith' necessarily carry with it an implication that a party must be obliged to make (or at least ready to make) some material concession? If so, on what basis? And what if the court concludes that the discussions were unfriendly?[150]

95. In general, when assessing whether the parties acted in good faith during negotiations and the mediation process, arbitral tribunals and national courts have understandably emphasized that the content of the obligation to negotiate/mediate in good faith inevitably depends on the context and contract in question.[151]

96. As a result of the importance of the context in determining whether a party has acted in good faith during negotiations and/or mediation, few arbitral tribunals and national courts have elaborated on what *in abstracto* constitutes good faith behaviour and have limited themselves to determining on the facts of the case whether the parties have complied with their obligations to negotiate or mediate in good faith.[152]

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149 REDFERN/HUNTER (6TH EDN), 40, §1.135.

150 FLANNERY/MERKIN, 103.

151 ICC Case No 6276, Partial Award of 29 January 1990 referred to in FIGUERES, 77; CHAPMAN, 96; *United Group Rail Services Ltd. v Rail Corp. New South Wales* (2009) NSWCA 177, §70: "What the phrase "good faith" signifies in any particular context and contract will depend on that context and that contract."; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) NSWSC 996, §156: "These are matters to be determined depending always on the precise circumstances of each individual case; SOURDIN, 23.

152 See, in this regard, *Licensor and buyer v Manufacturer*, Interim Award and Final Award, 17 July 1992 and 13 July 1993 (law of the PRC, Stockholm (Sweden)) (L. RAHMN; J. COHEN; J. GILLIS WETTER), (1997) 22 YB Comm Arb 197–210, §10: "The Tribunal is convinced by the testimony given by [the claimant's witness Mr. A] that the claimant did make repeated good faith attempts to engage in friendly negotiations with a view to reaching a negotiated settlement of the dispute on reasonable business terms but to no avail."

97. Notwithstanding the fact that defining good faith participation in negotiations or mediation is fraught with difficulties given that the notion itself is inherently ambiguous,[153] the formidability of the task should not prevent an attempt to outline its contours. In the author's view, it is important for parties to be provided with some guidance concerning their roles and responsibilities in the negotiation or mediation. As pointed out by Justice EINSTEIN in the Australian case of *Aiton Australia v Transfeld* (in which express clauses obliging the parties to attempt to settle the dispute in good faith, and failing that, to mediate their dispute in good faith were present):

> […] the "certainty" issue does require that the court spell out, even in non-exhaustive terms, the perceived essential or core content of an obligation to negotiate or mediate in good faith. [154]

98. The content of the obligation to arbitrate in good faith is equally lacking in clarity.

99. As stated by BORN:

> [t]he precise contours of the obligation to participate cooperatively, diligently and in good faith in the arbitral process are varied and potentially complex.[155]

100. Finally, further uncertainties are caused by the unclear consequences of a failure to comply, in particular, with the obligation to arbitrate in good faith.

101. As stated by BORN:

> the remedies to enforce the positive effects of arbitration agreements (e.g., the obligations to participate cooperatively and in good faith in the arbitration) are less clear.[156]

153 See, in this regard, in the context of mediation in the USA, WESTON, 622.

154 *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) NSWSC 996, §§156–157.

155 BORN, 1357.

156 BORN, 1359 and 974.

Chapter 2: Aims and Scope of the Present Thesis

102. The aims (I.) and scope (II.) of the present thesis will be discussed in turn.

I. Aims

103. As shown above,[157] the application of good faith by arbitral tribunals in international commercial arbitration is frequent but gives rise to a certain number of objections and a significant number of uncertainties.

104. From the perspective of users of international commercial arbitration, the uncertainties surrounding the application of good faith by an arbitral tribunal create an unwelcome unpredictability.

105. The present thesis therefore aims: (i.) to study the available international arbitral awards applying good faith and thus provide guidance on how this notion is applied by arbitral tribunals in international commercial arbitration to both the parties' contract and the arbitration agreement; and (ii.) to propose guidelines for the future application of good faith by arbitral tribunals to both the parties' contract and the arbitration agreement.

106. It is accordingly hoped that this thesis will contribute to increased clarity with respect to the application of good faith by arbitral tribunals in international commercial arbitration and address some of the objections raised to the recourse to good faith by arbitral tribunals.

[157] See Part I, Chapter 1.

II. Scope

107. The present thesis focuses on how good faith has been applied by arbitral tribunals to the parties' contract and to their arbitration agreement. However, reference is made to national court case law when discussing the role and scope of good faith under national law and non-national law. In addition, reference is made to national court case law on the application of good faith to the arbitration agreement to the extent that such national courts are faced with similar issues that arbitral tribunals are faced with concerning the arbitration agreement.

108. The present thesis focuses on the application of good faith by arbitral tribunals to the parties and does not examine the application of good faith to the arbitral tribunal or to arbitral institutions.[158]

109. The present thesis focuses on how good faith has been applied by arbitral tribunals in the field of international commercial arbitration. However, reference to arbitral awards applying good faith in the neighbouring fields of international investment and sports arbitration has been made to the extent that it highlights the current trends in international commercial arbitration.

[158] See e.g., DUARTE HENRIQUES, The role of good faith in arbitration: are arbitrators and arbitral institutions bound to act in good faith? (2015) 33 ASA Bull 514–532.

Chapter 3: Outline of the Structure of the Present Thesis

110. Part II of the present thesis traces the historical roots of good faith.

111. In Chapter one, the concept of *bona fides* is studied under Roman law. Chapter two examines the concept of *bona fides* in the medieval *ius commune* and *lex mercatoria* before turning to its role in the early modern period in Chapter three. Part II ends with a conclusion on the historical origins of good faith in Chapter four.

112. Part III examines the role and scope of good faith under both national and non-national law.

113. In Chapter one, good faith is first studied under national law, with a focus on English law, US (in particular, New York) law, Swiss law and French law, such laws being the most popular governing laws chosen by parties in international commercial arbitration proceedings.[159]

114. In Chapter two, good faith is studied under non-national law, including its role and scope as a general principle of law. The role and scope of good faith is also studied under relevant international conventions, in particular, the CISG which applies in a significant number of arbitrations involving international sales transactions due to the large number of contracting States.[160] Good faith is further examined under international academic restatements, notably the PICC which are increasingly chosen by parties to govern their contract, and may also be chosen by the arbitrators as the applicable law or applied by arbitrators as reflective of the *lex mercatoria* or general principles of law.[161]

115. This Part ends with a conclusion on the role and scope of good faith under both national and non-national law in Chapter three.

116. Part IV of the present thesis is dedicated to the study of the application of good faith by arbitral tribunals to the parties' contract. To this end an empirical study

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159 See below, para. 310 et seq.

160 See below, Part III, Chapter 2, Section IIA.

161 See below, Part III, Chapter 2, Section IIIA.

of the available arbitral awards has been carried out.[162] For the purposes of this analysis, the arbitral case law has been classified according to the basis on which good faith was applied, namely, an express contractual provision (Chapter one), national law (Chapter two), non-national law (Chapter three), and in cases where the arbitrator was granted the power to rule *ex aequo et bono* or as an *amiable compositeur* (Chapter four). Each Chapter concludes with proposed guidelines for the application of good faith by arbitral tribunals to the parties' contract depending on the source of good faith.

117. In Part V, the application of good faith by arbitral tribunals to the arbitration agreement is explored.

118. Chapter one clarifies the source and role of good faith with respect to the significant issue of the validity and interpretation of the arbitration agreement, focusing, in particular, on the issues of the formal validity of the arbitration agreement, the incorporation of an arbitration agreement by reference and the interpretation of the arbitration agreement. Proposed guidelines for the application of good faith to each of these issues is included at the end of each section.

119. Chapter two clarifies the source and role of good faith with respect to the parties to the arbitration agreement. This Chapter studies, in particular, the application of good faith to the capacity and power of the parties to arbitrate as well as its application to the issue of the extension of an arbitration agreement to a non-signatory party. Proposed guidelines for the application of good faith to each of these issues is included at the end of each section.

120. In Chapter three, good faith is studied in relation to pre-arbitration requirements, namely the obligation to negotiate or mediate in good faith prior to resorting to arbitration. This Chapter focuses on the sources of good faith in the obligation to negotiate or mediate in good faith as well as the content of the obligation to negotiate or mediate in good faith. It further explores the difficulties associated with proving a violation of an obligation to negotiate or mediate in good faith as well as the consequences of a violation of such obligations. A proposed rationalization of, and guidelines for, the application of good faith to pre-arbitration requirements is made at the end of Chapter three.

121. Chapter four is dedicated to the study of the application of good faith to the performance of the arbitration agreement, namely the parties' obligation to arbitrate in good faith. This Chapter studies the sources of the obligation to

[162] An empirical study of 18 ICC arbitration awards has been carried out by NOVÝ ZDENĚK in his 2012 PhD Thesis in the Czech language on 'Good Faith as a Principle of Contract Law in International Trade' in order to test his hypothesis that there is an autonomous concept of good faith in international arbitration. The present thesis goes further in endeavouring to study all published arbitral awards found dealing with good faith.

arbitrate in good faith as well as the content of this obligation. The measures taken by arbitrators to sanction the failure of a party to act in good faith during the arbitral proceedings are also explored as well as the source of the arbitrator's power to sanction the bad faith of a party. A proposed rationalization of, and guidelines for, the application of good faith to the performance of the arbitration agreement is made at the end of Chapter four.

122. The present thesis ends with a general conclusion in Part VI.

Part II :

The Historical Origins of Good Faith

123. This Part examines the historical origins of good faith starting with the concept of *bona fides* in Roman law (Chapter 1.) before examining the meaning of *bona fides* in the medieval *ius commune* and *lex mercatoria* (Chapter 2.) and the role of good faith in the early modern period (Chapter 3). This Part ends with a conclusion on the historical origins of good faith (Chapter 4.)

Chapter 1: *Bona Fides* in Roman law

124. The notion of *bona fides* (good faith) in Roman law was derived from the concept of *fides* (I.) and first arose in the causes of action known as *bonae fidei iudicia* (good faith causes of action) (II.).

I. The Concept of *Fides*

125. It is undisputed that the notion of *bona fides* evolved from the concept of *fides*.[163]

126. Originally, the concept of *fides* represented inequality and was closely linked with the idea of subjugation.[164]

127. This concept appeared in both public international law and private law.[165] In public international law, *fides* corresponded to the subjugation of conquered people to the conquering or roman people (known as *deditio in fidem*)[166] and the protection of the former by the latter.[167] In the context of private law, *fides* presided over a number of relationships, in particular, the relationship between a patron and client.[168] The client would submit itself to the mercy of its patron and in exchange for its obedient trust, the client would be protected.[169] There were also other relationships which were based on the concept of *fides,* some of which were even incorporated into the law, such as *tutela* (guardianship)[170],

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163 JONES, 1: "*Que la bona fides plonge ses racines dans la fides, les romanistes sont unanimes à le penser*." ("That *bona fides* has its roots in *fides* is something that all romanists agree on.") (informal English translation of the French original).

164 LEMOSSE, 42, 43–47; see also JONES, 2.

165 IMBERT, *nexum*, 344–345; IMBERT, *sociologie*, 407; LOMBARDI, 47–103; PIGANIOL, 346; see also JONES, 3.

166 IMBERT, *nexum*, 346–347; DIETER NÖRR, *Aspekte des römischen Volkrrechts Aspekte des römischen Völkerrechts: Die Bronzetafeln von Alcantara* (Verlag der Bayerischen Akademie der Wissenschaften 1989) 94–101; PIGANIOL, 342; see also BROGGINI, 7; JONES, 4; SCHERMAIER, 78.

167 PIGANIOL, 342; see also BROGGINI, 7.

168 IMBERT, *nexum*, 347–350; IMBERT, *sociologie*, 407–408, 411; KUNKEL, 5; LEMOSSE, 43–44; SCHULZ, *Prinzipien,* 157; TURPIN, 262; see also JONES, 5–6 SCHERMAIER, 79.

169 PIGANIOL, 346; see also BROGGINI, 7.

170 Under Roman law, some individuals, although they were of independent legal status, were still deemed to require supervision, especially with respect to their property. According to the law of guardianship, such individuals (those not of adult age and women) could be subject to the control of a tutor (see THOMAS A J MCGINN, Tutela in Roger Bagnall/Kai Brodersen/Craige Champion/Andrew Erskine/Sabine Huebner (eds), The Encyclopedia of Ancient History (1st edn Blackwell Publishing Ltd 2013) 6890–6892).

societas omnium bonorum (a partnership governing all of the goods of the associates or partners)[171], *mandatum* (mandate)[172] and *fiducia* (trust)[173].[174]

128. The concept of *fides* evolved over time.[175] It was no longer closely associated with the idea of subjugation and came to signify a relationship of mutual and reciprocal loyalty and trust unifying two people on an equal footing.[176] As such, *fides* was primarily identified with the principle that one should keep one's word.[177] Indeed, CICERO defined *fides* as "truth and fidelity to promises and agreements" and referred to it as the "foundation of justice".[178] It was this meaning of *fides* which provided the ground for the protection of old commercial contracts in the *ius gentium*[179].[180]

129. However, the concept of *fides* was not limited to the notion of keeping one's word.[181] Indeed, in the relationships in Roman society governed by *fides*, such as the *tutela, fiducia, mandatum* and *societas omnium bonorum, fides*

171 The *societas omnium bonorum* was a specific type of company in which the partners contributed all of their own assets*, see* DUNAND/PICHONNAZ, 166.

172 The *mandatum* was a consensual contract concluded free of charge by which an agent bound itself to the principal to manage the business of the latter or to render promised services to the latter, see DUNAND/PICHONNAZ, 110.

173 The *fiducia* was a legal act sanctioned by the action of the trust agreement (*action fiduciae*) whereby the trustee transferred ownership of a property to the trustee by a *mancipatio* or by an assignment, subject to the condition that the trustee would transfer the ownership back to the trustee on a specific date or when certain conditions were fulfilled, see DUNAND/PICHONNAZ, 66.

174 KASER, *altrömische,* 296–298; WIEACKER, 29–31; see also SCHERMAIER, 79–80; TURPIN, 264.

175 JONES, 9.

176 *Idem*, 9–10.

177 "*quid enim tam congruum fidei humanae, quam ea quae inter eos placuerunt servare?*" ("What corresponds the best to the faith of mankind as to observe those things which the parties have agreed upon?") (informal English translation of the Latin original) (D. 2. 14. 1 – ULPANIUS); see also IMBERT, *sociologie*, 413–414; SCHULZ, *Prinzipien*, 151 et seq.; TURPIN, 262; see also JONES, 10; SCHERMAIER, 78.

178 "*Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas*." ("The foundation of justice, moreover, is faith - that is, truth and fidelity to promises and agreements.") (informal English translation of the Latin original) (CICERO, *De Officis,* 1.23).

179 The oldest meaning of the *ius gentium* is interregional commercial law. It is often linked to the creation of the Roman magistrate called the *praetor peregrinus* in 242 B.C. who had jurisdiction over cases arising in the interregional commercial sphere, see LAURENS WINKEL, *Ius gentium* in Roger Bagnall/Kai Brodersen/Craige Champion/Andrew Erskine/Sabine Huebner (eds), The Encyclopedia of Ancient History (1st edn Blackwell Publishing Ltd 2013) 3553–3554.

180 KUNKEL, 1–15; see also JONES, 11.

181 SCHERMAIER, 80.

corresponded to "very specific ideas of how the contracting parties should behave towards each other."[182]

[182] *Ibid*.

II. The *Bonae Fidei Iudicia* (Good Faith Causes of Action)

130. The term *bona fides,* which was derived from the concept of *fides,* emerged in certain causes of action known as the *bonae fidei iudicia* or good faith causes of action.

131. As a consequence, before exploring the role played by *bona fides* in the *bonae fidei iudicia* (E.), it is first important to examine the civil procedure in place in Roman times (A.) in which the *bonae fidei iudicia* arose. As we shall see, the age and origin of the *bonae fidei iudicia* are debated (B.). These causes of action allowed the enforcement of certain contracts (C.) and had their own unique procedural formula (D.).

A. Civil procedure in Roman times

132. In Roman times, the earliest form of civil procedure was the *legis actio* (1.). Around the 3rd century B.C., the formulary system emerged (2.). The formulary system was thereafter replaced by the *cognitio* procedure (3.).

1. *Legis actio* as the earliest form of civil procedure

133. In Roman times, the earliest known form of civil procedure which existed around 450 B.C.–200 B.C. was called *legis actio* (literally: act according to the law).[183] Only claims which were foreseen by statute, notably the Twelve Tables[184] or subsequent legislation (*plebiscita*), could be brought.[185]

134. In a first part of the proceedings, and in order to bring their claims, parties were obliged to repeat ritual phrases prescribed by law which were recited by the *pontifex*.[186] The *praetor* (the magistrate in charge of the administration of

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183 SCHERMAIER, 72.

184 The Twelve Tables was promulgated in 450 B.C. and was a source of both private and public law containing a list of important legal rules, see JOHNSTON, 2.

185 SCHERMAIER, 72. There were five types of *legis actiones*: *legis actio sacramento*; *legis actio per iudicis arbitrive postulationem, legis actio per condictionem, legis actio per manus iectionem* and *legis actio per pignoris capionem*. The first three were used to resolve a dispute while the last two were used to enforce the execution of a judgment (see in this regard, ROBY, 339–346).

186 SCHERMAIER/DEDEK, *legis actio*, 4005–4006.

justice)[187] would then consider whether the *ius civile*[188] provided a remedy for the claimant's grievance.[189] If so, in a second stage of the proceedings, a judge would be appointed to listen to the evidence and to pass judgment.[190] The *praetor* was restricted to considering whether the *ius civile* provided a remedy – he had no power to create new actions.[191]

135. This form of civil procedure was extremely formal, ritualistic and rigid.[192] Indeed, the proceedings would fail if any mistake was made with respect to the ritual to be followed.[193] In addition, if the claim could not be fitted into one of the forms espoused by the *praetor*, then no remedy was available.[194]

2. The emergence of the formulary system in the 3rd century B.C.

136. Such a procedure could not keep pace with the needs of the growing Roman Republic.[195] As a result, around the 3rd century B.C., a new type of procedure emerged known as the formulary system.[196] Although the origins of this new procedure are debated,[197] most authors appear to agree that it may have originated in the jurisdiction of the *praetor peregrinus* (the *praetor* responsible for administering justice in disputes involving non Roman citizens)[198] and was then extended to cases between Roman citizens before the urban *praetor* and was in

187 The urban *praetor* was created by the Romans in 367 B.C., see DU PLESSIS, 33; JOHNSTON, 3; ROBY, 312.

188 The *ius civile* was comprised of both statute, including the Twelve Tables, and customary law. See JOHNSTON, 2 in particular with respect to customary law; SCHERMAIER, 72.

189 SCHERMAIER, 72.

190 SCHERMAIER, 72; SCHERMAIER/DEDEK, *legis actio*, 4005–4006.

191 SCHERMAIER, 72.

192 BUCKLAND, 379, §156.

193 BUCKLAND, 379, §156; DU PLESSIS, 67.

194 BUCKLAND, 379, §156; ROBY, 346 referring to an example where a plaintiff did not receive a remedy as the Twelve Tables provided a remedy against someone who cut down trees and the plaintiff had his vines cut down.

195 DU PLESSIS, 72; NICHOLAS, 21; ROBY, 347; TURPIN, 263.

196 SCHERMAIER, 72–73.

197 In TURPIN's view, this procedure may have also evolved gradually in the practice of the urban *praetor*, namely in domestic disputes. He argues that in cases where the *ius civile* provided no solution, the *praetor* may have required an informal statement of claim by the plaintiff, and denial by the defendant in terms appropriate to the circumstances of the case. These statements would have then served as instructions to the judge (TURPIN, 261).

198 The peregrine *praetor* was created in 242 B.C., see DU PLESSIS, 33.

place at the latest in 150 B.C. when the formulary procedure was formally recognized by the Aebutian Law[199].[200]

137. Under the formulary system, parties no longer had to utter ritual phrases prescribed by law in order to bring their claims.[201] During the first stage of the proceedings, both parties would meet and discuss with the *praetor* in order to draw up a *formula*.[202] The *formula* appointed and gave authority to a judge to rule on the dispute (*nominatio*) and set out the issues that the judge had to rule on.[203] In a second stage of the proceedings, the judge would then examine the facts of the case described in the *formula (demonstratio)* and rule on the claims and defences (*intentio*).[204] The *formula* instructed the judge on the judgment to be rendered if the claimant's claims were founded (*condemnatio*).[205]

3. The replacement of the formulary system by the *cognitio* procedure

138. The formulary system was in place during the first two centuries A.D. and was thereafter replaced by the *cognitio* procedure.[206]

B. Debated age and origin of the *bonae fidei iudicia*

139. Both the age (1.) and origin (2.) of the *bonae fidei iudicia* are debated.

1. Debated emergence of the *bonae fidei iudicia*

140. According to the majority view, the *bonae fidei iudicia* emerged in the 2nd century B.C.[207]

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199 The Aebutian Law authorized the formulary system in all cases but did not forbid *legis actio* and the two Julian laws passed by AUGUSTUS formally abolished the *legis actio*, see BUCKLAND, 381–382; ROBY, 347.

200 DU PLESSIS, 34; SCHERMAIER, 72, fn 37 stating that "modern researchers agree that the statute only subsequently recognized the formulary procedure."; STEIN, 19; TURPIN, 260–261.

201 BUCKLAND, 381; SCHERMAIER, 73.

202 BUCKLAND, 381; JOHNSTON, 112–114; SCHERMAIER, 73.

203 SCHERMAIER, 73.

204 *Ibid*.

205 *Ibid*.

206 It was formally abolished in 342 A.D., see DU PLESSIS, 80.

207 WIEACKER, 34; see also NICHOLAS, 163 fn 5; SCHERMAIER, 68, 71; SCHERMAIER/DEDEK, *bona fides*, 1155.

141. However, other authors argue that they date back to the 3rd century B.C.[208] or that they did not emerge until the 1st century B.C.[209]

2. Debated origin of the *bonae fidei iudicia*

142. In addition to their age, the origin of the *bonae fidei iudicia* is a subject of intense controversy among scholars. Indeed, the first debate centres around whether these causes of action emerged in the *ius gentium* or the *ius proprium ciuium romanorum* (a.). The second debate centres around whether these causes of action were legal or praetorian creations (b.). Putting aside these two debates, many precursors have been identified which may have inspired the creation of the *bonae fidei iudicia* (c.).

a. Emergence in the *ius gentium* or *ius proprium ciuium romanorum*?

143. The submission that the *bonae fidei iudicia* emerged in the *ius gentium* (inter-regional commercial law)[210] is supported by the fact that all the consensual contracts were sanctioned by a *bonae fidei iudicia.*[211] Indeed, the absence of formalism, which characterized consensual contracts, reigned in the *ius gentium*, by contrast with the formalism which reigned in the *ius proprium ciuium romanum* (the law applicable to Roman citizens)[212].[213] In addition, three of the consensual contracts were qualified as *iuris gentium* contracts.[214]

144. Most authors however refute the proposition that the *bonae fidei iudicia* emerged in the *ius gentium*[215] pointing out that the principle of *fides* was also well known in Roman society as it applied in many relationships prevalent in Roman society[216] and that many of the contracts sanctioned by the *bonae fidei*

208 KASER, *Oportere,* 23ff; KUNKEL, 12–13; see also SCHERMAIER, 72.
209 LOMBARDI, 179ff ; see also SCHERMAIER, 71.
210 See above, para. 128.
211 NAUMOWICZ, 30.
212 DUNAND/PICHONNAZ, 86.
213 NAUMOWICZ, 30.
214 *Ibid*.
215 GALLO, 115; VON LUBTÖW, 417–436; TURPIN, 264; WIEACKER, 1–41 (see in this regard, SCHERMAIER, 77 stating that "[t]he bonae fidei iudicia, on the other hand as Wieacker has shown, did not originate in legal relations between foreigners and Roman citizens.").
216 See SCHERMAIER, 77; SCHERMAIER/DEDEK, *bona fides*, 1155.

iudicia could not be attributed to trade with foreigners such as the *tutela* and *mandatum*[217].[218]

b. Praetorian or legal creations?

145. Out of the authors who argue that the *bonae fidei iudicia* emerged in the *ius gentium*, some argue that such actions were grounded in law given that *bona fides* was a transnational source of the law of obligations, whilst others argue that they were creations of the peregrine *praetor*.[219]

146. With respect to the authors who argue that the *bonae fidei iudicia* emerged in the *ius proprium ciuium romanorum,* it is also contested whether these causes of action were legal or praetorian creations. Indeed, the *bonae fidei iudicia* were classed by the jurists in the classical period as personal civil actions due to the term "*oportere*" contained in the formula.[220] They were therefore deemed to be grounded in, and governed by, the *ius civile* rather than praetorian law.[221] However, no direct or indirect legislative source for such actions can be found.[222]

147. According to the majority view, these actions were originally praetorian creations by which the *praetor* sanctioned a moral or social duty. It was only later that the jurists in the classical period laid emphasis on the term "*oportere*" and classed it as a civil obligation thus forgetting the praetorian origins of the action.[223]

148. Conversely, some authors argue that *bona fides* was a social or moral duty which was, like legislation, a formal legal source. According to these authors, the *bonae fidei iudicia* were thus classed as civil actions because *bona fides* was a formal legal source.[224]

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217 With respect to the *tutela* and *mandatum*, see above, para. 127.

218 KASER, *altrömische,* 296–298; see also TURPIN, 264.

219 NAUMOWICZ, 30–31; KASER, *Oportere,* 23ff; KUNKEL, 1–15.

220 KASER, *Oportere,* 24 ; NAUMOWICZ, 28; TURPIN, 268.

221 *Ibid*.

222 NAUMOWICZ, 28; SCHERMAIER, 76.

223 ANDRÉ MAGDELAIN*, Le consensualisme dans l'Edit du Préteur* (Paris 1958) 121; ANDRÉ MAGDELAIN, *Les actions civiles* (Paris 1954) 46; JONES, 12–13; NAUMOWICZ, 28; NICHOLAS, 163 fn 5.

224 HUGO KRUEGER, *Zur Geschichte der Entstehung der bonae fidei iudicia*, (1890) ZSS 165; ANDRÉ MAGDELAIN, *Gaius IV, 10 et 33*. *Naissance de la procédure formulaire*, TR, 59 (Haarlem-Bruxelles 1991) 239, 249; see also NAUMOWICZ, 30.

c. Potential precursors

149. Authors have put forward many propositions for potential precursors to the *bonae fidei iudicia*.

150. One precursor may have been the old *actio fiduciae* (action on a trust) which required the "*bene agere"* of the trustee.[225] This can be compared to the "*bona fides*" required in good faith causes of action.[226]

151. A second precursor may have been the *legis actio per iudicis postulationem*, a cause of action where parties were in agreement upon the existence of the legal relationship and an arbitrator or judge was appointed to decide on the distribution or definition of the rights in the relationship.[227]

152. Further inspiration may have come from early proceedings before an elected arbitrator (*arbitrium boni viri*) in which the latter had to balance both parties' interests,[228] as well as the old partition actions,[229] the *actio rei uxoriae* (action for wife's property) and certain defences granted by the *praetor* (such as the exception of fraud) which all required the judge to weigh up both parties' interests.[230]

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225 SCHERMAIER, 82: "[t]he old part of the *formula* of the *actio fiduciae* demanded the *bene agere* of the trustee. As this demand corresponded to the classical standard of *bona fides* it seems reasonable to assume that the *actio fiduciae* was a precursor of the *bonae fidei iudicia*." See also SCHERMAIER 83 at fn 127; KASER, *Oportere,* 31, fn 135.

226 *Ibid*.

227 VINCENZO ARANGIO-RUIZ, *Le Formule con Demonstratio e la loro Originei*, Studi Economico-Giuridici Università di Cagliari (1912); see in this regard TURPIN, 262 stating that: "Arangio-Ruiz in 1912 advanced a compelling thesis which finds the origin of the *bonae fidei iudicia* and other formulae with a *demonstratio* in the *legis actio per iudicis postulationem*. This form of *legis actio* was appropriate *inter alia* in certain cases in which the parties were in agreement upon the existence of a legal relationship between them and desired the appointment of a *iudex* or *arbiter* in order to obtain a distribution or definition of rights arising from that relationship."

228 See in this regard, GERARD BROGGINI, *Iudex arbiterve: Prolegomena zum officium des römischen Privatrichters* (Böhlau 1957) 115, 194, 218ff ; IMBERT, *sociologie*, 413; LOMBARDI, 181, 183, 190–193; see also JONES, 12; SCHERMAIER, 82, 83 at fn 122.

229 Such as the *actio familiae erciscundae* (action for dissolving a community of heirs) or the *societas omnium honorum* (partnership covering all goods of all members).

230 SCHERMAIER, 82–83.

C. Contracts enforced by the *bonae fidei iudicia*

153. Under Roman law, only certain contracts, known as consensual contracts, were binding by consent.[231] All other contracts were only binding when certain formalities were complied with, or when the object of the contract was delivered.[232] These consensual contracts, as well as real contracts except the *mutuum* (loan), were enforced through the *bonae fidei iudicia*.[233]

154. During CICERO's time, the following contractual relationships were subject to *bonae fidei iudicia*: *tutela*, *societas*, *fiducia, mandatum*, *emptio venditio* (contracts of sale), as well as the *locatio conductio* (hire of an object or of services and contracts for a piece of work to be done).[234]

155. A list enumerated by GAIUS also included: *negotiorum gestorum* (unauthorized agency), *depositi* (deposit), *pro socio* (action by one partner against another in a partnership), and *rei uxoriae* (action for wife's property).[235]

156. JUSTINIAN added the *commodati* (loan), *pigneraticium* (pledge), *familiae erciscundae* (partition of inheritance), *communi dividundo* (action among co-owners for division of property), *praescriptis verbis quae de aestimato propronitur, et ea quae ex permutatione competit* (action arising from a commission to sell

231 See e.g., GORDLEY, good faith, 97.

232 *Ibid*.

233 BUCKLAND, 365.

234 "*Q. quidem Scaevola, pontifex maximus, summam vim esse dicebat in omnibus iis arbitriis, in quibus adderetur ex fide bona, fideique bonae nomen existimabat manare latissime, idque versari in tutelis, societatibus, fiduciis, mandatis, rebus emptis, venditis, conductis, locatis, quibus vitae societas contineretur; in iis magni esse iudicis statuere, praesertim cum in plerisque essent iudicia contraria, quid quemque cuique praestare oporteret*." ("It was Quintus Scaevola, the pontifex maximus, who used to attach the greatest importance to all questions of arbitration to which the formula was appended "as good faith requires"; and he held that the expression "good faith" had a very extensive application, for it was employed in trusteeships and partnerships, in trusts and commissions, in buying and selling, in hiring and letting — in a word, in all the transactions on which the social relations of daily life depend.") (informal English translation of the Latin original) (CICERO, *De Officis,* 3.70); see also JONES, 14; SCHERMAIER, 70.

235 "*Sunt autem bonae fidei iudicia haec: ex empto vendito, locato conducto, negotiorum gestorum, mandati, depositi, fiduciae, pro socio, tutelae, rei uxoriae*." ("*Bona fide* actions are such as the following: contracts of sale; hire of a thing or of services and contracts for a piece of work to be done; unauthorized agency; mandate; deposit; trust; partnership; guardianship; action for wife's property.") (informal English translation of the Latin original) (GAIUS, Institutiones 4. 62); see also JONES, 14; ROBY, 90.

at a fixed price, or an exchange) as well as the *hereditatis petitio* (demand of an inheritance).[236]

D. The formula for *bonae fidei iudicia*

157. The *bonae fidei iudicia* emerged at the time when the formulary system[237] was in place. In the formula drawn up in such cases, the term "*ex fide bona*" was found in the *intentio* part of the formula. An example of such a formula is set out below:

> *C. Aquilius Iudex esto* (nominatio). *Quod Aulus Agerius mensam argenteam apud Numerium Negidium deposuit (demonstratio), qua de re agitur, quidquid o beam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bona* (intentio), *eius C. Aquilius iudex N. Negidium A. Agerio condemnato* (condemnatio). *Si non paret absolutio*.
>
> (Let Caius Aquilius be judge. From the fact that Aulus Agerius has deposited a silver table with Numerius Negidius, which is the object of this dispute, and as a result of which Numerius Negidius has the obligation to give and to do towards Aulus Agerius, which should be measured according to good faith, hold liable Numerius Negidius for all of this. If this is not the case, he shall not be condemned.)[238]

E. The role of *bona fides*

158. It is contested whether *bona fides* initially provided the ground for recognizing a new cause of action (1.). In any event, it was a tool which increased judicial discretion (2.) and was employed as a standard against which performance was to be measured (3.). The role of *bona fides* was nonetheless restricted and this notion was eventually replaced by the wider notion of *aequitas* or equity (4.).

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236 According to JUSTINIAN's Institutes: "*Actionem autem quaedam bonae fidei sunt, quaedam stricti juris. Bonae fidei sunt hac: ex empto vendito, locato conducto, negotiorum gestorum, mandati, depositi, pro socio, tutelae, commodati, pigneratitia, familiae erciscundae, communi dividundo, praescriptis verbis quae de aestimato propronitur, et ea quae ex permutatione competit, et hereditatis petitio*." ("Again, some actions are *bonae fidei*, some are *stricti juris*. Of those *bonae fidei* there are the following: the actions on contracts of sale, hire of a thing or of services and contracts for a piece of work to be done, unauthorised agency; mandate, deposit, partnership, guardianship, loan; partition of inheritance; action among co-owners for division of property; action arising from a commission to sell at a fixed price, or an exchange or the demand of an inheritance.") (informal English translation of the Latin original) (JUSTINIAN, Institutes 4. 6. 28).

237 See above, para. 136 et seq.

238 Emphasis added (informal English translation of the Latin original) GAIUS, Institutes 4.47.

1. Bona fides as the ground for recognising a new cause of action

159. The majority of authors appear to agree that *bona fides* was initially the basis for the recognition of a new cause of action.[239]

160. Some authors, however, argue that *bona fides* was not the basis for recognizing a new cause of action but was merely a standard by which the parties' performance was to be measured and a tool for increasing judicial discretion.[240]

161. Even those who support the view that *bona fides* was initially a ground for recognizing a new cause of action admit that this was not the case for the old *fides* relationships already recognized by the *ius civile*.[241]

2. Bona fides as a tool for increasing judicial discretion

162. As noted above,[242] in good faith causes of action, the *formula* contained the words *ex fide bona*.[243] This allowed the judge to take into account what ought to be done or given in good faith by the parties in the circumstances.[244] Such causes of action allowed the judge to weigh both parties' interests when considering and ruling on the claim.[245]

163. The discretion of the judge in assessing the merits of the case was therefore increased in good faith causes of action.[246]

164. With respect to the interpretation of the contract, good faith allowed the judge to bypass a literal interpretation of the contract and attempt to ascertain the real

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239 KUNKEL, II, 1ff, 5ff ; see also DEROUSSIN, 90; NAUMOWICZ, 31; SCHERMAIER, 74.

240 GALLO, 115; LOMBARDI, 179ff; VON LUBTÖW, 417–436; WIEACKER, 1–41 (see TURPIN, 266, describing WIEACKER's view that institutions based on *fides* had already been recognized by the *ius civile* and that the object of the creation of the *bonae fidei iudicia* was therefore only to enlarge the discretion of the judge); see further NAUMOWICZ, 31.

241 TURPIN, 265.

242 See above, para. 157.

243 SCHULZ, Roman Law, 35.

244 "*Item in his contractibus alter alteri obligatur de eo, quod alterum alteri ex bono et aequo praestare oportet*." ("Moreover in contracts of this description (consensual contracts) each of the parties is bound to the others for whatever should be done, consistent with justice and good faith.") (informal English translation of the Latin original) (D. 44.7.2.3 – GAIUS); JONES, 15; MOUSOURAKIS, 189; SCHERMAIER, 66; SCHULZ, Roman Law, 36; ZIMMERMANN, Obligations, 428 (*mandatum*), 445 (*negotiorum gestio*), 789.

245 NICHOLAS, 164; SCHMIDLIN, 365; SCHERMAIER, 82.

246 See e.g., JONES, 15.

intention of the parties.[247] It also allowed the judge to take usages and custom into account.[248]

165. This additional discretion also enabled the judge to take into account matters which would have to be expressly raised in a strict law cause of action (actions in which the formula did not contain the clause *ex fide bona*).[249] For example, issues such as fraud (*dolus*),[250] duress (*metus*),[251] informal agreement (*pactum conventum*)[252] and equitable defenses had to be raised expressly as defences in

247 "*Ubi est verborum ambiguitas, valet quod acti est, veluti cum stichum stipuler et sint plures stichi, vel hominem, vel carthagini, cum sint duae carthagines. Semper in dubiis id agendum est, ut quam tutissimo loco res sit bona fide contracta, nisi cum aperte contra leges scriptum est.*" ("Where any ambiguity of language exists, the validity of a transaction will depend upon the intention of the parties; for instance, if I should stipulate for Stichus, and there are several slaves of that name; or for a slave in general; or for something to be delivered at Carthage, and there are two cities so called; and in every instance where doubt arises, it must be considered that the contract was made in good faith to be carried out in the place where it was most convenient, unless it is clear that it has been drawn up contrary to law.") (informal English translation of the Latin original) (D. 34. 5. 21 – PAULUS) see also JONES, 17–18; ROBY, 89.

248 "*ea enim, quae sunt moris et consuetudinis, in bonae fidei iudiciis debent venire*." ("for matters of usage and custom should always be included in good faith causes of actions") (informal English translation of the Latin original) (D. 21. 1. 31. 20 – ULPANIUS).

249 ADOLF BERGER, Encyclopedic Dictionary of Roman Law (1953), 520. However see SCHULZ, Roman Law, 36, stating that the designation of other causes of action other than good faith causes of action as 'strict law causes of actions' is improper.

250 "*quia hoc iudicium fidei bonae est et continet in se doli mali exceptionem*" ("because this proceeding is one of good faith, and hence includes a defence on the ground of fraud") (informal English translation of the Latin original) (D. 30. 84. 5 – JUSTINIAN); "*cum enim doli exceptio insit de dote actioni ut in ceteris bonae fidei iudiciis*" ("for since a defence on the ground of fraud is included in an action on dowry, as in other *bona fide* actions") (informal English translation of the Latin original) (D. 24. 3. 21 – ULPANIUS).

251 "*Nihil consensui tam contrarium est, qui ac bonae fidei iudicia sustinet, quam vis atque metus: quem comprobare contra bonos mores est*." ("Nothing is so opposed to consent, which is the basis of *bona fide* actions, as force and fear; and to approve anything of this kind is contrary to good morals.") (informal English translation of the Latin original) (D. 50. 17. 116 – ULPANIUS).

252 "*Emptio et venditio sicut consensu contrahitur, ita contrario consensu resolvitur, antequam fuerit res secuta: ideoque quaesitum est, si emptor fideiussorem acceperit, vel venditor stipulatus fuerit, an nuda voluntate resolvatur obligatio. iulianus scripsit ex empto quidem agi non posse, quia bonae fidei iudicio exceptiones pacti insunt*." ("Purchase and sale are contracted by common consent, and so they can also be rescinded by common consent before the transaction has been concluded. Therefore, the question arose as to whether the obligation could be rescinded by the mere will of the parties, if the purchaser has accepted a surety, or the vendor had entered into a stipulation. Julianus says that then, indeed, an action on sale would not lie, because defences based on the contract are included in a *bona fide* action.") (informal English translation of the Latin original) (D. 18. 5. 3 – PAULUS); "*Sed cum nulla subest causa,*

strict law causes of action.[253] In good faith causes of action, however, such issues could be taken into account by the judge without being expressly raised.[254]

166. The same applied to interest.[255] In strict law causes of action, it had to be expressly raised in order to be granted.[256] Conversely, in good faith causes of action, interest could be awarded by the judge without being expressly raised, in case of delay in complying with one's obligations from the date of non-compliance.[257]

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propter conventionem hic constat non posse constitui obligationem: igitur nuda pactio obligationem non parit, sed parit exceptionem. Quin immo interdum format ipsam actionem, ut in bonae fidei iudiciis: solemus enim dicere pacta conventa inesse bonae fidei iudiciis. sed hoc sic accipiendum est, ut si quidem ex continenti pacta subsecuta sunt, etiam ex parte actoris insint: si ex intervallo, non inerunt, nec valebunt, si agat, ne ex pacto actio nascatur." ("But, where there is no ground for an agreement, it has been established that no obligation can be created; therefore, a mere agreement does not create an obligation, but it does create a defence. Sometimes, however, it does give rise to a suit, as in *bona fide* actions; for we are accustomed to say that agreements which are entered into are included in *bona fide* actions; but this must only be understood in the sense that where agreements follow as parts of a contract, they are included so as to give the right of action to the plaintiff.") (informal English translation of the Latin original) (D. 2. 14. 7. 4-5 – ULPANIUS). "*Ab emptione venditione, locatione conductione ceterisque similibus obligationibus quin integris omnibus consensu eorum, qui inter se obligati sint, recedi possit, dubium non est. aristoni hoc amplius videbatur, si ea, quae me ex empto praestare tibi oporteret, praestitissem et cum tu mihi pretium deberes, convenisset mihi tecum, ut rursus praestitis mihi a te in re vendita omnibus, quae ego tibi praestitissem, pretium mihi non dares tuque mihi ea praestitisses: pretium te debere desinere, quia bonae fidei, ad quam omnia haec rediguntur, interpretatio hanc quoque conventionem admittit*." ("There is no doubt that the parties can withdraw in all contracts relating to purchase, sale, leasing, hiring, and other similar obligations, where everything remains the same by the common consent of those who have bound themselves. The opinion of Aristo goes still farther, for he thinks that if I have performed all the acts which it was necessary for me to perform as vendor, with regard to the property sold to you; and, while you still owe me the purchase money, it is agreed between us that you shall restore to me everything relating to the property sold, which was delivered to you by me, and that you shall not pay the purchase money; and, in accordance with this, you do return it to me, you will cease to owe me the money; because good faith which governs matters of this kind admits of this interpretation and agreement.") (informal English translation of the Latin original) (D. 2. 14. 58 – NERATIUS).

253 DEROUSSIN, 92; JONES, 15–16; SCHERMAIER, 84–85; STEIN, 25; ZIMMERMANN, Obligations, 509, 658, 663, 667, 674.

254 *Ibid*.

255 "*In bonae fidei contractibus ex mora usurae debenture*." ("In *bona fide* contracts, interest becomes due through default.") (informal English translation of the Latin original) (D. 22. 1. 32. 2 – MARCIANUS); see also DEROUSSIN, 93; JONES, 15; ROBY, 89; SCHERMAIER, 85; WAELKENS, 343.

256 *Ibid*.

257 *Ibid*.

167. Furthermore, in good faith causes of action, a judge could also set off any counterclaims against damages awarded in the main action as long as they arose from the same legal relationship.[258] This was not allowed in strict law causes of action – the respondent's only option was to bring a cross action.[259]

168. With respect to remedies, the judge was not limited to deciding whether a certain sum of money was owed or not but was able to determine exactly what the defendant had to pay.[260]

169. In addition, a judge could also refuse to condemn the defendant if the claimant had not performed its own obligations.[261]

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258 "*Liberum est tamen iudici nullam omnino inuicem conpensationis rationem habere; nec enim aperte formulae uerbis praecipitur, sed quia id bonae fidei iudicio conueniens uidetur, ideo officio eius contineri creditor*." ("The judge also has a right not to consider any set-off, at all, as he is not expressly directed to do so by the terms of the formula; but, for the reason that this seems to be proper in a *bona fide* action, it is therefore held to be part of his duty.") (informal English translation of the Latin original) (GAIUS 4. 63). "*Q. quidem Scaevola, pontifex maximus, summam vim esse dicebat in omnibus iis arbitriis, in quibus adderetur ex fide bona, fideique bonae nomen existimabat manare latissime, idque versari in tutelis, societatibus, fiduciis, mandatis, rebus emptis, venditis, conductis, locatis, quibus vitae societas contineretur; in iis magni esse iudicis statuere, praesertim cum in plerisque essent iudicia contraria, quid quemque cuique praestare oporteret*." ("It was Quintus Scaevola, the pontifex maximus, who used to attach the greatest importance to all questions of arbitration to which the formula was appended "as good faith requires"; and he held that the expression "good faith" had a very extensive application, for it was employed in trusteeships and partnerships, in trusts and commissions, in buying and selling, in hiring and letting — in a word, in all the transactions on which the social relations of daily life depend; in these, he said, it required a judge of great ability to decide the extent of each individual's obligation to the other, especially when the counter-claims were admissible in most cases.") (informal English translation of the Latin original) (CICERO, *De Officiis* 3. 70); see also JONES, 15; ROBY, 89–90; SCHERMAIER, 85; ZIMMERMANN, Obligations, 761–762.

259 SCHERMAIER, 85.

260 "*in bonae fidei autem iudiciis libera potestas permitti videtur iudici ex bono et aequo aestimandi quantum actori restiteri debeat*." ("Moreover, in actions of good faith free power appears to be granted the judge of estimating in accordance with the principles of justice and equity, how much should be paid to the plaintiff; and in this he has authority, (if the plaintiff should, on his part have to pay anything after this amount has been set off) to condemn the defendant to pay the remainder to him who brought the suit.") (informal English translation of the Latin original) (Inst. IV, 6, 30); JOHNSTON, 116; JONES, 15; ZIMMERMANN, Obligations, 796, 826.

261 "*Bona fides non patitur, ut, cum emptor alicuius legis beneficio pecuniam rei venditae debere desisset antequam res ei tradatur, venditor tradere compelletur et re sua careret*." ("Good faith does not tolerate that, where a buyer, through the indulgence of some law, is not compelled to pay the price of the property purchased before it is delivered to him, the vendor shall be compelled to deliver it, and relinquish possession of the same.") (informal English translation of the Latin original) (D. 19. 1. 50 – LABEO); see also JONES, 15.

3. *Bona fides* as a standard by which performance was to be measured

170. In good faith causes of action, *bona fides* was employed as a standard by which the obligations owed by the parties were to be determined and a standard by which the parties' performance was to be measured.[262]

171. Indeed, the addition of the adjective "*bona*" to the concept of "*fides*" determined the standard of behaviour that was to be expected of a good man (*bonus vir*).[263] *Bona fides* was often linked to the *bonus vir*, who according to CICERO was the man who does not harm others but helps others as much as possible.[264]

172. The standard of *bona fides* implemented by the judge was what was fairly to be expected from average and decent businessmen.[265]

173. This did not lead to arbitrariness or uncertainty because there was a uniform and concrete understanding of what was meant by the concepts of *fides* and *bona fides* which accorded with social ethics in Roman society at that time.[266]

174. In this respect, over time, the requirement to act in accordance with *bona fides* became more and more onerous as higher standards of conduct from contracting parties were required.[267]

175. Concerning the content of the standard of *bona fides*, *bona fides* required first and foremost that parties should keep their word.[268]

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262 DEROUSSIN, 88.

263 SCHMIDLIN, 362 ff; SCHERMAIER, 82; see also DEROUSSIN, 95.

264 "*vir bonus est is, qui prodest quibus potest, nocet nemini*." ("he is a good man, who does good to whom he can, and injures nobody.") (informal English translation of the Latin original) (CICERO, *De Officiis* 3, 80); see also in this regard BROGGINI, 9.

265 ZIMMERMANN, Obligations, 256 *et seq* (referring to an example where a grain merchant who sails from Alexandria to famine stricken Rhodos where grain has become a very precious commondity, may sell his grain without indicating that various other vessels are about to arrive shortly).

266 SCHERMAIER, 77, 82.

267 STEIN, 25.

268 "[…] *bona fides exigit, ut quod convenit fiat"* ("good faith requires that what was agreed upon should be done") (informal English translation of the Latin original) (D. 19. 2. 21 – IAVOLENUS); "*cum enim sit bonae fidei iudicium, nihil magis bonae fidei congruit quam id praestari, quod inter contrahentes actum est.*" ("for since this is a *bona fide* action, there is nothing more consistent with good faith than that what was agreed upon between the contracting parties should be carried out.") (informal English translation of the Latin original) (D. 19. 1. 11. 1 – ULPANIUS). See also "*Hoc edicto praetor favet naturali aequitati: qui constituta ex consensu facta custodit, quoniam grave est fidem fallere*." ("In this Edict the Praetor favors natural equity, as he protects promises made by consent, since a breach of faith is a serious matter.") (informal English translation of the Latin original) (D. 13. 5.1 - ULPANIUS).

176. Second, *bona fides* required parties to act honestly and was opposed to the concepts of fraud and deceit.[269]

177. Indeed, the good faith causes of actions were mostly used to sanction fraudulent behaviour.[270]

178. The most popular given illustration is the recognition of liability for concealed defects under an *emptio venditio*.[271] Under the *ius civile*, a seller was only liable for defects which it had expressly denied.[272] In a *bonae fidei iudicia*, however, the judge could decide the extent of a party's duties according to good faith and the latter required that a seller should inform the buyer of all defects of which it was aware.[273]

179. In addition, *bona fides* prevented a party from acting dishonestly and collecting on a debt twice.[274]

180. Finally, *bona fides* prevented a party from exercising its discretion in an unreasonable and arbitrary fashion.[275]

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269 "*Societas si dolo malo aut fraudandi causa coita sit, ipso iure nullius momenti est*, *quia fides bona contraria est fraudi et dolo.*" ("If a partnership is contracted with malicious intent or with a view to defraud, it is, without more, null and void, as good faith excludes fraud and malice." (informal English translation of the Latin original) (D. 17. 2. 3. 3 - PAULUS). Parties could also not contract out of responsibility for fraud: see ROBY, 90. "*nam hoc servabitur, quod initio convenit (legem enim contractus dedit), excepto eo, quod celsus putat non valere, si convenerit, ne dolus praestetur: hoc enim bonae fidei iudicio contrarium est*." ("for what was agreed upon in the beginning must be observed, since the contract imposes a law; except where, as Celsus says, the contract would not be valid if it was agreed that no fraud should be committed, for this is contrary to the good faith attaching to contracts.") (informal English translation of the Latin original) (D. 50. 17. 23 – ULPIANUS); see also DEROUSSIN, 95–96.

270 SCHERMAIER, 86.

271 SCHERMAIER, 66–68; see also ZIMMERMANN, Obligations, 308–309.

272 *Ibid*.

273 *Ibid*.

274 "*Bona fides non patitur, ut bis idem exigatur*" ("Good faith does not permit the same debt to be collected twice.") (informal English translation of the Latin original) (D. 50. 17.57 – GAIUS).

275 "*Si in lege locationis comprehensum sit, ut arbitratu domini opus adprobetur, perinde habetur, ac si viri boni arbitrium comprehensum fuisset, idemque servatur, si alterius cuiuslibet arbitrium comprehensum sit: nam fides bona exigit, ut arbitrium tale praestetur, quale viro bono convenit*." ("Where it is included in the contract of lease that the work shall be approved by the owner, it is considered that this means in accordance with the judgment of a good citizen. The same rule is observed where recourse is to be had to the judgment of any other person whomsoever; for good faith demands that such judgment should be afforded as befits a good citizen") (informal English translation of the Latin original) (D. 19. 2. 24 – PAULUS); "*Generaliter probandum est, ubicumque in bonae fidei iudiciis confertur in arbitrium domini*

4. Restricted role of *bona fides* and replacement by the notion of *aequitas*

181. *Bona fides* was often linked to, and seen as part of, the concept of equity or *aequitas*.[276]

182. However, it should be noted that the use of *bona fides* was restricted to the domain of the *bonae fidei iudicia*.[277] Outside of such causes of action, similar notions such as *aequitas* or *bonum et aequum* were used to correct, where required, the *ius civile*.[278]

183. The concept of *bona fides* was gradually replaced by a reasoning based on *aequitas* due largely to the fact that *bona fides* was so closely linked to the formulary system[279] which later fell into disuse.[280]

184. In addition, the concept of *aequitas* was much more general, and thus much more flexible and comprehensive, than the concept of *bona fides* which was limited to the notion of loyalty and fair dealing in contractual relationships.[281]

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vel procuratoris eius condicio, pro boni viri arbitrio hoc habendum esse." ("The rule is generally approved that, wherever, in *bona fide* agreements, a condition is left to the decision of the owner of the property, or his agent, this is understood to be done in accordance with the judgment of a good citizen") (informal English translation of the Latin original) (D. 50. 17. 22. 1 – ULPIANUS); ROBY, 90.

276 "*Bona fides quae in contractibus exigitur aequitatem summam desiderat*" ("Good faith, which is required in contracts, demands the greatest degree of equity.") (informal English translation of the Latin original) (D. 16. 3. 31 – TRYPHONINUS). With respect to the concept of *aequitas*, see KAIUS TUORI, Aequitas in Roger Bagnall/Kai Brodersen/Craige Champion/Andrew Erskine/Sabine Huebner (eds), The Encyclopedia of Ancient History (1st edn Blackwell Publishing Ltd 2013) 132–133.

277 SCHERMAIER, 87.

278 *Ibid*.

279 BECK, 25: "*Die Aequitas, nicht die bona fides, ist es gewesen, der im Mittelalter bis in die Neuzeit die führende Rolle in der Rechtsentwicklung zukam*." ("It was Aequitas, not bona fides, which played the leading role in the development of law from the Middle Ages to modern times.") (informal English translation of the German original); see also SCHERMAIER, 89.

280 The formulary system was replaced by the *cognito* procedure. See above, para. 138.

281 BECK, 24 et seq; SCHERMAIER, 89.

Chapter 2: *Bona Fides* in the Medieval *Ius Commune* and *Lex Mercatoria* (5th - 16th Centuries)

185. During the medieval period, the concept of *bona fides* took on different meanings within the *ius commune* (I.) and the *lex mercatoria* (II.).

I. *Bona Fides* in the *Ius Commune*

186. Following the rediscovery of Roman law in the medieval period, the *ius commune* was formed and became the learned law in Europe (A.). The role and meaning of *bona fides* within the *ius commune* were studied by both medieval Roman law scholars (B.) and Canon law scholars (C.).

A. The formation of the *ius commune*

187. In the medieval period, which began in the 5th century, following the fall of the Western Roman Empire, there was a fragmented system of law in place in Western Europe, which was, however, suited to the agrarian and military society of the time.[282] There were numerous overlapping sources of law (referred to as *ius proprium*) which included the laws of the community, rural or urban laws (*consuetudines*), laws of the cities (*statuta*) and royal laws or the laws of a prince, duke or count.[283]

188. In the 11th century, dramatic changes took place – the nation State with a monarchy at the helm became the dominant form of political organization, a centrally organized church under the papacy emerged, the market economy replaced the closed agrarian economy and there was the development of intellectualism.[284] It was against this background that the *corpus iuris civilis* of JUSTINIAN[285] was rediscovered.[286] This sparked a period of intense study of Roman law by scholars at the University of Bologna in Italy.[287] These scholars, known as glossators, familiarized themselves with the sources of Roman law, and influenced legal practice and administration.[288] Later scholars known as

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282 VAN CAENEGEM, 26, §19.

283 BELLOMO, 78.

284 VAN CAENEGEM, 30–31, §21.

285 The emperor JUSTINIAN (527–565 A.D.) at the beginning of his reign appointed a commission that was to review and make excerpts from the *ius* in order to prepare a concise code containing no obsolete material and no contradictions, known as the Digest or Pandects, see WOLFGANG KAISER, Digesta in Roger Bagnall/Kai Brodersen/Craige Champion/Andrew Erskine/Sabine Huebner (eds), The Encyclopedia of Ancient History (1st edn Blackwell Publishing Ltd 2013) 2091–2093.

286 VAN CAENEGEM, 45, §29.

287 See, in general, ROBINSON/FERGUS/GORDON, 42–43, §3.1.

288 *Idem*, 43–44, §3.2.

Commentators developed the application of Roman law in practical affairs.[289] In this way, a medieval Roman law was born.[290]

189. In the 16th century, the Humanist school of Roman law developed.[291] Jurists of the Humanist school employed historical methods in order to ascertain the social context in which certain legal rules arose as well as philological methods in order to ascertain the true meaning of the texts.[292]

190. Together with Canon law,[293] the medieval Roman law became the learned law which was common to continental Europe, hence the name *ius commune*.[294] In some areas, such as Italy and the south of France, the *ius commune* was adopted as the basis of the legal system, and the application of the *ius proprium* was limited and subject to the general rules of the *ius commune*.[295] In other areas, however, such as in the north of France and the southern Netherlands, customary law was the main source of law with the *ius commune* playing a supplementary and interpretative role.[296]

B. *Bona fides* according to the medieval Roman law scholars

191. The medieval Roman law scholars often assimilated the notion of *bona fides* with *aequitas* (equity) (1.). The medieval Roman law scholars recognized the rule that all agreements should be kept (2.) and extended the notion of *bona fides,* in the sense that there should be no fraud or deceit, to all contracts (3.). They also submitted that in *bonae fidei* contracts, *bona fides* meant that terms based on equity could be implied into the parties' contract (4.).

289 *Idem*, 59 §4.1.

290 VAN CAENEGEM, 45, §29.

291 *Idem*, 55, §32.

292 *Ibid*.

293 Canon law is the law of the western Church before the Reformation in the 16th century starting with GRATIAN'S Decretum in 1140, see ROBINSON/FERGUS/GORDON, 72, §5.1.1.

294 VAN CAENEGEM, 46, §29; see also ROBINSON/FERGUS/GORDON, 107, § 7.1.1 who define *ius commune* in the narrow sense as the two learned laws i.e., Roman law and Canon law. In a broader sense, they define the *ius commune* as comprising local custom with feudal law, Roman law, Canon law and the law merchant.

295 VAN CAENEGEM, 67–68, §38.

296 *Idem*, 69–70, §38.

1. Assimilation of *bona fides* with *aequitas*

192. Medieval jurists very often assimilated *bona fides* (good faith) with *aequitas* (equity).[297]

193. These included BALDUS DE UBALDIS (Italian commentator, 1327–1400),[298] and CORNEL BENINCASIUS (Italian jurist, unknown–1603).[299]

2. Recognition of the rule of *pacta sunt servanda*

194. According to the early medieval jurists, notably IRNERIUS (Italian glossator, 1050–1125), *fides* (faith), *aequitas* (equity) as well as the *ius gentium* required that agreements must be kept.[300]

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297 GORDLEY, good faith, 95 at fn 8, 108.

298 BALDUS DE ULBALDIS, *Decretalium volumen commentaria* (1595) to X 1.29.3: "*bona fides aequitatem desiderat."* ("good faith requires equity") (informal English translation of the Latin original); see also in this regard BROGGINI, 12; GORDLEY, good faith, 108.

299 CORNEL BENINCASIUS, *Ad titulum De actionibus interpretation* (1561) 198: "*bona fides nihil aliud est quam aequitas iuris gentium*." ("good faith is nothing other than the equity of the *ius gentium*") (informal English translation of the Latin original).

300 IRNERIUS in ENRICO BESTA, *L'opera d'Irnerio*, Vol II, *Glosse inedite d'Irnerio al Digestum vetus* (1896) 31 to D. 2. 14: "*Pacta servari aequitas est, non eius qua pro tempore seu loco postulat, conveniens dicitur, sed eius quae natura dictante semper et in cunctis se optinet. Namque ipsum genus eius est naturel: hoc est fidem praestare, fides autem est eorum quae dicta sunt Constantia et veritas, dictat vero partim ratio sola, partem noster consensus et, is cogimur servare superiorem partem, quanto magis inferiorum*." ("It is just that an agreement should be kept, not because the time or place demand it, but because nature itself insists that this should be the case always and in all things. For its very origin is natural: that is to give faith; however faith is of those things called constancy and truth; but partly reason alone and partly what has been agreed on, and, if we are compelled to keep the better part, how much more the lower.") (informal English translation of the Latin original); *Summa trecensis*, published in HERMAN FITTING (ed), *Summa Codicis des Irnerius* (1894) 2.3.3: "*Equitas seu ratio qua pacta servantur tum iudicium proprium est, cui resistendum non est: hoc enim varii et inconstantis hominis est, quia quod semel nobis placuit, id postea displicere non debet, tum fides que a uno promittutur ab altero separator, hoc suadet, u teas que complacita sunt serventur, cum veritati hoc debemus ne fallamur, et hoc naturaliter in nobis inest ut verum dicamus*." ("The equity or reason by which agreements are kept is, then, one's own judgment, which is not to be resisted, for this would be characteristic of a changeable and inconstant man. That which we once agreed we should not then break, nor the faith which is promised by one, and hoped for by another. Therefore those things which were agreed should be kept, since in truth we ought not to deceive in this, and this is part of our nature: that we speak truly.") (informal English translation of the Latin original); see also GORDLEY, good faith, 95–98.

195. Their conclusion in this regard was supported by a text in the Justinian Digest which stated that "the justice of this Edict is natural, for what is so suitable to the faith of mankind as to observe those things which parties have agreed upon?"[301]

196. The medieval jurists were, however, unable to satisfactorily reconcile this conclusion with the fact that under Roman law, only certain contracts, known as consensual contracts (*contractus consensus*), were binding by consent and that other contracts were only binding when certain formalities were complied with (for example, the *contractus litteris* required a written entry in the ledger of the *Paterfamilias* and the *contractus verbis* required the pronouncement of particular words in a set form) or the object of the contract was delivered (*contractus re*)[302].[303]

3. ***Bona fides*** **as the opposite of** ***dolus*** **in all contracts**

197. The early medieval Italian jurists submitted that *bona fides* meant that there could be no *dolus* (fraud or deceit) in contractual relationships.[304]

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301 (informal English translation of the Latin original): "*Huius edicti aequitas naturalis est quid enim tam congruum fidei humanae, qua mea quae inter eos placuerunt servare*."(D.2.14.1 (ULPANIUS)); see in this regard GORDLEY, good faith, 96.

302 With respect to the different types of contracts, see HELGE DEDEK/MARTIN SCHERMAIER, Obligation, Greek and Roman in Roger Bagnall/Kai Bodersen/Craige Champion/Andrew Erskine/Sabine Huebner (eds), The Encyclopedia of Ancient History (1st edn Blackwell Publishing Ltd 2013) 4852–4855 and DU PLESSIS, 256.

303 GORDLEY, good faith, 97–98.

304 See in this regard, BARTOLUS DE SAXOFERRATO, *Commentaria in corpus iuris civilis in omnia quae extant opera* (1615) to C. 4. 10. 4: "*Bonam fidem, Quaero, utrum haec lex debeat intelligi in cotractib. Bonae fidei tantum, uel de omnibus? Respon. De omnibus. In omnibus enim bona fides cosideratur, tamen diuersimode. Sciendu est enim, q, si dolus dat causam cotractui bonae fidei, reddit actu nullu ipso iure: in actu stricti iuris. Ope exceptionis I ut ff. de dolo & 1.elegater. in primo. Et quantu ad officiu iudicis, action, deferuiens. Na in actibus bone fidei uenieunte ea de quib. Non est actum, nec cogitatum, si bona fides existat*." ("Re. good faith, I ask, whether this law should be understood in good faith contracts, or all contracts? I respond: in all. For good faith is taken into account in them all, although in different ways. For it should be known that if fraud gives cause in a good faith contract, it renders the action *null ipso jure* in a strict law cause of action. By way of exception 1 and following de dolo & 1 is read firstly. And as for the duty of the judge presiding over the action. For in actions where good faith comes in, the action or decision is not concerned with those things if good faith is present." (informal English translation of the Latin original); see also ACCURSIUS, *Glossa ordinaria* (1581) to C. 4. 10. 4; ODOFREDUS, *Lectura super Codicem* (1552) to C. 4. 10. 4; see further GORDLEY, good faith, 100–102.

198. BALDUS, as well as later medieval French jurists were also of the same view.[305] Indeed, PIERRE REBUFFI (French jurist, 1487–1557) stated that *bona fides* was the opposite of fraud and deceit[306] and JACQUES CUIACIUS (French jurist, 1522–1590) also equated *bona fides* with the duty of the honest man.[307]

199. FRANCISCUS DE ACCOLTIS (Italian jurist, 1418–1486), and HUGO DONELLUS (French scholar, 1527–1591) agreed that *bona fides* meant the opposite of fraud

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305 With respect to BALDUS, see BALDUS DE ULBALDIS, *Commentaria in corpus iuris civilis* (1577) to C. 4.10.4 nos 1-2: "*Ad intellectum huius legis quaero, ad quem finem debet iudex considerare bonam fidem. Ad hoc respondeo quod ad duos fines: quia duo sunt actus circa contractum, qui recipit duos fines: primus est in contrahendo, secundus vero in adimplendo. In primo actu consideratur bona fides, ut per hoc diiudicetor, et cognoscatur, an contractus sit servandus vel non, et hoc tangit glossa hic posita. Circa secundum consideratur bona fides ut in eo casu quo servandus est contractus, diiudicetur an satisfaciat, sicut satisfieri debet et intelligitur primo bona fides per abnegationem, scilicet sui contrarii, id est, privationem doli unde bona fide cessante, id est, dolo interveniente, de iure contractus non est servandus: sicut factus per eum, qui dolum passus est : et si contractus bonae fidei incipit a traditione, habet locum actio de dolo propter dolum, et si credebat se teneri, locum habet condictio indebiti secundum Nicolaus de Matarellis*."("In order to understand this law, I ask, why should the judge take good faith into account? To this I respond there are two reasons: there are two acts in the contract, which relate to two ends: the first is in the contracting, the second in the fulfilling. In the first act good faith should be taken into account, so that by this it might be determined and known whether a contract should be kept or not, and the gloss here touches on this. In the second, good faith ought to be taken into account so that in the event that the contract should be kept, it can be decided whether it should be satisfied, just as good faith ought to be satisfied and understood in the first by the denial of its opposite, that is, the removal of the deceit by which good faith ceased, that is, if there is deceit, *de jure* the contract should not be kept: as is done by him who suffered the deceit: and if a contract in good faith begins with a surrender, an *action de dolo* may be taken because of the fraud, and if he believed himself to be bound, then a *condictio indebiti* may be made according to Nicolaus de Matarellis.") (informal English translation of the Latin original); See also GORDLEY, good faith, 109.

306 PIERRE REBUFFUS, *In tit. Dig. De verborum et rerum significatione commentaria* (1614) 400ff: "*Bona fide agere dicitur, qui sine ullo dolo et figmento, vere atque diligenter agit, quod agendum suscepit*." ("A person is said to act *bona fide* if he fulfils the obligation that he has entered into without any fraud or deceit") (informal English translation of the Latin original); see also FÖLDI, 316–317.

307 JACQUES CUIACIUS, *Opera, IV* (1777) 295: "*Quid igitur est bona fides? Hoc loco est aequitas arbitri et officium boni viri, hoc est bona fides quam bonus vir existimaturus est. Arbiter et bonus vir idem est*." ("What then is *bona fides*? In this case it means the equity of the judge and the duty of the honest man, that is, *bona fides*, is what an honest person considers it to be. The judge and the honest man mean the same.") (informal English translation of the Latin original); see also FÖLDI, 318–319.

and deceit but they specified that all contracts, and not just *bonae fidei* contracts, were subject to this requirement.[308]

4. Bona fides implying terms based on equity in *bonae fidei* contracts

200. The early medieval jurists were of the view that *bona fides* meant that the parties were bound by terms that they had not agreed on or even foreseen.[309]

201. In this regard, BALDUS submitted that *bona fides* meant that one should not be enriched at another's expense.[310] He called this latter requirement "the rule of rules in the life of conscience"[311] and referred to it as "natural equity" or "general/generic equity".[312] GORDLEY argues that this requirement was similar to the principle of equality which had been previously espoused by ARISTOTLE

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308 FRANCISCUS DE ACCOLTIS, *Glossa ordinaria, Institutionum sive Primorum totius iurisprudentiae elementorum libri quattuor* (Lugduni 1572) 491: "*Notare autem debes in principio, quod duplex est bona fides. Una quae est contraria dolo et fraudi. Et hoc modo omnes contractus bonae fidei sunt: in omnibus enim debet abesse dolus et fraus.*" ("Let us first of all note that *bona fides* is twofold in meaning. In one of its meanings it is the opposite of fraud and deceit. In that sense all contracts are based on *bona fides* because all of them must be free of fraud and deceit.) (informal English translation of the Latin original); HUGO DONELLUS, *Opera omnia, VII* (1765) 830ff quoted by LUCHETTI/PETRUCCI (eds), *Fondamenti romnistici del deritto europeo. Le obbligazioni e i contratti dalle radici romane al Draft Common Frame of Reference, I* (2010) 39: "*Bona fides* […] *Altero modo consideratur in hoc, ut nihil fiat contra bonam fidem, id est nihil dolo malo, nihil metu. Et si quid contra factum sit, ne ratum sit quod ita gestum est.*" ("*bona fides ...* […] requires that nothing should be done that contradicts *bona fides*, that is, there should be no fraud or duress. And if anything has been done contrary to *bona fides*, it should be considered invalid.") (informal English translation of the Latin original); see also BARNABAS BRISSONIUS, *De verborum quae ad ius pertinent significatione* (1578) 84; see further FÖLDI, 314–315, 317–318.

309 See in this regard, ODOFREDUS, *Lectura super Codicem* (1552) to C.4.10.4: "*multa veniunt de quibus non est actum"*; ALBERICUS DE ROSATE, *Commentaria in primam Digesti veteris partem* (1585) to D.2.15.5: "*In contractus tamen bonae fidei veniunt aliqua de quibus non est actum nec cogitatum.*"; BARTOLUS DE SAXOFERRATO, Commentaria in corpus iuris civilis in omnia quae extant opera (1615) to C.4.10.4: "*veniunt ea de quibus non est actum nec cogitatum*."; see also GORDLEY, good faith, 103 et seq.

310 BALDUS DE ULBALDIS, *Decretalium volumen commentaria* (1595) to X.1.2.8 no 1: "*Regula regularium in via conscientie est, non locupletari cum aliena iactura*." See also GORDLEY, good faith, 108.

311 *Ibid*.

312 BALDUS DE ULBALDIS, *Commentaria in Corpus iuris civilis* (1577) to D.4.32.2 no 3: "*et fundantur in ratione, naturali aequitate, que est quod quis non locupletetur cum aliena iactura*,"; BALDUS DE ULBALDIS, *Commentaria in Corpus iuris civilis* (1577) to C.4.44.1 no 3: "*non debet quis praetextu metus sibi illati lucrari cum aliena iactura et in ista equitate generali fundatur omnia remedia in integrum restitutionis*."; See also GORDLEY, good faith, 108.

and THOMAS AQUINAS.[313] This prohibition of enrichment at another's expense explained why parties were obliged to comply with obligations implied into their contract by natural equity.[314]

202. ACCOLTIS agreed that *bona fides* meant that parties would be bound in their contract by consequences based on equity which they had not agreed on in advance.[315] However, he specified that this meaning of *bona fides* only applied to *bonae fidei* contracts.[316] DONELLUS confirmed this view.[317]

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313 GORDLEY, good faith, 108.

314 BALDUS DE ULBALDIS, *Commentaria in corpus iuris civilis* (1577) to C. 4.10.4 nos 1-2: "*La secundo autem actu intelligitur bona fides et observatio eius, quo actum est inter contrahentes secundum naturalem aequitatem, et iuris ordinationem. Naturalis enim aequitas est attenda, cum dubitatio oritur circa ea, quae non sunt in iure expressa, et per hoc intelligitur iudici committi aut ordination attenditur in his, quae in iure sunt expressa. Ex praedictis modis suadet equitas bonam fidem servari, quod comprehendit et tradit haec lex.*"; ("In the second act, however, good faith is understood as the observation of that to which the parties are committed according to natural equity and the ordination of the law. Attention is to be paid to natural equity when doubt arises as to those things that are not expressed in the law, and attention is to be paid to the law's ordination in things that it does express. In these ways equity urges good faith to be kept, which this law includes and hands on.") (informal English translation of the Latin original); See also GORDLEY, good faith, 109, 114; see further DECOCK, 619.

315 FRANCISCUS DE ACCOLTIS*, Glossa ordinaria, Institutionum sive Primorum totius iurisprudentiae elementorum libri quattuor* (Lugduni 1572) 491: "*Est et alia bona fides, quae antonomatice vocatur bona fides propter exuberantem quae est in ea. Ab ista bona fide dicuntur contractus in isto enumerati, bon. Fi. Sed domine, quae est exuberantia fidei quae est in ista sive in istis actionibus? Repon: Frater, ex hoc quod in eis multa eveniunt ex bono et aequo, de quibus non fuit actum inter partes. In contractibus qutem stricti iuris solum veniunt ea de quibus actum est inter partes ut venirent*." ("There is another type that we call *bona fides* proper for the sake of making it more comprehensible because of its correlation with utmost faith. It is with reference to that type of *bona fides* that we call contracts listed in this section as *bonae fidei* contracts. What then is meant by utmost faith that is referred to in actions of this type? We can answer that question by stating that they include many consequences based on equity about which the parties have not agreed in advance. By contrast, in the case of *stricti iuris* contracts, only what the parties have agreed in advance can be taken into consideration.") (informal English translation of the Latin original); see also FÖLDI, 314–315.

316 FRANCISCUS DE ACCOLTIS*, Glossa ordinaria, Institutionum sive Primorum totius iurisprudentiae elementorum libri quattuor* (Lugduni 1572) 491.

317 HUGO DONELLUS, *Opera omnia, VII* (1765) 830 et seq quoted by Luchetti/Petrucci (eds), *Fondamenti romnistici del deritto europeo. Le obbligazioni e i contratti dalle radici romane al Draft Common Frame of Reference, I* (2010) 39: "*Bona fides […] duobus modis consideratur: uno modo, ut praestetur alteri ex contrahentibus quo ex bono et aequo praestari oportet, etiamsi de eo praestando aperte nihil convenerit. […] Priore modo bona fides consideratur tantum in contractibus bonae fidei*. " (We speak of *bona fides* […] in two senses: in the first sense it means that a party to a contract has to do for the other party whatever he has to do on

C. *Bona fides* according to the medieval Canon law scholars

203. It is through the concept of *bona fides* that the Christian faith made the most impact on contract law (1.). The medieval canonists assimilated *bona fides* with faith in the religious sense and with *bona conscientia* (2.). Like their civil counterparts, the canonists recognized the principle of *pacta sunt servanda* (3.). The Canon law scholars also agreed with the Roman law scholars that *bona fides* prohibited *dolus* in all contracts (4.) and also implied terms required by equity into *bonae fidei* contracts (5.).

1. The significant contribution of Christianism to contract law through *bona fides*

204. It is through the notion of *bona fides* that the Christian faith made the most significant impact on contract law.[318] Indeed, it was employed to free contract law from formalism and to impose liberal and equitable views on contract law.[319]

205. Notwithstanding, there is little reference to the notion of *bona fides* in the legal doctrine.[320] This may because the notion was such a basic assumption that it was felt that there was no need to expressly make reference to it.[321]

the basis of equity. […] *Bona fides* as construed in the first sense only plays a role in *bonae fidei* contracts) (informal English translation of the Latin original); see also FÖLDI, 317–318.

318 DECOCK, 617 stating that "if Christian morality has had any influence on the shaping of modern contract law, then it is generally thought to be through the notion of good faith."

319 THEODORE F T PLUCKNETT, A Concise History of the Common Law (5th edn Boston 1956), 304–305.

320 DECOCK, 617–618 stating that there is surprisingly "little reference […] to good faith in the moral theological literature."

321 *Ibid* stating as follows: "Perhaps this is just another example of human beings not feeling the need to express the most basis assumptions that underlie their ways of living and thinking, much as fish are unaware of the water in which they live."

2. Assimilation of *bona fides* with religious faith and *bona conscientia*

206. Medieval canonists assimilated "good faith" in the legal sense with "faith" in the religious sense.[322] *Mala Fides* (bad faith) was hence seen as an expression of *peccatum* (sin).[323]

207. Medieval Canon lawyers, including DIEGO COVARRUBIAS Y LEYVA (1512–1577),[324] and BALDUS,[325] also assimilated "*bona fides*" (good faith) with "*bona conscientia*" (good conscience).[326]

322 BROGGINI, 12; WAELKENS, 346 ("*bona fide*" meant "according to the Christian way of life"), 349 "([…] *e bona fide* therefore meant 'according to the Christian way of dealing with one's fellow man").

323 *Decretales Gregori IX* in Emil Friedberg (ed.), *Corpus iuris canonici*, Vol II (1876), 2, 26, 20: "*Quoniam omne quod non est ex fide peccatum est. Synodali iudicio diffinimus, al nulla valeat absque bona fide prescriptio, tam canonica quam civilis*." ("Since everything that is not from faith is a sin […] prescription counts for nothing without good faith in matters of Canon law and civil law alike.") (informal English translation of the Latin original); see also FÖLDI, 313; GORDLEY, good faith, 96.

324 DIEGO COVARRUVIAS Y LEYVA, *Relectio in regulam possessor*, Part 2, §6, no. 1, 391: "*In summa denique bonam fidem ipse interpretor iudicium illud privatum, quo quisque de rebus propriis diiudicat secum, particulariter quidem de omnibus propriis actibus moralibus. Nam et fides iudicium quoddam est quo credimus aliquid, item et illud, quo proprios nostros actus morales iudicamus. Quamobrem in hac parte fides pro conscientiae adsumitur*." ("Finally then, the actual interpreter of good faith is private judgement, by which everyone, within themselves, decides concerning their own affairs, and in particular, about all their own moral acts. For faith too is a certain judgment by which we believe something, so also is that by which we judge our own moral acts. For this reason faith can be taken in this way for conscience.") (informal English translation of the Latin original); see also DECOCK, 291.

325 BALDUS DE ULBALDIS in *Decretalium volumen commentaria* (1595) to X 1.29.3 nos 6, 7: "*voco bonam fidem id est bonam mentis qualitatem et conscientiam quae etiam in contractibus stricti iuris requiritur*." ("I call good faith that good quality of mind and conscience which is also required in *stricti juris* contracts.") (informal English translation of the Latin original); to X 1.6.24 no. 24: "*Quaero unde proveniat bona fides, dicit glossa quod non proveniat mere a iure, sed ab hominis conscientia*." ("I ask where does good faith come from, the gloss says that it does not come merely from the law, but from the conscience of man.") (informal English translation of the Latin original); see also GORDLEY, good faith, 108.

326 See also HOSTIENSIS (HENRICUS DE SEGUSIO), *In Decretalium Commentaria* (1581) to X 2, 26, 17 no. 11; see further FÖLDI, 313 and GORDLEY, good faith, 94.

3. Recognition of the rule of *pacta sunt servanda*

208. The principle of *pacta sunt servanda* was recognized under Canon law.[327]

209. According to the medieval canonists, agreements were enforceable before Canon law courts notwithstanding the distinction made in Roman law between consensual contracts and real contracts and between nominate and innominate contracts.[328] Indeed, under Roman law, consensual contracts were binding by mere consent whereas real contracts only became binding upon the delivery of a corporeal object and innominate contracts only became binding when one party had performed its part of the bargain.[329] This conclusion that all agreements were enforceable was grounded on the maxim that "God does not distinguish between mere speech and an oath."[330]

[327] *Decretales Gregorii IX* in EMIL FRIEDBERG (ed), *corpus iuris canonici*, Vol II (1876) 1.35.1: "*Aut inita pacta obtineant firmitatem, aut conventus, si se cohibuerat, ecclesiasticam senentiar disiplinam, dixerunt universi: pax servetur, pasta custodiantur*." ("Either the contracts entered into have effect, or the agreement, if it holds, is subject to ecclesiastical discipline; all have said: peace is to be kept, contracts are to be kept.") (informal English translation of the Latin original); *Decretales Gregorii IX* in EMIL FRIEDBERG (ed), *corpus iuris canonici*, Vol II (1876) 1.35.3: "*Studiose agendum est, ut ea, quae promittuntur opera compleantur*." ("One should act zealously in order that those things which were promised should be fulfilled.") (informal English translation of the Latin original); see also GORDLEY, good faith, 99.

[328] *Glossa ordinaria to Decretales gregorii* IX (1612) *to 1.35.1 to pacta custodiantur: "pacta, quantumcumque nuda, sunt servanda."* ("agreements, no matter how bare they are, have to be performed") (informal English translation of the Latin original); GORDLEY, good faith, 99; see also WAELKENS, 350.

[329] DU PLESSIS, 256, 264, 300, 310.

[330] GORDLEY, good faith, 99; see also WAELKENS, 350 citing Matthew 5.34-37: "let your yes be yes and your no no, even when you are not under oath."

4. *Bona fides* as the opposite of *dolus* in all contracts

210. The Canon scholars, notably HOSTIENSIS[331] and COVARRUBIAS[332] agreed with their civil counterparts that *bona fides* meant the contrary to fraud and deceit in all contracts.[333]

5. *Bona fides* implying terms based on equity in *bonae fidei* contracts

211. The Canon scholars further agreed with their civil counterparts that parties to a *bonae fidei* contract were bound by implied terms required by *bona fides*.[334]

212. PIERRE DE BELLEPERCHE (French canonist, 1230–1308) emphasized that a higher degree of *bona fides* was required in *bonae fidei* causes of action than in strict law causes of action.[335] COVARRUVIAS clarified, in this regard, that

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331 HOSTIENSIS (HENRICUS DE SEGUSIO) in *Decretalium Commentaria* (1581) to X 3.16.2: "*Bona fides et dolus contraria sunt*." ("good faith is the opposite of fraud") (informal English translation of the Latin original); see also *Glossa ordinaria to Decretales Gregorii IX* (1612) *to X 3.16.2 to rebus tuis salvis*: "*si bona fides abest, dolus adesse praesumitur nam contraria sunt*."; see further GORDLEY, good faith, 102.

332 DIEGO DE COVARRUBIAS LEYVA, *Relectio Regulae, Possessor malae fidei*, part 2, §6, no. 1, 391: *Quo fit, ut is dicatur bona fide possidere, bona fide contrahere, qui credit se id iuste facere, et ut dicitur, nullum habens in corde figmentum nec dolum*." ("On account of which, he who believes that he acts justly, and, as is said, has no deceit or fraud in his heart, may be said to have and to contract in good faith.") (informal English translation of the Latin original); see also DECOCK, 291.

333 *Glossa Bonae fidei sunt at Inst. 4.6.28 in Corporis Iustinianaei Institutiones* (ed Gothofredi), Tome 4 (*Volumen parvum*), Col. 492: "*Sed quare magis hae dicuntur bonae fidei quam aliae? Nunquid ideo, quia possit esse mala fides in aliis? Respondetur non, quia in omni contractu debet bona fides intervenire*." ("But why are these things said more of *bonae fidei* contracts than others? Is it possible that there can be bad faith in other contracts? No is the response, because in every contract good faith ought to be present.") (informal English translation of the Latin original); see also DECOCK, 293 stating that in both strict law contracts and good faith contracts, good faith in the sense of sincerity was to be observed.

334 *Glossa ordinaria* to *Decretales Gregorii IX* (1612) to X 3.17.6: "*in contractibus bonae fidei multa veniunt de quibus nec est dictum nec cogitatum*" ("in *bonae fidei* contracts there are many things which are neither said nor thought of") (informal English translation of the Latin original) to X 2.25.6 to *bonae fidei*: "*in bona fidei actionibus quandoque veniunt ea de quibus nihil est cogitatum*." ("whereas in *bonae fidei* actions there are things which are not thought of") (informal English translation of the Latin original); see also GORDLEY, good faith, 105.

335 PIERRE DE BELLEPERCHE, *In libros Institutionum commentarii* (Lugduni 1536) ad Inst. 4.6.28 num.1, 712–713: "*Opponitur, dicitur hic quaedam sunt bonae fidei. Contra division habet fieri ex opposite supponit quod actiones stricti iuris non requirunt bonam fidem. Contra C. de actio. Et oblig. 1 bonamfidem. Dico concede quod in omnibus contractibus requiritur*

obligations in strict law contracts were to be rigorously interpreted whereas obligations in good faith contracts could be interpreted equitably.[336] FERNÄO REBELO (Portugeuse Jesuit, 1547-1608) was also of the same view.[337] This

bonafides, et hoc dicitur hic propter exuberantiam bonaefidei."("On the contrary, it is said here that some are *bonae fidei*. This division would require one to hold, conversely, that *stricti iuris* actions do not require good faith. Against C. concerning action and obligation l. good faith. I say that I concede that in all contracts good faith is required, and that this is said here on account of the abundance of good faith.") (informal English translation of the Latin original); see also DECOCK, 276.

336 DIEGO DE COVARRUBIAS LEYVA, *Relectio Regulae, Possessor malae fidei*, Part 2, §6, no.4, 392: "*Igitur ex his apparet ratio, quare contractus quidam bonae fidei dicantur, reliqui vero stricti iuris. Nam bonae fidei contractus ideo quidam censentur, quod in his alter alteri arbitrio et officio aequissimo iudicis teneatur de eo, quod ex bono et aequo praestari oportet, etiam si in conventione id dictum non sit. Habet etenim iudex potestatem in his actionibus iudicandi quod sibi bonum aequumque visum fuerit, quanquam nihil a contrahentibus dictum sit*." ("Therefore from this the reason why some contracts are called *bonae fidei*, but others *stricti juris* appears. For some are judged to be *bonae fidei* contracts, because in these one by another may be bound to the most equitable decision and instructions of the judge in this, which should proceed from a good and fair intention, even if this is not stated in the agreement. And so the judge has the power in these actions of judging whether it seems good and fair to him, although nothing was said about this by the contracting parties.") (informal English translation of the Latin original); *Glossa Bonae fidei sunt at Inst. 4.6.28 in Corporis Iustinianaei Institutiones* (ed GOTHOFREDI), Tome 4 (Volumen parvum), Col. 492: "*Cum ergo dolus ubique puniatur vel mala fides, ad quid bonae fidei istae dicuntur? Respondetur, aliae stricti iuris dicuntur, quia non venit in eis nisi quod stricte exigit natura actionis. Unde non veniunt usurae ex mora in contractibus stricti iuris* […] *sed in contractibus bonae fidei sic* […]." ("When therefore deceit or bad faith is everywhere punished, why are *bonae fidei* contracts so called? It is responded, that some are called *stricti juris*, because there is nothing in them except what is strictly required by the nature of the action. For this reason interest for arrears is not due in *stricti juris* contracts [...] but is in *bona fidei* contracts [...]") (informal English translation of the Latin original); see also DECOCK, 293–294.

337 FERNÄO REBELO, *De obligationibus justitiae, religionis et charitatis*, Part 2, Lib 1, quaest 2, sect 1, no. 3, litt d. 198: "*sed cum bona fides dupliciter dicatur, ut notat glossa citata, uno modo, quod contraria sit dolo aut fraudi, quo pacto omnes contractus bonae fidei esse debent, hoc, sine dolo et fraude celebrari ac impleri; altero per antonomasiam, hoc est, propter exuberantem fidem, quae in certis contractibus esse debet (quod scilicet ad multa ex bono et aequo, prout iudex sive vir prudens arbitrabitur, de quibis non fuit actum inter partes, suapte natura extendi debeat) a fide, hoc secundo modo sumpta, contractus dicuntur bonae fidei ut opponuntur aliis stricti iuris, quia etiam ex eo tales dicuntur quod natura sua habent, ut in eis non debeat fieri extensio, nisi ad ea, de quibus expressio fact fuit*." ("but since good faith is so called for two reasons, as the cited gloss notes; in one way, because the contrary is deceit or fraud, and so all contracts ought to be in good faith, and honoured and fulfilled without deceit or fraud; in a second way, by antonomasia, on account of the abundant faith which ought to be in certain contracts (that is to say that its nature should be extended to cover, with a good and fair intention, as a judge or prudent man would judge it, many things about which

meant that the judge had a wider discretion when interpreting *bonae fidei* contracts.[338] COVARRUVIAS added that *bona fides,* in this sense, allowed one to mitigate the rigours of the strict law.[339]

213. Although BALDUS famously stated that "as a matter of canonical equity, I think that all contracts in this world are of good faith,"[340] COVARRUVIAS argued that the silence, and lack of explicit opposition, of the Canon lawyers with respect to the distinction between strict law and good faith contracts suggests that they approved of the distinction between these two contracts made by their civil

nothing was contracted by the parties). Taken in this second way, contracts are called *bonae fidei* as opposed to others which are *stricti juris*, because even these are named from that which they take their nature, so that they should not be applied, except to those things which were expressly stated.") (informal English translation of the Latin original); see also DECOCK, 306.

338 *Gloss Bonae fidei* to X 2.25.6 in *Corpus juris canonici* (ed. Gregoriana), part 2 col. 841: "*non dicuntur bonae fidei, quia in eis tantum servari debeat bona fides, quia in contractibus stricti iuris servari debet bona fides, et in quocunque contractu bona fides intervenire debet. (...) In actionibus bonae fidei multum exuberat officium iudicis et pinguius quam in actionibus stricti iuris, et istis rationibus dicuntur bonae fidei et aliae dicuntur stricti iuris*." ("They are not called *bonae fidei,* because only in them good faith should be kept, for also in *stricti juris* contracts good faith should be kept, and in any contract good faith should be present. [...] In *bonae fidei* actions the duty of the judge is much broader and greater than in *stricti juris* actions, and for these reasons they are called *bonae fidei* and the others are called *stricti juris*.") (informal English translation of the Latin original); see also DECOCK, 275.

339 DIEGO DE COVARRUBIAS LEYVA, *Relectio Regulae, Possessor malae fidei*, part 2, §6, no. 2, 392: "*Verum apud iuris civilis reponsa interdum verbum hoc "bona fides" non tam synceram illam voluntatem et animum dolo contrarium quam aequitatem quondam et iustitiam ipsam a rigore quodam summon segregatam et puram significat*." ("But in civil law it is sometimes said that this term "bona fides" does not so much signify the sincere will and an intention not to deceive as a certain simple equity and justice, not a strict rigidity.") (informal English translation of the Latin original); see also DECOCK, 292.

340 BALDUS DE ULBALDIS, *Super decretalibus*, ad X 2.11.1 No. 12, f. 144v: "*Ego puto quod de aequitate canonica omnes contractus mundi sint bonae fidei, non dico quantum ad titulum actionis sed quo ad mentem et substantiam intentionis et, ideo, si dolus dat eis causam alias non contracturis, quod contractus sit nullus ipso iure*." (I think that as a matter of canonical equity all contracts in the world are of good faith, I do not say this with regard to remedy but to the spirit and substantial intent and, therefore if the other party would not have contracted were it not for the deceit, the contract is void *ipso jure.*") (informal English translation of the Latin original); see also DECOCK, 279.

counterparts.[341] FRANCESCO SARMIENTO DE MENDOZA (Spanish jurist, 1595) confirmed the distinction between strict law and good faith contracts.[342]

341 DIEGO DE COVARRUBIAS LEYVA, *Relectio Regulae, Possessor malae fidei*, Part 2, §6, No. 5, 393: "*Quarto subsequitur ex praecedentibus, falsam esse opinionem Baldi qui in cap. 1 de plus petit. In fine scribit iure canonico contractus omnes bonae fidei censeri etiam eos qui iure civili stricti iuris nominantur, atque idcirco iure pontificio sublatam esse fistinctionem contractuum stricti iuris a contractibus bonae fidei […] Etenim haec conclusion falsa est, nec iure pontificio alicubi haec actionum distinction reprobate fuit. Unde cum ea iure civili admissa sit, existimandum est in dubio tacite a iure ipso pontificio admitti*." ("Fourthly it follows from the preceding that the opinion of Baldus is false where at the end of chap. 1 concerning more petit. he writes, in Canon law all contracts are *bonae fidei*, even those which in the civil law are called *stricti juris*, and therefore in Canon law the distinction is made between *stricti juris* contracts and *bonae fidei* contracts [...] This conclusion is indeed false, nor has this distinction between actions been shown to exist anywhere in Canon law. And so since they are admitted in civil law, it should be judged that by its silence Canon law admits them as well.") (informal English translation of the Latin original); see also DECOCK, 295.

342 FRANCESCO SARMIENTO DE MENDOZA, *De selectis interpretationibus* (Francoforti ad Moenum 1580) Lib 3, cap. 3, No.1 1 (*De iure canonico etiam sunt contractus stricti iuris*) 187: "*Si enim materiam ligneal vel lapideam, quails est materia contractuum stricti iuris, velimus extendere, vel diducere, sicut materiam plumbeam, seu auream, quails est materia contractuum bonae fidei, non esset ex bono et aequo procedure, sed materiam corrumpere*." ("For if we wanted to extend or stretch wood or stone material, which is like the material of *stricti juris* contracts, in the way we can lead or gold material, which is like the material of *bonae fidei* contracts, goodness and equity would not result, but rather, the material would break.") (informal English translation of the Latin original); see also DECOCK, 306.

II. *Bona Fides* in the Medieval *Lex Mercatoria*

214. The concept of *bona fides* took on its own unique meaning in the *lex mercatoria* (B.), which developed in medieval Europe (A.).

A. The development of the *lex mercatoria* in medieval Europe

215. From the 12th century onwards, a commercial law based on custom arose out of the practice of merchants.[343] This law developed separately from the medieval Roman and Canon law and was formed in international trade fairs, notably those in Champagne and Flanders in the 12th and 13th centuries.[344]

216. Rules of merchant corporations also formed part of this *lex mercatoria,* as well as maritime laws which evolved in the main trade centers such as the Amalfitan tables, the *lex Rhodia*, the Black Book of the Admiralty, the *Consulat de Mar*, the *Rôles d'Oléron* and the laws of Damme and Wisby.[345] The merchants had their own courts which were administered by their peers and which applied the rules of the *lex mercatoria*.[346]

B. The meaning of *bona fides* in the medieval *lex mercatoria*

217. The *lex mercatoria* was built on the basis of good faith and equity.[347]

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343 VAN CAENEGEM, 83, §44; ROBINSON/FERGUS/GORDON, 91, §6.1.1; TRAKMAN, 7.

344 VAN CAENEGEM, 83–84, §44.

345 VAN CAENEGEM, 84, §44; see also GOODE/KRONKE/MCKENDRICK, 12, §1.17; TRAKMAN, 8.

346 VAN CAENEGEM, 84, §44.

347 BEWES, 9 and 19 stating that the "law merchant […] rested on mutual confidence and good faith to an extent unknown in civil life", "among merchants good faith was paramount" and that "the two great distinctive elements in the merchants' law […] were good faith and despatch, for speedy and honesty must be obtained"; BROGGINI, 12; PAUL-LOUIS HUVELIN, *Essai historique sur le droit des marchés et des foires* (Arthur Rousseau 1897) 595: "[…] *et de plus en plus se développe l'idée de la bonne foi, de la loyauté qui doivent présider au commerce*. […] *c'est au moyen age, le droit du commerce né du droit romain, et fondé sur la bonne foi, qui réagit contre la rudesse et le matérialisme du droit germanique, et qui, sans en détruire toutes les traces façonne ce droit et le transforme pour l'accommoder aux besoins du monde nouveau*" ("and more and more the idea of good faith, of loyalty that must preside over trade is developing. It is in the Middle Ages, the law of commerce born of Roman law, and founded on good faith, which reacts against the harshness and materialism of Germanic law, and which, without destroying all traces of it, shapes this law and transforms it to adapt it to the needs of the new world.") (informal English translation of the French original);

218. Indeed, an English judge defined the *lex mercatoria* in 1791 as a "system of equity founded on rules of equity and governed in all its parts by plain justice and *good faith*."[348]

219. In the Mediterranean area, the notion of *bona fides* was rooted in Roman law (1.). In Northern Europe, however, due to the Germanic influence, the everyday term of "*Treu und Glauben*" was more common (2.).

1. *Bona fides* in the Mediterranean area influenced by Roman law

220. In the Mediterranean area, *bona fides* was considered to be the cornerstone of trade.[349]

221. According to GIUSEPPE LORENZO MARIA CASAREGI, (Italian jurist, 1670–1737), "*bona fides est primum mobile ac spiritus vivificans commercii*" ("good faith is the prime mover and life-giving spirit of commerce.").[350] BALDUS also stated that, "*bonam fidem valde requiri in his, qui plurimum negotiantur*" ("good faith is much required of those who trade most").[351]

222. *Bona fides* stood for mutual trust and fairness in the international community of business people.[352]

223. Indeed*, bona fides* was invoked when justifying why informal contracts (contracts which did not comply with the relevant formal requirements, notably a writing requirement[353]) were binding in acts of commerce.[354]

CHARLES KERR, The Origin and Development of the Law Merchant (1929) 15 Virginia Law Review 353: "The fundamentals of the Law Merchant were based on good faith and mutual confidence."; MEYER, 61 stating that *bona fides* was the cornerstone of the *lex mercatoria*; MITCHELL, 20 stating that "plain justice and good faith, disregard of technicalities and regard for "the sole truth of the matter" characterize alike in England, France and Italy, the development of the Law Merchant."; TRAKMAN, 7 stating that "throughout the evolution of the law merchant, the principle of good faith appears as the bastion of international commerce".

348 Emphasis added, BULLER J. in *Master v Miller*, (1791) 4 T R 320 Eng Rep 1042 at 1055.

349 MEYER, 61.

350 (informal English translation of the Latin original): GUISEPPE LORENZO MARIA CASAREGIS, *Discursus legales de commercio et de avariis*, Vol II, 144, no. 10; see also MEYER, 62.

351 STRACCA, Part VII, 278, no. 3; see also MEYER, 62.

352 MEYER, 62.

353 For the distinction between formal and informal contracts, see PETER BIRKS, The Roman Law of Obligations (2014) 33 et seq.

354 BEWES, 28 (stating that good faith meant that an agreement was honoured between merchants when consented to even if there was no writing); MITCHELL, 102: "The idea of good faith, an idea urged by the Church and supported by the merchants, did more than create a rule

224. The popularity of the notion of *bona fides* in Mediterranean commerce was due to its inherent flexibility. *Bona fides* permitted the speedy conclusion of commercial dealings but also allowed derogations from strict legal rules where equity demanded this. The flexibility inherent in *bona fides* also allowed the commercial law to be adapted to new developments and changed circumstances.[355]

225. In this regard, international trade, and, in particular, the need for the rapid and final conclusion of contracts and resolution of disputes, often came into conflict with the so-called "*apices iuris*" or subtleties of law (namely, the rigid, formalistic, and inflexible application of the law).[356] Commerce required an equitable application of the law which took into account trade usages and the actual circumstances of the case ("*veritas facti*") and which was not based on legal niceties or formalisms.[357] *Bona fides* was thus employed as an equitable concept when interpreting a contract or applying the law which permitted the taking into account of the actual facts and circumstances and served as a counter principle to "*apices iuris*" or subtleties of law.[358]

protecting the honest purchaser in market and fair. Slowly it undermined the Roman and Germanic principle that in general formless contracts are not binding." 104: "It would seem however that in commercial disputes the principle of good faith received a wider and earlier application. In Italy it was recognized by Bartolo and Baldo, the great jurists of the 14th century, that in acts of commerce, informal contracts were binding; and this peculiarity in mercantile usage they attempted to explain by an appeal to the principles of equity."

355 MEYER, 62.

356 MEYER, 62–63.

357 MEYER, 64; see also MITCHELL, 20 stating that "disregard of technicalities […] characterize alike in England, France and Italy, the development of the Law Merchant."

358 MARC ANTONIO BELLONE, *Decisiones Rotae Genuae de mercatura* (1582), Decision 153, No. 8, 210: "*Quia inter mercatores agitur bona fides, et tales apices sunt rejecti*" and Decision 31, No.1 (*In causis mercatorum attendenda est veritas facti, non apices iuris*): "*et quicquid bona fidem non tangit rei geste, sed extrinsecus ventilator, abhorrent, & aliena esse debent a bona fide mercatoria, que apices iuris non attendit* […]" ("Because among merchants good faith is relied on, and subtleties of law are rejected" and Decision 31, no. 1 (In merchants' cases the truth of the matter is to be sought, not points of law): "and anything of good faith not pertaining to the things done, but raised inessentially, should be abhorred, and should be alien from the good faith of the market, which does not attend to points of law […].") (informal English translation of the Latin original); STRACCA, Part V, No. 12: "*et hoc, ut dixi, non ex natura contractus, sed ea bona fide, quae maxime inter mercatores observanda est, cum inter eos non convenit de apicibus iuris disputare.*" ("and this, as I have said, is not from the nature of the contract, but from that good faith which should especially be observed between merchants, since it is not appropriate for them to dispute on points of law.") (informal English translation of the Latin original); see also MEYER, 64.

2. *Treu und Glauben* in Germanic influenced Northern Europe

226. In the area of Northern Europe, which was under Germanic influence, the everyday term of "*Treu und Glauben*" rather than *bona fides* was employed.[359]

227. In everyday use, this term was associated with the honest, reputable and profit-making businessman and also had religious connotations.[360]

228. In the commercial context, "*Treu und Glauben*" was associated with the honourable and honest merchant.[361]

229. In addition, the notion of "*Treu und Glauben*", in its commercial sense, was used to justify the application of clear, hard and fast rules in order to allow the quick settlement of disputes and to promote trade.[362]

230. Indeed, the introduction to the statutes of the city of Lübeck (former capital and Queen City of the Hanseatic League[363]) refers to "*Treu und Glauben*" in order to explain why this city had opted for hard and fast rules.[364] Such rules permitted

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359 MEYER, 65.

360 *Ibid*.

361 *Statuta des Lundischen Conthors* (1554) cited by STRÄTZ, 193*:* "[...] *daß fürbaß ein ieder so der Ansen Privilegien zugeniessen gedencket, Treu und Glauben zu halten sich befleissigen soll; [...] [die] Kauffmanns-Handlung [ist] allenthalben auff gutem auffrichtigen und treuen Glauben fundiret und erbauet."* ("[...] that anyone who intends to enjoy the Ansen privileges should exercise good faith; [...] [the] merchant's trade [is] everywhere founded and built on good sincere and faithful belief.") (informal English translation of the German original).

362 MEYER, 66–67.

363 The Hanseatic League (also known as the Hansa) was an alliance of trading guilds that established and maintained a trade monopoly along the coast of Northern Europe, from the Baltic to the North Sea, during the late middle ages and early modern period (circa thirteenth–seventeenth centuries).

364 *Der Kayserlichen Freyen und des Heiligen Römischen Reiches Stadt Lübeck Statuta und Stadt-Recht* (1586) Beginn des Privilegs cited by STRÄTZ, 194: "[…] *so seind derselben Rationes vornemblich daher genommen, weil die Stadt Lübeck eine Kauffmans Stadt, auff Handel und Wandel gewidmet ist, dabey Treu und Glauben sein muß, daß die Ersten und Alten Conditores Statutorum darauff gesehen, damit Treu und Glauben gehalten, und viel besser sey, dass Privat Personen, sonderlichen aber die Frauen, an ihrem Gute und Patrimonio etwas Schaden leiden, dann daß der Glaube in Kauffhändeln geschwächet, oder gar bey dieser Stadt zu derselben Unheil und Untergang fallen solle."*("[…] the same rules are taken from the fact that the city of Lübeck is a merchant city, dedicated to trade and commerce, where good faith is required, that the first and old Conditores Statutorum have seen to it that good faith is kept, and that it is much better that private persons, but especially women, suffer some damage to their property and patrimony, than that the faith in merchandising should be weakened, or even lead to this city's disaster and downfall..") (informal English translation of the German original).

the speedy and clear handling of commercial relationships and thus promoted trade and commerce.[365]

231. The term "*Treu und Glauben*" further arose in a procedural context. In this regard, frequent appeals to the imperial courts from the territorial courts were deemed incompatible with "*Treu und Glauben*" as this would be contrary to the rapid resolution of disputes.[366]

[365] MEYER, 67.

[366] MEYER, 67; see in this regard *Der Kayserlichen Freyen und des Heiligen Römischen Reiches Stadt Lübeck Statuta und Stadt-Recht* (1586) Beginn des Privilegs: cited by STRÄTZ, 192: "*auch dieweil die Stadt Lübeck am ende des Römischen Reiches gelegen, viel trawens und glaubens der Kauffleute, so jhr gewerb, handtierung und Kauffmans handel daselbst brauchen und treiben, dadurch geschwecht, die Händel in abnemen und abfall gesetzt und gebracht werden* [...]". ("also because the city of Lübeck is situated at the end of the Roman Empire, many loyal and faithful merchants, who need and carry on their trade, business and merchant's trade there, are thereby harmed, and the trade is put into decline and brought to waste.") (informal English translation of the German original).

Chapter 3: Good Faith in the Early Modern Period (17th – 20th Centuries)

232. The Natural Law School attributed an increasing role and scope to the notion of good faith (I.) before its codification, at the turn of the 19th and 20th centuries, in the national law codes (II.). The 19th century saw a reduced role attributed to good faith (III.) before its subsequent reinvigoration in the 20th century (IV.).

I. Good Faith and the Natural Law School (16th-18th Centuries)

233. The concept of good faith was invoked by the late Scholastics (A.), the Northern Natural Law School of GROTIUS and PUFENDORF, (B.) and subsequently by the French scholars, DOMAT and POTHIER, who were inspired by the Natural Law school (C.).

A. The late Scholastics

234. In the 16th century and early 17th century, the "late Scholastics" based in Spain, rebuilt Roman law around the Natural Law ideals of ARISTOTLE and THOMAS AQUINAS.[367]

235. The late Scholastics referred to "equity" and "good faith" much less than their predecessors and instead referred to faithfulness to promises, fraud, gratuitous contracts and contracts of exchange, equality in exchange and terms which were required by the nature of the contract.[368]

236. The late Scholastics associated good faith primarily with the rule that contracts must be observed. Thus, according to FRANCISCO SUÁREZ (1548–1617), good faith related "most decidedly to the province of Natural Law".[369] In this regard, he submitted that Natural Law required a contract to be observed once it has been concluded.[370]

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367 GORDLEY, Philosophical Origins, 69–111; GORDLEY, good faith, 115;

368 *Ibid*.

369 FRANCISCO SUÁREZ, *De Legibus* (1612), Book II, Chapter 17, section 6: "*idemque est de praecepto restituendi alienum, vel reddendi depositum, vel seruandi fidelitatem, dicendi veritatem, & similibus que sunt propria hominum & non comunia cum brutis etiam materialiter, & tamen ad natural ius maxime pertinent*." ("The same is true, moreover, of the commands relating to the restitution of the property of another, the return of a deposit, the observance of good faith, speaking the truth, and similar matters; all of these being peculiar to mankind and not common even in a material fashion to the brutes, while they nevertheless pertain most decidedly to the province of the natural law.") (informal English translation of the Latin original); see also BROWN SCOTT, 566.

370 FRANCISCO SUÁREZ, *De Legibus* (1612), Book II, Chapter 19, section 7: "*secundum est observatio contractus postquam consummates est & hoc pertinet ad ius naturale*." ("The second factor is the observance of the contract after it has been made; and this matter as is evident pertains to the natural law.") (informal English translation of the Latin original); see also BROWN SCOTT, 566.

237. LUIS DE MOLINA (1535–1600) and LEONARD LESSIUS (1554–1623) also referred to CICERO's statement that "*fides*" is the foundation of justice to support their conclusion that breaking one's word was contrary to "*fides*".[371]

B. Northern Natural Law School of GROTIUS and PUFENDORF

238. The Northern Natural Law School of HUGO GROTIUS (1538–1645) and SAMUEL PUFENDORF (1632–1694)[372] drew on and popularized the conclusions of the late Scholastics.[373] Like the late Scholastics, they referred infrequently to "equity" and "good faith" and referred instead to faithfulness to promises, fraud, gratuitous contracts and contracts of exchange, equality in exchange and terms which were required by the nature of the contract.[374]

239. Again, like the late Scholastics, GROTIUS and PUFENDORF primarily associated good faith with the duty to abide by any contractual obligations made. Hence, GROTIUS stated that "nothing is more conducive to good faith among men, than

371 LUIS DE MOLINA, *De iustitia et jure tractatus* (Venice 1614) Disp. 262, 4: "*Virtus vero, quae ejusmodi actum imperat pacta & promissa implendo , fides, autore Cicone I. de offic. Nuncupatur &, ut ait, dicitur à fio, & dico, quasi per eam fiat, quod dictum est."* ("The virtue, however, which in the same way orders the act to fulfill the agreement and promise, is called by the author Cicero in De Officiis 1 *fides* (faith), and, as he says, it is so called from *fio* (to happen/occur), and *dico* (to say), as if it means that that which is said (*dictum est*) should happen (*fiat*).") (informal English translation of the Latin original); LEONARD LESSIUS, *De iustita et jure* (Paris 1628) lib. 2, cap. 18 dub. 18, 56: "*Quia Cicero lib.I.offi.dicit: Fundamentum instititia est fides, id est, dictorum conuentorumque constantia & veritas. Vocat fidem, institia fundamentum ; quia est causa aperum iustorum, seu cur impleantur promissa & seruentur contractus. Nam fides nihil est aliud, quam affectus voluntaris, inclinans ad servanda promissa, non tantum gratuita, sed etiam onerosa: idque non tantum ad verificandum quod dictum est, sed propriè ad satisfaciende obligationi, quae ex promissione est orta, unde videtur esse pars iustitiae*." ("Because Cicero in De Officiis 1 says: The foundation of justice is faith, that is, fidelity and truth to promises and agreements. He calls faith the foundation of justice, because it is the cause of just works, otherwise why would promises be fulfilled or contracts kept? For faith is nothing other than a movement of the will to the keeping of a promise, not only when this is easy, but also when it is difficult; and not just to confirm what was promised, but to actually satisfy the obligations arising from the promise, whence, it seems to be a part of justice.") (informal English translation of the Latin original); see also GORDLEY, Philosophical Origins, 74.

372 With respect to the Northern Natural Law School of GROTIUS and PUFENDORF, see VAN CAENEGEM, 118–119, §63.

373 GORDLEY, Philosophical Origins, 69–111; GORDLEY, good faith, 115.

374 *Ibid*.

a strict adherence to the engagements they have made with each other."[375] PUFENDORF was also of the view that it was a sacred precept of Natural Law that a party must keep its word and thus carry out its obligations under a contract.[376]

240. In this regard, PUFENDORF added that good faith justified why a party was not obliged to perform its contractual obligations if the other party had failed to perform its own obligations and also justified the termination of the contract when the other party breached its obligations under the contract.[377]

241. GROTIUS further observed – in the context of the interpretation of treaties – that good faith had a role to play in interpretation and referred to CICERO's famous observation according to which "in good faith what you meant, not what you said, is to be considered".[378]

375 GROTIUS, Book II, Chapter XI, I: "*eodem modo dicitur, nihil esse tam congruum fidei humanae, quam ea quae inter eos placuerunt fervare*." ("nothing is more conducive to good faith among men, than a strict adherence to the engagements that have been made with each other.") (informal English translation of the Latin original).

376 SAMUEL PUFENDORF, *De iure naturae et gentium* (1672) Book VIII, Chapter III, IV. 2: "*Si quae autem inter homines ineuntur pacta, illa sancte ob servanda esse, sociabilis natura hominis requirit.*" ("Now whenever human beings enter into any agreements, human sociability requires that the agreements be faithfully observed.") (informal English translation of the Latin original).

377 SAMUEL PUFENDORF, *Elementorum jurisprudentiae universalis* (1660) Book I, Definition XII, §12: "*Hae porro, cum utrinque respeciant res conventas, atque reciprocam supponant fidem facile patet, si una pars datam fidem violaverit, alteram quoque non amplius teneri, adeoque perfidum non esse, qui pactis non stat ab altero jam violatis*." ("Furthermore since these obligations regard matters which have been agreed upon by both sides and presuppose reciprocal good faith, it is readily seen that if one party has broken its pledged good faith the other party also is no longer bound, and therefore, he who does not stand by pacts already violated by the other party is not perfidious") (informal English translation of the Latin original) and §20: "*Quia omnia pacta pro fundamentali conditione supponunt unvicem paciscentium fidem quam, quam ubi unus abruperit, alter quoque statim eadem solvitur*." "(Because all pacts presuppose as a fundamental condition mutual good faith between the contracting parties, and when one has broken this good faith the other also is immediately released from obligation to the same.") (informal English translation of the Latin original).

378 GROTIUS, Book II, Chapter XVI, I: "*Ipsum qui promisit solum si spectamus sponte id praestare obligatur in quod obligari voluit. In fide quid senseris non quid dixeris cogitsnfum inquit Cicero.*" ("If we consider the promisor alone, he is naturally bound to fulfil his engagements. Good faith as Cicero observes requires that what you meant and not what you said is considered") (informal English translation of the Latin original).

C. DOMAT and POTHIER

242. French jurists, JEAN DOMAT (1625–1696) and ROBERT POTHIER (1699–1772) were subsequently inspired by the Natural Law school.[379] However, contrary to the late Scholastics and the Northern Natural Law School, both DOMAT and POTHIER invoked the notion of good faith much more frequently.[380]

243. According to DOMAT, the rule of good faith was an unchangeable law which could not be derogated from[381] and which applied to all areas of law.[382]

244. DOMAT confirmed that the Roman distinction between good faith and strict law contracts[383] no longer applied and thus that every contract was subject to good faith.[384].[385] Indeed, already in 17th century France, according to maxim no. 690

379 GORDLEY, Philosophical Origins, 69–111; GORDLEY, good faith, 115.

380 GORDLEY, good faith, 115.

381 DOMAT, *Traité*, Chapter XI, §§20–21:"[…] *il y a plusieurs lois immuables dont il y a des exceptions et des dispenses, sans que néanmoins elles perdent le caractère de lois immuables; comme au contraire il y en a plusieurs qui ne souffrent ni de dispense ni d'exceptions […] Ainsi les lois qui ordonnent la bonne foi, la fidelité, la sincérité, et qui défendent le dol, la fraude, et toute surprise, sont des lois dont il ne peut y avoir ni de dispense ni d'exception*." ("there are several unchangeable laws to which there are exceptions and derogations, without them losing the character of being unchangeable laws; as by contrary there are several which do not suffer from any derogation or exception […] Therefore the laws which command good faith, fidelity, sincerity and which prohibit deceit, fraud and all ruses are laws which are not subject to any derogation or exception.") (informal English translation of the French original).

382 DOMAT, *Traité*, Chapter XII, §18:"*Ainsi quelques-unes sont communes à toute sorte de matière, comme celles qui ordonnent la bonne foi, et qui défendent le dol et la fraude, et autres semblables*." ("Thus some are common to all sorts of matters, like those which command good faith and which prohibit fraud and other similar things.") (informal English translation of the French original).

383 Whilst good faith contracts empowered the judge to apply its equitable discretion to the facts of the case and generated bilateral obligations for both parties to the contract, strict law contracts which arose from the *ius civile*, had to strictly observe certain formalities and mostly imposed a unilateral obligation to perform on one party; DU PLESSIS, 258.

384 DOMAT, *Lois,* Book I, Section III, §12: "*Cette différence entre le plus ou le moins d'étendue de la bonne foi, selon les différences des conventions, est le fondement de la distinction qu'on fait dans le droit romain entre les contrats qu'on appelle contrats de bonne foi, et ceux qu'on dit etre de droit étroit, mais par la nature et par notre usage, tout contrat est de bonne foi, en ce qu'elle y a toute l'étendue que l'équité peut y demander*."("This difference between the greater or lesser extent of good faith, according to the differences between the contracts, is the basis of the distinction made in Roman law between contracts called good faith contracts, and those said to be of strict law, but by nature and by our use, every contract is a good faith contract, in that it has the full extent that equity can demand of it.") (informal English translation of the French original); see also DEROUSSIN, 104.

385 DU PLESSIS, 258.

of Loisel's *Institutes coutumières* 1607, all contracts were subject to good faith ("*toutes actions sont de bonne foi*").[386]

245. DOMAT argued that, in all agreements, it is implied that one party owes good faith to the other party and is bound by the consequences that equity attributes to the agreement, both with respect to its interpretation and performance.[387] However, he clarified that in some contracts, the role of good faith was more pronounced than in others.[388] Hence, DOMAT compared the sales contract to the contract for a loan of money and pointed out that good faith forms the basis of more obligations in a sales contract than in a contract for a loan of money.[389]

246. According to DOMAT, parties owed good faith not only to their contractual partners but also to all those that may have an interest in the contract.[390]

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386 Available at < https://gallica.bnf.fr/ark:/12148/bpt6k624134/f112.item.r=Institutes%20coutumi%C3%A8res%20de%20M%20Loisel>, accessed 1 March 2023.

387 DOMAT, *Lois*, Book I, Section III, §12: "*Il n'y a aucune espèce de convention où il ne soit sous-entendu que l'un doit à l'autre la bonne foi avec tous les effets que l'équité peut y demander, tant en la manière de s'exprimer dans la convention, que pour l'exécution de ce qui est convenu, et de toutes les suites. Et quoiqu'en quelques conventions cette bonne foi ait plus d'étendue, et en d'autres moins, elle doit être entière en toutes, et chacun est obligé à tout ce qu'elle demande, selon la nature de la convention, et les suites qu'elle peut avoir.*" ("There is no type of agreement where it is not understood that one owes to the other good faith with all the effects that equity can require of it, both with respect to the manner in which one expresses oneself in the agreement, and for the performance of what is agreed, and for all consequences. And even though in some agreements this good faith is more extensive and in others less so, it must be present in all agreements, and every individual is obliged to everything that good faith requires according to the nature of the agreement and the consequences that it may have.") (informal English translation of the French original).

388 *Ibid*.

389 DOMAT, *Lois*, Book I, Section III, §12: "*Dans la vente, la bonne foi forme un plus grand nombre d'engagements que dans le prêt d'argent. Car le vendeur est obligé de délivrer la chose vendue, de la garder jusqu'à la délivrance, de la garantir, de la reprendre si elle a des défauts qui soient tels que la vente doive être résolue. Et l'acheteur a aussi des engagements. Mais dans le prêt d'argent, celui qui emprunte n'est obligé qu'à rendre la même somme et les intérêts, s'il paye au terme après la demande*." ("In the contract of sale, good faith gives rise to a greater number of obligations than in the loan of money. As the seller is obliged to deliver the thing sold, to keep it until the delivery, to warranty it, to take it back if it suffers from defects which are so great that the sale must be rescinded. And the buyer also has obligations. But in the loan of money, the person who borrows is only obliged to give back the same sum and interest, if he pays at term after the request.") (informal English translation of the French original).

390 DOMAT, *Lois*, Book I, Section III, §13: "*La bonne foi nécessaire dans les conventions n'est pas bornée à ce qui regarde les contractants: ils la doivent aussi à tous ceux qui peuvent avoir un intérêt à ce qui se passe entre eux, dans le contrat*." ("Good faith which is necessary in agreements is not limited to what concerns the contracting parties: they also owe it to all those

247. DOMAT further pointed out that it was not contrary to good faith for a party to act with regard to its own interests when contracting and to object to the other's proposals with respect to uncertain and discretionary elements in the contract.[391] Conversely, DOMAT underlined that good faith placed a limit on the parties' freedom to modify the obligations owed by either party.[392]

248. According to POTHIER, good faith generally required contracting parties to not act fraudulently.[393]

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who may have an interest in what happens between them in the contract.") (informal English translation of the French original).

391 DOMAT, *Lois*, Book I, Section III, §14: "*Les manières dont chacun ménage ses intérêts lors de la convention et la résistance de l'un aux prétentions de l'autre dans l'étendue de ce qui est incertain et arbitraire et qu'il faut régler, n'ont rien de contraire à la bonne foi*.": ("The ways in which an individual arranges his interests at the time of the agreement and the resistance of one against the claims of the other with respect to that which is uncertain and arbitrary and what must be decided on, are not at all contrary to good faith.") (informal English translation of the French original).

392 DOMAT, *Lois*, Book I, Section IV, §3: "*La liberté d'augmenter, ou de diminuer les engagements, est toujours bornée à ce qui se peut dans la bonne foi et sans dol ni fraude.*" ("The liberty to increase, or to decrease commitments is always subject to what can be done in accordance with good faith and without deceit or fraud.") (informal English translation of the French original).

393 POTHIER, Part I, Chapter I, Article 3, §3 (du dol), §30: "*Dans le for intérieur on doit regarder comme contraire à cette bonne foi, tout ce qui s'écarte tant soit peu de la sincérité la plus exacte et la plus scrupuleuse: la seule dissimulation sur ce qui concerne la chose qui fait l'objet du marché, et que la partie avec qui je contracte aurait intérêt de savoir, est contraire à cette bonne foi; car puisqu'il nous est commandé d'aimer notre prochain autant que nous-même, il ne peut nous être permis de lui rien cacher de ce que nous n'aurions pas voulu qu'on nous cachât, si nous eussions été à sa place […] Dans le for extérieur, une partie ne serait pas écouté à se plaindre de ces légères atteintes que celui avec qui elle a contracté aurait données à la bonne foi; autrement il y aurait un trop grand nombre de conventions qui seraient dans le cas de la rescision, ce qui donnerait lieu à trop de procès, et causerait un dérangement dans le commerce. Il n'y a que ce qui blesse ouvertement la bonne foi qui soit, dans ce for, regardé comme un vrai dol, suffisant pour donner lieu à la rescision du contrat, tels que toutes les mauvaises maneouvres et tous les mauvais artifices qu'une partie aurait employés pour engager l'autre à contracter, et ces mauvaises manœuvres doivent être pleinement justifiées*." ("In the internal sphere, one must consider as contrary to this good faith, everything which departs even a little from the most exact and scrupulous sincerety: the mere concealement of something concerning the item which is the object of the deal and that the other contracting party would have an interest in knowing, is contrary to good faith; as since it is ordered to love one's neighbour as ourselves, it cannot be permitted to hide anything from him that we would not want to be hidden from us if we were in their place […] In the external sphere, a party will not be listened to who complains of these slight contraventions of good faith by its contracting party; otherwise there would be too many contracts which would be subject to rescission, which would lead to too many proceedings and cause a disturbance in

249. However, in certain relationships, notably in sales contracts, good faith required parties to disclose information concerning the object of the sale which the other party would have an interest in knowing.[394] Good faith also obliged the buyer to not act fraudulently in leading the seller to sell, or to sell at a lower price, and to not buy the object at a less than fair price.[395]

commerce. It is only that which openly injures good faith which in this sphere will be considered to be a real deceit, sufficient to give rise to the rescission of the contract, such as all the bad ruses and artifices that a party would have carried out in order to get the other to contract, and these bad ruses must be fully justified.") (informal English translation of the French original).

394 POTHIER, Part II, Chapter II, Article 1, §234: "*Quoique, dans plusieurs affaires de la société civile, les règles de la bonne foi se bornent à nous défendre de mentir, et nous permettent de ne pas découvrir aux autres ce qu'ils auraient intérêt de savoir, lorsque nous avons un égal intérêt de ne le leur pas découvrir; néanmoins dans les contrats intéressés, au nombre desquels est le contrat de vente, la bonne foi ne défend pas seulement tout mensonge, mais toute réticence de tout ce que celui avec qui nous contractons a intérêt de savoir, touchant la chose, qui fait l'objet du contrat. La raison est que la justice et l'équité, dans ces contrats, consiste dans l'égalité*." ("Although in several matters of civil society the rules of good faith are aimed at preventing us from lying, and do not allow us to conceal from others what they would have an interest in knowing, when we have an equal interest in not revealing it to them; nevertheless in interested contracts, which include the contract of sale, good faith does not only prevent all lies, but the failure to inform about anything which the person we are contracting with would have an interest in knowing concerning the item which is the object of the contract. The reason is that justice and equity in contracts consists in equality.") (informal English translation of the French original).

395 POTHIER, Part II, Chapter II, Article I, §294: "*La bonne foi, qui doit régner dans le contrat de vente, oblige l'acheteur à deux choses: à n'user d'aucun dol pour porter le vendeur à vendre, ou à vendre moins cher; à ne pas acheter la chose au-dessous du juste prix*." ("Good faith which must govern in a contract of sale imposes two obligations on the buyer: to not use any fraudulent device in order to get the seller to sell or to sell at a less expensive price; to not buy the thing at less than the fair price.") (informal English translation of the French original).

II. Good Faith and the Codification Movement

250. The principle of good faith was codified in the major European civil law codes of the 19th and early 20th centuries (A.). Although, the principle of good faith is not explicitly found in the commercial law codifications, this principle still underlies the provisions found in such codifications (B.)

A. Inclusion of good faith in the major civil law codifications in the 19th/20th centuries

251. In the late 18th century, the codification movement in Europe began, starting with the Prussian Civil Code of 1794 (*Allgemeines Landrecht*).[396]

252. There followed, in the 19th and early 20th centuries, the enactment of the major civil law codifications in Europe which all contained provisions incorporating good faith. These included, notably, Articles 1134(3) and 1135 of the French Civil Code of 1804 (1.), Section 242 of the German Civil Code of 1900 (2.) and Article 2 of the Swiss Civil Code of 1907 (3.).

1. Articles 1134(3) and 1135 of the French Civil Code

253. Article 1134(3) FrCC provided that "agreements shall be performed in good faith" ("[les conventions] *doivent être exécutées de bonne foi*.").[397]

254. Reflecting DOMAT's and POTHIER's conception of good faith,[398] Article 1135 FrCC also provided that "agreements are binding not only as to what is therein expressed, but also as to all the consequences which equity, usage or statute give to the obligation according to its nature" ("*les conventions obligent non*

396 VAN CAENEGEM, 123–124, §64.

397 Article 1134(3) of the 1804 version of the French Civil Code can be found here: <https://www.legifrance.gouv.fr/affichCode.do;jsessionid=71F95D91C531144A70C950D2195897D8.tplgfr31s_2?idSectionTA=LEGISCTA000006150240&cidTexte=LEGITEXT000006070721&dateTexte=18040427>, accessed 1 March 2023.

398 See paras 242 et seq above and GORDLEY, good faith, 115.

seulement à ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation d'après sa nature.").[399]

255. In the *travaux préparatoires* of the French Civil Code, little is said about the notion of good faith, and when the notion was invoked, it was mainly in connection with the principle of *pacta sunt servanda*. Thus GUILLAUME-JEAN FAVARD DE LANGLADE (1762–1831) was of the view that the recognition of the principle of *pacta sunt servanda* in the code would guarantee good faith which must govern the performance of contracts.[400] JEAN-JACQUES-RÉGIS DE CAMBACÉRÈS (1753–1824), on the other hand, stated that good faith placed a limit on the principle of *pacta sunt servanda*.[401] In particular, he stated that the primary inviolable rule regulated by the code is that of *pacta sunt servanda* and that although it is permitted for a party to act in its own interest, one should not do so at the expense of the other's interest as this would trample on the principle of good faith which is the foundation of all contracts.[402]

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399 Article 1135 of the 1804 version of the French Civil Code can be found here: <https://www.legifrance.gouv.fr/affichCode.do;jsessionid=71F95D91C531144A70C950D2195897D8.tplgfr31s_2?idSectionTA=LEGISCTA000006150240&cidTexte=LEGITEXT000006070721&dateTexte=18040427>, accessed 1 March 2023.

400 *Recueil complet des travaux préparatoires, Band XIII, Rapport fait par le Tribun Favart sur les quatre premiers chapitres*, 319: "*il n'y aura plus d'incertitude sur ce principe* [de pacta sunt servanda]*; il sera désormais fondé sur une loi positive et garante de l'autorité des contrats, garante par conséquent des fortunes des particuliers; et ce qui est plus précieux encore, garante de la bonne foi qui doit régner dans l'exécution des conventions*. " ("there will no longer be any uncertainty concerning the principle [of pacta sunt servanda]; it will be from now on grounded on a positive law and guarantor of the authority of contracts, guarantor as a consequence of the fortunes of individuals; and what is even more precious, guarantor of good faith which must govern the performance of agreements.") (informal English translation of the French original); see also ROMAIN, 85, §45.3.

401 *Recueil complet des travaux préparatoires du code civil, Band I, Rapport fait par Cambacérès*, 108.

402 *Ibid*: "*La première de toutes la plus inviolable est celle qui ordonne de respecter le contrat […]. Il est permis de chercher son intérêt, mais il ne l'est pas de le chercher aux dépens de l'intérêt d'autrui, il ne l'est pas de fouler aux pieds le fondement de tous les engagements, la bonne foi*." ("The first of all of the most inviolable is the one which commands that the contract be respected […]. One is allowed to act in one's own interest but one should not do so at the expense of the interest of the other, it is not permitted to trample on good faith, the foundation of all commitments.") (informal English translation of the French original); see also ROMAIN, 87–88, §46.

2. Section 242 of the German Civil Code

256. Deeply rooted in Natural Law concepts,[403] Section 242 of the German Civil Code of 1900 provided that "the debtor is obliged to perform in such a manner as good faith requires, regard being had to general practice" ("*Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*.").[404]

257. At the time that this provision was incorporated in the BGB, as will be discussed further below,[405] German jurists placed emphasis on the intention of the parties and linked implied terms with the intention of the parties. They were of the view that good faith did not impose any substantive obligations of fairness on the parties.[406]

258. The committee that approved the inclusion of good faith in this provision was also of the view that Section 242 BGB was a general rule of interpretation and not a legal standard imposing a duty to perform the contract in good faith.[407]

3. Article 2(1) of the Swiss Civil Code

259. Article 2(1) SwCC provided that "every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations." ("*Chacun est tenu d'exercer ses droits et d'exécuter ses obligations selon les règles de la bonne foi*; *Jedermann hat in der Ausübung seiner Rechte und in der Erfüllung seiner Pflichten nach Treu und Glauben zu handeln; Ognuno è tenuto ad agire secondo la buona fede così nell'esercizio dei propri diritti come nell'adempimento dei propri obblighi*.").[408]

260. Although good faith was not included in the draft project of the Swiss Civil Code, the explanatory statement pointed out that good faith was one of the

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403 JALUZOT, 40, §132.

404 Section 242 of the BGB of 1900 can be found here: <http://www.koeblergerhard.de/Fontes/BGBDR18961900.htm>, accessed 1 March 2023. With respect to the drafting, in particular of Section 242, see LOOSCHELDERS/OLZEN, §§25–37.

405 See para. 277 below.

406 *Ibid.*

407 *Protokolle der Kommission zur Ausarbeitung eines bürgerlichen Gesetzbuchs* in HORST JAKOBS/WERNER SCHUBERT (eds), *Die Beratung des Bürgerlichen Gesetzbuchs in systematischer Zusammenstellung der unveröffentlichten Quellen, Recht der Schuldverhältnisse,* Vol. I (1978) 47; see also GORDLEY, good faith, 116.

408 The Swiss Civil Code can be found online here: <https://www.admin.ch/opc/en/classified-compilation/19070042/index.html>, accessed 1 March 2023.

principles which dominated private law and that it was sufficient to make reference to it in the Code with respect to certain specific issues.[409]

261. However, under the influence of EUGEN HUBER, good faith was included in the draft of 1904 and did not give rise to any specific debates thereafter.[410]

B. Underlying good faith in the commercial law codifications

262. During this period, commercial law was nationalized and also codified.[411]

263. Already in the second half of the 16th century, the first national norms of commercial law had been created in France, namely the Colbert ordonnances (*ordre du commerce 1673, ordre de la marine 1681*) which culminated in the French Commercial Code (*code de commerce*) of 1806.[412]

264. In Germany, the *Allgemeines Deutsches Handelsgesetzbuch* (Prussian Commercial Code) of 1861 was the predecessor to the *Handelsgesetzbuch* (German Commercial Code) which came into force in 1900.[413]

265. Despite its significant importance for trade, good faith was not explicitly included in the national codifications.[414] Rather, the specific rules and standards which had been derived from good faith were included.[415]

266. For example, in the French Commercial Code of 1806, it was explained that partnerships/joint ventures were not subject to the same formalities as other companies and could be proved by various means (Articles 49–50).[416] This was explained by the fact that commercial life did not always lend itself easily to compliance with formalities and it was therefore believed that partnerships/joint

409 *Code civil suisse, avant projet*, *Exposé de motifs* I, 23–24; see also STEINAUER, 174, §487.

410 ISABELLE AUGSBURGER-BUCHELI, Genèse de l'article 2 du code civil suisse, in *Abus de droit et bonne foi* (Fribourg 1994) 23, 29; see also STEINAUER, 174, §487.

411 GOODE/KRONKE/MCKENDRICK, 17, §1.25; MEYER, 69; CLIVE SCHMITTHOFF, International Business Law: A New Law Merchant in Clive Schmitthoff/Chia-jui Cheng (eds), Clive M. Schmitthoff's Select Essays on International Trade Law (Martinus Nijhoff 1988), 22.

412 MEYER, 69.

413 JOHANNES FLUME, Law and Commerce: The Evolution of Codified Business Law in Europe (2014) Comparative Legal History, 46–84, 64.

414 MEYER, 71.

415 *Ibid*.

416 ANDRÉ MARIE JEAN JACQUES DUPIN, *Mémoires, plaidoyers et consultations de 1807 à 1817* (1827), 61, stating in relevant part that "*le législateur n'a pas voulu que la confiance pût être trahie, et la bonne foi impunément violée car la confiance et la bonne foi sont l'âme et la vie du commerce*."("the legislator did not want trust to be betrayed and good faith to be violated without punishment because trust and good faith are the life and soul of commerce.") (informal English translation of the French original).

ventures should be enforced on the ground of good faith even if a company act had not been drawn up.[417]

267. Another example can be found in the draft Prussian Commercial Code of 1869. Indeed, the special consideration of good faith in trade was invoked to justify the interpretation provisions found therein according to which a judge must attempt to ascertain the actual intent of the parties and not be bound by the literal meaning of the contract and that customs and trade usages should be taken into account when interpreting acts and omissions.[418]

268. Notwithstanding the lack of an explicit incorporation of good faith, the importance of the observation of good faith in commerce was also made clear in the various codifications and their *travaux préparatoires*.

269. For example, good faith was described as the soul of commerce in the *ordre de la marine* 1681.[419] In addition, in the *travaux préparatoires* of the French Commercial Code, M ARCHICHANCELIER pointed out that good faith and equity were the real rules of commerce in order to support his argument that the provisions in the code should not be too specific so that equity could play a role in the

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417 *Ibid*.

418 JÜRGEN SCHMIDT, Section 242 BGB (Staudinger Kommentar) (13th edn 1995) §17: "*Das ADHGB enthielt zum Problemkreis neben der Auslegungsvorschrift in section 278, von der die Motive zum preussischen Entwurf gesagt hatten, sie sei erforderlich wegen der "im Handel besonders notwendigen Rücksichtnahme auf Treu und Glauben", die Vorschrift des section 279: In Beziehung auf die Bedeutung und Wirkungen von Handlungen und Unterlassungen von Handlungen ist auf die im Handelsverkehr geltenden Gewohnheiten und Gebräuche Rücksicht zu nehmen,* […] *In seiner Rechtsprechung zu sections 278, 279 ADHGB nahm das RG im übringen öfters zu dem "im Handelsverkehr vor allem aufrecht zu erhaltenden Grundsatz von Treue und Glauben" oder dem "den Handelsverkehr vor allem aufrecht zu erhaltenden Grundsatz von Treue und Glauben" Zuflucht, wie überhaupt in der Handelssprache die Wortverbindung "Treue und Glauben" als Kennzeichnung des redlichen Kaufmannes Eingang gefunden zu haben scheint*." ("In addition to the interpretation provision in section 278 (which stated that "In the evaluation and interpretation of commercial transactions, the judge must investigate the will of the contracting parties and not be bound by the literal meaning of the term."), of which the motives for the Prussian draft had said that it was necessary because of the "special consideration of good faith required in trade", the ADHGB contained the provision of section 279: "In relation to the meaning and effects of acts and omissions of acts, consideration must be given to the customs and practices applicable in trade, […] In its case-law on sections 278, 279 ADHGB, the RG often resorted to the "principle of good faith, which must above all be upheld in commercial transactions" or to the "principle of good faith, which must above all be upheld in commercial transactions", just as the word combination "good faith" seems to have found its way into the commercial language as a designation of a bona fide businessman.") (informal English translation of the German original); MEYER, 71; see also JALUZOT, 38, §124.

419 *Ordre de la marine* 1681, Art XXX: "*La bonne foi est l'âme du commerce*".

application of the provisions.[420] Further, in the French Commercial Code 1808, it was also stated, in the part containing the reasons for the draft law relating to the fixing of the period when the Code of Commerce would come into force, that commercial relationships will be based on the consideration of good faith (*"les transactions commerciales reposeront sous l'égide de la bonne foi*.").[421]

420 JEAN GUILLAUME LOCRÉ DE ROISSY, *Législation civile, commerciale et criminelle ou commentaire ou complément des codes français* (1837), *Procès verbal du conseil d'état, séance du 15 janvier 1807*, M ARCHICHANCELIER, 101: "*les véritables règles du commerce sont celles de la bonne foi et de l'équité, il faut bien se garder de les affaiblir par des règles trop positives qui dans beaucoup de circonstances engênent l'application. L'art, dans les lois de cette espèce est de poser des principes féconds en conséquences, et qui dans l'exécution, ne résistent jamais à l'équité*." ("The true rules of commerce are those of good faith and equity, one must ensure not to weaken them by too positive rules which in many cases will disturb their application. The art with respect to the laws of this type is to set down principles rich in consequences, and which in performance, will never resist equity.") (informal English translation of the French original).

421 JEAN GUILLAUME LOCRÉ DE ROISSY, *Législation civile, commerciale et criminelle ou commentaire ou complément des codes français* (1837), *Exposé de motifs, séance du corps législatif du 8 septembre 1807*, M CORVETTO, 36.

III. Good Faith in the 19th Century

270. The 19th century saw the curtailment of the role played by good faith in both France (A.) and Germany (B.)

A. Limited role of good faith in France

271. In 19th century France, the role played by good faith was reduced as a result of the insistence on party autonomy and the strict adherence to the terms of the contract.[422]

272. Article 1134(3) FrCC was seen as a provision which empowered the judge to ascertain by all possible means the common intention of the parties.[423] This provision was thus restricted to the process of interpretation of the parties' intent.[424]

273. Hence, according to GABRIEL BAUDRY-LACANTINERIE (1837–1913)/LOUIS BARDE (1852–1932) and CHARLES AUBRY (1803–1883)/FRÉDÉRIC-CHARLES RAU (1803–1877), Article 1134(3) FrCC which provided that contracts should be performed in good faith meant that contracts should be performed according

422 ROMAIN, 136, §77.1; WHITTAKER/ZIMMERMANN, surveying the landscape, 33.

423 CHARLES DEMELOMBE, *Cours de Code Napoléon, Traité des contrats I* (1882) 371, §393, (with respect to Article 1134(3) FrCC): "*Et c'est toujours, en effet, le devoir du juge, id officio ejus contineri, d'interpréter la convention et d'en ordonner l'exécution, conformément à l'intention des parties eu égard au but qu'elles se sont proposé d'atteindre*." ("And it is always the duty of the judge, *id officio ejus contineri*, to interpret the agreement and order its performance, in accordance with the intention of the parties in view of the purpose they have set themselves to achieve.") (informal English translation of the French original); VICTOR-NAPOLÉON MARCADÉ, *Explication théorique et pratique du Code Napoléon*, IV (6th edn Paris 1869) 396: "*Le Code Napoléon, dans notre troisième alinéa, pose comme principe fondamental que la bonne foi devra toujours présider à l'exécution des conventions* […] *le juge doit toujours prononcer ex aequo et bono en recherchant par tous les moyens possible quelle a été la commune intention des parties, pour donner tout son effet à cette intention*."("The Napoleonic Code, in our third paragraph, establishes as a fundamental principle that good faith must always govern the performance of agreements […] the judge must always pronounce *ex aequo et bono* by seeking by all possible means what was the common intention of the parties, to give full effect to this intention.") (informal English translation of the French original); see also WHITTAKER/ZIMMERMANN, surveying the landscape, 34.

424 ROMAIN, 136, §77.1.

to the intention of the parties and in light of the aims for which they had been concluded.[425]

274. FRANÇOIS LAURENT (1810–1887) also stated, in this regard, that terms implied by equity and usage into the parties' contract (as per Article 1135 FrCC) would only be terms that were in fact intended, albeit tacitly, by the parties.[426] He also stated that parties were bound to perform their contractual obligations and that a judge should not intervene with respect to the parties' contract on the basis of equity.[427] In the same vein, CHARLES BONAVENTURE MARIE TOUILLER (1732–

425 GABRIEL BAUDRY-LACANTINERIE/ LOUISBARDE, *Traité théorique et pratique de droit civil, les obligations* (3rd edn 1906) 390, §343: "[…] *l'article 1134 contient un dernier alinéa ainsi conçu: 'Elles (les conventions) doivent être exécutées en bonne foi'. De bonne foi c'est-à-dire conformément à l'intention des parties et aux buts qu'elles se sont proposées*." ("[…] Article 1134 contains a last sentence which provides as follows: 'They (the agreements) must be performed in good faith.' In good faith means in conformity with the intention of the parties and with the aims that they proposed.") (informal English translation of the French original); CHARLES AUBRY/FREDERIC-CHARLES RAU, *Cours de droit civil français* (5th edn 1902), 563: "*les conventions doivent être exécutées de bonne foi, c'est-à-dire conformément à l'intention des parties, et au but en vue duquel elles ont été formées*." ("agreements must be performed in good faith, namely in conformity with the intention of the parties and in accordance with the aim in view of which they have been concluded.") (informal English translation of the French original).

426 LAURENT, §182: "*Autre est la question de savoir si l'on doit suivre l'équité et l'usage de préférence aux clauses des contrats. En règle générale, il faut répondre négativement. Si les obligations obligent aux suites que l'équité et l'usage donnent à l'obligation d'après sa nature, c'est que telle est la volonté tacite des parties contractantes*."("Another question is whether equity and usage should be followed in preference to contract clauses. As a general rule, the answer should be negative. If the obligations bind to the consequences that equity and usage give to the obligation according to its nature, it is because it is the tacit will of the contracting parties.") (informal English translation of the French original); see also GORDLEY, good faith, 116.

427 LAURENT, §178: "*Les parties contractantes se sont obliges à exécuter leurs engagements, elles sont liées comme elles le seraient par une loi, elles ne peuvent pas réclamer au nom de l'équité, et si elles le faisaient, le juge ne pouvait pas écouter leurs réclamations. Le juge est donc lié par les conventions des parties contractantes comme si c'étaient des lois. Il n'y peut apporter aucune modification au nom de l'équité*." ("The contracting parties have undertaken to fulfil their commitments, and they are bound as they would be by law, and they cannot claim in the name of equity, and if they did so, the judge could not listen to their claims. The judge is therefore bound by the agreements of the contracting parties as if they were laws. There can be no change in the name of equity.") (informal English translation of the French original); see also GORDLEY, good faith, 116.

1855) asserted that when agreements were clear, one should not ignore the clear wording by resorting to equity or good faith.[428]

B. Limited role of good faith in Germany

275. In Germany, FRIEDRICH VON SAVIGNY (1779–1861) rejected the Natural Law school of thought and created the Historical School by searching for the historical source of all laws.[429] Around the same time, the school of conceptual jurisprudence (*Begriffsjurisprudenz)* was founded by GEORG FRIEDRICH PUCHTA (1798–1846) which advocated a legal order based on purely legal and specific concepts in order to avoid judicial arbitrariness.[430]

276. Reflecting the general consensus during this period, RUDOLPH VON JHERING (1818–1892) stated in 1844 that *bona fides* could bring down the entire law and that judicial decisions should therefore not mention *bona fides*.[431]

277. German jurists, like the French jurists, attached great weight to the parties' intent and were also of the view that only terms consistent with the parties' intent could be implied.[432]

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428 CHARLES BONAVENTURE MARIE TOUILLER, *Le droit civil français suivant l'ordre du Code* (Brussels 1824) §338: "*on ne doit pas violer les conventions en cherchant une équité purement imaginaire* […] *quand elles [les conventions] sont claires, il ne faut pas en éluder la lettre, sous prétexte d'en revenir à l'équité et à la bonne foi*". ("one should not violate agreements by searching for a purely imaginary equity […] when they [the agreements] are clear, one must not sidestep the literal meaning under the pretext of coming back to equity and good faith.") (informal English translation of the French original); see also BROGGINI, 15.

429 FRIEDRICH CARL VON SAVIGNY, *Traité de droit romain* (translated by M. Ch Guenoux) (Paris 1840) §XLVI: "*les uns pensent qu'il existe un droit universel et normal (le droit naturel), complément subsidiaire de tout droit positif, comme en Allemagne, le droit romain par rapport aux différents droits territoriaux. Je n'ai pas besoin de réfuter ici cette application particulière d'une doctrine que j'ai combattue dans son principe*."; ("some believe that there is a universal and normal law (natural law), a subsidiary complement to any positive law, as in Germany, Roman law in relation to the various territorial rights. I do not need to deny here this particular application of a doctrine that I fought against in principle.") (informal English translation of the French original); see also JALUZOT, 39, §129; SCHLOSSER, 124 et seq.

430 SCHLOSSER, 133; JALUZOT, 40, §133.

431 RUDOLF VON JHERING, *Abhandlungen aus dem roemischen Recht* (1844), 54, §1: "*man könne mit der bona fides das ganze Recht über den Haufen werfen; die heutige Jurisprudenz dürfe keine bona fides mehr kennen*." ("One could throw the entire law into disarray with good faith; today's case law should no longer refer to good faith.") (informal English translation of the German original); see also JALUZOT, 40, §131.

432 LUDWIG ENNECCERUS, *Rechtsgeschäft, Bedingung und Anfangstermin* (1889) 17–19; GEORG PUCHTA, *Pandekten* (2nd edn 1844) §58; BERNHARD WINDSCHIED, *Lehrbuch des*

Pandektenrects, Vol I (7th edn 1891) §75 n. 1a; see also GORDLEY, good faith, 116; LOOS-CHELDERS/OLZEN, §§41–44 (stating that the meaning of Section 242 BGB was derived from the presumed will of the parties and in further development of the respective declarations of intent and that the scope of judicial interference was limited to closing existing gaps in the specific obligations); SCHUBERT, §20.

IV. Good Faith in the 20th Century

278. The 20th century saw the reinvigoration of good faith in both France (A.) and Germany (B.).

A. Reinvigoration of good faith in France

279. In France, RENÉ DEMOGUE (1872–1938) reinvigorated good faith in the 20th century.[433] Referring to Article 1134(3) FrCC, he stated that, as a result of this provision, obligations should be performed in conformity with the intention of the parties and in light of the aims pursuant to which they had been concluded as well as in conformity with the rules implied by honest and loyal conduct.[434]

280. In an oft quoted citation, he stated that: "the contracting parties form a sort of microcosm, a small company where each party must work towards a common aim which is the sum of the individual aims pursued by each party unquestionably as is a civil or commercial company."[435]

281. This reinvigoration of good faith corresponded to a general change in the attitudes of the judges from one which was reverent to the will of the parties to one which was more eager to introduce by any possible means a control of morality and justice in contracts.[436]

B. Reinvigoration of good faith in Germany

282. In 20th century Germany, the school of free law (*Freirechtsbewegung*) replaced the school of conceptual jurisprudence (*Begriffsjurisprudenz*).[437] The latter school was criticized due to the fact that it did not allow the law to be adapted

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433 ROMAIN, 147, §81.

434 DEMOGUE, Vol 6, Chapter 1, 9 §3: "*En conséquence les obligations s'exécutent conformément à l'intention des parties et au but en vue duquel elles ont été formées, ainsi qu'aux règles qu'implique une conduite honnête et loyale*." ("As a consequence, obligations are to be performed in accordance with the intention of the parties and the aim for which they were concluded, as well as in accordance with the rules implied by honest and loyal conduct.") (informal English translation of the French original).

435 (informal English translation of the French original): DEMOGUE, Vol 6, Chapter 1, 9, §3: "*les contractants forment une sorte de microcosme, une petite société où chacun doit travailler dans un but commun qui est la somme des buts individuels poursuivis par chacun, absolument comme dans la société civile ou commerciale*."

436 BÉNABENT, *obligations*, 253, §301.

437 JALUZOT, 42, §139.

to new circumstances,[438] that flexibility was needed in order to adapt each decision to the circumstances of a case[439] and that this theory did not allow the possibility of filling in gaps in the law.[440] Proponents of this school, such as EUGEN EHRLICH (1862–1922), advocated that the more general and vague concepts such as *bona fides* in Section 242 BGB could be used to develop the law.[441]

283. From 1904 onwards, the courts no longer only used Section 242 BGB to fill gaps but also to control and correct legal principles.[442] Thus, the notion of good faith, which was found in Section 242 BGB, allowed the judges to reevaluate obligations in Marks in light of the hyperinflation which arose in the Weimar Republic.[443]

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438 FRANÇOIS GÉNY, *Méthode d'interprétation et sources en droit privé positif*, Book 2 (2nd edn 1919), 337, §207; JALUZOT, 42, §140.

439 JALUZOT, 42, §141.

440 *Idem*, 42, §142.

441 EUGEN EHRLICH, *Ueber lücken in Recht* (1888) *Juristische Blätter* 1888 as summarized in EUGEN EHRLICH, *Freie Rechtsfindung und Frei Rechtswissenschaft*, III–IV stating in relevant part as follows: "*In meiner Arbeit: Ueber Lücken im Rechte habe ich auszuführen versucht, dass der Richter, der die Aufgabe hat, nach dem geltenden positiven Rechte zu entscheiden, gewisse Unklarheiten der Theorie und des Rechtsystems dazubenützt, um den Erfordernissen der Rechtsentwickelung Rechnung zu tragen und wie gerade die verschwommensten Begriffe mit denen die Theorie und Praxis operiert: die Natur der Sache, die bona fides, das Prinzip von Treu und Glauben, die actio doli, die ungerechtfertigte Bereicherung, das contra bonos mores, sich dazu am besteneignen*." ("In my work: On gaps in the law, I have tried to explain that the judge, who has the task of deciding according to the applicable positive law, uses certain ambiguities of the theory and the legal system in order to take into account the requirements of the development of law and how just the most blurred concepts with which the theory and practice operates: the nature of the thing, the *bona fides*, the principle of good faith, the *actio doli*, the unjustified enrichment, the *contra bonos mores*, are best suited to it.") (informal English translation of the German original); see also JALUZOT, 42–43, §143.

442 LOOSCHELDERS/OLZEN, §50; RG, 26 Mai 1914, RGZ 85, 108.

443 RG, 28 nov. 1923, RGZ, 88: "*Nach dem Eintritte des Verfalls der Papiermark entstand nunmehr ein widerstreit zwischen diesen Währungsvorschriften einerseits, auf der anderen Seite denjenigen sonstigen Gesetzesbestimmungen, die verbuten wollen, dass der schuldner in der Lage sei, sich seiner Verbindlichkeiten in einer Weise zu entledigen, die mit den Anforderungen von Treu und Glauben und mit der Verkehrssitte nicht vereinbar ist, also namentlich mit der das Rechtsleben beherrschenden Vorschritf des section 242 BGB. Bei diesem Widerstreit muss die leztere Vorschrift den Vorrang haben und müssen die Währungsvorschriften zurücktreten, weil, wie dargetan, bei ihrem Erlass die Möglichkeit eines derartigen Währungsverfalls, infolge dessen die aus den Wahrungsbestimmungen sich ergebenden Folgerungen mit den Grundsätzen von Treu und Glauben und mit der Billigkeit nicht mehr vereinbar sind, nicht in Betracht gezogen waren, ein starres Festhalten an ihnen für diesen Fall also nicht vorgesehen war. Tatsächlich hat denn auch die Reichsgesezgebung in der letzten Zeit*

284. In Nazi Germany, general clauses such as Section 242 BGB were also used as a way of infiltrating Nazi values into the law.[444] Indeed, in one decision, good faith was employed in order to enforce the racist principles of that time and to prevent a Jewish film director from claiming part payment of the contract after its termination by the employer.[445]

immer mehr und mehr gezeigt, dass sie den Grundsatz "*Mark=Mark*" *nicht ohne Einschränkung aufrecht erhalte, weil eben gegenüber den Anforderungen des Wirtschaftslebens und dem Einfluss der Veränderung der wirtschaftlichen Verhältnisse an den Währungsgesetzen nicht mehr festgehalten werden kann, soweit sie die Papiermark der Goldmark gleichstellen*." ("After the collapse of the paper market, a conflict arose between these currency provisions on the one hand, and on the other hand between those other provisions of the law that want to assume that the debtor is in a position to discharge his obligations in a manner that is incompatible with the requirements of good faith and custom, i.e. in particular with the provisions of Section 242 of the German Civil Code governing legal life. In this conflict, the last provision must take precedence and the currency provisions must withdraw because, as has been shown, the possibility of such a currency forfeiture, as a result of which the consequences resulting from the currency provisions are no longer compatible with the principles of good faith and equity, was not taken into consideration at the time of their enactment, so that rigid adherence to them was not provided for in this case. In fact, in recent times, the imperial legislation has shown more and more that it does not fully uphold the principle of the mark, because, in the face of the demands of economic life and the influence of changes in economic conditions, it is no longer possible to adhere to the currency laws in so far as they treat the paper mark as equivalent to the gold mark.") (informal English translation of the German original); see also JALUZOT, 44–45, §151; LOOSCHELDERS/OLZEN, §55–58; SCHUBERT, §21; WHITTAKER/ZIMMERMANN, surveying the landscape, 20–21.

444 JALUZOT, 48, §165; LOOSCHELDERS/OLZEN, §66 et seq.

445 RG 17 nov. 1933, JW 1933, 2918: "*Auf jedem Fall war es der Beklagte bei der Entwicklung, die die politischen Verhältnisse nach dem 30 Jan. 1933 in Deutschland genommen haben, nicht zuzumuten, als sie die Kündigung des Vertrages am 5. April 1933 aussprach, einen Film von dem jüdischen Regisseur K. drehen zu lassen. Das Bestreben der Reichsregierung geht dahin, den jüdischen Einfluss insbesondere auch auf allen Gebieten des kulturellen Lebens einzudämmen und auch auszuschliessen*." ("In any case, in view of the development of the political situation in Germany after January 30, 1933, it was not reasonable for the defendant, when it announced the termination of the contract on April 5, 1933, to allow the Jewish director K. to shoot a film. The efforts of the Reich government are aimed at containing and excluding Jewish influence, especially in all areas of cultural life.") (informal English translation of the German original); see also JALUZOT, 49, §169.

Chapter 4: Conclusion

285. This historical overview has shown how *bona fides* or good faith has been employed in order to incorporate a certain moral and social standard of conduct into the law (I.). This historical review has also shown that *bona fides* is a malleable concept (II.) which was often assimilated with *aequitas* or equity (III.). This historical review has further shown how *bona fides* has been employed as a tool to increase a decision maker's discretion (III.) as well as a tool to mitigate the strict rigours of the law or contract (IV.). This historical review has, moreover, highlighted the significant importance attributed to *bona fides* in the field of commerce (VI.).

I. *Bona Fides* as a Means to Incorporate a Certain Moral and Social Standard of Conduct into the Law

286. This historical overview has shown how *bona fides* or good faith has been employed in order to incorporate a certain moral and social standard of conduct into the law.

287. Indeed, as we have seen, the notion of *bona fides* was employed by Roman law in order to incorporate a certain standard, namely that of *boni viri,* into the law.[446] The medieval canonists also associated the notion of *bona fides* with the standard of a good Christian acting with a good conscience.[447] In the medieval *lex mercatoria*, the notions of *bona fides* and *Treu und Glauben* were further used to impose the standard of an honest and reputable businessman.[448]

288. With respect to the content of this notion, we have seen how *bona fides* has been consistently tied to the principle that agreements must be kept (or the principle of *pacta sunt servanda*).[449] It has also been consistently linked with the requirement to act honestly.[450] *Bona fides* has further been consistently associated with the interpretative principle that a decision maker should seek the parties' actual intentions when interpreting their contract and not stick to the literal wording of the contract.[451] When employed extensively, *bona fides* has moreover been employed in order to impose additional obligations on the contracting parties.[452] Finally, *bona fides* has been associated with the defence of non-performance[453] and the prohibition of the arbitrary use of contractual discretion.[454]

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446 See above, para. 171.
447 See above, para. 207.
448 See above, para. 227.
449 See above, paras. 175, 194 et seq., 208 et seq., 236 et seq., 239 et seq.
450 See above, paras. 176, 197 et seq., 210, 228, 248.
451 See above, paras. 164, 241, 267.
452 See above, paras. 200 et seq., 211 et seq.
453 See above, para. 240.
454 See above, para. 180.

II. Good Faith as a Malleable Concept

289. This historical review has also shown that good faith is a malleable concept capable of playing a more or less extensive role depending on the social and moral ideals of the time.

290. Indeed, in Roman times, the concept of *bona fides* was given an increasingly extensive role in line with the ideals of *fides* that prevailed in Roman society at that time.[455] In addition, in 20th century France and Germany, the concept was given an extensive role in line with the ideals of contractual solidarity that prevailed in France and the support for increased judicial discretion in Germany expounded by the Free Law school.[456] Conversely, in 19th century France and Germany, the concept was given a restrictive role as a result of the importance attached to the will of the parties in France and the prevalence of the historical and conceptual jurisprudence schools in Germany.[457]

291. Good faith was attributed a reduced role when there was an insistence on the principle of party autonomy and on a strict adherence to the terms of the parties' contract. Conversely, good faith was attributed an increased role when there was support for an interventionist approach and an increased control of morality and justice in contracts.

292. In this regard, when good faith was attributed an extensive role, we have seen the emerging justification of equality, namely how *bona fides* is employed in order to ensure equality between the parties or to prevent one party being enriched at the other's expense.[458]

293. The elastic nature of good faith also allows it to play a more or less extensive role depending on the nature of the contract in question. As underlined by DOMAT, the role of good faith would be more pronounced in a sales contract than in a contract for a loan of money.[459]

294. The malleability of good faith flows from the open nature of this concept.[460] As we shall see below, this malleability of good faith can be seen in the different role and scope that good faith plays today under different national and non-national laws.[461] This differing role and scope[462] can be explained by the

455 See above, para. 174.
456 See above, paras. 278 et seq.
457 See above, paras. 270 et seq.
458 See above, para. 201.
459 See above, para. 245.
460 See above, para. 19 et seq.
461 See Part III, Chapters one and two.
462 See below, para. 1016 et seq. (national law) and para. 1048 et seq. (non-national law).

different social and moral ideals underlying these various laws.[463] As argued in more detail below, arbitrators should be aware of these nuances in order to ensure an application of good faith which is in conformity with the applicable law.[464]

[463] See below, paras. 1038–1042 (national law) and paras. 1045 et seq. (noting that most non-national laws have followed the (more extensive) Civil law approach to good faith).

[464] See e.g., para. 1042 and paras. 1061–1062.

III. Assimilation of the Concept of *Bona Fides* with *Aequitas* or Equity

295. In this historical review, we have further seen the constant assimilation of the concept of *bona fides* with *aequitas* or equity.[465]

296. Indeed, good faith was deemed to be encompassed in the more general and broader concept of *aequitas* or equity.[466]

297. The equitable nature of the concept of *bona fides* also explains its popularity today in international commercial arbitration where it is employed in order to "do justice" or achieve an equitable solution in a particular case.[467]

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465 See above, para. 181 et seq., 192 et seq., 206 et seq.

466 See above, para. 181 et seq.

467 See above, para. 37.

IV. Good Faith as a Tool to Increase a Decision Maker's Discretion

298. This historical review has moreover highlighted how good faith has been employed as a tool to increase a decision maker's discretion.

299. Indeed, the notion of *bona fides* was introduced in Roman times as a tool to increase judicial discretion and to allow the Roman judge to weigh both parties' interests when ruling on their dispute.[468]

300. However, as distrust of the judiciary become more prevalent, the role of good faith waned. This is particularly apparent in 19th century France and Germany where distrust of the judiciary was high.[469] Conversely, in 20th century Germany, the role of good faith increased in line with the promotion of judicial freedom which was expounded by the *Freirechtsbewegung*.[470]

301. This characteristic of good faith also explains its popularity in international commercial arbitration today. Indeed, arbitrators appreciate a discretion-increasing tool such as good faith which allows them to fashion a just solution to the case before them.[471]

468 See above, paras. 162 et seq.

469 See above, paras. 270 et seq.

470 See above, paras. 282 et seq.

471 See above, para. 39.

V. Good Faith as a Tool to Mitigate the Strict Rigours of the Law or Contract

302. This historical review has also underlined how good faith allows the strict rigours of the law or contract to be mitigated and the circumstances of the case to be taken into account.

303. This quality of good faith appears most clearly in the medieval *lex mercatoria* where *bona fides* was often resorted to in order to relieve merchants from the subtleties of law ("*apices iuris*") and to allow the consideration of the circumstances of the case ("*veritas facti*").[472]

304. This quality of good faith was also apparent in 20th century Germany where the concept of good faith was employed in order to allow the judges to reevaluate obligations in Marks in light of the hyperinflation at that time.[473]

305. As we have already seen,[474] this characteristic of good faith helps explain the frequent resort by arbitrators to good faith in international commercial arbitration today. The desire of arbitrators to have the flexibility to depart from the strict application of the law or contract in order to "do justice" and to take into account the circumstances of the case explains the frequent recourse to good faith in international commercial arbitration.

472 See above, para. 225.

473 See above, para. 283.

474 See above, para. 39.

VI. Significant Importance Attributed to *Bona Fides* in the Field of Commerce

306. For present purposes, the significant importance attributed to *bona fides* in both the medieval *lex mercatoria* and in the nationalized commercial law of the early modern period is significant.

307. Indeed, as we saw, *bona fides* was considered to be the prime mover and life-giving spirit of commerce ("*bona fides est primum mobile ac spiritus vivificans commercii*") in the medieval *lex mercatoria*.[475] Good faith was also described as the soul of commerce (*l'âme du commerce*) in the French *ordre de la marine* of 1681.[476]

308. This importance is mirrored in today's world of international commerce and explains the frequent recourse to good faith in today's international commercial arbitration.

[475] See above, para. 221.

[476] See above, para. 269.

Part III: Good Faith Under National and Non-National Law

Chapter 1: The Role and Content of Good Faith Under National Law

309. This Chapter examines the role and content of good faith under national law. Not only is the following analysis useful for determining whether arbitrators apply good faith in the same way as national courts[477] and whether arbitrators are influenced by their legal background when applying good faith,[478] it is also useful as a "starting point" for determining the role and content of good faith under non-national sources of law which will be discussed in Chapter two.[479]

310. The role and scope of good faith in contract law will be principally studied under English law (I.) and New York law (II.), given that such laws are the most popular governing laws chosen by parties involved in international commercial arbitration.[480] Subsequently, the role and scope of good faith will be examined

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477 See above paras. 71 et seq.

478 See above paras. 56 et seq.

479 ZELLER, Scarlet Pimpernel, 2, stating that knowledge of good faith as expressed in domestic law is needed to give one a starting point in ascertaining the meaning of good faith and how it is to be applied in the context of the CISG; see also ZELLER, International Trade, 134.

480 Queen Mary Survey, Choices, 11, 14 (according to this survey, the most frequently used governing law is English law with 40% of the vote followed by New York law with 17% of the vote); see also 2020 ICC Dispute Resolution Statistics stating at p. 17 that "The most frequently selected lex contractus was English law with 122 cases (13% of all cases registered), the laws of a US state (104 cases)."; 2018 ICC Dispute Resolution Statistics stating at p. 13 that: " As in previous years, English law was the most selected lex contractus (16% of cases registered in 2018), closely followed by the laws of a US state (12% of cases). The contracts applying the laws of US states referred to the laws of 17 states, with New York law selected in half of the contracts." 2017 ICC Dispute Resolution Statistics (2018) ICC Disp Res Bull 61 stating that "The laws of England and USA States remained the most frequent choices, followed by French and Swiss law."; 2015 ICC Dispute Resolution Statistics (2016) ICC Disp Res Bull 9 stating that "English law and the laws of the USA were the most frequent choices, between them accounting for a quarter of all contracts" and that "[i]n those contracts in which the parties chose US laws, their choices covered the laws of 15 states. New York law was chosen in almost 50% of contracts."; According to the 2014 ICC Dispute Resolution Statistics, English law was chosen in 14.1% of cases and US law was chosen in 10.2% of cases, with New York law being the chosen law in 44.4% of the US law cases; According to the 2016 ICC Dispute Resolution Statistics ((2017) ICC Disp Res Bull 98), the laws of

under Swiss Law (III.) and French law (IV.), given that such laws are the two most popular governing laws chosen by parties after English and New York law.[481]

311. The role and scope of good faith will thereafter be examined briefly under the laws of four other Common law legal systems (V.), namely, Canada (to the exclusion of the province of Quebec), Australia, Hong Kong and Singapore as well as under the laws of two other Civil law systems (VI.), namely, Germany, and the People's Republic of China.

312. The role and scope of good faith in Canada is studied as an example of a Common law jurisdiction which has recently recognized a general principle of good faith applicable to the performance of the contract.[482]

313. The role and scope of good faith in Australia is also studied as an example of a Common law country where the application of good faith to the performance of all contracts is gaining increasing acceptance.[483]

314. The role and scope of good faith in the legal systems of both Hong Kong and Singapore is explored as two examples of legal systems following the English

England and the USA remained the most frequent choices of laws chosen by the Parties with New York law being the most popular US law; According to CUNIBERTI, 472–473, English law is the most popular governing law and US law is the third most popular governing law.

481 Queen Mary Survey, Choices, 11, 14 (according to this survey, Swiss law received 8% of the vote whilst French law received 6% of the vote); see also 2020 ICC Dispute Resolution Statistics stating at p. 17 that "The most frequently selected lex contractus was English law with 122 cases (13% of all cases registered), the laws of a US state (104 cases), followed by Swiss law (66 cases), French law (56 cases)."; 2019 ICC Dispute Resolution Statistics at p. 15 stating that: "As in 2018, English law was the lex contractus in 16% of all cases registered. Swiss law was the second most selected applicable substantive law (12%), followed by the laws of a US state and French law (10% each)"; 2018 ICC Dispute Resolution Statistics stating at p. 13 that: " As in previous years, English law was the most selected lex contractus (16% of cases registered in 2018), closely followed by the laws of a US state (12% of cases). The contracts applying the laws of US states referred to the laws of 17 states, with New York law selected in half of the contracts. French and Swiss law also remained frequent choices (in approximately 9% of the cases registered in 2018)"; 2017 ICC Dispute Resolution Statistics (2018) ICC Disp Res Bull 61 stating that "The laws of England and USA States remained the most frequent choices, followed by French and Swiss law."; 2015 ICC Dispute Resolution Statistics (2016) ICC Disp Res Bull 9 stating that: "[o]ther common choices [after English and US law] were the laws of Switzerland, France and Germany."; According to the 2014 ICC Dispute Resolution Statistics, Swiss law and French law were, respectively, the third and fifth most popular laws with Swiss law being chosen in 7.3% of cases and French law being chosen in 6.2% of cases; According to CUNIBERTI, 472–473, Swiss law is the second most popular governing law and French law is the fourth most popular governing law.

482 See below, in this regard, paras. 516 et seq.

483 See below, in this regard, paras. 528 et seq.

law approach with respect to the application of good faith to the performance of the parties' contract[484] and as laws often applied in arbitral disputes involving Asian parties.[485]

315. German law is chosen as a popular governing law[486] and as a law attributing a significant role to good faith.[487] The law of the PRC is chosen as a popular governing law in Asia[488] and due to the fact that there are a significant number of arbitration users in the PRC[489] together with the fact that approximately half of all arbitration users attempt, where possible, to choose the law of their home jurisdiction.[490]

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484 See below, in this regard, paras. 534 et seq. and 539 et seq.

485 Queen Mary, Choices, 14 stating that "there are some generally acceptable governing laws for parties of certain nationalities which will be 'pooled' in negotiations in order to reach an acceptable solution: for example, Hong Kong, Singapore and English law may be acceptable in Asia."; According to CUNIBERTI, 516 at fn 187, parties arbitrating in Singapore and Hong Kong often provide for the application of English law or the law of the seat, namely Singapore or Hong Kong law; In addition, according to the 2018 White & Case International Arbitration Survey: The Evolution of International Arbitration, 2, the SIAC and HKIAC are among the five most popular arbitral institutions and Singapore law is often chosen in disputes administered by the SIAC and Hong Kong law is often chosen in disputes administered by the HKIAC (see < https://siac.org.sg/wp-content/uploads/2022/06/SIAC-AR2021-FinalFA.pdf>, p. 22 and <http://www.hkiac.org/about-us/statistics>, both accessed 1 March 2023).

486 According to the 2015 ICC Dispute Resolution Statistics (2016) ICC Disp Res Bull 9: "Other common choices [after English and US law] were the laws of Switzerland, France and Germany."; According to the 2018 ICC Dispute Resolution Statistics at p. 13, German law was the 5th most popular law. According to the 2014 ICC Dispute Resolution Statistics, German law was the 4th most popular law; According to CUNIBERTI, 472–473, German law is the fifth most popular governing law.

487 See below, paras. 546 et seq.

488 According to the statistics of the HKIAC, 515 arbitrations were filed in 2022 and Hong Kong law was the most commonly chosen governing law of the underlying contract, followed by English law, Jersey law and Chinese law, see <http://www.hkiac.org/about-us/statistics>, accessed 1 March 2023; see further 2016 Statistical Report (2017) ICC Disp Res Bull 98 and 2017 ICC Dispute Resolution Statistics (2018) ICC Disp Res Bull 61 stating that "In China, the laws of the mainland were chosen almost as often as those of Hong Kong."

489 Chapter 1: Introduction, in Wei Sun/Melanie Willems (eds), Arbitration in China (Kluwer Law International 2015) 7, §1.1.2 stating that in 2012, there were over 1500 foreign arbitrations administered by arbitral institutions in the PRC. By comparison, 810 new cases were filed with the ICC in 2017, see 2017 ICC Dispute Resolution Statistics in (2018) ICC Disp Res Bull 52.

490 According to Queen Mary Survey, Choices, 11–12, 44% of corporations said that they choose the law of their home jurisdiction if they are free to do so and 53% of respondents said that the counterparty usually chooses its home jurisdiction.

I. English Law

316. This section sets out the role and content of good faith under English contract law in general (A.) before specifically examining the application of good faith to the pre-contractual stage (B.) and the contractual performance stage (C.).

A. Good faith in general

317. As early as 1766, Lord MANSFIELD famously stated that good faith is the "governing principle […] applicable to all contracts and dealings."[491] Indeed, Lord MANSFIELD was attempting at the time to introduce into English commercial law a general principle of good faith.[492] Similarly, Lord KENYON in 1792 wrote that, "in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith."[493]

318. This was, however, the high watermark of good faith in English contract law.

319. As explained by ATIYAH:

> We should begin by noting that in the latter half of the eighteenth century there were signs of an emerging principle of good faith in contract law. The idea of good faith would, of course, have been completely congruent with the traditional morality, though it needed someone like Lord Mansfield to enunciate and apply the principle in a wide variety of cases. Mansfield began this task, but it was never completed, for the economic liberalism which he also favoured and helped to develop, ultimately proved fatal to anything as paternalistic as a general principle of good faith.[494]

320. Indeed, presently, English contract law does not recognize a generally applicable principle of good faith.[495]

321. Indeed, in the recent Supreme Court decision of *Pakistan International Airline Corporation v Times Travel (UK) Ltd,* Lord BURROWS said:

> [95]…I do not think that this is an appropriate case in which to rely on a general principle of good faith dealing in so far as that would require a court to try to apply a standard of what is commercially unacceptable or unreasonable behaviour. That would be a radical

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491 *Carter v Boehm* (1766) 3 Burr 1905, 1910. This case concerned the recognition of the duty of disclosure in contracts of insurance.

492 Lord MUSTILL in *Pan Atlantic Ins Co v Pine Top Ins Co* [1995] 1 AC 501.

493 *Mellish v Motteux* (1792) Peake 156, 170 E R 113.

494 PATRICK S ATIYAH, The Rise and Fall of Freedom of Contract (Oxford Clarendon Press 1979) 168.

495 See CARTWRIGHT, 61, Section III (1.); BEALE, Chitty, 93, §2-024; WHITTAKER/ZIMMERMANN, surveying the landscape, 39.

> move forward for the English law of contract and the uncertainty caused by it seems unlikely to be a price worth paying.[496]

322. As discussed in more detail below,[497] in addition to the policy objection that the recognition of a general principle of good faith would be contrary to adversary individualism, the autonomy of the parties and the principle of freedom of contract, there are also other objections to the recognition of such a principle including that it would create too much uncertainty and that it would be contrary to the Common law approach to resolve disputes on a case-by-case basis. Moreover, it is argued that English law still manages to achieve more or less the same results as other national laws do by applying the principle of good faith through, what have been coined, "piecemeal solutions".[498]

B. Good faith at the pre-contractual stage

323. Under English law, at the pre-contractual stage, there is no general implied duty of good faith (1.) In addition, an express agreement to negotiate in good faith is generally not considered to be binding (2.). The legal doctrine is, however, divided over whether English law should recognize a general doctrine of good faith which applies to the pre-contractual stage (3.).

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496 [2021] UKSC 40, [2021] 3 WLR. 727, [2021] 3 WLR 727, at [95]. See also *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789; [2017] 1 All E.R. (Comm) 483, at [45] in which MOORE-BICK LJ declared that there is no "general duty of good faith" and that "the recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences and I do not think it is necessary or desirable to resort to it in order to decide the outcome of the present case…In my view the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some "general organising principle" drawn from cases of disparate kinds."

497 See below, paras. 355 et seq.

498 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433, 438 (per Lord BINGHAM); see also ANDREWS, Contract Law, 599–600, §21.21; BRIDGE, good faith, 100; O'CONNOR, 48 referring to the "technical and schematic approach to contract which often produces specific rules to deal with breaches of good faith."; STEYN, 133 referring to the examples of rectification, implication of terms and estoppel by representation and convention; TETLEY, 13–27 referring to equity, misrepresentation, collateral promises, collateral warranties, collateral contracts, mistake, undue influence, duress, warranties, conditions and innominate terms, fundamental breach, waiver and estoppel, fiduciary obligations, and unjust enrichment and restitution.

1. No general implied duty of good faith

324. Under English law, there is no general implied duty of good faith that applies to pre-contractual negotiations.[499] Prevalence is given to the principle of freedom of contract and parties are assumed to know the risks of entering into negotiations, namely, that a certain amount of investment may be wasted if the negotiations do not succeed.[500] Accordingly, a party may break off negotiations even when the contract is about to be signed or conduct negotiations with third parties at the same time without incurring any liability.[501]

325. The only exception to this appears to be in the specific context of public tendering, where there is an implied duty on the invitor to conduct the tendering process in good faith.[502] This encompasses a duty to consider each valid tender, to ignore invalid tenders and not to award the contract ahead of the deadline for submission of the tender.[503]

2. Express agreement to negotiate in good faith generally not binding

326. Recent case law has confirmed that even where the parties have expressly agreed to negotiate the conclusion of a contract in good faith, such an agreement is not binding.[504] This approach is taken because of the view that such a duty is too uncertain as there are no objective criteria by which a court can decide whether a party has acted in compliance with such a duty, and also because a

499 ANDREWS, Contract Law, 22, §2.03; ANDREWS, Contract Rules, 21; BRIDGE, good faith, 107; BEALE, Chitty, 400, §4-254; FURMSTON/TOLHHURST 394, §13.07 & 426–427, §13.92; see also O'CONNOR, 35; for case law confirming this proposition, see *Knatchbull-Hugessen v SISU Capital Ltd* [2014] EWHC 1194 (Comm) [21] (LEGGATT J) and *Cobbe v Yeomans Row Management Ltd* [2006] EWCA Civ 1139, [2006] 1 WLR 2964 [4] (MUMMERY LJ).

500 BEALE, Chitty, 399, §4-253; GOODE, English Law, 3.

501 GOODE, English Law, 3.

502 *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195 (CA) 1202; see also *Fairclough Building Ltd v Port Talbot Borough Council* (1992) 62 BLR 82 (CA); see further ANDREWS, Contract Law, 70, §3.49.

503 *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195 (CA) 1202; see also ANDREWS, Contract Law, 69, §3.48.

504 *Rosalina Investments Ltd & Anor v New Balance Athletic Shoes* (UK) Ltd [2018] EWHC 1014 (QB) [45]–[52]; *Barbudev v Eurocom Cable Management Bulgaria* EOOD [2012] EWCA Civ 548, [2012] 2 All ER (Comm) 963 [43]–[46] and *Charles Shaker v Vistajet Group Holdings SA* [2012] EWHC 1329 (Comm), [2012] 2 All ER (Comm) 1010 [7]; see also ANDREWS, Contract Law, 28, §2.08; ANDREWS, Contract Rules, 16; BEALE, Chitty, 114–115, §2-053 and 345, §4-168.

duty to negotiate in good faith is deemed to be inherently inconsistent with the position of a negotiating party.[505]

327. As famously stated by Lord ACKNER in the House of Lords case of *Walford v Miles*:

> […] the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms […].[506]

328. Notwithstanding the above, if the main agreement is binding, courts may enforce an express ancillary agreement to negotiate in good faith certain outstanding aspects of the transaction, as long as there are objective and clear criteria by which a court can decide whether a party has acted in compliance with such an agreement.[507] In addition, the parties may agree that a party is entitled to recover its costs and expenses incurred in negotiations if they are aborted.[508]

3. Future recognition of a general doctrine of good faith applicable to pre-contractual obligations?

329. ANDREWS considers that the application of a general doctrine of good faith to pre-contractual obligations would not add anything to the existing state of the law given that there are a plethora of existing mechanisms under English law

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505 *Charles Shaker v Vistajet Group Holdings SA* [2012] EWHC 1329 (Comm), [2012] 2 All ER (Comm) 1010 [7].

506 *Walford v Miles* [1992] 2 AC 128 (HL) 138 (Lord ACKNER). See also *Little v. Courage Ltd.* (1994) 70 P&CR 469 (CA) holding that: "Unlike some systems of law, English law refuses to recognise a pre-contractual duty to negotiate in good faith, and will neither enforce such a duty when it is expressly agreed nor imply it when it is not."

507 *Petromec Inc v Petroleo Brasileiro SA Petrobas (No. 3)* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep 121 in which the term to negotiate in good faith the cost of upgrading an oil platform was part of a contract supplementing a complex series of contractual arrangements relating to the purchase, upgrading and hire of an oil production platform. Referring to the *Petromec* case, LEGGATT J in *Knatchbull-Hugessen v SISU Capital Ltd* [2014] EWHC 1194 (Comm) at [23], noted that "notwithstanding the decision of the House of Lords in *Walford v Miles*" it is now generally accepted that a binding contract to regulate the parties' negotiations "may impose an obligation on one or both parties to conduct negotiations in good faith."; see also ANDREWS, Contract Law, 33, §2.12; ANDREWS, Contract Rules, 17; BEALE, Chitty, 114–116, §2-053, 348, §4-172 (stating that a court may also imply a term to negotiate in good faith).

508 *Knatchbull-Hugessen v SISU Capital Ltd* [2014] EWHC 1194 (Comm) at [23] (LEGGATT J).

which deal with instances of unfairness at the pre-contractual stage such as proprietary estoppel, restitution, and tortious misrepresentation.[509] He, moreover, argues that the introduction of such a doctrine would give rise to litigation in cases where large deals break down.[510] Conversely FURMSTON/TOLHURST have argued that expense could be saved by introducing a tort of bad faith negotiation so that pleadings alleging pre-contractual liability would not all "roam through negligent misstatement, promissory estoppel and restitution."[511]

330. The application of a general doctrine of good faith to pre-contractual negotiations which would impose on parties "a duty to have an open mind, to willingly consider the proposals made by the other party, not to take advantage of the other side's willingness and not to withdraw from negotiations on extremely unreasonable grounds" still meets with resistance from English legal scholars as at odds with what should be expected by parties at the pre-contractual stage.[512] Indeed, as stated by ANDREWS, "not […] even a convocation of bishops would wish to subject themselves to this demanding set of criteria."[513]

C. Good faith at the contractual performance stage

331. Although there is no general duty to act in accordance with good faith at the contractual performance stage (1.), the courts of England and Wales will enforce an express contractual obligation to act in good faith (2.). In addition, a contractual duty to act in good faith is implied by law in certain contracts (3.) and a duty to act in good faith may be implied in fact in a particular case (4.). The breach of such express or implied terms to act in accordance with good faith gives rise to certain legal remedies (5.). The future recognition of a general doctrine of good faith applicable to the performance of the contract, however, remains uncertain (6.).

509 ANDREWS, Contract Law, 595, §21.11; see also BEALE, Chitty, 400, §4-254 referring to the "wide range of doctrines and principles that can be deployed by the courts to deal with contraventions of good faith and fair dealing in the pre-contractual period."; GOODE, English Law, 3 referring to the fact that English law does sanction a party who opens negotiations and deceives the other by making false statements or enters into negotiations when he has no intention of ever concluding the contract; O'CONNOR, 36.

510 ANDREWS, Contract Law, 595, §21.12.

511 FURMSTON/TOLHURST, 427–428, §13.95.

512 ANDREWS, Contract Law, 595, §21.12 referring to BERG, 363.

513 ANDREWS, Contract Law, 595, §21.12.

1. No general implied duty of good faith

332. At the contractual performance stage, there is no general duty on the parties to act in good faith.[514]

2. Enforcement of an express contractual duty to act in good faith

333. The courts of England and Wales do, however, recognize and enforce express contractual duties to act in good faith.[515]

334. The Court of Appeal has recently held that an express contractual duty of good faith imposes a "core" requirement on a party to behave honestly. Depending on the contractual context, this duty may be breached by conduct taken in bad faith, which could include conduct which would be regarded as "commercially unacceptable by reasonable and honest people". The Court insisted, however,

514 BEATSON/BURROWS/CARTWRIGHT, 162 stating that "English law does not impose a free-standing duty to perform a contract in good faith."; PEEL, 2–3, §1-004; see also *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472 (Comm) [249] stating that "[t]here is no general doctrine of "good faith" in English contract law." See further *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [27] stating that "in contrast to many civil law jurisdictions and some common law jurisdictions, English law has never recognised a general principle of good faith in contracting."

515 ANDREWS, Contract Law, 34, §2.13; BEALE, Chitty, 116–121, §2-055–§2-060; see also *Unwin v Bond* [2020] EWHC 768 concerning an express duty of good faith in a shareholder's agreement. The High Court held that this duty extended to the majority shareholder's decision to terminate the minority shareholder's employment and required the majority shareholder to deal "fairly and openly" with Mr Minority and have regard to his interests. Failure to give the minority shareholder "fair notice" of the plan to dismiss him or to hear him out or give him a chance to remedy the performance breached the express duty of good faith (notwithstanding the agreed bad leaver provisions); *Health and Case Management Ltd v Physiotherapy Network Ltd* [2018] EWHC 869 (QB) holding that an express clause that the claimant would act in good faith towards the defendant at all times had been violated; *VR Global Partners LP v Exotix Partners LLP* [2017] EWHC 2620 (Comm) concerning a contract for the sale of a loan in which the High Court held that both parties had complied with the following clause: "[CVI and Exotix] shall, and [Exotix] shall procure that [VR] shall, act in good faith towards each other in relation to any unwinding of this transaction." *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch) [237]–[248], [2010] NPC 74 in which it was held that the content of the express obligation of utmost good faith in a share purchase agreement was to adhere to the spirit of the contract and therefore obtain planning consent for the maximum developable area in the shortest possible time; *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch) [86]–[98], [2007] 24 EG 169 concerning an agreement between a claimant developer and the defendant landowners to maximize the development potential of part of the defendants' farm. The High Court held that the express obligation of utmost good faith would be broken if the defendants entered into a proposed agreement to sell to a third party the part of the farm to which the agreement related.

that any further requirements of an express duty of good faith must be capable of being derived as a matter of interpretation or implication from the other terms of the contract.[516]

335. The courts of England and Wales have also enforced express good faith negotiation clauses requiring the parties to negotiate to vary agreed terms in a binding agreement.[517]

336. These express contractual duties to act in good faith are often construed restrictively and have been interpreted as not applying to the whole contract[518] or as only applying to the specific purposes set out in the relevant clause.[519]

516 *Mark Faulkner & Ors v. Vollin Holdings Limited & Ors* [2022] EWCA Civ 1371 at [147]–[243].

517 *Gold Group Properties Ltd v BDW Trading* [2010] EWHC 1632 (TCC) [88]–[91] and *Butters v BBC Worldwide Ltd* [2009] EWHC 1954 (Comm), [2009] BPIR 1315. Both cases concerned a clause obliging the parties, in the event that any provision of their agreement was held to be invalid or unenforceable, to enter into good faith negotiations to substitute a valid or enforceable clause.

518 In *Teesside Gas* v *CATS North Sea* [2019] EWHC 1220 (Comm) [38], certain clauses of the contract in question explicitly provided for a good faith requirement in respect of particular discrete aspects of performance, for example, the right to dispute an invoice in good faith. It was accordingly held that the contract defined exhaustively the extent of any good faith obligations arising under it and that it would be inconsistent with those terms to imply any wider duty of good faith; in addition, in *Portsmouth City Council v Ensign Highways Ltd* [2015] EWHC 1969 (TCC), it was held that the parties' contractual obligation to "deal fairly, in good faith and in mutual co-operation with one another and Interested Parties" in spite of its general wording did not apply to the whole contract. This was because there were a number of other express provisions to act in good faith throughout the contract leading the court to conclude that the parties had agreed that the express terms of good faith should only apply to specific parts of the contract.

519 In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200, [2013] BLR 265 involving a contract for the provision of services to a hospital, the relevant contractual provision provided that "[t]he Trust and the Contractor will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust or, as the case may be, any Beneficiary to derive the full benefit of the Contract." The court held that this obligation meant that the parties should work together honestly but only with respect to achieving the two stated purposes; see also in this regard, BEALE, Chitty, 119–120, §2-059.

3. Implication by law of duty of good faith in certain contracts only

337. Traditionally, under English law, a duty of good faith is only implied *by law* in certain categories of contracts such as insurance contracts, employment contracts, partnerships or those contracts involving fiduciary relationships.[520]

338. In insurance contracts, there is a requirement of utmost good faith.[521] As insurance contracts are based on facts and knowledge which are within the exclusive domain of the party to be insured and given that a proper assessment of the risk could not be made unless such facts were disclosed, there is a positive duty to disclose relevant information flowing from the requirement of utmost good faith in such contracts.[522]

339. In employment contracts, there is an implied term, flowing from good faith, that the employer will not without reasonable and proper cause, conduct itself in a manner calculated to destroy or seriously damage the relationship of confidence between the employer and employee.[523]

340. In partnerships, partners are required to exercise good faith in all that relates to their common business and good faith also requires prospective partners to disclose material facts of which they have knowledge and which the other negotiating parties are not aware of.[524]

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520 See e.g., *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472 (Comm) [249]; *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [131].

521 BEALE, Chitty, 125, §2-065; O'CONNOR, 45.

522 O'CONNOR, 45.

523 *Eastwood v Magnox Electric plc* [2005] 1 AC 503 (HL) [11]; *Johnson v Unisys Ltd* [2003] 1 AC 518 (HL) [24]; *Malik v BCCI* [1998] AC 20 (HL).

524 BEALE, Chitty, 125, §2-065; BEATSON/BURROWS/CARTWRIGHT, 359; see also, *Barber & Ors v Rasco International Ltd & Anor* [2012] EWHC 269 (QB) at [36]: "It is a fundamental principle of partnership law that each partner must act towards each of the other partners in all matters concerning the partnership with utmost good faith. The relationship of each partner to all the other partners is, therefore, a fiduciary one and it requires each partner to act honestly towards the other partners, to be fully accountable and completely transparent to each of them about their involvement in the business of the partnership, to account to all of them for any profit made out of partnership property or at the partner's expense, to share in all losses incurred by the partnership, to use management powers conferred by the partnership honestly and in good faith but not arbitrarily or capriciously and to hold partnerships assets acquired or under that partner's control on trust for the partnership as a whole. These principles, usually referred to compendiously as the duty of utmost good faith, arising from the equitable foundations of partnership law, therefore ensure that each partner must be completely transparent in relation to everything that he does in relation to the partnership business and as to any aspect of the accounts relating to the partnership within his knowledge or control."

341. Furthermore, in contracts involving fiduciary relationships, such as the relationship between a principal and an agent, the agent is obliged to act in accordance with good faith and disclose all material circumstances to its principal.[525] The agent is also obliged not to accept any bribes and not to use its position to acquire a benefit.[526]

4. Implication in fact of a duty of good faith

342. A duty to act in good faith may be implied *in fact* in a given case.

343. The conditions for implying terms in fact are strict: such an obligation must be reasonable and equitable; it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; it must be so obvious that 'it goes without saying'; it must be capable of clear expression; and it must not contradict any express term of the contract.[527]

344. Accordingly, a duty to perform the contract in good faith may be implied in a given case if such conditions are met.[528] Given the implied nature of the duty of good faith, it is open to the parties to modify and even exclude such a duty.[529] In this regard, it should be underlined that a duty to act in good faith will not be implied where it would be inconsistent with the express terms which set out the parties' mutual obligations.[530] As an example, in the *TSG Building Services* case, Justice AKENHEAD refused to imply a term that an unqualified right to serve notice to terminate the contract should be exercised in good faith, even though there was an express clause in that contract requiring the parties to work together in a spirit of trust, fairness and mutual cooperation.[531]

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525 O'CONNOR, 46; *Bristol & West BS v Mothew* [1998] Ch 1, 18 per MILLETT LJ: "The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith."

526 *Ibid*.

527 *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another* [2015] UKSC 72; see also *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2 [5]; see further BEALE, Chitty, 1183–1190, §16-006 to 16-013; MCKENDRICK, Good Faith, 201.

528 BEATSON/BURROWS/CARTWRIGHT, 162.

529 PEEL, 274, §6-079; *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [149].

530 *Bernhard Schulte GmbH & Co K G v Nile Holdings Ltd* [2004] EWHC 977 (Comm), [2004] 2 Lloyd's Rep 352 [113]–[114].

531 *TSG Building Services v South Anglia Housing Limited* [2013] EWHC 1151 stating that "[e]ven if there was some implied term of good faith, it would not and could not circumscribe

345. Traditionally, terms have been implied by the courts which accord with general notions of good faith.

346. Hence, a duty to cooperate in the performance of a contract,[532] and a duty not to unreasonably withhold consent[533] have been implied into contracts. In addition, a duty not to do anything to prevent performance of the contract either by preventing the fulfilment of a condition precedent or doing something which will put an end to a required state of circumstances[534] and a duty to bring onerous or unusual contractual terms to the attention of another party[535] have been implied into contracts.

347. In the *Yam Seng* case, Justice LEGGATT held that an obligation to act in good faith is more likely to be implied in fact in so-called "relational" contracts involving long-term relationships and substantial commitments, such as joint venture agreements, franchise agreements and long-term distributorship agreements.[536] Conversely, such an obligation is less likely to be implied in an arm's

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or restrict what the parties had expressly agreed in Clause 12.3, which was in effect that either of them for no, good or bad reason could terminate at any time before the term of four years was completed. That is the risk that each voluntarily undertook when it entered into the Contract."; see also *Property Alliance Group Ltd v The Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch) [250] in which the court held that a duty of good faith could not be implied as the agreements contained express and standard terms excluding any equitable or fiduciary duties.

532 *Mackay v Dick* (1880-81) LR 6 App Cas 251 (HL) 263 holding that there is an implied duty of cooperation that the buyer will do all that is necessary to ensure that the seller fulfils the contractual terms; see also BEALE, Chitty, 1197–1198, §16-026; see further, in this regard, MCKENDRICK, Good Faith, 199.

533 *Gan v Tai Ping* (Nos 2 & 3) [2001] Lloyd's Rep IR 667 in which it was held that the unqualified right of a reinsurer to withhold its approval of a settlement between insurer and insured was subject to the duty to exercise such right in good faith; see in this regard MCKENDRICK, Good Faith, 199.

534 *Stirling v Maitland* (1864) 5 B&S 840, 852 (Cockburn CJ): "I look on the law to be that, if a party enters into an agreement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative."; see also BEALE, Chitty, 1198–1199, §§16-027.

535 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 (CA); see in this regard MCKENDRICK, Good Faith, 199.

536 *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526, [142] involving a distributorship contract concluded for 3 years in which the court implied a term of good faith in its performance entailing that the party should not knowingly provide false information on which the other party was likely to rely as well as a duty not to undercut duty free prices. See also *TAQA Bratani Ltd v Rockrose UKCS8 LLC* [2020] EWHC 58 (Comm), holding that the joint operating agreements and one unitisation and unit operating agreement in relation to the Brae Fields on the UK Continental Shelf were arguably relational contracts but that this did not assist the original operator who had been

terminated in the case at hand as the parties had expressly agreed for a right of removal which was unqualified; *Cathay Pacific Airways Ltd v Lufthansa Technik AG* [2020] EWHC 1789 holding that a term of good faith may be implied in a relational contract as a matter of law subject to any contrary express term and that the test for incorporation as a matter of law is whether the contract is a long-term contract which requires the parties to collaborate in the future in ways that respects the spirit and the objectives of their joint venture but which the parties have not specified or have been unable to specify in detail. The contract will also involve trust and confidence that each party will act with integrity and co-operatively; a good faith term may be implied as a matter of fact in a relational contact but there is no special rule for incorporation in a relational contract. Each term must be considered against the usual test for implied terms; *Essex CC v UBB Waste (Essex) Ltd* [2020] EWHC 1581 holding that a term of good faith could be implied as the 25 year contract for design, construction, financing, commissioning, operation and maintenance of a mechanical biological waste treatment plant was a relational contract. It was held that whether a party has not acted in good faith is an objective test; that the key question is whether the conduct would be regarded as 'commercially unacceptable' by reasonable and honest people; and what will be required in individual cases depends upon the contractual and factual context; *Bates v Post Office Ltd (no 3)* [2019] EWHC 606 (QB) [711] in which Justice FRASER held as follows: "I consider that there is a specie of contracts, which are most usefully termed "relational contracts", in which there is implied an obligation of good faith." Justice FRASER further set out nine characteristics of relational contracts at [725] and held at [746] that seventeen terms were implied into the contract as a result of the finding that there was an implied obligation of good faith; *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v* Kent [2018] EWHC 333 (Comm) in which a duty of good faith was implied into a joint venture agreement; *Apollo Window Blinds Ltd v McNeil & Anor* [2016] EWHC 2307 (QB) in which the High Court refused to imply a duty of good faith into the parties' franchise agreement which would impose upon the franchisor a duty to remind the franchisee that unless he gives notice to renew there is a risk that the franchisor might allow the contract to end; *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472 (Comm) [250] holding that the mere fact that a contract is a long-term or relational contract is not sufficient to imply a term requiring the parties to perform the contract in good faith and refusing to imply a good faith term as the parties' contract would not lack commercial or practical coherence and holding that such a good faith term could not be implied with respect to the contractual right to terminate holding that "a contractual right to terminate is a right which may be exercised irrespective of the exercising party's reasons for doing so."; *National Private Air Transport Services Company (National Air Services) Ltd v Creditrade Llp & Anor* [2016] EWHC 2144 (Comm) in which it was held that there was no implied term of good faith in an aircraft lease as it was not a relational contract and the lessor was entitled to redelivery in compliance with contractual terms; *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB) holding that there was an implied term that the parties would act with honesty and integrity (i.e., in good faith) in operating the contract which it deemed to be a relational contract par excellence; *Carewatch Care Services Ltd v Focus Caring Services Ltd & Ors* [2014] EWHC 2313 (Ch) in which the High Court refused to imply a duty of good faith into a franchise agreement pointing to the detailed express terms of the latter, the stringent necessity test for implying terms and the fact that it would be inconsistent with some of the express provisions of the agreement; *Bristol Groundschool Ltd v Intelligent Data Capture Ltd & Ors* [2014] EWHC 2145 (Ch) involving an ongoing business relationship

length contract between two sophisticated commercial parties.[537] In addition, it has been submitted that the more demanding the term, the less likely a court will be to imply the term into the contract.[538]

348. An obligation to act in good faith may more readily be implied where a contract confers an absolute discretion on one party.[539] Indeed, it has been held that a party must exercise such discretion honestly, in good faith and not arbitrarily, capriciously, perversely or irrationally.[540]

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producing and selling training manuals for use by various civil aviation agencies. It was held that BGS had breached its duty of good faith by downloading information from IDC's computers; *Acer Investment Management Ltd & Anor v The Mansion Group Ltd* [2014] EWHC 3011 (QB) in which the High Court held that there was no relational contract in that case in an agreement between distributors of financial products and independent financial advisers and that hence a duty to act in good faith could not be implied; *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat) refusing to imply a duty to act in good faith even if the agreement in question had been deemed to be a joint venture agreement.

537 *Greenclose Ltd v National Westminister Bank* [2014] EWHC 1156 (Ch) [150] finding confirmed in *Property Alliance Group Ltd v The Royal Bank of Scotland Plc* [2016] EWHC 3342 (Ch) [250].

538 BEALE, Chitty, 145, §2-089 stating that a court will be more willing to imply a term merely requiring honesty of the parties, as distinct from a term imposing wider or more demanding obligations.

539 BEATSON/BURROWS/CARTWRIGHT, 163; BEALE, Chitty, 125–136, §2-066–§2-079; PEEL, 273, §6-078.

540 *Braganza v BP Shipping Ltd* [2015] UKSC 17; *British Telecommunications Plc v Telefónica O2 UK Ltd and Others* [2014] UKSC 42 at [37]; *Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd* [2008] EWCA Civ 116*;* see also *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718 implying a term in the reinsurance context that the insurer's right to present its reinsurance claims must be exercised in a manner which is not arbitrary, irrational or capricious; *LBI EHF v Raiffeisen Bank International AG* [2018] EWCA Civ 719; *Watson v Watchfinder.co.UK Ltd* [2017] EWHC 1275 (Comm), allowing the claimant's claim for specific performance of a share option agreement as the defendant had an implied duty not to exercise its discretion, in respect of consent to the option agreement, unreasonably, capriciously or arbitrarily; *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2015] EWHC 283 (Comm) [97]; *Bluewater Energy Services BV v Mercon Steel Structures BV & Ors* [2014] EWHC 2132 (TCC); *Brogden & Anor v Investec Bank Plc* [2014] EWHC 2785 (Comm); *Cf Dennis Edward Myers & anr v Kestrel Acquisitions Ltd & ors* [2015] EWHC 916 (Ch) in which the High Court refused to imply an obligation of good faith into a term allowing the modifications of loan notes, highlighting that there was nothing to suggest that any modifications should be limited by such a good faith obligation, in particular, given the fact that the relevant documents were detailed and had been professionally prepared; *Greenclose Ltd v National Westminister Bank* [2014] EWHC 1156 (Ch) in which it was pointed out that the context is vital in deciding whether such an obligation will be implied. Indeed, a discretion given to the board of directors of a company to award bonuses to its employees may be more readily susceptible to such implied restrictions on its

349. The content of an implied obligation to act in good faith depends heavily on the context of the particular case.[541] The test of good faith is objective as it depends on whether, in the particular context, the conduct would be regarded as commercially unacceptable by reasonable and honest people.[542] It has been held to include a core minimum obligation to act honestly,[543] a duty to comply with standards of commercial dealing which are generally accepted and a duty to adhere to the parties bargain.[544] In cases involving relational contracts, it has been suggested that the obligation to act in good faith could imply a duty to disclose information as these contracts import expectations of loyalty and require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence.[545] It does not, however, normally require a party to surrender contractual rights[546] or to subordinate its own interest to the

exercise than a discretion given to a commercial party to act in its own commercial interests. See further MCKENDRICK, Good Faith, 200.

541 *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [141]; see also *Greenclose Ltd v National Westminister Bank* [2014] EWHC 1156 (Ch) [150]; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200 [109]. See further MCKENDRICK, Good Faith, 203.

542 *Bates v Post Office Ltd (no 3)* [2019] EWHC 606 (QB) [711]; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200 [150], [196]. See further MCKENDRICK, Good Faith, 203.

543 *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [135]–[140]; see also *Astor Management AG & Anor v Atalaya Mining Plc & Ors* [2017] EWHC 425 (Comm) [98]–[99]: "A duty to act in good faith, where it exists, is a modest requirement. It does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people. This is a lesser duty than the positive obligation to use all reasonable endeavours to achieve a specified result which the contract in this case imposed."; *T and L Sugars Ltd v Tate and Lyle Industries Ltd* [2015] EWHC 2696 (Comm) at [152]: "while it would be right to imply a term that the Defendant would act in good faith and honestly in carrying out the process envisaged in clauses 3.7.1 and 3.7.3 (concerning the transfer of Future Contracts to the claimant), there is no proper basis for the implication of the very much more onerous term for which the claimant argues (namely that the defendant was obliged to make an assessment and to ensure that it was only legitimate Future Contracts that were transferred)."; *Bristol Groundschool Ltd v Intelligent Data Capture Ltd & Ors* [2014] EWHC 2145 [196]; *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200 [109]. See further MCKENDRICK, Good Faith, 202–203.

544 *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [135]–[139]; MCKENDRICK, Good Faith, 202, 204.

545 *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [142]; MCKENDRICK, Good Faith, 203.

546 *BP Gas Marketing Ltd v La Societe Sonatrach & Anor* [2016] EWHC 2461 (Comm) [401].

interests of the other parties.[547] Indeed, it is not an external standard imposed by law on the parties.[548]

5. Legal remedies for breach of an express or implied good faith term

350. In case of a breach of an express obligation to act in good faith or an implied obligation to act in good faith, as for the case of any contractual violation, the usual remedy will be damages,[549] and potentially, a right to terminate the contract depending on whether the obligation is classed as a condition, warranty or innominate term.[550]

351. If the obligation is considered to be a condition i.e., one of the most important terms of the contract, the aggrieved party can treat the contract as repudiated and claim damages.[551] If the obligation is considered to be a warranty, i.e. a less important term, the aggrieved party can only claim damages.[552] If the obligation is considered to be an innominate term, the aggrieved party may terminate the contract as well as claim damages if the breach is considered to be sufficiently serious.[553]

352. In some cases, the courts have awarded equitable remedies. Hence, in *Berkeley Community Villages Ltd v Pullen*, the claimant was a property developer who agreed to assist the owners of some farmland in promoting the land and trying to get planning consent for its residential development. The developer spent a lot of time and effort in promoting the land. As a result, the prospects of

547 *Hamsard 3147 Ltd (t/a Mini Mode Childrenswear) & Anor v Boots UK Ltd* [2013] EWHC 3251 (Pat) [86]; MCKENDRICK, Good Faith, 206.

548 MCKENDRICK, Good Faith, 206.

549 With respect to the right to claim damages in case of a breach of contract, see PEEL, 1110, §20-002.

550 With respect to the right to terminate depending on whether the term is classified as a condition or warranty, see PEEL, 981 et s., §18-043 et seq.

551 BEALE, Chitty, 1986, §27-013; PEEL, 981, §18-043; see for example *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [173], [192], where it was held that ITC was in repudiatory breach of the Agreement by knowingly giving false information to Yam Seng aware that the latter would rely on this information (contrary to the implied duty of honesty in the provision of information) entitling Yam Seng to terminate the Agreement and to damages for wasted expenditure; see also *D&G Cars Ltd v Essex Police Authority* [2015] EWHC 226 (QB) in which the court held that the defendant was entitled to treat the contract as repudiated given the serious breach of both the implied term of honesty and in particular integrity and also the express terms relating to the Defendant's instructions for disposal and not retaining vehicles for the Claimant's own use.

552 BEALE, Chitty, 1986, §27-013 and 1990, §27-020; PEEL, 981, §18-043.

553 BEALE, Chitty, 2002, §27-037 and 2004–2006, §27-042–27-043; PEEL, 989–990, §18-052.

obtaining planning consent were significantly improved and the land became much more valuable. However, the landowners decided to sell the land before planning consent had been obtained, and therefore before the developer had become entitled to be paid a fee for its work. The developer was awarded an injunction by the court to prevent the sale, whilst its agreement with the landowners was still in force, on the ground that the sale would be a breach of the express clause requiring the parties to act with the utmost good faith.[554]

6. Future recognition of a doctrine of good faith?

353. As noted by MCKENDRICK, "[t]he reluctance of English contract law to recognize a doctrine of good faith is both well-known and well documented."[555]

354. In the *Yam Seng* case, Justice LEGGATT noted that English law seems to be "swimming against the tide" in failing to recognize a general principle of good faith which is recognized by most Civil law systems.[556] He noted that the general concept of good faith has been introduced into English law through the implementation of EU directives which use this concept (see, for example, the Unfair Terms in Consumer Contracts Regulations 1999) and that many European harmonization efforts, such as the Lando Commission PECL, also include this concept.[557] He further noted that the principle has been recognised in other Common law jurisdictions such as the US (see, for example, Section 1-203 UCC) and has been gaining ground in other Common law jurisdictions such as Canada and Australia.[558]

355. One of the first objections to the recognition of such a doctrine of good faith is that the content of a general principle of good faith would be too vague and subjective and would create too much uncertainty as it would require difficult inquiries into the contracting parties' reasons.[559] Indeed, under English law, predictability is favoured over achieving justice in a particular case.[560] Justice LEGGATT, however, argued in the *Yam Seng* case that the application of a duty of

554 *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch), [2007] 3 EGLR 101 [142].

555 MCKENDRICK, Good Faith, 196.

556 *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [124]. See also in this regard MCKENDRICK, Good Faith, 198.

557 *Ibid.*

558 *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [124]. See also in this regard MCKENDRICK, Good Faith, 198.

559 ANDREWS, Contract Law, 595–596, §21.13; BROWNSWORD, 16–18; CARTWRIGHT, 63, Section III(1.); MCKENDRICK, Good Faith, 197; *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [123].

560 GOODE, English Law, 4.

good faith creates no more uncertainty than is already inherent in the process of contractual interpretation.[561]

356. A further objection to the recognition of such a principle is policy based and is based on the prevalence given to adversary individualism, whereby parties are free to pursue their own self-interest when performing a contract, as well as the objection that it would be contrary to the autonomy of the parties and the principle of freedom of contract to recognize such a principle.[562] Justice LEGGATT, however, argued in the *Yam Seng* case that where a duty of good faith is implied, it is done on the basis of the presumed intention of the parties and thus "its recognition is not an illegitimate restriction on the freedom of the parties to pursue their own interests."[563] In addition, it has been submitted that the primacy of adversarial individualism does not apply in non-adversarial contexts and may even be contrary to individual and collective economic well-being.[564]

357. The other reasons cited for the reluctance of the courts to recognize this principle are structural. Indeed, the Common law approach is to resolve disputes on a case-by-case basis rather than applying broad overarching principles.[565] It has been pointed out, however, that the implication of a duty of good faith in fact is heavily dependent on the context and is established through an interpretation of the contract and is therefore consistent with the case-by-case approach of the Common law.[566]

358. The precedential value of the *Yam Seng* case is limited given that it was a first instance judgment and that the analysis concerning good faith was a respectful

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561 *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [152].

562 ANDREWS, Contract Law, 595–596, §21.13; BROWNSWORD, 15–16, 18; GOODE, English Law, 1–2 stating that "[t]he attitude of the old common law judges was that life in the business world is rough and tough and you should not get into it if you do not what you are doing"; MCKENDRICK, Good Faith, 197; *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789; [2017] 1 All E.R. (Comm) 483, at [45] in which MOORE-BICK LJ stated that "There is…a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement."; *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [123].

563 *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [148].

564 BROWNSWORD, 38.

565 *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [123]; see also CARTWRIGHT, 62, Section III(1.) and MCKENDRICK, Good Faith, 197.

566 *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 Lloyd's Rep 526 [147].

suggestion as well as *obiter dicta* in the case concerned.[567] In addition, it has subsequently been distinguished more often that it has been accepted.[568] MCKENDRICK suggests that there are three approaches that may be followed in light of the *Yam Seng* case.[569] The first is that the recognition of a general principle of good faith will be rejected; the second is that such a principle will be recognized but will be organizational in nature and not lead to any change in the substantive law; the third is that such a principle will be recognized and that it will lead to a change in the substantive content of the rules of English contract law.[570] In the author's view, it is most likely that the recognition of a general principle of good faith will either be rejected or, if it is recognized, it will only be organizational in nature and will not lead to any change in the substantive law. Indeed, as we have seen, the Supreme Court has recently stated that the recognition of a general principle of good faith would be a radical move and would cause too much uncertainty.[571]

359. ANDREWS advocates against the recognition of such a general principle at the performance stage due to the fact that it would lead to uncertainty by provoking litigation.[572] Other commentators have also argued that a general doctrine of good faith would be inappropriate as it would not recognize that every contractual situation is not alike.[573]

360. Many commentators also question whether the recognition of such a general principle would in any event change anything. As argued by ANDREWS, it is unlikely that the courts would use it to overrule the case law holding that a party is not obliged to point out the other side's misapprehension on the nature of the subject matter of the contract.[574] Furthermore, despite not recognizing a general

567 MCKENDRICK, Good Faith, 204.

568 *Idem*, 205.

569 *Idem*, 208.

570 *Ibid*.

571 See above, para. 321.

572 ANDREWS, Contract Law, 599, §21.20. See also *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789 [45] (MOORE-BICK LJ): "In my view the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in this case called some "general organising principle" drawn from cases of disparate kinds. […]. There is in my view a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement."

573 BROWNSWORD, 20; STEYN, 140 stating that "I am not persuaded that generalized duties of good faith are useful across the spectrum of contractual relations. There are so many varieties of contract. In some contexts, good faith and fair dealing have no significant role to play. Such is the case, for example, in many commercial contracts where one is not concerned with fault but simply with an allocation of the risks of a particular undertaking or enterprise."

574 ANDREWS, Contract Law, 599–600, §21.21.

doctrine of good faith, English law "is not the hard-hearted Dickensian ogre which [one] would at first sight [be] led to believe"[575] as it still manages to achieve more or less the same results as other national laws do by applying the principle of good faith through what have been coined "piecemeal solutions".[576] As one author has noted, "the foundation of a general rule of good faith can be discerned in the common law dust."[577]

361. On the other hand, other commentators argue that a general principle or doctrine of good faith would allow problems of bad faith to be addressed in a clear and head-on fashion and would allow judges to deal in a coherent and effective way with instances of unfair dealing.[578] It would also be in line with the protection of the parties' reasonable expectations and would contribute to an environment of trust and cooperation which would enhance the autonomy of contractors and which – it is argued – is a significant feature of successful economies.[579]

575 WHITTAKER/ZIMMERMANN, surveying the landscape, 45.

576 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433, 438 (per Lord BINGHAM). See also ANDREWS, Contract Law, 599–600, §21.21; BRIDGE, good faith, 100; O'CONNOR, 48 referring to the "technical and schematic approach to contract which often produces specific rules to deal with breaches of good faith."; STEYN, 133 referring to the examples of rectification, implication of terms and estoppel by representation and convention; TETLEY, 13–27 referring to equity, misrepresentation, collateral promises, collateral warranties, collateral contracts, mistake, undue influence, duress, warranties, conditions and innominate terms, fundamental breach, waiver and estoppel, fiduciary obligations, as well as unjust enrichment and restitution.

577 MALCOM CLARKE, The Common Law of Contract in 1993: Is There a General Doctrine of Good Faith? (1993) 23 Hong Kong Law Journal 318, 319.

578 BROWNSWORD, 32.

579 *Ibid*. See further KLAUS PETER BERGER/THOMAS ARNTZ, Good faith as a 'general organising principle' of the common law (2016) 32 Arb Intl 167–178 who advocates in favour of English law recognizing an organizing principle of good faith.

II. US (New York) Law

362. This section explores the role of good faith under US contract law and, in particular, under New York contract law (A.). The role of good faith will be examined at both the pre-contractual stage (B.), and the contractual performance stage (C.). Thereafter, the attempts by the US legal doctrine to rationalize good faith will be discussed (D.).

A. Good faith in general

363. Although the implied covenant[580] of good faith and fair dealing had been recognised by a few jurisdictions in the US in the early 20th century, it was not until the adoption of the UCC in the 1950s, that this covenant became widespread.[581]

364. Interestingly, good faith was introduced into the UCC due to the influence of the German *Treu und Glauben* doctrine through Professor Karl Llewellyn who was the Chief Reporter for the UCC and a former professor from Leipzig in Germany.[582]

365. Section 1-304 UCC provides that "[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement."[583]

366. Good faith is defined in Section 1-201(20) UCC as "honesty in fact and the observance of reasonable commercial standards of fair dealing".[584]

367. Section 205 Restatement (Second) of Contracts (adopted in 1979 and published in 1981) further declares that "every contract imposes upon each party a duty of

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580 The term 'covenant' under US law means "a formal agreement or promise, usually in a contract or deed, to do or not do a particular act; a compact or stipulation" whilst an 'implied covenant' is defined as "a covenant that can be inferred from the whole agreement and the conduct of the parties – Also termed covenant in law" (BRYAN A GARNER (ed) Black's Law Dictionary (10th edn 2014) 443). Historically, a covenant was a promise contained in a deed (a written document including a seal) and was binding even if not supported by consideration, see the definition of 'deed' in JONATHAN LAW (ed), A Dictionary of Law (9th edn Oxford University Press 2018).

581 BURTON, History and Theory, 211, 213.

582 See in this regard, JAMES Q WHITMAN, Note, Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code (1987) Yale Law School Faculty Scholarship Series, 156–175. See also FARNSWORTH, Good Faith, 51–52.

583 The UCC is available at <https://www.law.cornell.edu/ucc/1/1-304>, accessed 1 March 2023.

584 *Ibid*.

good faith and fair dealing in its performance and enforcement."[585] Examples of bad faith given in the Restatement include "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of the power to specify terms, interference with the other party's performance or failure to cooperate."[586]

368. Accordingly, today, the recognition of an implied covenant of good faith and fair dealing is widespread in contract law across the US.[587]

369. Given the prevalence of New York law as the law applicable to the contract in international commercial arbitrations,[588] this section will focus, in particular, on the implied covenant of good faith and fair dealing under New York law.

370. In this regard, it is interesting to note that the implied covenant of good faith and fair dealing recognized by New York law is touted as one of the benefits of choosing New York law as the law applicable to a contract.[589]

371. A claim for breach of the implied covenant of good faith and fair dealing is an ancillary claim to a breach of contract claim.[590] Notwithstanding this ancillary nature, such claims have been held to be arbitrable by the New York courts.[591]

B. Good faith at the pre-contractual stage

372. At the pre-contractual stage, there is no general implied duty to act in good faith under New York law (1.). An express agreement to negotiate in good faith may

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585 Section 205 of the Second Restatement of Contracts is available at <http://www.lex-inter.net/LOTWVers4/duty_of_good_faith_and_fair_dealing.htm>, accessed 1 March 2023.

586 *Ibid*.

587 See in this regard BURTON, History and Theory, 210 who states that hardly a complaint is filed stating a claim in contract without including an allegation of bad faith but that most of these claims are rejected by the courts.

588 See above, para. 310.

589 New York State Bar Association (Dispute Resolution Section/International Section), Choose New York Law for International Commercial Transactions, 9, available at < https://archive.nysba.org/Sections/Dispute_Resolution/Dispute_Resolution_PDFs/Choose_New_York_Law_For_International_Commercial_Transactions.html.>, accessed 1 March 2023.

590 CARTER/FELLAS, 105 et s., §4.49 et s.

591 *Circus Prods., Inc. v Int'l Impresarios*, No. 90 Civ. 0414, 1990 WL 55684 at [3] (SDNY 1990): "Any dispute over the implied covenant of good faith in a contract is, by its nature, a dispute regarding that contract. Thus, where, as in the instant case, disputes arising out of a contract are arbitrable, then a disagreement regarding the covenant of good faith is arbitrable."; CARTER/FELLAS, 105, §4.48.

be enforceable as long as the parties have agreed on the essential terms of the contract (2.).

1. No general implied duty to act in good faith

373. Under New York law, there is no general implied duty on negotiating parties to act in good faith at the pre-contractual stage.

374. Indeed, as the covenant of good faith and fair dealing is an implied term of a contract, there must be a contract in order for this covenant to come into play.[592]

375. This approach is supported by the view that parties are wary of each other during negotiations and, accordingly, are not deceived when the other party is not completely forthcoming during this stage.[593]

2. Enforceability of an express agreement to negotiate in good faith if agreement on essential terms

376. Notwithstanding, an express agreement to negotiate in good faith will be enforceable as long as the parties have agreed on the essential terms of the contract.[594]

377. Conversely, when the parties have not agreed on a material term in the written preliminary agreement, and there is no indication of their intent regarding that

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592 See e.g., *Keefe v New York Law School*, 71 AD3d 569, 570 (1st Dept 2010): "Absent the existence of a contract, a claim alleging breach of the implied covenant of good faith and fair dealing is legally unavailing."; *Schorr v Guardian Life Ins. Co. of Am*., 44 AD3d 319, 843 NYS2d 24 (1st Dept 2007); *Cyber Media Group Inc. v Island Mortgage Network Inc* 183 FSupp2d 559 (EDNY 2002); *Core Development Group LLC v Spaho*, 199 AD3d 447, 157 NYS3d 416 (1st Dept 2021); see also CARTER/FELLAS, 106, §4.50.

593 Judge POSNER in *Market Street Associates Ltd. Partnership v. Frey*, 941 F2d 588, 594 (7th Cir 1991): "Before the contract is signed, the parties confront each other with a natural wariness. Neither expects the other to be particularly forthcoming, and therefore there is no deception when one is not."

594 *Atla-Medine v Crompton Corp* 2001 WL 1382592 (SDNY 2001) at [5]: "New York law disfavors agreements to negotiate in good faith, and enforces them only where the parties have agreed to the "essential terms" of the contract."; see also *Teachers Insurance & Annuity Association v. Tribune Co.,* 670 FSupp 491 (SDNY 1987); *Teachers Ins. & Annuity Ass'n v. Butler,* 626 FSupp 1229 (SDNY 1986); BANKS, 24.

term, a provision obligating the parties to negotiate that term in good faith may be viewed as a mere agreement to agree which is too uncertain to be enforced.[595]

378. The purpose of an obligation to negotiate in good faith is to give the parties an assurance that the transaction will only break down in case of a genuine disagreement.[596]

379. If there is a valid agreement to negotiate in good faith, negotiations are conducted in good faith if they "encompass an honest articulation of interests, positions or understandings."[597]

380. A party may thus breach this duty if it makes an affirmative misstatement or fails to make a disclosure necessary to correct what it knows to be a mistaken belief of the other party.[598]

381. A party may also breach a valid obligation to negotiate in good faith if it: (i.) insists on different terms than those set out in the preliminary agreement; [599] (ii.)

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595 *L-3 Communications Corp. v. OSI Systems, Inc.,* 2004 WL 42276, (SDNY 2004) at [10]: "Where a material term is left open for negotiation in a preliminary agreement, and there is no 'indication of the parties' intent regarding that term, a provision obligating the parties to negotiate that term in good faith is a mere 'agreement to agree,' which is too indefinite to be enforced."; *Ward v. Pricecellular Corp.,* 1991 WL 64043, (SDNY 1991) at [6]: "If an agreement leaves a material term open for negotiation and provides no indication of the parties' intent regarding that term, a provision obligating the parties to negotiate that term in good faith is a mere "agreement to agree," which is too indefinite to be enforced."

596 *Gas Natural Inc v Iberdrola SA*, 33 FSupp3d 373, 382 (SDNY 2014).

597 *L-7 Designs Inc v Old Navy LLC* 2013 WL 4569979 (SDNY 2013) at [307]; *Penguin Grp. (USA) Inc. v Steinbeck*, No. 06 Civ. 2348 (GBD), 2009 WL 857466 at [2] (SDNY 2009).

598 *Gas Natural Inc v Iberdrola SA*, 33 FSupp3d 373, 384–385 (SDNY 2014): "Whether the duty of good faith obligated Defendants to disclose that they had received competing offers–or at least correct Plaintiff's alleged misunderstanding that it was the only interested party–presents a closer question. Good faith, to be sure, "requires honesty in fact." […]. At the same time, however, in order to show a breach of the duty of good faith, Plaintiff must plausibly allege "some 'deliberate misconduct'—arbitrary or capricious action taken out of spite or ill will or to back out of an otherwise binding contractual commitment." […]. If the Complaint alleged that Defendants affirmatively misrepresented their intent to seek other bids or the presence of interested third parties, then the outcome of the case might be different." The Court went on to hold that the duty of good faith did not require Defendants to negotiate exclusively with Plaintiff, disclose the existence of competing offers, or correct any mistaken belief that it was the only party interested in purchasing New Hampshire Gas.

599 *Teachers Ins and Annuity Ass'n of America v Ormesa Geothermal* 791 FSupp 401, 415 (SDNY 1991): "Ormesa breached its duty to negotiate in good faith to resolve the issues left open by the Commitment Agreement. By, among other things, insisting upon a lowered interest rate, Ormesa attempted to change and undercut terms that had been agreed to in the Commitment letter. By using as a pretext that TIAA's Commitment Letter had expired and that TIAA had "walked from the deal" on July 15, Ormesa further manifested its failure to

advances a reason, which although consistent with the preliminary agreement, is a pretext for walking away from the negotiations;[600] or (iii.) negotiates outside the framework set forth in the preliminary agreement.[601]

382. A party further breaches the obligation to negotiate in good faith if it renounces or renegotiates the deal, abandons the negotiations, attempts to scuttle the deal or to take advantage of expenditures made by the other side to advance the project.[602]

383. If the preliminary agreement obliges the parties to pursue a transaction on an exclusive basis, then negotiating with other parties may also constitute a breach of the obligation to negotiate in good faith.[603]

384. In order to state a claim for failure to negotiate in good faith, the plaintiff must allege the specific instances or acts that constituted the breach as generalized allegations are inadequate.[604]

385. A party does not, however, breach the obligation to negotiate in good faith if it pursues its own interest or does not agree to the other's demands for legitimate

negotiate in good faith."; *QT Infrastructure Ltd. v. Smith* 861 FSupp2d 220, 231 (SDNY 2012): "As I have found it plausible that the LOI was a Type II agreement, the obligation to negotiate in good faith did not expire on September 8, 2010, and thus the imposition of a new condition in October could violate that obligation."; *Cambridge Capital LLC v Ruby Has LLC*, 2021 WL 4481183 (SDNY 2021); BANKS, 26.

600 *Ibid*.

601 *Network Enterprises Inc. v APBA Offshore Productions Inc* 264 Fed Appx 36, 39 (2d Cir 2008): "The ROR imposed the obligation to negotiate in good faith within its general framework toward the contractual goal it contemplated. […]. Negotiating outside of that framework did not discharge defendants' duty to negotiate within it as well."

602 *L-7 Designs Inc v Old Navy LLC* 2013 WL 4569979 (SDNY 2013) at [308]: "[…] a party acts in bad faith if it "renounce[s] the deal, abandon[s] the negotiations, or insist[s] on conditions that do not conform to the preliminary agreement." […] Thus, "trying to scuttle the deal" or to take advantage of expenditures made by the other side to advance the project may constitute bad faith, depending on the circumstances."; see also *Garda USA, Inc. v Sun Capital Partners, Inc*., 194 AD3d 545, 149 NYS 3d 37 (1st Dep't 2021); *Cambridge Capital LLC v Ruby Has LLC*, 2021 WL 4481183 (SDNY 2021).

603 *180 Water Street Associates L.P v Lehman Bros Holdings Inc* 7 AD3d 316, 317 (1st Dept 2004): "However, because the letter required the parties to negotiate in good faith and only with each other toward a final lease, and to do so on an exclusive basis, plaintiff's allegation that defendant was negotiating with other landlords from the beginning suffices to state a cause of action for breach of an agreement to negotiate."; BANKS, 26.

604 *Garda USA, Inc. v Sun Capital Partners, Inc*., 194 AD3d 545, 149 NYS 3d 37 (1st Dep't 2021); *Cambridge Capital LLC v Ruby Has LLC*, 2021 WL 4481183 (SDNY 2021).

business reasons.[605] Indeed, if the parties fail to reach a final agreement after making a good faith effort to do so, the parties have no further obligations.[606]

386. A breach of a valid obligation to negotiate in good faith entitles the aggrieved party to claim the expenses incurred as damages.[607] Generally, damages based on the benefit of the contract that was the subject of the negotiations are not recoverable.[608] Expectancy damages, however, may be recoverable if the plaintiff can prove that, but for the defendant's bad faith, the parties would have entered into the agreement that they were negotiating.[609] Furthermore, if the parties entered into a binding agreement to carry out a transaction and to prepare a definitive contract to embody that agreement, a breach of the duty to negotiate in good faith the remaining open terms may allow the non-breaching party to recover, as damages, the benefit of the transaction contemplated by the parties.[610] If both parties failed to negotiate in good faith towards the

605 *L-7 Designs Inc v Old Navy LLC* 2013 WL 4569979 (SDNY 2013) at [307]: "a party does not act in bad faith merely because, in the end, it refuses to capitulate to the other side's demands […] self-interest is not bad faith […]. Acting in one's financial self-interest, for example, in response to market changes, does not constitute bad faith."

606 *Main Street Baseball LLC v Binghamton Mets Baseball Club Inc* 103 FSupp3d 244, 255 (NDNY 2015).

607 *PA Holdings Ltd v Arthur D Little Inc*. 2000 WL 1335007 (SDNY 2001); *In re 131 Liquidating Corp*., 44 FSupp2d 552, 554–555 (SDNY 1999) (holding that damages should be limited to the amount that it expended in reliance on the debtor's promise of exclusive negotiations); *Venture Associates Corp. v. Zenith Data Systems Corp*., 96 F3d 275, 278 (7th Cir 1996) (holding that the party led on by the other's bad faith can only recover his reliance damages, namely, the expenses it incurred by being misled into continuing to negotiate futilely); BANKS, 365.

608 *Goodstein Const Corp v City of New York* 80 NY2d 366, 273, 590 NYS2d 425, 429, 604 NE2d 1356 (NY 1992): "Here, the City's sole obligation under the letters of January 29, February 1, and June 2, 1982 was to negotiate in good faith. The City was neither bound to agree to an LDA nor to continue the negotiating process. To allow the profits that plaintiff might have made under the prospective LDA as the damages for breach of the exclusive negotiating agreements would be basing damages not on the exclusive negotiating agreements but on the prospective terms of a nonexistent contract which the City was fully at liberty to reject. It would, in effect, be transforming an agreement to negotiate for a contract into the contract itself."

609 *Venture Associates Corp. v. Zenith Data Systems Corp*., 96 F3d 275, 278 (7th Cir 1996): "if the plaintiff can prove that had it not been for the defendant's bad faith the parties would have made a final contract, then the loss of the benefit of the contract is a consequence of the defendant's bad faith, and provided that it is a foreseeable consequence, the defendant is liable for that loss – liable that is, for the plaintiff's consequential damages." Confirmed in *PA Holdings Ltd v Arthur D Little Inc*, 2001 WL 1335007 (SDNY 2001).

610 *Teachers Ins and Annuity Ass'n of America v Ormesa Geothermal* 791 FSupp 401, 415 (SDNY 1991) (concerning a case where a prospective borrower was held to have breached its

implementation of a binding agreement, the overall damages can be apportioned in proportion to each party's responsibility for the breakdown of the negotiations.[611]

C. Good faith at the contractual performance stage

387. An implied covenant of good faith and fair dealing has been recognised under New York law since the early part of the 20th Century (1.). The content of this implied covenant of good faith and fair dealing (2.), the limits on its application (3.) and the legal remedies awarded in case of the violation of this covenant (4.) will be discussed in turn.

1. Recognition of the implied covenant of good faith and fair dealing

388. The New York courts were the first courts in the US to recognize the implied covenant of good faith and fair dealing in contracts.[612] The most cited early case is that of *Kirke La Shelle v Paul Armstrong* of 1933,[613] in which the New York Court of Appeals held that an implied covenant of good faith and fair dealing exists in every contract which prevents a party from doing anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.[614]

389. In 1962, New York adopted the UCC. Section 1-304 NYUCC (added effective 17 December 2014) provides that "every contract or duty within the UCC imposes an obligation of good faith in its performance and enforcement." Section

duty to negotiate in good faith the issues left open by the preliminary commitment agreement and in which the District Court held that the lender was entitled to damages equal to the discounted present value of incremental interest income the lender would be expected to lose as a result of the breach).

611 *Teachers Ins. And Annuity Ass'n of America v Coaxial Communications of Cent. Ohio, Inc*. 799 FSupp 16 (SDNY 1992).

612 See *New York Central Iron Works Co v United States Radiator Co*, 174 NY 331, 335 (1903), in which the Court of Appeals stated that "[b]oth parties in such a [sales] contract are bound to carry it out in a reasonable way. The obligation of good faith and fair dealing towards each other is an implied concept of this character. […] the plaintiff was not acting reasonably or in good faith but using the contract for a purpose not within the contemplation of the parties; that is to say for speculative as distinguished from regular and ordinary business purposes".

613 *Kirke La Shelle Company v. The Paul Armstrong Company et al*. 263 NY 79; 188 NE 163; 1933 NY. See in this regard, BANKS, 201–202 and BURTON, History and Theory, 210.

614 *Kirke La Shelle Company v. The Paul Armstrong Company et al*. 263 NY 79, 87; 188 NE 163; 1933 NY.

1-201(b)(20) NYUCC defines good faith as "honesty in fact in the transaction or conduct concerned". Section 2-103(1)(b) NYUCC provides that in a case involving a merchant, good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."[615]

390. An obligation of good faith is hence implied in every contract subject to the NYUCC[616] and a covenant of good faith and fair dealing is also implied generally in every contract subject to New York law.[617] However, whilst the implied covenant of good faith and fair dealing under New York law may be disclaimed,[618] the obligation of good faith under the NYUCC cannot be disclaimed although standards for the performance of the obligation may be agreed upon as long as they are not manifestly unreasonable.[619]

2. Content of the implied covenant of good faith and fair dealing

391. The covenant of good faith and fair dealing implies into a contract "any promises which a reasonable person in the position of the promisee would be justified in understanding were included."[620]

392. This encompasses a pledge that neither party shall do anything which would have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.[621]

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615 See https://www.nysenate.gov/legislation/laws/UCC, accessed 1 March 2023.

616 *Medinol Ltd v Boston Scientific Corp*, 346 FSupp2d 575, 625 (SDNY 2004).

617 See e.g., *511 West 232nd Owners Corp v Jennifer Realty Co* 98 NY2d 144, 153 (2002); see also BANKS, 200.

618 *Commerzbank AG v US Bank National Association*, 277 FSupp3d 483 (SDNY 2017).

619 See Section 1-302(b) NYUCC which provides as follows: "The obligations of good faith, diligence, reasonableness, and care prescribed by this act may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever this act requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement."

620 *Dalton v Educational Testing Service*, 87 NY2d 384, 389, 639 NYS2d 977, 979, 663 NE2d 289, 291 (1995); *511 West 232nd Owners Corp v Jennifer Realty Co* 98 NY2d 144, 153, 746 NY 2d 131, 773 NE2d 496 (2002); *Rowe v. Great Atl. & Pac. Tea Co*., 46 NY2d 62, 69 (NY 1978). See also BANKS, 205–206.

621 *Dalton v Educational Testing Service*, 87 NY2d 384, 389, 639 NYS2d 977, 979, 663 NE2d 289, 291 (1995); *Rooney v Slomowitz* 11 AD3d 864, 867, 784 NYS2d 189 (3rd Dept 2004) and *Kirke La Shelle Co v Paul Armstrong* Co, 263 NY 79, 87, 188 NE 163 (1933); see also *ABN AMRO Bank NV v MBIA Inc.* 17 NY3d 208, 228, 928 NYS2d 647, 952 NE2d 463 (2011); *Medinol Ltd v Boston Scientific Corp*, 346 F Supp 2d 575, 625 (SDNY 2004); *Atlas Elevator*

393. It is debated whether the implied covenant imposes on the parties a duty to co-operate in achieving the contract's objectives.[622]

394. Indeed, the implied covenant has mainly a negative role in that it forbids a party from: (i.) intentionally or purposely preventing the other party from carrying out the agreement;[623] (ii.) acting so as to substantially reduce the likelihood that it will be able to perform its contractual obligations;[624] (iii.) preventing the other party from doing what is necessary to reap the fruits of the agreement;[625] and (iv.) exercising its discretion in an arbitrary or irrational manner.[626]

395. The implied covenant also obligates a party to facilitate the occurrence of a condition precedent by either refraining from conduct which would prevent or hinder the occurrence of the condition and/or by taking proactive action to cause its occurrence.[627]

Corp v United Elevator Group Inc 77 AD3d 859, 861 (2010); *25 Bay Terrace Associates, LP v Public Service Mutual Insurance Company*, 194 AD3d 668, 148 NYS3d 484 (2nd Dept 2021); *Singh v City of New York*, 189 AD3d 1697, 139 NYS 3d 307 (2nd Dept 2020); *Celauro v 4C Foods Corp*., 187 AD3d 836, 132 NYS3d 159 (2nd Dept 2020); *Twinkle Play v Alimar-Properties Ltd*, AD3d, 2020 WL 5540060 (2nd Dept 2020); *Healthy Lifestyle Brands, LLC v Envt Working Grp*, No. 20 CIV. 1098 (ER), 2021 WL 4459458 (SDNY 2021); see further BANKS, 204

622 *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc*., 487 F3d 89, 98 (2d Cir 2007); *Bear Sterns Inv Products Inc v Hitachi Automotive Products (USA) Inc,* 401 BR 598, 629 (SDNY 2009) stating that "the covenant may take the form of a requirement that a party take "affirmative steps to cooperate in achieving" the contract's purpose. Cf. *Garrett v Music Pub Co of America LLC*, 740 F Supp 2d 457 (SDNY 2010) holding that: "The implied covenant of good faith and fair dealing does not impose an affirmative duty to assist a contracting party in performing its obligations under the contract."

623 *Wieder v Skala* 80 NY2d 628, 637, 593 NYS2d 752, 609 NE2d 105 (1992); *Grad v Roberts*, 14 NY2d 70, 75 (1964): "The law contemplates fair dealing and not its opposite. Persons invoking the aid of contracts are under implied obligation to exercise good faith not to frustrate the contracts into which they have entered. The rule is grounded in many cases that in every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part." BANKS, 203.

624 *ABN AMRO Bank NV v MBIA Inc*, 17 NY3d 208, 928 NYS 2d 647, 952 ME2d 463 (2011).

625 *Kapsis v American Home Mortg. Servicing Inc*. 923 FSupp2d 430 (EDNY 2013).

626 *Dalton v Educational Testing Service*, 87 NY2d 384, 389, 639 NYS2d 977, 979, 663 NE2d 289, 291 (1995); *Medinol Ltd v Boston Scientific Corp*, 346 F Supp 2d 575, 625–626 (SDNY 2004); *Ahmed Elkoulily MD, PC v New York State Catholic Healthplan Inc*, 153 AD3d 768, 61 NYS3d 83 (2nd Dept 2017); BANKS, 205.

627 *Royal Park Investments SA/NV v HSBC Bank USA, Nat Ass'n*, 109 FSupp3d 587 (SDNY 2015); BANKS, 198; see, in this regard, Article 156 SwCO which provides as follows: "A condition is deemed fulfilled where one of the parties has prevented its fulfilment by acting in bad faith."

396. On the other hand, a party does not breach the implied covenant of good faith and fair dealing by acting in its own self-interest even though this may incidentally lessen the other party's anticipated fruits from the contract.[628]

3. Limits on the implied covenant of good faith and fair dealing

397. The implied covenant of good faith and fair dealing is subject to certain limits. Indeed, it has been held that the implied covenant of good faith and fair dealing does not import into the law of contracts a generalized code of good conduct.[629]

398. First, given the importance attached to freedom of contract, the implied covenant of good faith and fair dealing cannot be used to imply a term which is contrary to an express term of the parties' agreement.[630] The implied covenant can only impose an obligation which is consistent with other mutually agreed

628 *Ray Legal Consulting Group v DiJoseph,* 37 F Supp 3d 704 (SDNY 2014) stating that "the implied covenant does not extend so far as to undermine a party's general right to act on its own interests in a way that may incidentally lessen the other party's anticipated fruits from the contract." However, other courts have held that the implied covenant allows a party to act in its own interests only if the action has no impact on the other party's anticipated fruits from the contract, see *Brown v Lower Brule Community Development Enterprise LLC*, 2014 WL 5508645 (SDNY 2014).

629 *Cambridge Capital LLC v Ruby Has LLC*, 2021 WL 4481183 (SDNY 2021).

630 *Peter R Friedman Ltd v Tishman Speyer Hudson Ltd Partnership* 107 AD3d 569, 570 (1st Dept 2013) in which the defendants were not required by the implied covenant of good faith and fair dealing to preserve the plaintiff's entitlement to a renewal commission as this right was expressly limited by the brokerage agreement; *Marine Midland Bank N A v Yoruk* 242 AD2d 932, 933, 662 NYS2d 957, 959 (4th Dept 1997) (holding that an obligation could not be implied as it "would be inconsistent with other terms of the contractual relationship"); *Fesseha v TD Waterhouse Investor Services Inc*, 305 AD2d 268, 268 761 NYS2d 22, 23 (1st Dept 2003) holding that "while the covenant of good faith and fair dealing is implicit in every contract, it cannot be construed so broadly as to effectively nullify other express terms of a contract or to create independent contractual rights."; *Natl Union Fire Ins Co of Pittsburgh PA v Xerox*, 25 AD3d 309, 310 (1st Dept 2006); *NMC Residual Ownership LLC v US Bank Nat Assn*, 153 AD3d 284, 60 NYS3d 110 (1st Dept 2017) holding that the cause of action against the trustee for breach of the implied covenant of good faith and fair dealing was barred by a provision in the real estate mortgage investment conduit trust stating that "no implied covenants or obligations shall be read into the Trust Agreement against the Trustee."; *Transit Funding Assocs v Cap One Equip Fin*, 149 AD3d 23, 30 (1st Dept 2017); *ADE Syystems Inc v Energy Labs Inc.*, 183 AD3d 791, 124 NYS 3d 361 (2nd Dept 2020) holding that the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract; see further BANKS, 203.

upon terms in the contract.[631] It cannot add a substantive provision to the contract which is not included by the parties.[632]

399. Second, a party does not violate the implied covenant of good faith and fair dealing if it exercises a right explicitly granted to it under a contract in bad faith.[633]

400. For example, if a party terminates a contract without notice or without cause in compliance with the terms of the contract, it does not violate the implied covenant of good faith and fair dealing, notwithstanding that it was activated by an ulterior motive.[634]

401. Third, a party may only bring a claim for breach of the implied covenant of good faith and fair dealing if the facts underlying this claim are different from the one underlying a separate claim for breach of an express term of the contract.[635]

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631 *Broder v. Cablevision Systems Corporation,* 418 F3d 187, 199 (2005); *Geren v. Quantum Chem. Corp.,* 832 FSupp 728, 732 (SDNY 1993); *Sabetay v. Sterling Drug Inc,* 69 NY2d 329, 335, 514 NYS2d 209, 212, 506 NE2d 919, 922 (1987); BANKS, 206.

632 *Broder v. Cablevision Systems Corporation,* 418 F3d 187, 199 (2005); BANKS, 206.

633 *Moran v Erk*, 11 NY3d 452, 872 NYS 2d 696, 901 NE2d 187 (2008) (concerning an attorney approval contingency and refusing to read in a bad faith exception to this contingency).

634 *Triton Partners LLC v Prudential Securities Inc* 301 AD2d 411, 752 NYS2d 870 (1st Dept 2003); *ADE Systems Inc v Energy Labs Inc*., 183 AD3d 791, 124 NYS3d 361 (2nd Dept 2020) (holding that a manufacturer of heating, ventilation and air conditioning equipment did not breach the implied covenant of good faith and fair dealing in its manufacturer's representative agreement with its distributor when it cancelled the agreement after giving notice to the distributor as the agreement expressly provided that either party could terminate the agreement within the initial one-year term after giving 30 days' notice to the other party); see also in this regard, BANKS, 216, 251–252.

635 *JPMorgan Chase Bank N A v IDW Group LLC* No. 08 Civ 9116 (PGG) 2009 WL 321222 at [8]–[9] (SDNY): "a claim for breach of the implied covenant of good faith can survive a motion to dismiss "only if it is based on allegations different from those underlying the accompanying breach of contract claim""; *Netologic Inc v Goldman Sachs Group Inc*, 110 AD3d 433, 433–434 (1st Dept 2013) (dismissing breach of implied covenant claim that was duplicative of breach of contract claim "since both claims arise from the same facts and seek the identical damages for each alleged breach."); *Danusiar v Auditchain USA*, 2020 WL 6126378 (SDNY Oct. 8 2020) (holding that a good faith and fair dealing claim is "redundant if it merely pleads that defendant did not act in good faith in performing its contractual obligations." *Parlux Fragrances LLC v S Carter Enterprises LLC*, 204 AD3d 72, 164 NYS3d 108 (1st Dept 2022) (holding that a fragrance company that brought a claim against a celebrity musician for breach of license agreements could not maintain the separate cause of action against the celebrity for breach of the implied covenant of good faith and fair dealing); *Shmaltz Brewing Company LLC v Dog Cart Management LLC*, 202 AD3d 1349, 163 NYS3d 659 (3rd Dept 2022); 320 *West 115 Realty LLC v All Building Construction Corp*., 194 AD3d 511, 149

402. As a consequence, a claim for damages for breach of this covenant is not allowed in the event that this breach is intrinsically tied to damages resulting from a separate breach of contract.[636]

403. Fourth, with respect to the obligation of good faith under the NYUCC, bad faith, in and of itself does not constitute an independent basis for recovery.[637] Indeed, proof must be adduced that a contracting party acted in bad faith with respect to a specific contractual provision.[638] There is no action for damages for breach of the obligation of good faith in the absence of any other basis of recovery.[639]

404. Finally, there can be no claim for breach of the implied covenant if the plaintiff has already received full benefit under the agreement.[640]

4. Legal remedies for breach of the implied covenant of good faith and fair dealing

405. There is a presumption that a party to a contract has acted in good faith.[641] Hence, the burden of proof is on the party alleging the absence of good faith.[642]

NYS3d 28 (1st Dept 2021); *BT Holdings LLV v Village of Chester*, 189 AD3d 754, 137 NYS3d 458 (2nd Dept 2020); cf *Anexia v Horizon Data Solutions Center*, 74 Misc3d 1233(A), 2022 NY Slip Op 50320(U) (Sup Ct NY Cnty 2022) (rejecting plaintiff's argument that the counterclaim was simply duplicative of the breach of contract claim since the good faith claim was premised on specific, bad faith conduct distinct from express obligations and does not depend on a breach of contrat); see also BANKS, 217, 306–308.

636 *Appert v Morgan Stanley Dean Witter Inc*, 673 F3d 609 (7th Cir 2012); *Empire One Telecomms., Inc. v. Verizon N.Y., Inc*, 26 Misc3d 541, 888 NYS2d 714, 730 (NYSup 2009).

637 *Abramovitz v Paragon Sporting Goods Co. Inc* 202 AD2d 206, 308 NYS2d 432 (1st Dept 1994).

638 *Flagler Automotive Inc v Exxon Mobil Corp*, 582 FSupp2d 367, 67 UCC Rep Serv 2d 1 (EDNY 2008).

639 *Quail Ridge Assocs. v Chemical Bank*, 162 AD2d 917, 919 (NY App Div 1990); *Super Glue Corp. v. Avis Rent A Car Sys*., 132 AD2d 604, 606 holding that the UCC does not permit recovery of money damages for not acting in good faith where no other basis of recovery is present. Cf *Palmer v Safe Auto Sales Inc*., 114 Misc 2d 964, 452 NYS2d 995 (1982) holding that a cause of action exists for violation of the obligation of good faith under section 1-203 NYUCC.

640 *Wornow v Register.com, Inc*., 778 NYS2d 25, 27 (1st Dept 2004) (holding that the cause of action for breach of the covenant of good faith and fair dealing implied in the parties' agreement was properly dismissed on the ground that plaintiff received the full benefit of that agreement, namely, the registration of his domain names).

641 *Canon Inc v Tesseron Ltd*, 146 FSupp3d 568 (SDNY 2015).

642 *Ibid*.

406. In general, as a breach of contract claim, damages may be sought for a breach of the implied covenant of good faith and fair dealing.[643] A breach of the implied covenant of good faith and fair dealing may also excuse the non-breaching party from further performance under the contract.[644]

407. Where appropriate, for example, where damages are inadequate,[645] specific performance may be granted.[646]

D. Rationalization attempts

408. Various attempts at rationalizing the role and scope of good faith under US law have been made by the legal doctrine including the excluder theory (1.), the foregone opportunities theory (2.), the commutative justice approach (3.) and the community standards approach (4.).

1. Excluder theory

409. ROBERT SUMMERS, is the proponent of the well-known excluder theory.[647]

410. SUMMERS' excluder theory is based on the premise that it is much easier to identify bad faith conduct than it is to explain what constitutes good faith conduct. As put by SUMMERS himself: "good faith […] is best understood as an

643 See, in general, on damages under New York law, BANKS, 347 et seq.

644 *Rebecca Broadway Ltd. Partnership v. Hotton* 143 AD3d 71, 37 NYS3d 72, 2016 NY Slip Op 05839 (2016) holding that a party to a bilateral contract, when faced with a breach of an implied covenant of good faith and fair dealing by the other party, must make an election between declaring a breach and terminating the contract or, alternatively, ignoring the breach and continuing to perform under the contract.

645 For example, in *Van Valkenburgh, Nooger & Neville v. Hayden Publ. Co.,* 30 NY2d 34, 45 (1972), cert. denied, 409 US 875 (1972), in a dispute by an author against a publisher concerning *inter alia* an alleged breach by the publisher of the implied covenant of good faith and fair dealing, it was held that if the action was one merely for breach of contract for which money damages afforded a sufficient remedy, it would normally be inappropriate to grant an injunction absent some showing of imminent risk of frustration of a resulting judgment, such as insolvency or siphoning off of assets.

646 See *Dalton v Educational Testing Service*, 87 NY2d 384, 389, 639 NYS2d 977, 979, 663 NE2d 289, 291 (1995): As a remedy for the testing service's breach of the implied covenant of good faith and fair dealing by failing to consider the student's evidence offered to indicate that he had taken the second Scholastic Aptitude Test (SAT) himself after the testing service had refused to release his test score based on the suspicion that the student had an imposter take the exam, the student was entitled to specific performance of the contract consisting of a good faith consideration of the material that the student submitted; however, the student was not entitled to the release of his score as though fully validated.

647 The excluder theory is set out in SUMMERS, 195–267.

"excluder" – it is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith."[648] Indeed, a judge is primarily concerned with prohibiting undesirable conduct rather than formulating the positive content of the standard of good faith.[649]

411. SUMMERS gives some examples of bad faith conduct and the corresponding meaning of good faith formulated positively. Thus, a form of bad faith conduct would be a seller concealing a defect in an item that it is selling. Formulated positively, the corresponding meaning of good faith is that a seller is obliged to fully disclose material facts. A further example of bad faith conduct given is a party adopting an overreaching interpretation of contract language. When formulated positively, the corresponding meaning of good faith is that contract language should be interpreted fairly.[650]

412. SUMMERS suggests that decision makers should work from the instances of bad faith conduct excluded by previous decision makers either directly or by analogy rather than attempting to adopt a definition of good faith.[651]

2. Foregone opportunities theory

413. STEVEN BURTON has attempted to define a standard which delimits the boundary between good faith and bad faith performance.[652]

414. BURTON assimilates the breach of an express contractual promise with a violation of the duty to perform in good faith. According to BURTON, in both cases, a party is attempting to recapture opportunities foregone upon contracting. However, with respect to the violation of the duty to perform in good faith, it is objectively more difficult to ascertain whether a party has acted to recapture foregone opportunities. BURTON thus introduces the concept of discretion and more specifically, the discretion which is expressly conferred on a party or arises from a lack of clarity or omission in the contract.[653]

415. According to BURTON's theory: "[g]ood faith limits the exercise of discretion in performance conferred on one party by the contract […]. Bad faith performance occurs precisely when discretion is used to recapture opportunities forgone upon contracting – when the discretion-exercising party refused to pay the expected cost of performance. Good faith performance, in turn, occurs when a

[648] *Idem*, 196, 201, 262.
[649] *Idem*, 202.
[650] *Idem*, 203.
[651] SUMMERS, 206–207.
[652] See BURTON, Good Faith, 369 et seq. and BURTON, History and Theory, 215 et seq.
[653] BURTON, Good Faith, 378 et seq.

party's discretion is exercised for any purpose within the reasonable contemplation of the parties at the time of formation – to capture opportunities that were preserved upon entering the contract, interpreted objectively."[654]

416. The question of whether a party used its discretion to recapture forgone opportunities is one of subjective intent and is a factual question.[655]

3. Commutative justice approach

417. Another theory, derived from US case law on good faith, which aims to rationalize the application of good faith, centers around the idea of commutative justice, namely that the principle of good faith is applied in order to enforce what the parties actually intended or what is in accordance with the spirit or inner logic of their contractual deal.[656]

418. This is often expressed in one of four ways: (i.) compliance with the parties' justified or reasonable expectations; (ii.) abstention from conduct that prevents the other party from obtaining the fruits or benefits of the bargain; (iii.) effectuating the parties' intentions; and (iv.) faithfulness to an agreed common purpose.[657]

4. Community standards approach

419. MILLER and PERRY, writing in connection with US case law on good faith, submit that the common denominator of all theories attempting to rationalize good faith is that courts or arbitrators always resort to community standards in determining whether parties have acted in accordance with the principle of good faith or not.[658]

420. Such community standards may be broken down into two subcategories. The first is common practice i.e., what people actually do. The second is the common view of morality i.e., what people believe ought to be done.[659]

421. However, MILLER and PERRY recognize the drawbacks of this approach. Indeed, they note that ultimately what community standards are actually depends on a subjective assessment or perception. The common view of morality is

654 *Idem*, 372–373.
655 *Idem*, 389.
656 MILLER/PERRY, 712 et seq.
657 *Idem*, 712–716.
658 *Idem*, 698–723.
659 *Idem*, 698–723.

based on what the members of the community deem to be moral. What is common practice will have to be testified by individual expert members of the community who are highly familiar with the particular industry and are ultimately giving their own perception.[660]

[660] *Idem*, 724–727.

III. Swiss Law

422. This section explores the role of good faith in general under Swiss contract law (A.). The role of good faith will be examined at the pre-contractual stage (B.), the contractual performance stage (C.) and the post-contractual stage (D.). Thereafter, the attempts at the rationalization of good faith by the Swiss legal doctrine will be discussed (E.).

A. Good faith in general

423. Article 2(1) SwCC[661] provides that "[e]very person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations."[662]

424. Hence, Article 2(1) SwCC imposes a general duty, on the creditor as well as on the debtor of an obligation, to act in accordance with the rules of good faith.[663]

425. The rules of good faith are derived from social and ethical values and are grounded on the universal value of justice.[664] These rules oblige a party to keep its word (*Treu*) in order that the other party can trust and rely on the latter (*Glaube*) and thereafter act accordingly.[665] It encompasses the values of honesty, loyalty and correctness which are required in legal commerce to ensure that social harmony is respected.[666] Parties can agree to exclude the application of Article 2(1) SwCC but only in so far as it relates to the interpretation and supplementation of their intention[667].[668]

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661 An unofficial translation in English of the Swiss Civil Code can be found here: <https://www.admin.ch/opc/en/classified-compilation/19070042/index.html>, accessed 1 March 2023.

662 Article 2(1) SwCC provides in the French original as follows: "*Chacun est tenu d'exercer ses droits et d'exécuter ses obligations selon les règles de la bonne foi*." It provides in the German original as follows: "*Jedermann hat in der Ausübung seiner Rechte und in der Erfüllung seiner Pflichten nach Treu und Glauben zu handeln*." It provides in the Italian original as follows: "*Ognuno è tenuto ad agire secondo la buona fede così nell'esercizio dei propri diritti come nell'adempimento dei propri obblighi*."

663 CHAPPUIS, 38, §1.

664 STEINAUER, 167, §469; TERCIER/PICHONNAZ, 30, §101.

665 STEINAUER, 168, §470; see also CHAPPUIS, 38, §2.

666 BAUMANN, 460, §3; CHAPPUIS, 38, §2; STEINAUER, 168, §470.

667 See below, paras. 443 et seq and 449 et seq.

668 CHAPPUIS, 41, §11.

426. Article 2 SwCC applies to public law as well as to procedural law[669] and proceedings in general.[670]

427. Significantly, the principle of good faith is considered to form part of public policy within the meaning of Article 190(2)(e) PILA[671]. Thus, an arbitral award may be annulled before the Swiss Federal Supreme Court on the ground of public policy if it contravenes the principle of good faith.[672] To the author's knowledge, there is no decision in which the Swiss Federal Supreme Court has set aside an arbitral award for violating the principle of good faith.[673] However, it has been suggested that an arbitral award may be set aside for violating the principle of good faith if the award deprives a party of the right to terminate a contract for cause concluded for an excessive term[674] or the arbitral tribunal misinterprets the concept of *culpa in contrahendo*.[675]

B. Good faith at the pre-contractual stage

428. Case law and the legal doctrine have drawn from the rules of good faith a certain number of duties which are imposed on negotiating parties at the pre-contractual stage (1.). The breach of these duties gives rise to pre-contractual liability[676] and certain legal remedies (2.).

669 With respect to the application of good faith to procedural law, see in particular, Article 52 of the Swiss Code of Civil Procedure of 19 December 2008 which provides as follows: "All those who participate in proceedings must act in good faith." An unofficial translation of the Swiss Code of Civil Procedure in English can be found here: <https://www.admin.ch/opc/en/classified-compilation/20061121/index.html>, accessed 1 March 2023.

670 CHAPPUIS, 40, §6.

671 Article 190(2)(e) PILA provides as follows: "The award may only be set aside […] if the award is incompatible with public policy."

672 SFSCD 4P.172/1999 of 17 February 2000, (2001) ASA Bull 792; SFSCD 4P.167/2002 of 11 November 2002 c. 3.2.

673 See ELLIOTT GEISINGER/ALEXANDRE MAZURANIC, Challenge and Revision of the Award, in Elliott Geisinger and Nathalie Voser (eds), International Arbitration in Switzerland (Alphen aan den Rijn 2013) 253 noting the same and that the principle of good faith will intervene only exceptionally in the context of the setting aside of arbitral awards.

674 SFSCD 4P.172/1999 of 17 February 2000 c. 5d, (2001) ASA Bull 793–794.

675 SFSCD 4P.88/2006 of 10 July 2006 c. 4.2 and SFSCD 4P.172/1999 of 17 February 2000 c. 5d, (2001) ASA Bull 792.

676 For detailed studies of pre-contractual liability under Swiss law, see PAUL PIOTET, *Culpa in contrahendo et responsabilité précontractuelle en droit privé Suisse* (Stämpfli 1963); NICOLAS KUONEN, *La responsabilité précontractuelle* (Schulthess 2007) 1–705 who submits that with respect to the source of the duties imposed on the negotiating parties there is no need to

1. Duties imposed by good faith

429. By virtue of the principle of freedom of contract, each party is free to commence and break-off negotiations when it wishes, even without justification.[677] The exercise of this freedom is, however, limited by the rules of good faith.[678]

430. First, the rules of good faith impose a duty to negotiate seriously and in conformity with one's actual intentions (*devoir de négocier sérieusement conformément à ses véritables intentions, die Parteien Verhandlungen ihrer wirklichen Absicht gemäss führen*).[679] A party cannot, by acting contrary to its actual intent, give rise in the other party to the illusory hope that the contract will be concluded and thereby lead it to take steps in this direction.[680] Accordingly:

– A negotiating party has a duty to only commence negotiations if it has a serious intention to conclude a contract;[681]
– A negotiating party also has a duty to break-off or to discontinue the negotiations when it knows, or should know, that it no longer wishes to conclude the contract;[682]

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have recourse to Article 2(1) SwCC and the rules of good faith and that it is sufficient to have recourse to the general duty of diligence and Article 41 SwCO; OLIVIER RISKE, *La responsabilité précontractuelle dans le processus d'uniformisation du droit privé européen: Perspectives pour l'ordre juridique suisse – Analyse historique, comparative et prospective* (Helbing Lichtenhahn 2016).

677 SFSCD 4A_313/2019 of 19 March 2020, c. 4.2.1 ; SFSCD 4A_55/2019 of 4 September 2019, c. 2.2.1 ; SFSCD 4A_71/2019 of 8 October 2019, c. 3.1.

678 *Ibid*.

679 CHAPPUIS, 46, §20; RISKE, 215, §535; ROUILLER, 2; STEINAUER, 204, §552; TERCIER, *culpa*, 228–229; see also SFSCD 140 III 200 [203] of 11 March 2014, c. 5.2, JdT 2014 II 401; SFSCD 121 III 350 [354] of 10 October 1995, c. 6c; SFSCD 105 II 75 [80] of 6 February 1979, c. 2a, JdT 1980 I 66; SFSCD 4A_55/2019 of 4 September 2019, c. 2.2.1.

680 SCHÖNLE, 200; TERCIER, *culpa*, 228; SFSCD 77 II 135 [137] of 6 June 1951, c. 2a: "*une partie ne peut pas, par une attitude contraire à ses véritables intentions, éveiller chez l'autre l'espoir illusoire qu'une affaire sera conclue et l'amener ainsi à faire des dépenses dans cette vue*."; SFSCD 4A_55/2019 of 4 September 2019, c. 2.2.1.

681 ROUILLER, 2 referring to the example of where a party commences negotiations with the other party in order to prevent the latter from concluding a contract with a certain third party; SCHÖNLE, 200; TERCIER, *culpa*, 228–229 referring to the case of someone who negotiates with another with the aim (even eventual) of breaking them off; TERCIER/PICHONNAZ, 162, §679; SFSCD 77 II 135 [138] of 6 June 1951, c. 2a, SJ 1980 565: "*Celui qui engage de la sorte des pourparlers dans le dessein, même éventuel, de les rompre doit réparation pour le préjudice causé à son partenaire*."

682 RISKE, 216, §536; ROUILLER, 2; SCHÖNLE, 200; TERCIER, *culpa*, 229; TERCIER/PICHONNAZ, 162, §679; see also SFSCD 140 III 200 [203] of 11 March 2014, c. 5.2, JdT 2014 II 401: "*Il comportamento contrario alle regole della buona fede non risiede nell'interruzione, ma nell'aver mantenuto la controparte nel convincimento che il contratto sarebbe stato concluso o nel non aver dissipato tale illusione*."

– A negotiating party cannot commence or continue negotiations in view of a contract when it knows, or should know, that it cannot validly conclude it.[683] This is the case for example if: (i.) the foreseen benefit is objectively impossible, contrary to Article 20 SwCO[684]; (ii.) the negotiating party does not have the capacity to enter into the contract, contrary to Article 11(2) SwCC[685]; (iii.) the negotiating party does not have the authority to represent the person for whom it is supposed to be concluding the contract for, contrary to Article 39(2) SwCO[686]; or (iv.) the negotiating party omits to inform the other that a former representative no longer has the authority to act, contrary to Article 36 SwCO[687]; and
– A negotiating party must not lead the other to believe that its willingness to conclude is stronger than it is in reality.[688] It is therefore contrary to good faith for a party to agree, in principle, to conclude a contract which requires the observation of certain formalities and then to refuse at the last minute to comply with such formalities.[689] The refusal to conclude, in itself, is not deemed to be conduct which is contrary to good faith.[690] However, leading the other party to believe that the contract would be

683 SCHÖNLE, 200–201; TERCIER, culpa, 229.

684 Article 20(1) SwCO provides as follows in the unofficial English translation: "A contract is void if its terms are impossible, unlawful or immoral."

685 Article 11SwCC provides as follows in the unofficial English translation: "(1) Every person has legal capacity. (2) Accordingly, within the limits of the law, every person has the same capacity to have rights and obligations."

686 Article 39(2) SwCO provides as follows in the unofficial English translation: "Where the [unauthorized] agent is at fault, the court may order him to pay further damages on grounds of equity."

687 Article 36 SwCO provides as follows in the unofficial English translation: "(1) Where an agent has been issued with an instrument setting out his authority, he must return it or deposit it with the court when that authority has ended. (2) Where the principal or his legal successors have omitted to insist on the return of such instrument, they are liable to *bona fide* third parties for any loss or damage arising from that omission."

688 TERCIER, *culpa*, 229; SFSCD 4A_55/2019 of 4 September 2019, c. 2.2.1 ; SFSCD 4A_615/2010 of 14 January 2011, c. 4.1.1: "*Celui qui engage des pourparlers ne doit pas faire croire que sa volonté de conclure est plus forte qu'en réalité*."

689 RISKE, 216, §540; SFSCD 140 III 200 [203]–[204] of 11 March 2014, c. 5.2, JdT 2014 II 401; see also SFSCD 4C.152/2001 of 29 October 2001, c. 3a, SJ 2002 I 164: "*il est contraire aux règles de la bonne foi de donner sans réserve son accord de principe à la conclusion d'un contrat formel et de refuser in extremis, sans raison, de le traduire dans la forme requise*."

690 TERCIER, *culpa*, 229; SFSCD 4A_229/2014 of 19 September 2014, c. 4.1: "*Le comportement contraire aux règles de la bonne foi ne consiste pas dans le fait d'avoir rompu les pourparlers, mais d'avoir maintenu l'autre partie dans l'idée que le contrat serait certainement conclu ou de n'avoir pas dissipé cette illusion à temps*."; see also SFSCD 4C.152/2001 of 29 October 2001, c. 3a, SJ 2002 I 164.

concluded or not having dispelled this belief in time is considered to be contrary to good faith.[691]

431. Second, the rules of good faith impose a general duty on both parties to inform the other (*l'obligation réciproque de renseigner, gegenseitige Aufklärungspflicht*).[692]

432. In principle, each party has a duty to inform itself.[693] However, the rules of good faith sometimes impose a duty to inform the other party, in which case, such party must inform the other correctly.[694] In this regard, a negotiating party is obliged to inform the other party of anything which may have an impact on the continuation of the negotiations or their decision to conclude the contract.[695] The extent of this duty will depend on the circumstances of the particular case, and notably on the nature of the proposed contract, the manner in which the negotiations are carried out, the status, intention and knowledge of the parties as well as the relevant information and its cost of acquisition.[696] Indeed, there is no duty to inform the other of facts which are current or easy to check and that the other party would be deemed to know if it had acted diligently.[697]

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691 *Ibid*.

692 CHAPPUIS, §20; RISKE, 235, §592; ROUILLER, 2; STEINAUER, 205, §553.

693 RISKE, 235, §592¸ SCHÖNLE, 198; TERCIER, *culpa*, 230; TERCIER/PICHONNAZ, 163, §681.

694 TERCIER, *culpa*, 230–231.

695 RISKE, 235, §592, 238, §598; ROUILLER, 3; SCHÖNLE, 198; SFSCD 125 III 86 [89] of 11 December 1998, c. 3c: "*Der Grundsatz von Treu und Glauben verpflichtet die Parteien bei Aufnahme von Vertragsverhandlungen zur gegenseitigen richtigen Aufklärung mit Bezug auf erhebliche Tatsachen, welche die Gegenpartei nicht kennt und nicht zu kennen verpflichtet ist, die aber ihren Entscheid über den Vertragsabschluss oder dessen Bedingungen beeinflussen können*."; see also SFSCD 105 II 75 [80] of 6 February 1979, c. 2a, JdT 1980 I 66; SFSCD 92 II 328 [333] of 20 December 1966, c. 3b.

696 RISKE, 235, §592; ROUILLER, 3; SCHÖNLE, 198; TERCIER, *culpa*, 230; TERCIER/PICHONNAZ, 163, §683; SFSCD 105 II 75 [80] of 6 February 1979, c. 2a, JdT 1980 I 66: *"In welchem Masse die Parteien einander gegenseitig aufzuklären haben, entscheidet sich nicht allgemein, sondern hängt von den Umständen des einzelnen Falles, namentlich von der Natur des Vertrages, der Art, wie sich die Verhandlungen abwickeln, sowie den Absichten und Kenntnissen der Beteiligten ab. Entgegen der Meinung der Beklagten setzt die Haftung aus culpa in contrahendo jedoch kein doloses Verhalten voraus. Wer Verhandlungen anbahnt und fortführt, aber nicht auf Umstände aufmerksam macht, von denen sich die Gegenpartei selber weder Kenntnis verschaffen kann noch verschaffen muss, haftet vielmehr auch bei fahrlässiger Verletzung der Aufklärungspflicht. Das leuchtet vor allem dann ein, wenn er diese Pflicht schon aus eigenem Interesse beachten sollte, um z.B. einer mangelhaften Zusage vorzubeugen.*"

697 RISKE, 238, §599; SFSCD 116 II 431 [434] of 22 May 1990, c. 3a, JdT 1991 I 45; SFSCD 92 II 328 [334] of 20 December 1966, c. 3b: "*Assurément, le devoir d'information ne concerne pas les circonstances que l'autre partie est censée connaître elle-même*."

433. A party is also obliged to warn the other if there is a potential for a mistake on their part and, if it does not do so, it may commit a fraud by omission (*dol par omission*) contrary to Article 28 SwCO[698].[699] However, if a party would have been able to discover its mistake by acting diligently, the other party is not deemed to have acted contrary to good faith by failing to look for potential mistakes that the other party may make.[700] In fact, good faith requires a negotiating party to prepare itself correctly (*devoir de se préparer correctement soi-même, sich selber korrekt für Vertragsverhandlungen vorzubereiten*) for the negotiations, if need be, by recourse to experts or advisers, so that the future contract will not be invalid on the ground of mistake.[701] Indeed, according to Article 25 SwCO, a party cannot invoke a mistake when to do so is contrary to good faith and such party is bound by the contract if the other party is willing to conclude the contract on the terms actually wanted by the aggrieved party.[702]

434. There is also a duty to inform in case of unusual circumstances that the other party could not normally expect.[703] Hence, it has been held that it was contrary to good faith for a party to fail to inform the other that it did not have the authority to sign.[704]

435. Third, good faith may give rise to a duty of confidentiality in certain cases.[705]

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698 Article 28(1) SwCO provides as follows in the unofficial English translation: "A party induced to enter into a contract by the fraud of the other party is not bound by it even if his error is not fundamental."

699 RISKE, 237, §596; ROUILLER, 3; SCHÖNLE, 197; TERCIER, *culpa*, 230–231; SFSCD 92 II 328 [334] of 20 December 1966, c. 3b: "*On doit toutefois redresser l'erreur qui porte sur un fait que l'on connaît ou que l'on doit connaître, si l'on s'aperçoit que le partenaire se fait une idée inexacte des prestations respectives ou de l'ampleur de son propre engagement*."; see also SFSCD 90 II 449 [456] of 22 October 1964, c. 4.

700 RISKE, 237, §596; SFSCD 102 II 81 [84] of 25 June 1976, c. 2, JdT 1977 I 210.

701 TERCIER, *culpa*, 232.

702 Article 25 SwCO provides in the French original as follows: "(1) *La partie qui est victime d'une erreur ne peut s'en prévaloir d'une façon contraire aux règles de la bonne foi.* (2) *Elle reste notamment obligée par le contrat qu'elle entendait faire, si l'autre partie se déclare prête à l'exécuter*." It provides in the German original as follows: "(1) *Die Berufung auf Irrtum ist unstatthaft, wenn sie Treu und Glauben widerspricht.* (2) *Insbesondere muss der Irrende den Vertrag gelten lassen, wie er ihn verstanden hat, sobald der andere sich hierzu bereit erklärt*."

703 SCHÖNLE, 198.

704 TERCIER/PICHONNAZ, 163, §679; SFSCD 105 II 75 [80] of 6 February 1979, c. 2, JdT 1980 I 66, 70 (holding that a party was liable for failing to inform the other party that the contract, which had been negotiated by representatives of the branch, had to be approved by headquarters.). See also ROUILLER, 3.

705 RISKE, 241, §§609–610; SCHÖNLE, 199; STEINAUER, 205, §554; TERCIER/PICHONNAZ, 164, §686.

436. Fourth, good faith gives rise to a duty to behave honestly and fairly and to respect the freedom of decision of the other party.[706] A negotiating party is therefore prevented from threatening the other party (contrary to Article 29 SwCO[707]), exerting illegitimate pressure on the other (by abusing its dominant position contrary to Article 7 CartA[708] or Article 21 SwCO[709]) and from having contact with competitors which is contrary to the rules on good faith (in violation of Article 230 SwCO[710] and Article 5 CartA[711]).

437. Finally, good faith may give rise to a duty to protect, for example, to ensure that the other party is not hurt when testing machinery that is for sale.[712]

2. Liability and legal remedies for violation of the duties imposed by good faith

438. Violation of the above duties imposed by good faith gives rise to pre-contractual liability (known as *culpa in contrahendo*) which is a subcategory of the general category of liability based on trust (*responsabilité pour la confiance, Vertrauenshaftung*) created by the Swiss courts.[713] It is disputed whether this liability

706 SCHÖNLE, 201; STEINAUER, 205, §554; TERCIER/PICHONNAZ, 164, §686.

707 Article 29(1) SwCO provides as follows in the unofficial English translation: "Where a party has entered into a contract under duress from the other party or a third party, he is not bound by that contract."

708 Article 7 'Unlawful practices by dominant undertakings' of the Swiss Federal Law on Cartels and Other Restrictions on Competition of 6 October 1995 provides as follows in the unofficial English translation: "Dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners."

709 Article 21(1) SwCO provides as follows in the unofficial English translation: "Where there is a clear discrepancy between performance and consideration under a contract concluded as a result of one party's exploitation of the other's straitened circumstances, inexperience or thoughtlessness, the injured party may declare within one year that he will not honour the contract and demand restitution of any performance already made."

710 Article 230(1) SwCO provides as follows in the unofficial English translation: "Any interested party may within ten days bring a claim for avoidance in respect of an auction whose outcome has been influenced by unlawful or immoral means."

711 Article 5(1) 'Unlawful agreements affecting competition' of the Swiss Federal Law on Cartels and Other Restrictions on Competition of 6 October 1995 provides as follows : "Agreements that significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency, and all agreements that eliminate effective competition are unlawful."

712 SCHÖNLE, 201; STEINAUER, 205, §554; TERCIER, *culpa*, 232.

713 CHAPPUIS, 61, §59; ROUILLER, 1; STEINAUER, 203, §550; TERCIER/PICHONNAZ, 163, §680 and 299–301, §§1289–1293; SFSCD 140 III 200 [203] of 11 March 2014, c. 5.2, JdT 2014 II 401.

is of a contractual or tortious nature, with the case law borrowing rules from both of the regimes on contractual and tort liability.[714]

439. If a party has acted contrary to the rules on good faith and the contract has been concluded, the aggrieved party may invoke the rules on lack of consent (*vices de consentement, Willensmängel*) (Arts. 23 & 24 (mistake); Art. 28 (fraud); Art. 29 (duress) SwCO) which, if fulfilled, may allow such party to invalidate the contract by virtue of Article 31 SwCO[715] or to invoke its partial nullity by virtue of Article 20(2) SwCO[716]. Such party may also be able to claim supplementary damages (Art. 31 III SwCO).[717]

440. In the case of an unfair advantage (*lésion, übervorteilung*) contrary to Article 21 SwCO, the aggrieved party may invalidate the contract.[718] The invalidation can give rise to a right of reclamation, rectification of the land registry and/or restitution of any sums paid.[719]

441. If a party has acted contrary to the rules of good faith but a contract has not been concluded, the aggrieved party may claim damages.[720] Usually, only negative interest damages are awarded i.e., costs incurred as a result of the negotiations for breach of the duty to act in good faith.[721]

C. Good faith at the contractual performance stage

442. At the performance stage, the rules of good faith come into play when objectively interpreting a contract (1.) and filling gaps in the parties' contract (2.)

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714 TERCIER/PICHONNAZ, 165, §691; SFSCD 121 III 350 [354] of 10 October 1995, c. 6c.

715 Article 31(1) SwCO provides as follows in the unofficial English translation: "Where the party acting under error, fraud or duress neither declares to the other party that he intends not to honour the contract nor seeks restitution for the performance made within one year, the contract is deemed to have been ratified."

716 Article 20(2) SwCO provides as follows in the unofficial English translation: "However, where the defect pertains only to certain terms of a contract, those terms alone are void unless there is cause to assume that the contract would not have been concluded without them."

717 SCHÖNLE, 197; TERCIER, *culpa*, 233–235; TERCIER/PICHONNAZ, 164, §§684, 688.

718 SCHÖNLE, 196.

719 *Ibid*.

720 SCHÖNLE, 196 and 201–202 stating that the aggrieved party has the right to be placed in the financial situation that he would have been in if the other party had respected the rules of good faith and that monetary damages are usually awarded but that compensation in kind is not excluded; TERCIER/PICHONNAZ, 165, §690.

721 STEINAUER, 207, §557; SFSCD 105 II 75 [81] of 6 February 1979, c. 3, JdT 1980 I 66, 72: "*Bei Haftung aus culpa in contrahendo ist das negative Interesse zu ersetzen. Der Geschädigte hat Anspruch auf Ersatz des Schadens, der ihm aus dem von der Gegenpartei erweckten Vertrauen auf das Zustandekommen eines Vertrages erwachsen ist*."

Good faith also imposes ancillary obligations on the parties (3.). The prohibition of an abuse of right found at Article 2(2) SwCC is considered to be derived from the rules on good faith (4.) and good faith is considered to be one of the potential bases justifying the termination or adaptation of a contract in case of a change of circumstances (5.).

1. Good faith as the basis for the objective interpretation of contracts

443. The rules of good faith apply to the interpretation of contracts.[722]

444. According to Article 18 SwCO, one should first attempt to ascertain the actual intention (*volonté réelle, tatsächlicher/wirklicher Wille*) of the author of a statement (known as subjective or empirical interpretation).[723] However, if this intention cannot be established or was not understood by the recipient, one should proceed to give a meaning to the statement which a recipient *in good faith* would give to it (known as objective or normative interpretation) and therefore establish the presumed intention (*volonté présumée, mutmasslicher Parteiwille*) of the parties.[724] This objective meaning of a statement flows from the principle of trust (*principe de la confiance, Vertrauensprinzip*) which itself flows from the principle of good faith.[725] The principle of trust allows everyone to understand the statements of another in a reasonable way and to expect that their own statements will be understood in a similar way.[726]

445. In carrying out an interpretation in accordance with the principle of trust, one must look at the literal meaning of the words, the context surrounding the conclusion of the contract, the drafting history, but not the post-conclusion circumstances (such as how the parties performed the contract).[727]

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722 TERCIER/PICHONNAZ, 240, §1027; SFSCD 144 III 93 [98]–[99] of 22 January 2018, c. 5.2.3; SFSCD 107 II 161 [163] of 2 June 1981, c. 6b, JdT 1981 I 582 (applying good faith to the interpretation of a clause attempting to exclude liability for significant defects in building land sold). See also, in general, GEISINGER, 804.

723 MÜLLER, Art. 18 SwCO, 765–766, §59; SFSCD 143 III 157 [159] of 28 March 2017, c. 1.2.2; SFSCD 5A_685/2020 of 19 April 2021, c. 3.2.

724 Emphasis added. CHAPPUIS, 42, §14; MÜLLER, Art. 18 SwCO, 767, §61; STEINAUER, 188, §516; WINIGER, 183, §134; SFSCD 143 III 157 [159] of 28 March 2017, c. 1.2.2; SFSCD 4A_112/2020 of 1 July 2020, c. 3.2.1.

725 CHAPPUIS, 42, §14; MÜLLER, Art. 18 SwCO, 813–814, §§186–187.

726 CHAPPUIS, 42, §14.

727 SFSCD 144 III 93 [99] of 22 January 2018, c. 5.2.3; SFSCD 4A_287/2021 of 7 June 2022, c. 6.1.2; STEINAUER, 192–196, §§525–535; WINIGER, 183–184, §134.

446. The principle of trust plays an important role with respect to the incorporation and interpretation of general conditions.[728] Hence, general conditions are incorporated into a contract if the other party is deemed to have accepted them, which is not the case with respect to surprising or unusual clauses (*règle de l'insolite ou de l'inhabituel*, *Ungewöhnlichkeitsregel*).[729]

447. Good faith also lies at the heart of the rule of interpretation known as in *dubio contra proferentem* which applies, in particular, to the interpretation of general conditions.[730] According to this rule of interpretation, in case of doubt between two possible interpretations, a clause which is ambiguous must be interpreted in favour of the party which did not draft the clause.[731]

448. This objective interpretation, which flows from the rules on good faith, also applies to the interpretation of the parties' expressions of intent.[732]

2. Good faith as the basis for filling gaps in the parties' contract

449. A judge may resort to the rules of good faith in order to fill a gap in a contract (*complètement du contrat, die Ergänzung des Vertrages*), i.e., when there is no clause which resolves the issue to be decided.[733]

450. In the absence of mandatory or non-mandatory rules (which may be applied by analogy), the judge will fill the gap with what the parties would have agreed to in good faith if they had foreseen the situation (referred to as "hypothetical intention" or "*volonté hypothétique*" or "*hypothetische Parteiwille*").[734]

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728 CHAPPUIS, 43, §16.

729 CHAPPUIS, 43, §16; SFSCD 138 III 411 [412] of 30 May 2012, c. 3.1; SFSCD 135 III 225 [227]–[228] of 28 January 2009, c. 1.3, JdT 2009 I 475; SFSCD 4A_238/2019 of 2 December 2019, c. 3.3.

730 CHAPPUIS, 43 §16 stating that the author of such a clause cannot reasonably and in good faith expect that an ambiguous clause will be accepted by the other party in the meaning wished by the author; SFSCD 124 III 155 [158] of 7 October 1997, c. 1b, JdT 1999 I 125.

731 *Ibid*.

732 SCHÖNLE, 204; TERCIER/PICHONNAZ, 58, §221. See further CHRISTOPH MÜLLER, Article 1 SwCO, *Art. 1-18 OR mit allgemeiner Einleitung in das Schweizerische Obligationenrecht* (2018) 165–171, §§148–169.

733 TERCIER/PICHONNAZ, 241, §1030.

734 CHAPPUIS, 43–44, §17; MÜLLER, Art. 18 SwCO, 907–908, §480; STEINAUER, 208–209, §§561–562; TERCIER/PICHONNAZ, 242, §1037; SFSCD 132 V 278 [282] of 28 April 2006, c. 4.3: "*Ergibt sich durch Auslegung, das seine reglementarische Ordnung für eine zwischen den Parteien aufgetretene Frage keine Regelung vorsieht, muss die vertragliche Regelung vom Gericht ergänzt werden. Beim Fehlen von dispositiven Gesetzesbestimmungen kann es das nur, indem es ermittelt, was die Parteien nach den Grundsätzen von Treu und Glauben*

3. Good faith as the basis for imposing ancillary duties of conduct

451. Case law has drawn ancillary duties of conduct (*devoirs accessoires de comportement, Verhaltens(neben)pflichten*) from the rules of good faith.[735]

452. Such duties are notably implied when the life or health of a contracting party are at issue or when one party has an advantage over the other such as negotiating power, expertise or professional know-how.[736] These duties aim to ensure the proper performance of the contract and require the parties to conduct themselves in such a way that the aims of the contract can be achieved in the best interests of each party.[737]

453. These include duties to:

- survey and protect (which aim to protect the personal and real property rights of the other party);[738]
- inform and advise (which aim to allow the other party to make choices knowingly);[739] and
- cooperate (which aim to help the other party in order to ensure the proper performance of the contract).[740]

hätten vereinbaren müssen, wenn sie den macht geregelten Punkt in Betracht gezogen hätten. Dabei hat sich das Gericht vom Wesen und Zweck des Vertrages leiten zu lassen und den gesamten Umständen des Falles Rechnung zu tragen." ("If the interpretation of the rules of procedure does not provide for a solution to a question which has arisen between the parties, the contractual provision must be supplemented by the court. In the absence of optional legal provisions, it can do so only by determining what the parties would have had to agree in good faith if they had considered the point not regulated. In doing so, the court must be guided by the nature and purpose of the contract and take into account the overall circumstances of the case.") (informal English translation of the German original).

735 CHAPPUIS, 44–45, §19.

736 *Ibid*.

737 BAUMANN, 615 et seq., §289 et seq; STEINAUER, 210, §565.

738 CHAPPUIS, 45, §19; STEINAUER, 210, §566; TERCIER/PICHONNAZ, 75, §292; SFSCD 113 II 246 [247]–[248] & [250]–[251] of 28 April 1987, c. 4, c. 7, JdT 1988 I 3 (holding that there was an ancillary duty in a contract of transport concluded with a cable car to ensure the safety of the ski runs.).

739 CHAPPUIS, 45, §19; STEINAUER, 210, §566; TERCIER/PICHONNAZ, 75, §292; SFSCD 124 III 155 of 7 October 1997, JdT 1999 I 125; SFSCD 111 II 72 [74]–[76] of 8 May 1985, c. 3d, JdT 1985 I 589 (obligation of an architect to draw the owner's attention to the necessity of concluding liability insurance).

740 STEINAUER, 211, §566 referring to the example of helping the other party obtain an official authorization or the agreement of a third party or minimizing its loss; TERCIER/PICHONNAZ, 75, §292.

454. A party which violates these ancillary duties is contractually liable (Art. 97 SwCO[741]) and the aggrieved party is entitled to damages.[742]

4. The prohibition of an abuse of right as a particular consequence in extreme circumstances of the general principle of good faith

455. Article 2(2) SwCC provides that "[t]he manifest abuse of a right is not protected by law."[743] Article 2(2) SwCC is considered by certain authors to set out a particular consequence, in extreme circumstances, of the general principle of good faith set out in Article 2(1) SwCC.[744]

456. Article 2(2) SwCC is an exceptional provision which is limited to specific cases where the application of a legal norm would lead to a shocking result.[745] It is frequently invoked but rarely admitted.[746] There must be a manifestly abusive exercise of a subjective right or a legal situation (such as a lack of compliance with a formal requirement).[747] In light of its importance, Article 2(2) SwCC is

741 Article 97(1) SwCO provides as follows in the unofficial English translation: "An obligor who fails to discharge an obligation at all or as required must make amends for the resulting loss or damage unless he can prove that he was not at fault."

742 CHAPPUIS, 45, §19; STEINAUER, 211, §567.

743 Article 2(2) SwCC provides in the French original as follows: "*L'abus manifeste d'un droit n'est pas protégé par la loi*." It provides in the German original as follows: "*Der offenbare Missbrauch eines Rechtes findet keinen Rechtsschutz*." It provides in the Italian original as follows: "*Il manifesto abuso del proprio diritto non è protetto dalla legge*." See in general, GEISINGER, 804–805.

744 PASCAL ANCEL/GABRIEL AUBERT, *Introduction en forme de dialogue franco-suisse* in Pascal Ancel/Gabriel Aubert/Christine Chappuis, *L'abus de droit: comparaisons franco-suisses: actes du séminaire de Genève*, May 1998 (Université de St Etienne 2001) 15, 23; STEINAUER, 176, §489. See also CHAPPUIS, 39, §5 noting that the application of the rules of good faith flowing from Article 2(1) SwCC cannot always be distinguished clearly from the sanction of an abuse of right within the meaning of Article 2(2) SwCC; SFSCD 113 II 209 [211] of 4 May 1987, c. 4a: "*La mise en oeuvre des règles de la bonne foi découlant de l'art. 2 al.1 CC ne peut pas toujours se distinguer nettement de la sanction de l'abus de droit au sens de l'art. 2 al.2 CC*." This is also supported by the fact that Articles 2(1) and 2(2) SwCC both fall under the title "*Handeln nach Treu und Glauben*" in German, "*Osservanza della buona fede*" in Italian and "*Agir en buna fai*" in Romansch. Conversely, the title in French is "*devoirs généraux*" or general duties.

745 BAUMANN, 467, §14b; CHAPPUIS, 48, §27; STEINAUER, 170, §478.

746 CHAPPUIS, 47, §25. See in this regard GEISINGER, 805 stating that "most Swiss practitioners see this defence as a last resort […] [a]nd Swiss and non-Swiss practitioners would be well-advised to bear in mind that the reflexive first instinct of courts or arbitral tribunals is to harbour suspicion that an "abuse of right" defence is actually the refuge of a scoundrel."

747 HAUSHEER/JAUN, 109, §10; see also CHAPPUIS, 48, §28.

applied automatically and is mandatory in the sense that parties cannot agree that they will have the right to act in an abusive manner.[748]

457. An abuse of right is committed in the event of:

- the exercise of a right or the use of a legal institution contrary to its purpose;[749]
- absence of interest in invoking a right usually with the intention of harming the other party;[750]
- gross disproportion between the interests in play i.e., invoking a lack of compliance with a formal requirement or deadline when the interests of the other party are significant (e.g., termination of a loan for late payment of a small amount);[751]
- lack of moderation when exercising a right i.e., exercising a right in a manner which would harm the other when a less harmful manner is available;[752]
- unclean hands (*nemo auditor propriam turpitudinem allegans*) i.e., exercise of a right by a party who has obtained the right fraudulently or illegally. [753] Article 156 SwCO which provides that "[a] condition is deemed

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748 CHAPPUIS, 41, §11.

749 CHAPPUIS, 49, §32; STEINAUER, 169, §476; SFSCD 131 III 535 [537]–[541] of 6 July 2005, c. 4 (holding that a bank's dismissal of an employee was abusive as it had dismissed the employee in order to save face and hold someone responsible for the fraudulent conduct of another employee who was under its supervision).

750 CHAPPUIS, 50, §34; STEINAUER, 214–215, §§573–576; SFSCD 127 III 506 [513] of 21 June 2001, c. 4a, JdT 2002 I 306 (holding that a co-owner who had tolerated the exclusive use by another co-owner of a communal part of the building does not commit an abuse of right by bringing proceedings in order to restore it to its original state even when the co-owner had initially given its consent for the other co-owner to use this part).

751 CHAPPUIS, 50, §34; HAUSHEER/JAUN, 138 et s, §97 et seq; STEINAUER, 215–217, §§577–580.

752 CHAPPUIS, 50–51, §35; HAUSHEER/JAUN, 140 et s, §101 et seq; STEINAUER, 217–219, §§581–582; SFSCD 131 III 459 [462]–[463] of 16 June 2005, c. 5.3, JdT 2005 I 588 (holding that there was no abuse of right). This principle also forms the basis of the duty to mitigate one's loss following a contractual breach (see CHAPPUIS, 51, §35).

753 CHAPPUIS, 51, §37; STEINAUER, 227–228, §§600–602; SFSCD 129 III 426 [430] of 2 May 2003, c. 2.2 (holding that there was no abuse of right): "*Cette objection* [des "unclean hands"] *signifie, littéralement, que quiconque a "les mains sales" ne peut pas reprocher à autrui de les avoir dans le même état. En d'autres termes, admettre une telle objection revient à refuser la protection de la loi à celui qui ne la respecte pas lui- même. C'est imputer au demandeur une attitude contraire aux règles de la bonne foi et un abus manifeste de son droit d'agir en justice*." ("This objection [to "unclean hands"] means, literally, that whoever has "dirty hands" cannot blame others for having them in the same condition. In other words, to admit such an objection is to deny the protection of the law to one who does not respect it himself. It is to impute to the plaintiff an attitude contrary to the rules of good faith and a manifest abuse of his right to take legal action.") (Informal English translation of the French original).

fulfilled where one of the parties has prevented its occurrence in disregard of the rules of good faith" is considered to be a specific application of the unclean hands doctrine.[754] Article 156 SwCo also applies by analogy when a party causes a condition to arise in its favour contrary to the rules of good faith[755];

– invoking a formal defect when that party has performed the contract voluntarily with knowledge of the relevant defect. The nature of the formal defect is an important factor to consider in determining whether there has been an abuse of right or not. It is also not necessary that the contract was completely performed as substantial performance may be sufficient[756];
– contradictory behaviour (*venire contra factum proprium*). The conduct of one party may lead the other party to justifiably rely on this conduct thus making a subsequent change of conduct an abuse of right;[757]
– the exercise of a right when it has not been invoked for a long time and the other party has relied justifiably on this failure (*péremption*, *Verwirkung*).[758] The owner of the right must have tolerated the violation for a long period and the author of the violation must have, in the meantime, relied on and changed its position accordingly[759]; and
– invoking two separate legal personalities when the assets belong to the same person (legal or natural) which is known as the piercing of the corporate veil (*levée du voile social, Durchgriff*).[760]

754 PASCAL PICHONNAZ, Article 156 SwCo in Commentaire Romand – Code des Obligations I (3rd edn 2021), §1; Article 156 SwCO provides in the French original as follows: "*La condition est réputée accomplie quand l'une des parties en a empêché l'avènement au mépris des règles de la bonne foi*" and in the German original as follows : "*Eine Bedingung gilt als erfüllt, wenn ihr Eintritt von dem einen Teile wider Treu und Glauben verhindert worden ist*." SFSCD 4A_203/2018 of 5 November 2018, c. 3.2.2 ; See also in this regard GEISINGER, 806.

755 SFSCD 109 II 20 [21] of 1 March 1983 c. 2a ; SFSCD 4A_293/2007 c. 7.1; SFSCD 4C.38/2007 c. 3.4; SFSCD 5C.192/2004 c. 2.3.1.

756 CHAPPUIS, 52, §38; STEINAUER, 224–227, §§592–599; TERCIER/PICHONNAZ, 177–179, §§749–753.

757 CHAPPUIS, 50, §33; STEINAUER, 218–219, 222–223, §§583, 589–591; see e.g., SFSCD 143 III 348 [359]–[360] of 16 June 2017, c. 5.5.1; SFSCD 143 III 55 [62] of 18 January 2017, c. 3.4; SFSCD 140 III 481 [483] of 19 September 2014 c. 2.3.2; SFSCD 131 III 430 of 25 April 2005, JdT 2005 I 479; SFSCD 128 V 236 of 24 September 2002; SFSCD 113 II 264 of 29 April 1987 c. 2e, JdT 1988 I 13; SFSCD 108 II 278 of 17 June 1982 c. 5b (holding that it was abusive for a party to lead the other not to bring legal proceedings during the limitation period and that such party could not therefore invoke the limitation period).

758 HAUSHEER/JAUN, 153 et seq., §136 et seq.; CHAPPUIS, 51, §36.

759 *Ibid*.

760 CHAPPUIS, 60–61, §58. See e.g., SFSCD 144 III 541 [545] of 12 September 2018, c. 8.3.

458. In the case of a manifest abuse of right, the consequences include that the right cannot be invoked, the performance of the obligation is avoided, the benefits owed are reduced, the contract is terminated or damages are awarded.[761]

5. Good faith as one of the potential bases for the adaptation/termination of the contract in case of a change of circumstances

459. Under Swiss law, the adaptation of a contract is justified when the contract contains a gap concerning its adaptation (*lacune d'adaptation*, *Anpassungslücke*).[762] It is submitted by certain authors that parties in good faith should have included an adaptation clause when certain circumstances arise but when they have not done so, there is a gap concerning the contract's adaptation and this gap should be filled according to the principle of good faith in business.[763]

460. Indeed, circumstances can change to such an extent that the performance of one of the party's obligations is out of proportion with what could have been foreseen.[764] It is therefore admitted that in the event of an extraordinary and unforeseeable change in circumstances which significantly alters the balance of interests in a contract and which renders performance intolerable for the debtor (*théorie de l'imprévision, clausula rebus sic stantibus*), the judge can modify or terminate the contract.[765]

461. It is debated in legal doctrine, and undecided in the case law, whether the ground for this power lies in Article 2(1) SwCC or Article 2(2) SwCC (provision on abuse of right[766]).[767]

462. As already stated, if the conditions set out above are fulfilled, the judge can modify the contract.[768] Good faith, however, first requires the judge to impose

761 CHAPPUIS, 48–49, §29; HAUSHEER/JAUN, 136, §92; STEINAUER, 170–171, §480.

762 PICHONNAZ, 27; TERCIER/PICHONNAZ, 244, §1042.

763 *Ibid*.

764 TERCIER/PICHONNAZ, 244, §1043.

765 BAUMANN, 692–693, §455; CHAPPUIS, 59, §56; PICHONNAZ, 27–29; STEINAUER, 228–229, §603; TERCIER/PICHONNAZ, 245, §1050 and 246–247, §§1053–1055 stating that two conditions must be fulfilled: (1) new, inevitable and unforeseeable circumstances and (2) an excessive burden on the debtor; WINIGER, 197–199, §§193–201; SFSCD 127 III 300 [304]–[305] of 24 April 2001, c. 5b, JdT 2001 I 239.

766 See above, para. 455 et seq.

767 CHAPPUIS, 59, §56. See TERCIER/PICHONNAZ, 244, §1043 who support the ground of Article 2(1) SwCC and 246, §1051 stating that the ground of Article 2(1) SwCC is imposing itself as the preferred ground in the case law and doctrine. See in this regard SFSCD 127 III 300 [306]–[308] of 24 April 2001, c. 6, JdT 2001 I 239.

768 See above, para. 460.

a duty on the parties to renegotiate between themselves in order to modify the contract.[769] It is only if this renegotiation does not take place that the judge can intervene.[770] The judge must endeavour to establish the hypothetical intent of the parties, by attempting to determine the solution that they would have come to if they had foreseen the modification of circumstances at the time of the conclusion of the contract.[771]

463. The judge can modify the extent of the obligations or reduce or extend the length of the contract as well as terminate the contract with or without compensation.[772]

D. Good faith at the post-contractual stage

464. Good faith applies at the post-contractual stage and, as a result, may impose post-contractual duties on the parties (*devoirs post-contractuels, nachvertragliche Pflichten*) such as a duty of discretion (*devoir de discretion, Diskretionspflicht*).[773]

E. Rationalization attempts

465. The Swiss legal doctrine has followed the approach of the German doctrine[774] and has attempted to rationalize the principle of good faith by pointing to the three functions of good faith, namely the interpretative, supplementing and corrective functions of good faith.[775] Hence, according to the majority of the Swiss doctrine, Article 2(1) SwCC has both an interpretative function and supplementing function whilst Article 2(2) SwCC has a corrective function.[776]

769 PICHONNAZ, 37; TERCIER/PICHONNAZ, 248, §1059.
770 *Ibid*.
771 MÜLLER, Art. 18 SwCO, 940, §583; PICHONNAZ, 38; TERCIER/PICHONNAZ, 258, §1059.
772 CHAPPUIS, 59–60, §56; TERCIER/PICHONNAZ, 248, §1059; WINIGER, 200–202, §§202–215.
773 TERCIER/PICHONNAZ, 75, §295.
774 See below, paras. 593 et seq.
775 BAUMANN, 471, §21; CHAPPUIS, 39, §5; STEINAUER, 171, §482.
776 *Ibid*.

IV. French Law

466. This section explores the role of good faith under French contract law[777] (A.). The role of good faith will be examined at the pre-contractual stage (B.), the contractual performance stage (C.) as well as at the post-contractual stage (D.).

A. Good faith in general

467. Up until 2016, Article 1134(3) FrCC provided that "[agreements] must be performed in good faith".[778]

468. Initially this provision, which was found in Chapter three on the effect of obligations, was seen as a mere rule of interpretation of the parties' contractual intent.[779] Indeed, the aim of this provision was to confirm that no distinction should be made (as under Roman law) between good faith and strict law contracts[780] and that all contracts should be interpreted in accordance with the intent of the parties rather than literally.[781] In 1939, one commentator stated that good faith "is of no interest. It has no legal effects of its own […] it is a notion with no actual content in the law as it stands today."[782]

469. However, since the second half of the 20th century, Article 1134(3) FrCC was applied not only to the interpretation of the parties' contract but also to its performance.[783] At this time, it was submitted that good faith dominated the whole of contract law and was one of the essential elements of each and every

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777 For more comprehensive studies of the notion of good faith under French law, see the theses of FRANÇOIS GORPHE, *Le principe de la bonne foi* (Thesis Paris 1928); ROBERT VOUIN, *La bonne foi: notion et rôle actuels en droit privé français* (Dijon LGDJ 1939); YVES PICOD, *Le devoir de loyauté dans l'exécution du contrat* (Paris LGDJ 1989); RICHARD DESGORCES, *La bonne foi dans les contrats:rôle actuel et perspectives* (Thesis Paris II 1992); SANDRINE TISSEYRE, *Le role de la bonne foi en droit des contrats* (Thesis PUAM, 2012); and RITA JABBOUR, *La bonne foi dans l'exécution du contrat* (Thesis Paris I 2014, LGDJ, 2016).

778 Article 1134(3) FrCC provided in the French original as follows: "[*Les conventions*] *doivent être exécutées de bonne foi*."

779 BÉNABENT, *bonne foi*, 291–292; BÉNABENT, *obligations*, 46, §38; LE TOURNEAU/POUMARÈDE, §9, §70, §84; PICOD, §4, §7; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 673, §597.

780 For the distinction between good faith and strict law contracts, see para. 165.

781 *Ibid*.

782 ROBERT VOUIN, *La bonne foi: notion et rôle actuel en droit privé français*, (LGDJ 1939) §243: "[La bonne foi] *ne présente aucun intérêt. Elle est dépourvue d'effets juridiques propres* [...] *c'est une notion vide de tout contenu réel dans notre droit positif*." See also COHEN, 522, §12.

783 BÉNABENT, *bonne foi*, 292; PICOD, §4, §7.

contract.[784] Good faith, and more particularly, the idea of loyalty was also gradually extended to the negotiation and conclusion of the contract.[785]

470. Today, Article 1104 FrCC (introduced by the ordonnance for the reform of the law of contract, the general regime of obligations, and proof of obligations published by the French Ministry of Justice on 16 February 2016 and applicable to contracts entered into after 1 October 2016), which is found in the first chapter on introductory provisions provides that "contracts must be negotiated, concluded and performed in good faith" ("*les contrats doivent être négociés, formés et exécutés de bonne foi*.").[786] As explicitly stated in Article 1104(2) FrCC, this requirement is a mandatory provision ("[c]*ette disposition est d'ordre public*") and as such parties cannot contract out of it.[787]

471. The requirement of good faith is seen as a way of incorporating morality or an element of justice into contract law and imposes a certain behaviour on contracting parties.[788] Significantly, the principle that contracts must be performed in good faith is considered to form part of French international public policy.[789] Accordingly, arbitral awards which contravene this principle may be set aside on the ground of public policy pursuant to Article 1520(5) FrCCP.[790]

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784 PIERRE BONASSIES, *Le dol dans la conclusion du contrat* (Thesis Lille 1995) 610: "*Aujourd'hui, il est juste d'affirmer que la bonne foi domine de haut l'ensemble du droit contractuel. Elle est l'un des éléments essentiels de tout contrat et de chaque contrat*."

785 BÉNABENT, *obligations*, 46, §38; MALAURIE/AYNÈS/STOFFEL-MUNCK, 260, §270.

786 The most recent version of the French Civil Code can be found here: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721, accessed 1 March 2023.

787 See also in this regard TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 674, §597. See, however, YVES-MARIE LAITHIER, *L'obligation d'exécuter le contrat de bonne foi est-elle susceptible de clause contraire? Réflexions comparatives*, D. 2014. 33 who has analyzed the question whether parties can derogate from the duty to perform the contract in good faith and who concludes that although a general waiver of the entire duty of good faith would not be valid, an agreed limitation of certain sub-obligations derived from the general duty of good faith could potentially be valid.

788 FABRE-MAGNAN, 110, §133; JOURDAIN, 121; GEORGES RIPERT, *La règle morale dans les obligations civiles* (LGDJ 1994), §157.

789 *Rép. de Côte d'Ivoire v. Norbert Beyrard,* Paris, 12 January 1993, (1994) Rev Arb 685 holding that: "*L'exécution de bonne foi des conventions est un principe général de droit public international, dont l'arbitre a notamment pour mission d'assurer le respect."* Challenge of Arbitral Awards in French Cours d'Appel in JEAN ROUCHE/GERALD H. POINTON ET AL., French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration (2nd edn Kluwer Law International 2009) 259, §465.

790 Article 1520(5) FrCCP provides in the French original as follows: "*Le recours en annulation n'est ouvert que si* […] *la sentence est contraire à l'ordre public international*."

B. Good faith at the pre-contractual stage

472. The duties imposed by good faith at the pre-contractual stage (1.) and the liability incurred and legal remedies available for their breach (2.) will be discussed in turn.

1. Duties imposed by good faith

473. As a result of the principle of freedom of contract, negotiating parties retain the freedom not to contract and therefore to break off talks.[791] However, the new provision of Article 1112(1) FrCC provides that the commencement, continuation and the breaking-off of pre-contractual negotiations must imperatively comply with the requirements of good faith.[792]

474. With respect to the pre-contractual negotiations, good faith imposes a duty of loyalty (*devoir de loyauté*) on each negotiating party and the corresponding duty to act coherently (*devoir de cohérence*).[793] In this regard, it has been argued that good faith even imposes a positive duty on the parties to do everything in their power during the negotiations in order to reach an agreement (*devoir de persévérance*).[794] The following are examples of conduct which are deemed to violate such duties:

– initiating negotiations without any intention of contracting;[795]
– hanging out negotiations when they are in vain;[796]
– negotiating with the sole aim of obtaining information;[797]

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791 Cass civ 1re, 20 déc. 2012, no. 11-27.340; Cass civ 3e, 31 mai 2018, no. 17-17.539.

792 Article 1112(1) FrCC provides in the French original as follows: "*L'initiative, le déroulement et la rupture des négociations précontractuelles sont libres. Ils doivent impérativement satisfaire aux exigences de la bonne foi*."

793 TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 164, §128.

794 JOURDAIN, 129; LE TOURNEAU/POUMARÈDE, §37; PICOD, §6.

795 JOURDAIN, 128; LE TOURNEAU/POUMARÈDE, §35; PETIT/ROUXEL, §11; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 274, §248; CA Rennes 8 juillet 1929, DH 1929.548.

796 JOURDAIN, 128; PETIT/ROUXEL, §12; Cass com 22 fév. 1994, no. 92-13871, Bull Civ IV no. 72, 55 (holding that a company was liable in tort when it had in its own interest extended the time limit for an act of sale of a bar-brasserie to take place beyond a reasonable limit despite knowing of the difficulties encountered by the potential buyer to find funds for the purchase and when it had encouraged the buyer to make costly modifications of the bar-brasserie in the meantime leading to its bankruptcy).

797 JOURDAIN, 128; LE TOURNEAU/POUMARÈDE, §37; Cass com 3 oct. 1978, Bull Civ IV no. 208, 176 (holding that a company had committed a fault of unfair competition by misusing information obtained during the negotiations).

- negotiating with the sole aim of preventing the other party from negotiating with a third party;[798]
- entering into negotiations without obtaining ownership of the right which is the object of the contract and without being certain of being able to obtain it;[799]
- entering into negotiations without informing the other of the necessity of obtaining a loan and remaining silent on this issue;[800]
- making manifestly unacceptable offers;[801]
- withdrawing an offer before giving the other party a reasonable time to think about it;[802]
- failing to inform the other party of parallel negotiations with a third party[803] (although a party is not generally prevented from negotiating with third parties as long as there is no exclusivity clause[804]);
- conducting negotiations on the basis of a high price whilst conducting negotiations with third parties on the basis of a much lower price;[805] and
- breaking-off negotiations at a late/advanced stage after raising expectations that the contract will be concluded, notably by requesting the other

798 LE TOURNEAU/POUMARÈDE, §37; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 274, §248.

799 JOURDAIN, 128.

800 LE TOURNEAU/POUMARÈDE, §37; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 274, §248. See Cass civ 1e 6 janv. 1998, no. 95-19199, JurisData no. 1998-000024 (holding that a purchaser was liable in tort when it had pursued negotiations in view of buying the shares of a company which owned a building for a lengthy period and had obtained the agreement of the sellers not to rent the company's building when it did not inform them until the day before the signature of the promise of sale that it needed to get a bank loan which it had not been able to obtain.).

801 JOURDAIN, 129; MALAURIE/AYNÈS/STOFFEL-MUNCK, 268, §278.

802 JOURDAIN, 129; MALAURIE/AYNÈS/STOFFEL-MUNCK, 268, §278 considering that not giving the other contracting party a reasonable time to think is contrary to the obligation of good faith in negotiations.

803 JOURDAIN, 128; LE TOURNEAU/POUMARÈDE, §36; cf FABRE-MAGNAN, 290, §364 stating that it is legitimate to carry out parallel negotiations and not to keep the other mutually informed; see also Cass com 15 déc. 1992, no. 90-21.175, RTD civ 1993, 577 (holding that a party did not have the obligation to inform company B of the status of its negotiations with the other candidates that had replied to its invitation to tender.).

804 LE TOURNEAU/POUMARÈDE, §36; MALAURIE/AYNÈS/STOFFEL-MUNCK, 268, §278; Cass com 15 déc. 1992, no. 90-21.175. See further Cass com 27 mars 2019, no. 17-22.083.

805 LE TOURNEAU/POUMARÈDE, §36; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 274, §248; Cass civ 2e 4 juin 1997, no. 95-10574, RTD civ 1997, 921, obs J. MESTRE (concerning the sale of a parcel of land in which the commune was proposing a price of 250 francs per m to a company which had an option over the land and 120 francs per m to a third party).

party to carry out works and leaving the other party in a state of uncertainty for a prolonged period of time.[806]

475. Conversely, it is not bad faith if a party terminates negotiations abruptly for a legitimate reason such as a disagreement with respect to the price, a failure of one of the parties to meet the stated technical requirements or economic difficulties.[807] Indeed, a negotiating party will only be liable if it abusively breaks off negotiations.[808]

476. Good faith also imposes on the parties a duty to respect the confidentiality (*devoir de confidentialité*) of any information received.[809] In this regard, Article 1112-2 FrCC now provides that any person who uses or divulges confidential information obtained during negotiations without permission will be liable under the conditions set out at law.[810]

477. With respect to the conclusion of the contract, good faith imposes on the parties an obligation to inform (*obligation précontractuelle d'information*).[811]

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806 JOURDAIN, 128; PETIT/ROUXEL, §27; LE TOURNEAU/POUMARÈDE, §40 and stating at §§41–43 that in order to determine whether a party has violated its duty to negotiate in good faith by breaking off negotiations, one should consider the state of advancement of the negotiations, the significance and the uniqueness of the discussed contract, whether the party who broke off negotiations was a professional, the publicity that was given to the negotiations, whether there was an offer to contract, whether such offer was already quite specific and any deadlines in place; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 274, §248; Cass com 20 mars 1972, Bull Civ IV no. 93, 90; see Cass civ 3e 3 oct 1972, no. 71-12993, Bull Civ III no. 491 (holding that a supermarket company was liable in tort when it abruptly terminated negotiations with the company owner of a building after the latter had made modifications to the building on the basis that the supermarket company would buy the commercial units in the building); Cass com 18 janv 2011 no. 09-14.617 (holding that a seller was liable in tort when it abruptly terminated advanced negotiations for the sale of shares and sold the shares to a third party); see also in general Cass com 9 nov. 2010 no. 09-70.726, Bull Civ IV no. 172.

807 PETIT/ROUXEL, §29; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 274–275, §248; Cass com 20 nov. 2007, no. 06-20332, RTD civ 2008, 101, note B FAGES (holding that the termination of negotiations discussing the development of medical centres at an advanced stage was justified given that the participation in the development was conditioned on the receipt of favourable legal and financial information concerning the other company which was not received); Cass com 16 févr. 2010, no. 09-12.097; Cass civ 1re 20 déc. 2012, no. 11-27.340.

808 Cass com 16 févr. 2016, no. 13-28.448.

809 LE TOURNEAU/POUMARÈDE, §§49–50; MALAURIE/AYNÈS/STOFFEL-MUNCK, 268, §278; PICOD, §43.

810 Article 1112-2 FrCC provides in the French original as follows: "*Celui qui utilise ou divulgue sans autorisation une information confidentielle obtenue à l'occasion des négociations engage sa responsabilité dans les conditions du droit commun*."

811 JOURDAIN, 123; LE TOURNEAU/POUMARÈDE, §55; PICOD, §6.

478. Case law frequently based this pre-contractual obligation to inform on the requirement of good faith found in former Article 1134(3) FrCC.[812] This pre-contractual obligation imposed on a party the duty to inform its contracting party of all facts that it had at its disposal which were of decisive importance to the other party's decision to enter into the contract.[813] This obligation assumed that the other party was legitimately unaware of this information.[814] Indeed, the other contracting party was also obliged to inform itself to the extent possible.[815]

479. Today, Article 1112-1 FrCC codifies this obligation and provides that "if one of the parties knows or ought to know information which is of decisive importance for the consent of the other, such party must inform him of it where it is legitimate that the other does not know the information or relies on him."[816] The information that has to be disclosed does not include the estimation of the value of the service but includes information with a direct and unavoidable link to the content of the contract or the status of the parties.[817] Article 1112-1 FrCC explicitly states that the person who asserts that information should be provided bears the burden of proving that the other party was obliged to provide this information.[818] This provision is also explicitly mandatory.[819]

812 JOURDAIN, 123–124; LE TOURNEAU/POUMARÈDE, §§54–55; PICOD, §6; Cass com 20 sept. 2005, no. 03-19.732, JurisData no. 2005-029785 (holding that the lessor had breached its duty towards the guarantors to contract in good faith by failing to disclose information on the viability of the operation guaranteed).

813 JOURDAIN, 124–125.

814 *Ibid*.

815 *Ibid*.

816 Article 1112-1(1) FrCC provides in the French original as follows: "*Celle des parties qui connaît une information dont l'importance est déterminante pour le consentement de l'autre doit l'en informer dès lors que, légitimement, cette dernière ignore cette information ou fait confiance à son cocontractant*."

817 Article 1112-1(2)-(3) FrCC provides in the French original as follows: "*Néanmoins, ce devoir d'information ne porte pas sur l'estimation de la valeur de la prestation. Ont une importance déterminante les informations qui ont un lien direct et nécessaire avec le contenu du contrat ou la qualité des parties*." See also Article 1137(3) FrCC which states that a party does not act fraudulently if it does not reveal to its contracting party the estimation of the value of the services and provides in the French original as follows : "*Néanmoins, ne constitue pas un dol le fait pour une partie de ne pas révéler à son cocontractant son estimation de la valeur de la prestation*."

818 Article 1112-1(4) FrCC provides in the French original as follows: "*Il incombe à celui qui prétend qu'une information lui était due de prouver que l'autre partie la lui devait, à charge pour cette autre partie de prouver qu'elle l'a fournie*."

819 Article 1112-1(5) FrCC provides in the French original as follows: "*Les parties ne peuvent ni limiter, ni exclure ce devoir*."

2. Liability and legal remedies for breach of duties imposed by good faith

480. Liability in tort on the basis of Article 1240 FrCC[820] is incurred for failing to act in good faith during the pre-contractual negotiations[821] except if a negotiation contract has been concluded, in which case, there will be contractual liability.[822]

481. According to the case law under former Article 1134(3) FrCC, a victim could only claim the expenses incurred and could not claim damages for the loss of a chance or specific performance (i.e., forced conclusion of the contract).[823] Article 1112(2) FrCC has now partially codified this case law and confirms that parties cannot claim damages for the loss of the benefits expected from the contract that was not concluded or for the loss of a chance of obtaining these advantages.[824] A recent decision of the *Cour de cassation* appears, however, to

[820] Article 1240 FrCC provides in the French original as follows: "*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer*." ; for an example of a decision rendered before the reform of the law of obligations, see Cass civ 1re 15 mars 2005, no. 01-13.018.

[821] FABRE-MAGNAN, 298, §378; JOURDAIN, 130; LE TOURNEAU/POUMARÈDE, §28, §46; MALAURIE/AYNÈS/STOFFEL-MUNCK, 268, §278; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 275, §248; Cass com 11 janv. 1984, no. 82-13259, Bull Civ IV n°16, 23 (holding that the loss resulting from a fault committed during the period which precedes the conclusion of a contract is redressed in the framework of tortious liability).

[822] JOURDAIN, 130; LE TOURNEAU/POUMARÈDE, §28.

[823] FABRE-MAGNAN, 300, §381; JOURDAIN, 130–131; LE TOURNEAU/POUMARÈDE, §47 and §48 (concerning the expenses that have been compensated); MALAURIE/AYNÈS/STOFFEL-MUNCK, 268, §278; PETIT/ROUXEL, §§39–42, §44 (concerning the expenses that have been reimbursed by the French courts); TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 276, §248. See Cass com 26 nov. 2003, Bull Civ IV no. 186 (*arrêt Manoukian*); Cass civ 3e 28 juin 2006 no. 04-20040, Bull Civ III no.164 (holding that a fault committed by unilaterally terminating precontractual negotiations is not the cause of a loss consisting in the loss of a chance to obtain the profits that one was hoping to obtain from the conclusion of the contract); Cass com 18 janv. 2011, no. 09-14.617; Cass com 1er mars 2011, no. 10-12.268; Cass com 18 sept. 2012 no. 11.19.629; Cass civ 3e 19 sept. 2012 no. 11-10.532.

[824] Article 1112(2) FrCC provides in French original as follows: "*En cas de faute commise dans les négociations, la réparation du préjudice qui en résulte ne peut avoir pour objet de compenser ni la perte des avantages attendus du contrat non conclu, ni la perte de chance d'obtenir ces avantages*." See however Cass civ 2e 20 mai 2020, no. 18-25.440 (holding that in the event that a bank violates its duty of information, every loss of a chance gives rises to a right to compensation).

authorize contractual adjustment by the parties of the sanction for bad faith during the negotiations.[825]

482. If a party has violated its pre-contractual obligation to inform and this constitutes fraudulent conduct (*dol*), the other party may, in addition to damages, also request the annulment of the contract concluded pursuant to Articles 1130 and following FrCC (Art 1112-1(6) FrCC).[826]

C. Good faith at the contractual performance stage

483. At the contractual performance stage, good faith is employed as a directive in order to ascertain the parties' true and common intent (1.) and also inspires the rule on the objective interpretation of the parties' contract (2.). Good faith informs the manner in which the parties should perform their obligations (3.) and imposes ancillary duties on the parties (4.). It further limits the manner in which the parties' contractual rights should be exercised (5.) and initially formed the basis for the adaptation or renegotiation of a contract in case of a change of circumstances (6.).

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825 Cass civ 1re 20 jan. 2021 no. 18-24.297. In this case, a clause provided for the early repayment of a real estate loan taken out by a couple of borrowers in the event of the provision of inaccurate information regarding their situation in the absence of any default in the repayment of the loan, since this information was decisive for the lender's consent. The lender declared the term of the loan forfeited on the basis of the aforementioned clause and sued the borrowers for payment, considering that they had provided false statements of account. Ignoring the presumption of abuse raised by the borrowers, the *Cour de cassation* considered that the disputed clause sanctioned "the disregard of the obligation to contract in good faith when taking out the loan", with the result that it did not create a significant imbalance between the parties' rights and obligations.

826 Article 1112-1(6) FrCC provides in French original as follows: "*Outre la responsabilité de celui qui en était tenu, le manquement à ce devoir d'information peut entraîner l'annulation du contrat dans les conditions prévues aux articles 1130 et suivants*." FABRE-MAGNAN, 294, §373. See Cass civ 1re 27 juin 2018 no. 17-15.039 in which the annulment of a contract concluded was allowed in a case where a loan had been granted by a bank in circumstances where the account statements which had been requested by the lender had been falsified by the borrower; see also Cass civ 1re 10 mai 1989 no. 87-14.294; Cass civ 1re 26 nov. 1991 no. 90-14.978; cf Cass civ 1re 1 juill. 2020 no. 18-26.352 in which the *Cour de cassation* did not allow the annulment of the contract in which the buyer of a vehicle alleged that the seller had hidden the origin of the vehicle.

1. Good faith as a directive of interpretation allowing the parties' true and common intent to be ascertained

484. Good faith is considered to be a directive for the interpretation of a contract.[827]

485. This directive inspires Article 1188(1) FrCC (former Article 1156 FrCC) which provides that one should look for the common intent of the parties rather than sticking to the literal meaning of the words used by the parties.[828]

486. In some cases, the courts have applied good faith directly to the interpretation of the parties' contract without citing the aforementioned provision.[829] Indeed, good faith has been directly applied in order to prevent parties from relying on the literal meaning of the contract and ignoring the spirit of the contract.[830]

2. Good faith as inspiration for the rule on objective interpretation

487. Good faith is also said to inspire Article 1188(2) FrCC[831] which provides that when the common intent of the parties cannot be ascertained, a contract shall be

827 BÉNABENT, *bonne foi*, 294; LE TOURNEAU/POUMARÈDE, §69 et seq. See also SIMLER, §§18–19 who states that when the contract is clear, there is no question of interpretation and it is just a question of whether the parties perform their obligations in accordance with good faith. The questions of interpretation and performance in good faith of the contract only both come into play when the contract is ambiguous. In such a case, either a party attempts to use the ambiguous wording in order to justify its bad faith performance or the ambiguous wording justifies performance by a party which was allegedly contrary to bad faith. In such cases, the question of performance in good faith is absorbed by the question of interpretation.

828 BÉNABENT, *bonne foi*, 294; LE TOURNEAU/POUMARÈDE, §71. Article 1188(1) FrCC provides in the French original as follows: "*Le contrat s'interprète d'après la commune intention des parties plutôt qu'en s'arrêtant au sens littéral de ses termes*." See also, in this regard with respect to Roman law, para. 164.

829 BÉNABENT, *bonne foi*, 294; LE TOURNEAU/POUMARÈDE, §71.

830 FABRE-MAGNAN, 122 §139; Cass com 20 oct. 1998, no. 96-10259 (in which the contract concluded with the company American Express provided that in case of the issuance of a credit card at the request of a company, the latter would remain liable for the withdrawals made by the holder of the card. After one holder left the company, the latter blocked the card. The *cour de cassation* sanctioned the decision of the *Cour d'appel* which had simply applied the provisions of the contract without checking whether the company American Express, after having received the request to block the card, had done everything in its power to avoid that withdrawals and payment requests be granted.). See also BÉNABENT, *obligations*, 254, §301 stating that good faith obliges the debtor to completely and honestly perform the contract and not stick to the literal words of the contract and LE TOURNEAU/POUMARÈDE, §§113–115.

831 Article 1188(2) FrCC provides in the French original as follows: "*Lorsque cette intention ne peut être décelée, le contrat s'interprète selon le sens que lui donnerait une personne raisonnable placée dans la même situation*."

interpreted according to the meaning that a reasonable person placed in the same circumstances would give to it.[832]

3. Good faith as informing the manner in which obligations should be performed

488. Good faith imposes a duty of loyalty (*devoir de loyauté*) on the parties.[833]

489. A debtor will hence act contrary to good faith if it:

- intentionally fails to perform its obligations (willful misconduct);[834]
- makes performance of its obligations under the contract impossible (by overbooking for example);[835]
- schemes in order to prevent the creditor from receiving the benefit that it was expecting from the contract;[836]
- does not act vigilantly;[837] and
- does not avoid all useless expenses for the creditor.[838]

832 LE TOURNEAU/POUMARÈDE, §71 arguing that the 'reasonable person' concept is linked to good faith.

833 COHEN, 524, §19; PICOD, §§87–88; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 673, §597.

834 PICOD, §80; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 674, §598; Cass Civ 1re, 4 fév. 1969, D 1969, jurisprudence 601, note J. Mazeaud. See also LE TOURNEAU/POMARÈDE, §89 stating that a debtor must fully perform the contract and at §§93–94 stating that a debtor has a duty to perform in compliance with the terms stipulated by the contract (*devoir de fidelité*).

835 TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 674, §598; TI Niort 17 janv. 2001, CCC 2001 no. 77, note RAYMOND (making contractual performance impossible); see also FABRE-MAGNAN, 110, §133.

836 TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 674, §598; Cass civ 17 janv. 1906, S 1909 1 205 (preventing the creditor from receiving the fruits of contract). See also Cass 3e, 19 janv. 2022, no. 20-13.951 (holding that the obligation of loyalty, good faith and sincerity applies in contractual matters and that the buyer of an occupied property who, after the signature of the unilateral promise to sell, concluded an agreement to vacate the premises with the occupant, without informing the seller at the time of the signature of the deed, violated this obligation and was accordingly liable to pay damages).

837 LE TOURNEAU/POMARÈDE, §90 stating that a professional must not be passive and wait for events to happen but must act with vigilance (*devoir de vigilance*).

838 TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 674, §598; Cass civ 28 nov. 1905, DP 1909.193, S 1909.1.269 (requiring a shipper to send goods by the most advantageous itinerary for the sender). See also PICOD, §39 stating that a debtor must perform its obligations in the most useful way for the creditor.

490. The party alleging the bad faith of the other party carries the burden of proof.[839]

491. In most cases, a contracting party who has violated its duty to act in accordance with good faith will be contractually liable and will be obliged to pay damages.[840] The bad faith of one party, however, may also permit the other party to ask for the termination of the contract on the basis of Articles 1224 et seq. FrCC.[841]

492. A debtor who owes a sum of money and who has acted in bad faith will be liable for damages in addition to interest for late payment (Art. 1231-6(3) FrCC).[842] If a debtor acts fraudulently (by, for example, intentionally failing to perform its obligations), it will be liable even for non-foreseeable loss.[843] In addition, a debtor acting in bad faith cannot invoke a grace period set out in Article 1343-5 FrCC,[844] or invoke a penalty clause or a limitation of liability clause (Art. 1231-5 FrCC).[845] Furthermore, a condition will be deemed to be fulfilled if the debtor prevented the accomplishment in bad faith (Art. 1304-3 FrCC).[846] Moreover, a debtor can only oppose the creditor's request for specific performance

839 BÉNABENT, obligations, 256, §301; FABRE-MAGNAN, 114, §136; LE TOURNEAU/POUMARÈDE, §124. See also Article 2274 FrCC which provides as follows in relation to subjective good faith: "*La bonne foi est toujours présumée, et c'est à celui qui allègue la mauvaise foi à la prouver*." ("Good faith is always presumed, and it is up to the person who alleges bad faith to prove it."); Cass civ 2e 5 juillet 2018, no. 17-20488.

840 ANCEL, 100.

841 TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 678, §598; Req 13 nov. 1928 DH 1928. 589 (allowing a landlord to terminate the lease contract as a result of the tenant having put up signs on the outside of the building and running a bank there contrary to the terms of the lease).

842 BÉNABENT, *bonne foi*, 296; LE TOURNEAU/POUMARÈDE, §136; PICOD, §81.

843 BÉNABENT, *bonne foi*, 296; LE TOURNEAU/POUMARÈDE, §136; PICOD, §81; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 678, §598.

844 BÉNABENT, *bonne foi*, 296; LE TOURNEAU/POUMARÈDE, §130; PICOD, §81; Cass civ 3e 27 nov. 1990, no. 89-17180.

845 LE TOURNEAU/POUMARÈDE, §130, §136; PICOD, §81; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 678, §598; Cass civ 22 oct. 1975, no. 74-13217 (holding that a show artist had committed willful misconduct and was not entitled to invoke the penalty clause contained in the contract when he did not turn up to a contracted performance when he had signed the contract and did not inform the organizers of his non-attendance or provide any explanation.).

846 LE TOURNEAU/POUMARÈDE, §130; PICOD, §81; Cass civ 3e 23 juin 2004, no. 03-12207, JurisData no. 2004-024294, Bull Civ 2004 III no. 132 (sanctioning the decision of the court of appeal which had declared invalid a promise of sale subject to a condition precedent of the payment of the price and fees before a fixed date because it did not consider whether the promisor had acted in good faith when invoking the failure of its contracting party and indeed had held that the promisor had demanded that the sale be stopped.).

on the ground that it is manifestly disproportionate if it is not acting in bad faith (Art. 1221 FrCC).[847]

4. Good faith as a tool for imposing ancillary contractual duties

493. Good faith is said to underly Article 1194 FrCC (former Article 1135 FrCC) which provides that contracts create obligations not only with respect to what is expressly provided but also with respect to the consequences which are given to them by equity, usage or legislation.[848]

494. As a result of this provision, the French courts have imposed various duties on contracting parties, most notably a safety obligation (*obligation de sécurité*), which imposes an obligation not to create a danger to the health of a person, and an obligation to inform (*obligation d'information*).[849] Accordingly, each contracting party is obliged to inform the other of facts that it has an interest in knowing for the performance of the contract.[850] It has even been held that good faith requires a contracting party to inform the other party of a mistake that it has made.[851]

495. Good faith also imposes a duty to cooperate (*devoir de coopération*) on the parties.[852] This duty encompasses an obligation for the parties to take into account the interests of the other party[853] which has become more and more stringent in

847 Article 1221 FrCC provides in the French original as follows: "*Le créancier d'une obligation peut, après mise en demeure, en poursuivre l'exécution en nature sauf si cette exécution est impossible ou s'il existe une disproportion manifeste entre son coût pour le débiteur de bonne foi et son intérêt pour le créancier*."

848 Article 1194 FrCC provides in the French original as follows: "*Les contrats obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que leur donnent l'équité, l'usage ou la loi*." See also in this regard BÉNABENT, *bonne foi*, 294; LE TOURNEAU/POUMARÈDE, §72.

849 LE TOURNEAU/POUMARÈDE, §73, §75. For an in-depth study on the obligation to inform under French contract law, see MURIEL FABRE-MAGNAN, *De l'obligation d'information dans les contrats: essai d'une théorie* (LGDJ 1992).

850 TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 679, §599; Cass civ 1re, 17 mars 1969, D 1969.532 (liability of a client for damages caused to the owner of a bulldozer that was destroyed when it hit an underground gas pipe for failing to inform the contractor of the underground pipelines). See also LE TOURNEAU/POMARÈDE, §92 with respect to the professional's duty to act transparently and to inform the other party of difficulties during the performance of the contract, when it changes its opinion and when it has completed its work.

851 Cass civ 1re 23 janv. 1996, Bull Civ I no. 36, 23; COHEN, 524, §19; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 680, §599.

852 TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 678, §599; PICOD, §44.

853 LE TOURNEAU/POMARÈDE, §96.

line with the judiciary's desire to ensure the respect of a minimum of contractual solidarity.[854]

496. On the creditor's side, this duty to cooperate obliges the creditor to facilitate the debtor's performance under the contract by providing the necessary help.[855] In this regard, a creditor will act contrary to good faith if it makes the performance of the contract by the other party impossible or difficult.[856] For example, a creditor who submits an order when the debtor is on holiday with the aim of making it impossible for the latter to perform within the deadlines, is acting contrary to good faith.[857]

497. This obligation is increasingly invoked by the French courts, in particular, in distribution contracts.[858]

498. The extent of the obligation to cooperate depends on the nature of the contract at issue.[859] It is especially pronounced in partnership contacts as well as long-term contracts where trust is required between the parties, such as in distribution contracts.[860] In cases where the parties have a long standing business relationship, the obligation will again be more pronounced.[861] The technical nature of the object of the contract (such as IT equipment or insurance products) may also give rise to a heightened obligation to cooperate in a given case.[862] If there is inequality between the parties, such as a professional on one side and a non-

854 PICOD, §44.

855 BÉNABENT, obligations, 254, §301; LE TOURNEAU/POUMARÈDE, §105; PICOD, §49; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 679, §599; See for example Cass com 15 janv 2002 no. 99-21.172, JurisData no. 2002-012712 (liability of an importer of Mazda cars to France when it imposed certain constraints on its distributors when confronted with a collapse in the automobile market together with an increase in the yen without making any financial efforts itself. The court held that the importer abused its right to unilaterally fix the sale conditions and that it owed damages to the distributors).

856 FABRE-MAGNAN, 110, §133; LE TOURNEAU/POUMARÈDE, §106; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 675, §598 ; See for example Cass com 4 nov 2014 no. 13-18.024 (holding that the principal had not faithfully performed its commitments by hindering the actions of its agent).

857 FABRE-MAGNAN, 110, §133; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 675, §598.

858 PICOD, §50.

859 PICOD, §45; LE TOURNEAU/POMARÈDE, §95; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 678, §599.

860 PICOD, §45; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 678–679, §599.

861 PICOD, §48.

862 PICOD, §46.

professional on the other, an obligation to advise may be imposed on the professional.[863]

5. Good faith as limiting the manner in which contractual rights should be exercised

499. Good faith also acts as a limit on the manner in which the parties exercise their contractual rights. Hence, a creditor will act contrary to good faith if it:

- invokes its contractual rights before giving the defaulting debtor a chance to perform;[864]
- relies on the literal application of the contract when the debtor's performance has given him substantial satisfaction;[865]
- relies on a minimal breach in order to escape from its own obligations under the contract;[866]
- relies on the contract in order to oblige the debtor to make monetary sacrifices which are disproportionate to the usefulness of the aim achieved;[867]

863 PICOD, §47, noting however that where the nonprofessional knows or ought to know the information, it cannot allege that it is entitled to such information or advice from the professional. See e.g., Cass com 25 mai 1993, no. 91-12205, JurisData no. 1993-001108, Bull Civ 1993 IV no. 211 (holding that the seller who was a specialist in systems against theft was bound, if need be by first informing itself on the conformity of its systems with the norms imposed by insurers, to inform the buyer of the consequences of the sale with respect to the insurance cover of the risk of theft).

864 LE TOURNEAU/POMARÈDE, §91 stating that a creditor has a duty to be tolerant when faced with a defaulting debtor; Cass com 28 sept. 2004, no. 02-21.522 holding that the licensor was not at fault when it invoked the contractual provisions allowing it to terminate the contract when it had first granted the licensee deadlines in order to pay the outstanding amounts under the contract.

865 LE TOURNEAU/POUMARÈDE, §115; PICOD, §91; CA Pau 15 févr. 1973 holding that a petrol company's request for the return of the tanks which had been lent was abusive given that the debtor, in order to avoid the costs of ripping up and re-doing the ground where the tanks were installed, had offered to give back new tanks of the same description.

866 PICOD, §91; Cass com 30 jan. 1979 D 1979.317 holding that the person who had hired defective equipment could not invoke the defence of non-performance, and therefore not pay the fees, as the defects did not render the equipment non-functioning.

867 TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 675–676, §599; Req 23 mars 1909, S 1909 1 552 where the judges refused to order that works be redone in a building when this would require the building to be more or less demolished and would cause costs to be incurred far superior to the amount of damages incurred due to the bad work done.

– acts inconsistently with its prior conduct (prohibition of contradictory behaviour);[868] and
– in certain circumstances, invokes its contractual right to terminate,[869] its contractual right to withdraw (*clause de dédit*),[870] or fails to renew a fixed term contract where the other party legitimately expected from that party's conduct that the contract would be renewed.[871]

500. Legal remedies imposed for a creditor's failure to act in good faith include contractual liability, as well as loss or suspension of the right invoked.[872] Indeed, a

868 LE TOURNEAU/POUMARÈDE, §119; PICOD, §91. This principle of the prohibition of contradictory behaviour is considered to be a general principle of law according to the Commercial chamber of the *Cour de cass*ation (Cass com 20 sept. 2011 no. 10-22888). See also TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 676, §598; Cass com 8 mars 2005, no. 02-15783, RDC 2005, 1015, note DENIS MAZEAUD (holding that a bank had violated its obligation to perform in good faith when it had treated the company's two accounts as independent accounts when it had signed an agreement on the unity of the accounts.). For an in-depth study on the principle of coherence under French law, see DIMITRI HOUTCIEFF, *Le principe de cohérence en droit privé des contrats* (PUAM 2000).

869 BÉNABENT, *bonne foi*, 298–299; COHEN, 524, §19; MALAURIE/AYNÈS/STOFFEL-MUNCK, 256–257, §269; PICOD, §82; Cass com 1 juill. 2020 no. 19-12.189; Cass civ 3e 10 nov. 2010 no. 09-15937 holding that the court of appeal did not give a legal basis for its decision declaring the automatic termination of a lease when it did not inquire whether this termination clause had been invoked in good faith. Indeed, the tenant argued that the landlord was seeking to put an end to a competing business of a company that it owned elsewhere; See, however, Cass com 10 juill. 2007, no. 06-14768 (*arrêt Les Maréchaux*) holding that a judge may sanction a bad faith use of a contractual prerogative but cannot touch the substantive rights ("*si la règle selon laquelle les conventions doivent être exécutés de bonne foi permet au juge de sanctionner l'usage déloyal d'une prerogative contractuelle, elle ne l'autorise pas à porter atteinte à la substance même des droits et obligations légalement convenus entre les parties*.") and Cass civ 3e 15 déc. 2016, no. 15-22.844. See further Cass com 19 juin 2019 no. 17-29.000 (holding that the requirement of good faith does not authorize the judge to interfere with the terms of payment of the price fixed by the parties, which constitute the very substance of the rights and obligations legally agreed upon by the parties) and Cass civ 3e 14 mai 2020 no. 19-13.355.

870 COHEN, 524, §19; PICOD, §85; Cass civ 3e 11 mai 1976, no. 75-10854, Bull Civ 1976 III no. 199 holding that the seller acted contrary to good faith when invoking the withdrawal clause in the contract promising the sale of an apartment.

871 PICOD, §87; Cass com 21 oct. 1970, no. 68-12882, JCP G 1971, II 16798, note J HÉMARD holding that there was no abuse of right where the licensor decided not to renew the contract in circumstances where the licensee's turnover had continued to decline and Cass com 5 oct. 2004, no. 02-17338, JurisData no. 2004-025096 holding that the fact that the licensor led the distributor to believe that the contract would be renewed does not mean that the termination was abusive when there was no encouragement to make investments in view of a potential renewal.

872 LE TOURNEAU/POUMARÈDE, §135 stating that the abusive invocation of certain rights justifies that the creditor is obliged to pay damages to the other party and that this is also the case

creditor may be prevented from exercising its contractual right to terminate if it is acting in bad faith.[873] For example, a creditor who gives notice to the debtor when the latter cannot remedy its breach or who does not demand payment or performance for a long period of time will be prevented from invoking its contractual right to terminate.[874] Conversely, the good faith of the debtor will not prevent a creditor from invoking a termination clause.[875] A creditor may also be prevented from invoking a withdrawal clause, a penalty clause, a non-competition clause, a non-guarantee clause and a notification clause if it is acting in bad faith.[876] Further, a creditor acting in bad faith cannot invoke the defence of non-performance.[877]

with respect to the unilateral right to fix the price pursuant to Articles 1164 and 1165 FrCC; PICOD, §90.

873 ANCEL, 106; LE TOURNEAU/POUMARÈDE, §132; TERRÉ/SIMLER/LEQUETTE/CHÉNEDÉ, 677, §598; Cass civ 3e 15 déc. 1976, Bull civ III, no. 465, a case in which the notice was issued to a tenant in his absence during the vacation period and in which it was held that the landlord was acting in bad faith and that the notice did not bring into play the termination clause; Cass civ 1re 16 févr. 1990, no. 96-21.997; Cass civ 3e 17. juill. 1992, no. 90-18810; Cass com 1er juill. 2020, no. 19-12.189.

874 LE TOURNEAU/POUMARÈDE, §132; Civ 3e 16 oct. 1973, no. 72-11956, Bull Civ III no. 529, 386 holding that a landlord had acted contrary to good faith by sending a notice to pay to the tenant as foreseen in the contractual termination clause during the summer holidays; LE TOURNEAU/POUMARÈDE, §132; Cass com 7 janv. 1963, Bull Civ III no. 16, 14 holding that termination clauses are subject to the requirements of good faith and that a landlord could not invoke a contractual termination clause for failure to pay the rent when it had not demanded the rent for several years.

875 LE TOURNEAU/POUMARÈDE, §134; PICOD, §89; Cass com 18 mars 1997, no. 95-11079 holding that the perfume company was entitled to terminate the contract with its distributor when it had violated the contract by exhibiting its products in the neighbouring pharmacy even though the court of appeal had held that it had not acted in bad faith and had not abused its right by doing so in circumstances where it had included a mention inviting the clients to visit the neighbouring perfumery, the breach of contract was formal and the exhibiting of the products in the pharmacy would not lead to any depreciation in their value.

876 LE TOURNEAU/POUMARÈDE, §132.

877 BÉNABENT, *bonne foi*, 297; PICOD, §82; Cass com 1 déc. 1992, no. 91-10930, JurisData no. 1992-002775, Bull Civ 1992 IV no. 392 concerning a company which had breached an exclusive distribution agreement by giving to a third party the right to exclusively distribute the products in the same geographical area. The court held that the defence of non-performance invoked by the licensor did not terminate the contract but only suspended it.

6. Good faith as the initial basis for the adaptation of contracts in case of a change of circumstances

501. French case law had traditionally refused to recognize the theory of hardship (*théorie de l'imprévision*) in civil contracts.[878] However, this theory had been recognized in administrative contracts since 1916 on the ground of ensuring the continuity of public services.[879] The French legal doctrine was divided on this subject.[880]

502. However, starting in the 1970s, seemingly on the basis of an underlying and more stringent requirement of good faith, the French courts recognized an obligation, in certain cases, to adapt the parties' contract in line with the foreseeable evolution of the situation or an obligation to re-negotiate in case of a modification of the economic context.[881]

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878 See decision "canal de Craponne" of 6 March 1876 (Cass civ 6 mars 1876) in HENRI CAPITANT/FRANÇOIS TERRÉ/YVES LEQUETTE/FRANÇOIS CHÉNEDÉ (eds), *Les grands arrêts de la jurisprudence civile, Tome 2, Obligations, Contrats spéciaux, Sûretés* (13th edn Dalloz 2015), no. 156 which held that "*dans les contrats à exécution successive il n'appartient pas aux tribunaux, quelque équitable que puisse leur paraître leur décision de prendre en considération le temps et les circonstances pour modifier les conventions des parties et substituer des clauses nouvelles à celles qu'elles ont librement acceptées*." ("in contracts for successive performance, it is not for the courts, however fair their decision to take into consideration the time and circumstances to modify the parties' agreements and substitute new clauses for those they have freely accepted.") (Informal English translation of the French original).

879 Decision of the *Conseil d'Etat* of 30 March 1916, *Compagnie générale d'éclairage de Bordeaux*, No. 28 in MARCEAU LONG/PROSPER WEIL/GUY BRAIBANT/PIERRE DELVOLVÉ/BRUNO GENEVOIS (eds), *Les grands arrêts de la jurisprudence administrative* (22nd edn Dalloz 2019) 175–183; see also LE TOURNEAU/POUMARÈDE, §80.

880 PICOD, §97.

881 LE TOURNEAU/POUMARÈDE, §79; MALAURIE/AYNÈS/STOFFEL-MUNCK, 257–258; §269; PICOD, §§94–95; Decision of the Paris Court of Appeal of 28 December 1976 (*EDF v Shell*), JCP G 1978 II 18810 note J. ROBERT where the Court ordered the parties to negotiate following the rise in petrol prices. If the negotiations failed, the Court reserved the right to terminate the contract (if the imposed formula would affect the economy of the contract) or to impose the solution. This exceeded the safety clause in the contract which only provided that the parties should negotiate failing which the contract could be terminated; Decision of the *Tribunal de grande instance de Paris* of 24 February 1988 obliging the parties to an illegal provision to renegotiate in good faith; Decision *Huard* of 3 November 1992 (Cass com 3 nov. 1992 no. 90-18.547, JurisData no. 1992-002431) in which the commercial division of the *Cour de Cassation* approved the decision of the Paris Court of Appeal obliging the BP company to negotiate a commercial cooperation agreement allowing the dealer to align itself with its competitors following the deregulation of the fuel prices; Decision *But* of 30 January 1996 (Cass com 30 janv 1996 no. 94-13799, JurisData no. 1996-005650) where the commercial chamber of the *Cour de cassation* held that the franchisor was liable for not modifying the

503. Article 1195 FrCC now imposes a duty on a party to renegotiate in the event of an unforeseeable change of circumstances that renders performance excessively onerous for one of the parties provided that the latter has not assumed this risk.[882] It provides as follows: "If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform its obligations during renegotiation. In the event of a refusal to renegotiate or failure of the renegotiations, the parties can agree to terminate the contract at a date and subject to the conditions that they agree on, or they can request the judge by common agreement to modify the contract. Failing an agreement within a reasonable period, the judge can modify the contract[883] or terminate the contract at the date and subject to the conditions that it fixes."

504. Recent case law in light of the COVID-19 crisis has imposed on contractual parties an obligation to renegotiate by virtue of the requirement of good faith.[884]

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commercial policy in line with the policy in the sector where the franchisee was based; Decision *Chevassus-Marche* of 24 November 1998 (Cass com 24 nov 1998 no. 96-18357, JurisData no. 1998-004489) in which the commercial division of the *Cour de cassation* held that a client violated the obligation of loyalty under Article 4 of the law of 25 June 1991 on the relationship between commercial agents and their principals and its duty to put its contracting party in a position to perform the contract when it did not take measures allowing it to charge competitive prices as compared to products sold in parallel sales by competitors; Decision of the Court of Appeal of Nancy of 26 September 2007 (no. 06/02221, JurisData no. 2007-350306) in which the Court invited the parties to a distribution contract to re-negotiate stating that it would award damages for abuse for rejection of the opposing offers. The Court also warned the parties that it would actively reinterpret the contract.

882 Article 1195 FrCC provides in French original as follows: "*Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l'exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation. En cas de refus ou d'échec de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu'elles déterminent, ou demander d'un commun accord au juge de procéder à son adaptation. A défaut d'accord dans un délai raisonnable, le juge peut, à la demande d'une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu'il fixe*."

883 The power of the judge to modify the contract gave rise to numerous debates. Indeed, the Senate argued in favour of deleting this power of the judge to modify the contract (see < https://www.senat.fr/seances/s201802/s20180201/s20180201002.html>, accessed 1 March 2023. With respect to the arbitrator's power to modify the parties' contract which is subject to French law, see PHILIPPE STOFFEL-MUNCK, *La révision du contrat par l'arbitre à la lumière de l'article 1195 du code civil* (2017) Rev Arb 52–67.

884 TJ Paris 21 janv. 2021, no. 20/55750; TJ Paris 26 oct. 2020 no. 20/55901; TJ Paris 10 juill. 2020 no. 20/04516; TJ RIOM 2 mars 2021, no. 20/01418.

D. Good faith at the post-contractual stage

505. According to case law, the requirement to act in accordance with good faith applies during the performance of the contract including the period when the contract is suspended but not once the contractual relationship has ended.[885]

506. However, a duty of confidentiality, which is derived from the obligation of good faith applies after the termination of a contractual relationship even in the absence of a contractual confidentiality clause.[886] In addition, the post-contractual obligation not to compete is also said to be derived from the obligation of good faith.[887]

885 LE TOURNEAU/POUMARÈDE, §138; MALAURIE/AYNÈS/STOFFEL-MUNCK, 259, §269; PICOD, §39; see Cass civ 3e 14 sept. 2005, no. 04-10.856, JurisData no. 2005-029699 holding that the obligation of good faith found in (former) Article 1134(3) of the Civil Code presupposes the existence of contractual links which are terminated by the non fulfilment of the condition precedent to which they are submitted.

886 LE TOURNEAU/POUMARÈDE, §139.

887 *Ibid*. This view is supported by a decision of the commercial chamber of the *Cour de cassation* of 24 February 1998 (no. 96-12.638, Bull civ IV no. 86) in which the Court of Appeal rejected a claim for damages submitted by a company for competitive conduct because the employee was not bound by a non-competition clause. The *Cour de cassation*, however, overturned this decision on the grounds that the employee had worked as a manager and then the general manager of the company and that the employee was therefore bound by a duty of loyalty with respect to the company.

V. Other Common Law Legal Systems

507. The role of good faith will be examined briefly under four other Common law legal systems, namely Canada (to the exclusion of the province of Quebec) (A.), Australia (B.), Hong Kong (C.), and Singapore (D.).

A. Canadian law

508. The role of good faith under Canadian contract law[888] will be examined at both the pre-contractual stage (1.) and the contractual performance stage (2.)

1. Pre-contractual stage

509. Canadian law does not presently recognize an overarching implied duty to negotiate contracts in good faith.[889]

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888 In this section, Canadian law refers to the law applicable in Canada, to the exclusion of the province of Quebec.

889 MCCAMUS, 153; *Westcom TV Group Ltd v CanWest Global Broadcasting Inc* 1996 CanLII 8601 (BCSC) stating at [13] that "The common law has generally never recognized a duty to bargain in good faith in normal commercial transactions between parties acting at arm's length"; *Martel Building Ltd v Canada* (CanLII) [2000] 2 SCR 860 stating at [73] that "a duty to bargain in good faith has not been recognized to date in Canadian law"; *978011 Ontario Ltd v Cornell Engineering Co* 2001 CanLII 8522 (ONCA) stating at [32] that "[a]bsent a special relationship, the common law in Canada has yet to recognize that in the negotiation of a contract, there is a duty to have regard to the person's interests, mainly, to act in good faith"; *Oz Optics Ltd v Timbercon Inc,* 2011 ONCA 714 (CanLII) stating at [63] that "the law has not recognized a general duty to bargain in good faith in contract"; *Doucet and Dauphinee v. Spielo Manufacturing Incorporated and Manship*, 2011 NBCA 44 (CanLII) stating at [35] that "the law does not recognize a pre-contractual duty to bargain in good faith." *Molson Canada 2005 v Miller Brewing Co* 2013 ONSC 2758 (CanLII) stating at [89] that "It is well established that, absent a special relationship between parties to a negotiation, Canadian law does not recognize a tortious duty to bargain in good faith"; *TDL Group Corp v DXStorm.com Inc* 2013 ONSC 5718 (CanLII) stating at [332] that "absent a special relationship between parties to a negotiation, Canadian law does not recognize a tortious duty to bargain in good faith."

510. In addition, the majority of the case law appears to support the view that, absent an agreement on essential terms, an express duty to negotiate in good faith, entered into before the main contract has come into force, is unenforceable.[890]

511. Conversely, in cases where there is an existing main contract, courts have enforced an express obligation to negotiate in good faith[891] and have sometimes implied a duty to carry out foreseen contractual negotiations in good faith.[892]

890 *Georgian Windpower Corp v Stelco Inc* 2012 ONSC 3759 (CanLII) stating at [168] that "an agreement to negotiate in good faith is unenforceable" and holding at [175] that "the use of the terms "good faith" and "best efforts" in the MOU and the AELLEA (Agreement to Establish a Land Lease Easement Agreement) related to future negotiations between the parties and did not create any independent legal duty or obligation; *Concord Pacific Acquisitions Inc. v Oei*, 2019 BCSC 1190 (CanLII) at [368]–[397]; cf *TDL Group Corp v DXStorm.com Inc* 2013 ONSC 5718 (CanLII) holding at [368] that there was a genuine issue requiring a trial on the issue of whether a contractual duty of good faith negotiation arose as a result of the express obligation in the letter of intent to "agree in good faith to promptly begin negotiation of the [TIM CARD Turnkey Solution] Agreement" or as a result of the unilateral representation of one of the parties.

891 *0856464 B.C. Ltd. v TimberWest Forest Corp*. 2014 BCSC 2433 (CanLII) enforcing an express term in logging contracts that the parties must negotiate each year in good faith to agree upon rates (at [124] et seq); *Northland Fleet Services Ltd v Quintette Operating Corp* 2001 BCSC 866 (CanLII) holding that [48] an express agreement to negotiate a renewal in good faith was enforceable. Cf *EdperBrascan Corp. v. 117373 Canada Ltd* 2000 CanLII 22694 (ON SC) in which EdperBrascan and Labatt had entered into an agreement regarding the liquidation of Labatt's investment companies controlled by EdperBrascan. The agreement provided that if the liquidation was not complete by a certain date, EdperBrascan would purchase the remaining investments for cash or securities of "equivalent value" determined in accordance with a formula or at a price mutually agreed upon. It was held that that the general principle that the law does not recognize a duty to negotiate in good faith applies equally where there is an existing contract within which the negotiation is to be conducted and distinguished other cases on the basis that some objective means of measurement were included in them that were not present in the agreement at hand.

892 See for example, *Empress Towers Ltd v Bank of Nova Scotia* 1990 CanLII 2207 (BCCA) where there was a express requirement in the lease for the parties to endeavour to agree on market rental and the majority found there ought to be implied a term that the landlord would negotiate in good faith with the tenant with the object of reaching an agreement on the market rental rate; *SCM Insurance Services Inc. v. Medisys Corporate Health LP* 2014 ONSC 2632 in which a party was given the right of first negotiation under an agreement and it was held at [34]–[36] that there was an implied duty to negotiate in good faith. Cf *Mannpar Enterprises Ltd v Canada* 1999 BCCA 239 (CanLII) in which it was held at [61] that there was no duty to negotiate in good faith with respect to a renewal clause for the renewal of the permit for the removal of sand and gravel since there was no language that could provide an objective benchmark to measure a "fair value" or "market value".

2. Contractual performance stage

512. Historically, Canada did not recognize a general principle of good faith applicable to the performance of a contract.[893] One commentator noted that the Canadian legal system has taken a "kind of perverted pride" in the absence of a duty of good faith, as if accepting it "would be admitting to the presence of some kind of embarrassing social disease."[894]

513. A good faith term was however implied *in law* in certain categories of contracts[895] namely franchise, insurance, employment, standard form contracts as well as other contracts with fiduciary elements.[896]

514. A good faith term was also implied *in fact* on a case-by-case basis in accordance with the parties' intentions at the time of the formation of the contract.[897] Such good faith terms were often implied in cases where the parties had to cooperate in order to achieve the object of the contract, where one party exercised a discretionary power under the contract and where one party sought to evade its contractual duties.[898]

515. Express good faith obligations found in parties' contracts were further enforceable.[899]

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893 JOHN SWAN, *Whither Contracts: A Retrospective and Prospective Overview*, in Special Lectures of the Law Society of Upper Canada 1984 – Law in Transition: Contracts (De Boo 1984) 125, 148.

894 *Ibid*.

895 O'BYRNE, 201–202.

896 With respect to franchise contracts, see O'BYRNE, 217 et seq.; with respect to insurance contracts, see *Coronation Insurance Co. v Taku Air Transport Ltd* 1991 (CanLII) 16 (Supreme Court of Canada); *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC (Supreme Court of Canada) 30 (CanLII) at [63], and O'BYRNE, 220 et seq.; with respect to standard form contracts, see *Tilden Rent-A-Car Co v Clendenning* 1978 (CanLII) 1446 (ONCA) O'BYRNE, 222; with respect to contracts including fiduciary elements, see O'BYRNE, 223 et s and *Cancor Developments Corp v Cadillac Fairview* 1994 CanLII 531 (BCSC); with respect to employment contracts, see *Wallace v United Grain Growers Ltd* [1997] CanLII 332 (Supreme Court of Canada) and *Honda Canada Inc. v. Keays*, 2008 SCC (Supreme Court of Canada) 39 (CanLII); see also *Bhasin v Hrynew* 2014 SCC (Supreme Court of Canada) 71 at [44].

897 O'BYRNE, 227 et seq.

898 MCCAMUS, 839–856.

899 See for example, *Roe, McNeill & Co. v McNeill*, 1994 CanLII 1888 (BCSC) concerning a clause in an agreement for the sale of an accounting practice imposing on the seller a duty to act in utmost good faith in introducing the purchaser to its former clients and to promote the purchaser; *Callahan Construction Co. Ltd. et al. v National Bank Financial Ltd. et al*., 2005 BCSC 1746 (CanLII) concerning express good faith provisions in a lease extension and renewal agreements.

516. However, in the case of *Bhasin v Hrynew*,[900] the Canadian Supreme Court lamented the "unsettled and incoherent body of law" that had developed "piecemeal" relating to the notion of good faith which it found "difficult to analyze".[901] The Supreme Court went on to recognise an organizing principle of good faith contractual performance underpinning the various rules recognising obligations of good faith performance.[902]

517. By recognising such an organizing principle, the Court's aim was to state, in general terms, a requirement of justice from which more specific legal doctrines could be derived.[903] The Court specified that the organizing principle was to be more of a standard than a rule which would help the law to be developed in a coherent and principled way.[904] According to the Court, the principle could be applied to particular situations where the existing law is found to be wanting and where the development could occur incrementally in line with the structure of the Common law.[905]

518. With respect to the content of this principle of good faith, the Court specified that this principle obliges a party to have appropriate regard to the legitimate contractual interests of the other party, but that it does not require a party to act so as to serve those interests in all cases.[906] The Court stressed that this principle should be applied in a way which is consistent with the great weight usually placed on the freedom of contracting parties to pursue their individual self-interest.[907] The Court warned that this principle should not be employed in such a way so as to veer into a form of *ad hoc* judicial moralism or "palm tree" justice.[908]

519. In recognising such a principle, the Supreme Court aimed to implement a duty that was just, in line with the reasonable expectations of commercial parties and sufficiently precise so as to enhance commercial certainty.[909]

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900 2014 SCC (Supreme Court of Canada) 71 (CanLII). On the facts of the case, the Supreme Court found that the defendant Can-Am breached this duty to act honestly by misleading the plaintiff and acting dishonestly in numerous ways up to, and including, the non-renewal of their agreement and therefore awarded damages to the plaintiff.

901 *Idem*, at [32].

902 *Idem*, at [33] and at [63].

903 *Idem*, at [64].

904 *Idem*, at [64].

905 *Idem*, at [66].

906 *Idem*, at [65].

907 *Idem*, at [70].

908 *Idem*, at [70].

909 *Idem*, at [34].

520. As a consequence of the recognition of this organizing principle, the Supreme Court held that there is a duty applicable to all contracts to act honestly which cannot be contractually excluded.[910] The Court went on to specify that this duty of honesty meant that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract[911] but that it does not include a duty of loyalty or disclosure.[912] The Court further stated that the precise content of honest performance would vary depending on the context (i.e., whether the contract was a long-term contract or a one-off transaction)[913] and that the parties would be free in some contexts to relax the requirements of the doctrine as long as they respected its minimum core requirements.[914]

521. Subsequent cases generally downplayed the effect of this decision by insisting on the rationalizing and clarifying, rather than creative, function of this principle.[915] However, two recent decisions of the Canadian Supreme Court have

910 *Idem*, at [33] and [63] and [75]. The Supreme Court however noted at [77] that the parties may determine the standards by which the performance of the obligation of good faith is to be measured as long as those standards are not manifestly unreasonable.

911 *Idem*, at [73]. See also, in this regard, the recent decision of the Supreme Court in *C.M. Callow Inc. v Zollinger* 2020 SCC 45 in which it was held by the majority that the duty of honest performance does not mean that one side has to sacrifice their interests for the other. On the facts of that case, the majority held that the duty of honest performance did not mean that the condo corporation had to tell Mr. Callow that they were going to end his contract early but it did mean that they could not mislead him about it and pretend it would be renewed once they knew it would be ended.

912 *Idem*, at [86].

913 *Idem*, at [69].

914 *Idem*, at [77].

915 See for example *Addison Chevrolet Buick GMC Limited et al. v General Motors of Canada Limited et al*., 2015 ONSC 3404 (CanLII) holding at [116] that "Bhasin is no authority for unbridled creativity in the creation from whole cloth of obligations in a contractual context which the parties have not provided for," and describing the doctrine of good faith at [112] as a doctrine which is "not the source of contractual obligations but a guide to the application of them."; *Bank of Montreal v Javed* 2016 ONCA 49 (CanLII), in which the Ontario Court of Appeal held at [12] that Bhasin did not extend the common law test for unconscionability; *Empire Communities Ltd. et al. v H.M.Q. et al.*, 2015 ONSC 4355 (CanLII) stating at [26] that "the Supreme Court has rationalized, renamed, and provided an overall framework for understanding several pre-existing aspects of duties of good faith that have been recognized by the law. In addition, it added one arguably new (arguably not new) duty not to lie to one's contractual counterparty. […] Neither did it create a freestanding, ill-defined, and potentially arbitrary duty of good faith against which to measure all aspects of contractual performance."; *Data & Scientific Inc. v Oracle Corp*., 2015 ONSC 4178 (CanLII) holding at [11] that "the pre-existing situational and relational aspects or pockets of implied good faith (such as the obligation to exercise discretionary contractual powers reasonably) were not eliminated but

expanded on the holding in *Bhasin v Hrynew*. Thus, in the *Callow v Zollinger* case, the Supreme Court held that silence that misleads a counterparty could breach the duty of honest performance. [916] In this case, Mr Callow concluded a property maintenance contract with some condo corporations for two winters. Pursuant to the contract, the condo corporations could terminate the contract on ten days' notice. The new property manager of the condo corporations decided to terminate the contract. Mr Callow thought that everyone was happy with his services, people from the condo corporations talked to him and led him to believe that he would probably get another contract for more winters and he did extra work over the summer because he wanted to encourage them to renew the contract. The majority of the Supreme Court held that the condo corporations breached the duty of honest performance by terminating the contract in the way that it did and Mr Callow was accordingly entitled to damages.[917]

522. In the *Wastech* case, the Canadian Supreme Court held that good faith prevents a contracting party from using its discretion unreasonably, namely when such party uses its discretion in a way that is unconnected to the purposes for which the parties agreed to have discretion in the first place.[918] However, on the facts of the case, it held that Metro used its discretion to keep costs low and so it could operate efficiently, and thus for the right purposes. According to the court,

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were simply realigned under a broad organizing principle of good faith."; *Expoed Inc. v. Anaca Technologies Ltd*., 2017 ONSC 5849 (CanLII) in which the court stated at [76] that Bhasin "rationalized, renamed, and provided an overall framework for understanding several pre-existing aspects of duties of good faith," and also "added one arguably new (arguably not new) duty not to lie to one's contractual counterparty."; *Styles v Alberta Investment Management Corporation*, 2017 ABCA 1 (CanLII) in which the Alberta Court of Appeal at [45]–[62] described *Bhasin* as recognising, first, a general organising principle of good faith, which underlays specific situations where good faith duties were already recognised, and second, a narrower duty of honest performance of contractual obligations. The Court held that the more general organising principle should "only be applied to situations where it has previously been invoked", while recognising a limited ability to progress the law. The Court went on to reject the argument that *Bhasin* required ""reasonable exercise of discretion" in contractual performance."; *Avalon Ford Sales (1996) Limited v Evans*, 2017 NLCA 9 (CanLII) in which the Court at [19] interpreted Bhasin as recognising only a future possibility of new substantive rules. Good faith was described as an "organising principle" as opposed to a "free-standing rule." See also ANGELA SWAN, Good Faith in Contract Performance: Bhasin v Hrynew two years on, 28 April 2017, available at < https://www.ryerson.ca/content/dam/csrinstitute/pdf/Angela-Swan-Bhasin-Two%20Years%20On-Session%20Two%20April%202-2017.pdf>, accessed 1 March 2023 stating at page 17 that "the 'new' duty is really no more than a generalization of well-recognized obligations, that the courts and lawyers have acknowledged for a very long time."

916 *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45.

917 *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, [41]–[75]

918 *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District,* 2021 SCC 7.

the contract did not require it to use its discretion to ensure that Wastech would reach its target operating ratio in any given year.[919]

B. Australian law

523. The role of good faith under Australian contract law will be examined at both the pre-contractual stage (1.) and the contractual performance stage (2.).

1. Pre-contractual stage

524. In Australia, there is no general implied duty on contracting parties to negotiate in good faith at the pre-contractual stage.[920]

525. An express agreement to negotiate in good faith, although usually unenforceable due to a lack of certainty may, however, be enforceable in certain cases where the terms of the agreement are not too vague.[921] This will be the case where a power is given to a third party to settle uncertainties or where the

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919 *Ibid*.

920 McKENDRICK/LIU, Contract Law, 276 stating that "Australian law knows of no general common law principle of good faith negotiation."

921 *Coal Cliffs Collieries Pty Ltd v Sijehama Pty Ltd* (1991) NSWLR 1 which concerned a preliminary agreement setting out the basis for a proposed joint venture which included a statement that "the parties will forthwith proceed in good faith to consult together upon the formulation of a more comprehensive and detailed Joint Venture Agreement". The Court held that the agreement to negotiate was unenforceable on the facts because the clause was considered to be "too illusory or too vague and uncertain to be enforceable" given the high number of points of disagreement between the parties and the fact that there had already been three years of negotiations between the parties which had not greatly advanced resolution of the matter. However, KIRBY P held that agreements to negotiate in good faith could be enforceable in certain cases in particular in the case where power is given to a third party to settle uncertainties or where the vagueness or incompleteness can be completed by a "readily ascertainable external standard". See also *Strzlecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222 in which the memorandum of understanding provided that the parties were to "at all times deal with each other in good faith" when negotiating a contract for the sale of land. The Court referred at [35] to the decision of the trial judge who held that although the law was not abundantly clear on this issue, this provision was enforceable. Cf *Baldwin v Icon Energy Ltd* [2015] QSC 12 in which a memorandum of understanding required the parties to use "reasonable endeavours" to negotiate a Gas Supply Agreement in "good faith". The court held at [19]–[54] that the 'reasonable endeavours' and 'good faith' requirements of the MOU were unenforceable because they were only a "non-binding indication" of the terms and conditions of supply and that in the absence of any criteria, the Court could not fill the gaps by enforcing the obligation or assessing damages based on what ought to have been agreed.

vagueness or incompleteness can be completed by a "readily ascertainable external standard".[922]

526. Such a valid express duty to negotiate in good faith imposes duties on the parties to act honestly, to act with fidelity towards the agreement to negotiate, to make, consider and respond to proposals and to not act in a manner which is arbitrary, capricious or intended to cause harm to the other party.[923] Merely submitting a proposal which the other party considers unreasonable does not constitute a breach of such a duty.[924]

527. It is unclear whether a duty to negotiate in good faith may be implied *in fact* in a given case.[925] However, court decisions indicate that such a duty will rarely be implied.[926]

2. Contractual performance stage

528. With respect to the performance stage, courts in different states and territories have taken varying positions with respect to whether there is a general implied term *in law* obliging the parties to perform their contract in good faith.[927]

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922 *Ibid*.

923 S*trzlecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222. PULLIN JA accepted at [61]–[62] that good faith meant fidelity to the agreement to negotiate and honesty. MURPHY JA stated at [94] that it comprised positive obligations to make, consider and respond to proposals and negative obligations not to negotiate in an arbitrary or capricious manner.

924 S*trzlecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222 at [64].

925 NICHOLAS SEDDON/RICK BIGWOOD/FRED ELLINGHAUS, Cheshire & Fifoot Law of Contract (10th Australian edition, Lexisnexis Butterworths, Australia, 2012), §10.47.

926 See *Caves Beachside Cuisine Pty Limited v Boydah Pty Limited* [2015] NSWSC 1273 stating at [95] that while parties might, in particular circumstances, enter into an express agreement to negotiate in good faith, the implication of a duty to negotiate in good faith by conduct is very difficult to conceive.

927 The issue has not yet been considered by the High Court, see *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5 and the decision of the Federal Court in *Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd* [2015] FCAFC 127; (2015) 237 FCR 534, 557 [122]; For a discussion of whether a general organizing principle of good faith should be recognized under Australian law, see JESSICA VIVEN-WILKSCH, Good Faith in Contracts: Australia at the Crossroads, (2019) 1 Journal of Commonwealth Law 273.

529. In New South Wales,[928] and South Australia,[929] the courts have held that a general duty of good faith, both in performing obligations and exercising rights, may be implied by law. This implied duty of good faith usually entails: (i.) an obligation to act honestly and with fidelity to the bargain; (ii.) an obligation not to undermine the bargain entered into or the substance of the contractual benefit bargained for; and (iii.) an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract objectively ascertained.[930]

530. This duty does not, however, require a party to act in the interests of the other party or subordinate its own legitimate interests to those of the other party, although it does require the party to have due regard to the rights and interests of the other party.[931] It also does not allow obligations to be imposed on the parties which are inconsistent with the express terms of their contract.[932]

531. Conversely, the courts in Victoria[933] and Tasmania[934] have refused to recognize the existence of a general implied term *in law* to act in good faith[935] and this

928 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 263–270; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 363–369; *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187 at [186]; *Vodafone Pacific Limited v Mobile Innovations Limited* [2004] NSWCA 15 at [125]; *United Group Rail Services Ltd v Rail Corporation (NSW)* [2009] NSWCA 177 at [58]–[61]; *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 at [11]–[12], [146]–[147]; *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184 at [144]; *Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd; TWT Property Group Pty Limited v Cenric Group Pty Limited* [2019] NSWCA 87 at [155].

929 In *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49, [581]–[596] BLEBY J held that the duty of good faith and fair dealing applied to all contracts.

930 *Paciocco v ANZ Banking Group* [2015] FCAFC 50 (April 2015) at [288].

931 *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184 at [144].

932 Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15 [194]–[208].

933 *Beling v McLeay as Victorian Legal Services Commissioner* [2021] VSCA 256 at [98]; *Key Infrastructure Australia Pty Ltd v Bensons Property Group Pty Ltd* [2019] VSC 522 at [294]; *David A Harris Pty Ltd and David Harris v AMP Financial Planning Pty Ltd* [2019] VSC 24; *Androvitsaneas v Members First Broker Network Pty Ltd* [2013] VSCA 212 [108]; S*pecialist Diagnostic Services Pty Ltd (formerly Symbion Pathonlogy Pty Ltd) v Healthscope Pty Ltd & Ors* [2012] VSCA 175 at [86]; see also *Esso Australian Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228.

934 *Tote Tasmania Pty Ltd v Garrott* [2008] TASSC 86 at [16]; *Driveforce Pty Ltd v Gunns Ltd* (No. 3) [2010] TASSC 38 at [12].

935 *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* [1993] FCA 445 at [34]; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5 at [40], [88], [156]; *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd* [2007] FCA 1066 at [132]–

issue still remains undecided in the courts of Queensland,[936] Western Australia,[937] the Northern Territory and the Australian Capital Territory.

532. All courts, however, seem to agree that a duty to act in good faith may be implied *in fact* in a given case,[938] and that it is implied *in law* in certain contracts such as insurance contracts.[939]

533. Furthermore, an express contractual obligation to act in good faith is also considered to be enforceable.[940]

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[134]; *Strzelecki Holdings Pty Ltd v Cable Sands Pty Ltd* [2010] WASCA 222; (2010) 41 WAR 318 at [79]–[80]; *Acton Real Estate Pty Ltd v Shemiran Pty Ltd* [2011] WASCA 33 at [14].

936 *QNI Resources Pty Ltd & Anor v North Queensland Pipeline No 1 Pty Ltd & Anor* [2022] QCA 169 holding that "until such time as the High Court recognizes the existence as a matter of law of a generally implied term of good faith, this Court should proceed on the basis that such a term is not to be generally or universally implied into all contracts or all commercial contracts"; *North Queensland Pipeline No 1 Pty Ltd v QNI Resources Pty Ltd* [2021] QSC 190; *Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Limited & Ors* [2020] QCA 211; *Gramotnev v Queensland University of Technology* [2015] QCA 127; (2015) 251 IR 448, 480 [167] (undecided); *In Kendells (NSW) Pty Ltd (In Liq) Kendell v Sweeney* [2005] QSC 64 at [60]; *Laurelmont Pty Ltd v Stockdale & Leggo (Qld) Pty Ltd* [2001] QCA 212 [41], [43]-[44] (rejection of the implication of an implied term of good faith in law in a franchise contract).

937 *Westgem Investments Pty Ltd v Commonwealth Bank of Australia Ltd (No. 6)* [2020] WASC 302 stating at [288] that the necessity for the implication of a good faith term has not been settled at the appellate level in Western Australia and that the implication of terms of good faith and reasonableness in all commercial contracts as a matter of law remains unresolved in Australia; *Trans Petroleum (Australia) Pty Ltd v White Gum Petroleum Pty Ltd* [2012] WASCA 165 following at [152] the line of authority in New South Wales.

938 See, for example, *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228 at [25]; *Tote Tasmania Pty Ltd v Garrott* [2008] TASSC 86 at [16].

939 It is implied in law in insurance contracts, see section 13 Insurance Contracts Act 1984 which provides "A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith. However, the High Court refused to imply in law a duty of mutual trust and confidence in all employment contracts, see *Commonwealth Bank of Australia v Barker* [2014] HCA 34.

940 *Auto Masters Australia Pty Ltd v Bruness Pty Ltd* [2002] WASC 286 ("The Franchisor will use its best endeavours to promote the performance and success of the Franchise Business and will deal at all times with the Franchisee in absolute good faith."); *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268: ("Without limiting the generality of any other provision of this agreement, the parties agree that in the performance of their respective duties and the exercise of their respective powers under this agreement and in their respective dealings with each other, they shall act in the utmost good faith."); *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd & Anor* [2011] QSC 264

C. Hong Kong law

534. The application of good faith at the pre-contractual stage (1.) and at the contractual performance stage (2.) under Hong Kong law will be examined below.

1. Pre-contractual stage

535. At the pre-contractual stage, the Hong Kong courts have not recognized a general duty to negotiate in good faith.[941] In this regard, it has been submitted that "in Hong Kong the principle of good faith is not required in the context of pre-contractual negotiations because of the highly developed and fertile array of existing doctrines."[942]

536. In addition, an express term to negotiate in good faith at the pre-contractual stage is considered as unenforceable.[943] The courts have also refused to imply *in fact* a term to conduct negotiations in good faith.[944]

("The participants will at all times act in good faith and in the best interests of the Joint Venture and the Participants must make their respective interests in the Tenements and the other Venture Property available for the purpose of the Joint Venture."); *Minumbra Lancewood Pty Ltd v AM Lancewood Investment Nominees Pty* Ltd [2013] NSWSC 1929 ("the Lender and the Borrower must meet to consider and discuss in good faith the Repayment Plan and determine whether or not the parties agree to implement any proposal.").

941 ANDREWS/YANG, 15, §2.03; FISHER/GREENWORD, 84. However, in *World Sport Group Pte Ltd v Asian Tour International Ltd* (unrep, HCA 2779/2008, 18 February 2009), Deputy Judge Carlson suggested that a duty to negotiate in good faith was worthy of consideration in certain cases.

942 ANDREWS/YANG, 8, §1.12.

943 ANDREWS/YANG, 157, §8.06 stating that Hong Kong law does not recognize an express agreement to bargain or negotiate in good faith; The English decision of *Walford v Miles* [1992] 2 AC 128 was applied by the Hong Kong Court of Appeal in *Bank of India v Surtani Murlidhar Parmanand (t/a Ajanta Trading Corpn)* [1994] 1 HKC 7 at [37]. See also *Hyundai Engineering & Construction Co. Ltd. v Vigour Ltd*. [2005] 3 HKLRD 723, where the Court of Appeal held at [28] that an agreement to submit to third party mediation was too vague to be enforceable. Relying on *Walford v Miles* [1992] 1 AC 128, the Court held at [27] that: "a court is not in a position to determine the good faith or otherwise of negotiations because a party is entitled to negotiate in any way it feels fit. In the first place it is inevitably acting in its own best interests and in the second place the tactics of negotiation may vary from person to person. In some cases part of a negotiating tactic maybe to call off the negotiations hoping that better terms would be offered."

944 *Secretary for Justice v The Hong Kong & Yaumati Ferry Co Ltd and Another* [2006] HKCFI 1456, HCA 15329/1999 (22 December 2006) at [113]–[124] following the judgment in *Hyundai Engineering* and refusing to imply a term suggested by the defendants that the Government would negotiate fairly, reasonably and in good faith in respect of the proposed pier development.

2. Contractual performance stage

537. At the performance stage, the courts have also held that there is "no principle of good faith of general application".[945] In this regard, it has been argued that there would only be a "slight benefit" in accepting a general principle of good faith governing the performance of contracts as it would be unlikely that the Hong Kong courts would "use the concept dynamically" and, in addition, the uncertainty and anxiety caused would outweigh any possible benefit gained.[946]

538. However, an express duty to act in good faith would appear to be enforceable.[947] In addition, a duty to act in good faith is implied *in law* in certain specific contracts (such as insurance, employment and partnership contracts)[948] and may further be implied *in fact* in a given case.[949]

D. Singapore law

539. The application of good faith at the pre-contractual stage (1.) and at the contractual performance stage (2.) under Singapore law will be examined below.

1. Pre-contractual stage

540. At the pre-contractual stage, there is no general duty to negotiate in good faith under the law of Singapore.[950]

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945 *GDH Ltd v Creditor Co Ltd* [2008] 5 HKLRD 895 holding at [57] that "an obligation on the French banks to act to the best interest of and in good faith to the other creditors [...] is not an obligation recognised by Hong Kong law".

946 ANDREWS/YANG, 8–9, §1.12.

947 No decision was found concerning an express good faith clause. It is assumed however that the Hong Kong courts would follow the position of the English courts in enforcing such clauses; see paras. 333 et seq.

948 *GDH Ltd v Creditor Co Ltd* [2008] 5 HKLRD 895 referring at [57] to insurance, employment and partnership contracts.

949 *Hong Jing Co Ltd v Zhuhai Kwok Yuen Investment Co Ltd* [2012] HKCA 297 at [37.1] where a duty was implied on the defendant to use its best or at least reasonable endeavours in good faith when complying with its contractual obligation to approach and reach a deal with the Bank of China Group Investment on the sale of debts and properties.

950 *AREIF (Singapore I) Pte Ltd v NTUC Fairprice Co-operative Ltd and another matter* [2015] SGHC 28 at [64]–[65] refusing to imply a duty to negotiate new rent in *good faith* and stating that "Singapore law does not recognize a general duty of good faith implied into contracts at common law […] Parties in an existing contractual relationship thus retain the freedom to perform their contractual obligations in their own self-interest and in a manner which

541. In addition, an express obligation to negotiate in good faith at this stage is considered to be unenforceable due to a lack of certainty.[951]

2. Contractual performance stage

542. At the performance stage, the courts have refused to imply a general duty to act in good faith *in law* to all contracts.[952]

543. However, an express duty to act in good faith would appear to be enforceable.[953] A duty to act in good faith may also be implied *in law* in certain categories of

maximizes their benefit, subject only to the limits imposed by the general law. *This is all the more so when the parties are negotiating the terms of a prospective contract."* [emphasis added].

951 ANDREW B L PHANG/GOH YIHAN, Contract Law in Singapore (Wolters Kluwer 2012) 125, §186 stating that the decision in *Walford v Miles* [1992] AC 128, according to which an agreement to negotiate in good faith is not binding, is apparently good law in Singapore; Indeed this decision was confirmed *in Sundercan Ltd and another v Salzman Anthony David* [2010] SGHC 92. See also *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Trust) v Toshin Development Singapore Pte Ltd* [2012] SGCA 48 at [40] which concerned a contractual obligation to "in good faith endeavour to agree" on the new rent for each new rental term after the first rental term. This provision was held to be enforceable and the court distinguished between an express obligation to negotiate found in a contract and an express obligation to negotiate before a contract has been concluded and stating that "In our view, there is no good reason why an express agreement between contracting parties that they must negotiate in good faith should not be upheld."

952 *Ng Giap Hon v Westcomb Securities* [2009] SGCA 19 [44]–[60]; *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] SGCA 21 [44]: "we note that the present position in Singapore as set out in the decision of this court in *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518 ("*Ng Giap Hon*") is that there is *no* implied duty of good faith based on a "term implied in *law*".."; *AREIF (Singapore I) Pte Ltd v NTUC Fairprice Co-operative Ltd and another matter* [2015] SGHC 28 stating at [64] that "Singapore law does not recognise a general duty of good faith implied into contracts at common law."; *Chua Choon Cheng v Allgreen Properties Ltd* [2009] 3 SLR(R) 724 at [85] refusing to imply any new duty of good faith in law into collective sale contracts outside that stipulated in the statutory scheme; see further KAH LENG, Good Faith in the Performance of Commercial Contracts Revisited (2014) 26 SAcLJ 111–113; LOUIS JOSEPH, A Doctrine of Good Faith in Singapore? [2012] Sing JLS 416– 440; YONG QIANG HAN, When West Meets East: Thinking Big in Singapore over Good Faith in Commercial Contract Law, (2019) 1 Journal of Commonwealth Law, advocating for the application of the "organizing principle" approach in *Bhasin v Hrynew* in Singapore contract law.

953 See for example *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another* [2012] SGHC 118 at [136]–[137] concerning an express good faith clause in a joint venture agreement although rejecting the alleged breach of such clause.

contracts, such as insurance and employment contracts.[954] It may further be possible for a duty to act in good faith to be implied *in fact* in a particular case.[955]

954 With respect to insurance contracts, *The Stansfield Group Pte Ltd (trading as Stansfield College and another v Consumers' Association of Singapore and another* [2011] SGHC 122 stating at [186] that "it is established insurance law that the duty of good faith […] is applicable to all contracts of insurance and reinsurance and applies both before a contract is concluded and during the performance of the contract." With respect to employment contracts, there is an implied term of mutual trust and confidence (for a recent case, see *Wee Kim San Lawrence Bernard v Robinson & Co (Singapore) Pte Ltd* [2014] SGCA 43 following the House of Lords decision in *Malik v BCCI* [1998] AC 21).

955 *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] SGCA 21 at [44]: "this court in *Ng Giap Hon* was prepared to leave open the possibility that such a duty could be implied by way of the *narrower* category of "terms implied in *fact*"." *Ng Giap Hon v Westcomb Securities* [2009] SGCA 19 at [61] et seq.

VI. Other Civil Law Systems

544. The role of good faith will be examined briefly under two other Civil law legal systems, namely under German law (A.), and the law of the PRC (B.).[956]

A. German law

545. This section explores the role of good faith in general under German contract law (1.). The role of good faith will thereafter be examined at the pre-contractual stage (2.), the contractual performance stage (3.) as well as at the post-contractual stage (4.). Finally, the attempts made by the German legal doctrine to rationalize good faith will be examined (5.).

1. Good faith in general

546. Good faith under German law has been said to have evolved from a legislative acorn into a judicial oak that overshadows the contractual relationships of private parties.[957] Innumerous judicial decisions have relied on good faith with one commentary on Section 242 BGB (the main article on good faith), extending to over two thousand pages.[958] In this regard, it has been claimed that – in theory at least – the whole system of private law could be administered by reference to good faith.[959]

547. Section 242 BGB provides that "[a]n obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration." ("*Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*.").

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956 For the reasons why such legal systems are examined, see above, para. 315.

957 EBKE/STEINHAUER, 171.

958 SCHLECHTRIEM, Good Faith, 7: "If one takes a commentary on 242 BGB in order to see what courts and literary contributions have made of this provision, one is immediately struck, if not shocked, by the abundance of cases, theories, detailed rules and sub-rules having sprung from it. Certainly the most frightening example is the 11th edition of the Staudinger commentary, where the commentator, Dr. Weber, dealt with this single provision in a tome of more than 2,000 pages."; WHITTAKER/ZIMMERMANN, surveying the landscape, 23: "countless decisions have relied, in one form or another, on §242 BGB; and one attempt to record the relevant case law as comprehensively as possible has led to what many consider as the hypertrophy of legal commentary" referring at fn 83 to WILHELM WEBER in Staudinger, Kommentar zum Bürgerlichen Gesetzbuch (11th edn 1961) §242.

959 SCHLECHTRIEM, Good Faith, 1 and 7–8 stating that "one can find a court decision or a scholarly theory applying the provision to almost every situation governed by the Civil Code."

548. The wording of this provision is narrow and only refers to the debtor's duty to perform in good faith.[960] However, Section 242 BGB has been applied to both the debtor and the creditor and applies not only to contracts but to all legal relationships arising between individuals.[961] Indeed, good faith has been extended to procedural law as well as to criminal and public law.[962]

549. Good faith is denoted by the term "*Treu und Glauben*". The term "*treu*" signifies an external and internal attitude towards the person to whom it is owed. It is characterized by a selfless willingness to fulfill obligations. The term "*glauben*" stands for faith and corresponds to the trust in the attitude of the person obliged to act in good faith.[963]

550. Good faith is derived from supra legal social imperatives and ethical principles which underlie the entire legal system.[964] Indeed, good faith is seen as an emergency valve that can be employed to close loopholes or to mitigate the rigorous individualism of the original law of contracts in the interest of supra legal socio-ethical principles.[965]

960 SCHUBERT, §2 and §7.
961 EBKE/STEINHAUER, 171; LEIBLE, 27; PÉDAMON, 131, §167.
962 SCHUBERT, §2.
963 LOOSCHELDERS/OLZEN, §141.
964 LOOSCHELDERS/OLZEN, §143; PÉDAMON, 131, §167 (referring to Section 242 BGB as a superior principle of legal ethics); SCHUBERT, §10.
965 PECL Official Commentary, Chapter I, 117; SCHUBERT, §2.

551. The general clause of Section 242 BGB has allowed the judiciary to infer new rules into the law,[966] adapt and keep contract law up to date[967] as well as introduce policy into contract law.[968] Due to its open and indeterminate nature, good faith has thus allowed the law to develop dynamically and to reflect social change and changing values.[969]

552. The main area of application of Section 242 BGB is the law of obligations. It plays a greater role in long-term relationships or where the relationship is characterized by personal ties or fiduciary elements. Hence, good faith plays less of a role in simple sales transactions and a greater role in the case of services rendered for the benefit of the other.[970] Section 242 BGB is considered to be an indispensable instrument for adapting obligations under the law of obligations to fundamental changes in facts and values and for reaching fair decisions in individual cases.[971] It has, however, been stated that Section 242 BGB must be applied with restraint in relation to contracts because recourse to good faith constitutes an encroachment on party autonomy.[972]

553. Today, the scope of Section 242 BGB has been considerably reduced and replaced by specific provisions, such as those found at Sections 241(2) and

966 As an example, a new cause of action was founded by the courts in 1907 in a case known as the poisonous fodder case on the ground of Section 242 BGB in order to remedy a wrong for which there was no statutory relief (such wrong not falling under the codified concepts of impossibility (*unmöglichkeit*), delay (*Schuldnerverzug*) or warranty (*Gewährleistung*)). Pursuant to the doctrine of positive *Vertragsverletzung* developed by Dr STAUB in 1902, claimants who incur damages as a result of the defendant's breach of a secondary obligation (*Sekundärpflicht*) are entitled to damages. They may also rescind a reciprocal contract (*gegenseitiger Vertrag*) where there is a material breach of such contract and enforcing the same would be unreasonable. A long-term contract can be terminated *ex nunc*. (see EBKE/STEINHAUER, 173–175). In addition, good faith, and more specifically Section 242 BGB, has been the ground invoked in order to give a right to sue to third persons who expressly or impliedly were intended by the contracting parties to fall within the ambit of the contract (*vertrag mit schutzwirkung für dritte*). The aim of the court in these cases was to provide injured third parties a contractual remedy because the law of torts provided no satisfactory remedy because of the possibility of exculpatory proof (see EBKE/STEINHAUER, 176–177). See also SCHUBERT, §22, §27 stating that Section 242 BGB has become the starting point for the judicial development of the law, for example, the control of general terms and conditions or the lapse of the basis of the contract.

967 See MARKESINIS/UNBERATH/JOHNSTON, 24; see also SCHLECHTRIEM, Good Faith, 10 with respect to the use of good faith to keep the BGB up to date.

968 MARKESINIS/UNBERATH/JOHNSTON, 24 giving as an example the introduction of Nazi values into the law during the Nazi period in Germany. See also, in this regard, para. 284 above.

969 SCHUBERT, §3.

970 SCHUBERT, §94.

971 LOOSCHELDERS/OLZEN, §121; see also SCHUBERT, §24.

972 LOOSCHELDERS/OLZEN, §340.

280(1), 313 and 314 BGB.[973] Section 242 BGB serves primarily to limit or exclude the content of existing rights,[974] although, in some cases, it may lead to the granting of rights.[975]

554. Good faith is mandatory and thus the parties cannot waive the criterion of honesty, the protection of legitimate expectations and substantive justice.[976] However, the principle of party autonomy allows contracting parties to agree on unreasonable provisions provided they are not immoral.[977]

555. The violation of Section 242 BGB constitutes a plea which must be taken into account *ex officio*.[978] The burden of proof lies with the party that invokes a breach of good faith.[979]

556. The principle of good faith forms part of public policy. Accordingly, an arbitral award may be set aside if it grossly violates the principle of good faith leading to an arbitrary decision.[980]

2. Pre-contractual stage

557. In the 19th century, RUDOLPH VON JHERING established the doctrine of *culpa in contrahendo*.[981] According to this doctrine, a special relationship (*Rechtsverhältnis der Vertragsverhandlung/Sonderrechtsverhältnis*) is created between parties entering into contractual negotiations which imposes duties of

973 SCHUBERT, §21, §27.

974 *Idem*, §80.

975 *Idem*, §81 referring to the example where good faith prevents a statute of limitation defence from being raised and leads to the upholding of the claim.

976 LOOSCHELDERS/OLZEN, §108; SCHUBERT, §92.

977 LOOSCHELDERS/OLZEN, §341.

978 LOOSCHELDERS/OLZEN, §319; SCHUBERT, §83.

979 LOOSCHELDERS/OLZEN, §329.

980 STEFAN MICHAEL KRÖLL/PETER KRAFT, Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter VII: Recourse against the Award, §1059 – Application for Setting Aside, in Patricia Nacimiento/Stefan Kröll et al. (eds), Arbitration in Germany: The Model Law in Practice (2nd edn Kluwer Law International 2015) 413, §87. See also OLG Karlsruhe 27.03.2009 – 10 Sch 8/08, available at < https://www.dis-arb.org/en/resources/case-law-database>, accessed 1 March 2023.

981 RUDOLF VON JHERING, *Culpa in Contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen* (1861) 4 *Jheringsjahrbücher für die Dogmatik des bürgerlichen Rechts* 1 et s. See also CARTWRIGHT/HESSELINK, 32; JALUZOT, 361, §1276; KESSLER/FINE, 401; LORENZ, 161; MARKESINIS/UNBERATH/JOHNSTON, 92.

care/duties of protection and loyalty (*Sorgfaltspflichten/Schutzpflichten*) drawn from good faith on the parties, the breach of which gives rise to liability.[982]

558. This doctrine was codified in 2001.[983] Pursuant to Section 311(2) BGB,[984] when contractual negotiations commence, an obligation is imposed on a negotiating party to take account of the rights, legal interests and other interests of the other party pursuant to Section 241(2) BGB.[985]

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982 CARTWRIGHT/HESSELINK, 33; LOOSCHELDERS/OLZEN, §672; see also JALUZOT, 369, §§1298–1299; RG 12 July 1923, RGZ 107, 240, 242–243: "*Auch die Vorverhandlungen eines Vertrages stehen unter dem Grundsatze von Treu und Glauben im Verkher (§§ 157, 242 BGB). Der Antrag bindet den Antragenden (§146 BGB) und löst deshalb auch bei dem Antragsempfänger gewisse Sorgfaltspflichten für die Behandlung des Antrags und ein gegenseitiges vertragsänliches Vertrauensverhältnis wenigstens dann aus, wenn der Antragsempfänger* […] *besondere Vorkehrung für die Entgegennahme* […] *der Vertragsanträge* […] *getroffen hat.*" ("The preliminary negotiations of a contract are also subject to the principle of good faith (§§157, 242 BGB). The application binds the applicant (§146 BGB) and therefore also triggers certain duties of care for the handling of the application and a mutual contractual relationship of trust with the recipient of the application, at least if the recipient of the application [...] has taken special precautions for the receipt [...] of the contract applications [...].."; RG 28 November 1923, RGZ 107, 357, 362: "*Es ist ein seit Jherings' Schrift über die culpa in contrahendo in der Rechtslehre vertretener Satz, dass auch schon vor Abschluss eines Vertrages zwischen den über einen solchen verhandelnden Parteien gewisse auf Treu und Glauben beruhende Sorgfaltspflichten, insbesondere zur Mitteilung und Offenbarung von Umständen, die auf die Entscheidung des anderen Teils über den Abschluss und die Gestaltung des Vertrags Einfluss sein können, begründet sind, und dass deren Nichterfüllung sowohl beim Zustandekommen des Vertrags wie auch bei nichtzustandekommen eines solchen* […] *Schadensersatzpflichtungen erzeugt*." ("It has been a proposition in legal doctrine since Jherings' writing on culpa in contrahendo that even before the conclusion of a contract, certain duties of care based on good faith are established between the parties negotiating such a contract, in particular, to communicate and disclose circumstances that may influence the other party's decision to conclude and form the contract, and that their non-fulfillment both at the time of the conclusion of the contract and at the time of the non-conclusion of such a contract [...] creates obligations to pay damages.") (informal English translations of the German originals).

983 CARTWRIGHT/HESSELINK, 33; MARKESINIS/UNBERATH/JOHNSTON, 92.

984 Section 311(II) BGB provides in the German original as follows: "*Ein Schuldverhältnis mit Pflichten nach § 241 Abs. 2 entsteht auch durch (1.) die Aufnahme von Vertragsverhandlungen, (2.) die Anbahnung eines Vertrags, bei welcher der eine Teil im Hinblick auf eine etwaige rechtsgeschäftliche Beziehung dem anderen Teil die Möglichkeit zur Einwirkung auf seine Rechte, Rechtsgüter und Interessen gewährt oder ihm diese anvertraut, oder (3.) ähnliche geschäftliche Kontakte*."

985 Section 241(2) BGB provides in English translation as follows: "An obligation may obligate each party, having regard to its substance, to take into consideration the rights, legally protected interests and (other) interests of the opposite party." It provides in the German original as follows: "*Gesetzliche Ansprüche sind nicht ausgeschlossen, wenn die Leistung nicht für*

559. A party who enters into negotiations when there is no reasonable chance for the other party to make a bargain (objective test) or without any intention at all to contract with the other party (subjective test) will breach its duties derived from good faith.[986] Similarly, these duties are breached if a party continues negotiations although it no longer wishes to conclude a contract.[987]

560. A party will further breach these duties if it breaks off negotiations without good reason or for ulterior motives after having conducted itself in such a way that the other party had reason to expect that a contract would come into force.[988] In this regard, in a case where the negotiating parties had reached an oral agreement concerning the sale of land and thereafter the owner refused to draw up the relevant act before the public notary, the courts held that such conduct was an abuse of right (the prohibition of which is derived from good faith).[989]

561. Each negotiating party is also under a duty to inform the other and is bound to disclose facts which are of clear importance to the other party's decision to contract[990] provided that the latter party is unable to obtain this information itself

den Empfänger bestimmt war oder in der irrigen Vorstellung einer Bestellung erfolgte und der Empfänger dies erkannt hat oder bei Anwendung der im Verkehr erforderlichen Sorgfalt hätte erkennen können."

986 CARTWRIGHT/HESSELINK, 35 and 75 (referring to the example of where a party enters into contractual negotiations without any intention of contracting but with the sole purpose of inducing a third party to reconsider its initial bargaining position); see also KESSLER/FINE, 419.

987 CARTWRIGHT/HESSELINK, 35.

988 CARTWRIGHT/HESSELINK, 35 and 99 (concerning the breaking off of negotiations in the case of a contract subject to a formal requirement, the conduct of the party breaking off the negotiations will only be considered an abuse of law if such party has violated its duty to negotiate in good faith); LORENZ, 166; MARKESINIS/UNBERATH/JOHNSTON, 100; BGH 12.05.1969 – VII ZR 15/67, BGH WM 1969, 595; BGH 22.02.1989 – VIII ZR 4/88, NJW-RR 1989, 627.

989 JALUZOT, 364, §1287; LORENZ, 167; BGH 27 November 1967, BGHZ 48, 396.

990 JALUZOT, 375–376, §1318; RG 16 May 1903, Seufferts Archiv No 58, 314: "*nach den Grundsätzen von Treu und Glauben ist der Verkäufer verpflichtet, dem Käufer alle ihm bekannten Umstände mitzuteilen, welche nach vernünftigen Ermessen für die Willensentschliessung des Käufers erheblich sein können*." ("according to the principles of good faith, the seller is obliged to inform the buyer of all circumstances known to him which, according to reasonable estimates, may be relevant to the decision of the buyer.") (informal English translation of the German original).

and the non-disclosing party is aware of this.[991] However, a negotiating party is not obliged to inform the other negotiating party about parallel negotiations.[992]

562. A breach of the duties derived from good faith entitles the aggrieved party to reliance damages (*Vertrauensschaden*) pursuant to Section 280(1) BGB[993] (provision on damages for breach of a duty arising from an obligation).[994]

563. A party may be entitled to avoid the contract if it was mistaken[995] due to the failure of the other party to inform it contrary to good faith. In addition, in a case where one party relies on the knowledge or expertise of the other contracting partner or where there is already a relationship based on mutual trust and

991 KESSLER/FINE, 404–405, 438 (noting that the scope of this duty varies depending on the type of transaction involved and with the circumstances of the individual case); JALUZOT, 373, §1310; see also a case where there was a lack of clear explanation regarding the financial cost of the acquisition of an apartment by an inexperienced buyer (BGH 27 February 1974-V ZR 85/72 NJW 1974 849). See, however, JALUZOT, 373 §1311 and a case where the existence of such an obligation was denied in a commercial sale (BGH 28 April 1971 - VIII ZR 258/69, NJW 1971, 1795). See further JALUZOT, 376, §1320 stating that such an obligation to inform is usually imposed: (i.) when there is a necessity to protect one of the parties (*Schutzbedürftigkeit*) when the latter is a weak party due to its inexperience, young or old age, social or family situation; and (ii) when there is an imbalance in the distribution of information (*Informationsgefälle*), namely where one of the parties possessed information that the other did not or could only get hold of with difficulty.

992 CARTWRIGHT/HESSELINK, 123.

993 Section 280(1) BGB provides in the German original as follows: "(1) *Verletzt der Schuldner eine Pflicht aus dem Schuldverhältnis, so kann der Gläubiger Ersatz des hierdurch entstehenden Schadens verlangen. Dies gilt nicht, wenn der Schuldner die Pflichtverletzung nicht zu vertreten hat*." It provides in the English translation as follows: "If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty."

994 PETER MANKOWSKI/M MÜLLER, Chapter 2: Formation in Stefan Leible/Matthias Lehmann, European Contract Law and German Law (Wolters Kluwer 2013), 113; MARKESINIS/UNBERATH/JOHNSTON, 99.

995 See Section 119 BGB which provides in the German original as follows: "(1) *Wer bei der Abgabe einer Willenserklärung über deren Inhalt im Irrtum war oder eine Erklärung dieses Inhalts überhaupt nicht abgeben wollte, kann die Erklärung anfechten, wenn anzunehmen ist, dass er sie bei Kenntnis der Sachlage und bei verständiger Würdigung des Falles nicht abgegeben haben würde.* (2) *Als Irrtum über den Inhalt der Erklärung gilt auch der Irrtum über solche Eigenschaften der Person oder der Sache, die im Verkehr als wesentlich angesehen werden*." ("(1) A person who, when making a declaration of intent, was mistaken about its contents or had no intention whatsoever of making a declaration with this content, may avoid the declaration if it is to be assumed that he would not have made the declaration with knowledge of the factual position and with a sensible understanding of the case. (2) A mistake about such characteristics of a person or a thing as are customarily regarded as essential is also regarded as a mistake about the content of the declaration.") (translation available at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0364, accessed 1 March 2023).

good faith, keeping silent may amount to fraud under Section 123 BGB[996] also allowing a party to avoid the contract.[997]

3. Contractual Performance stage

564. At the contractual performance stage, good faith is the basis for the objective interpretation of the parties' contract (a.), and the basis for filling gaps in the parties' contract (b.). Good faith determines the manner in which contractual obligations must be performed (c.) and was the initial ground for imposing ancillary duties on the parties (d.). Good faith limits the manner in which rights are exercised (e.) and was the initial basis for the recognition of the doctrine of changed circumstances (f.).

a. Good faith as the basis for objective interpretation

565. With respect to the interpretation of contracts, there is a specific section in the BGB which applies good faith to the interpretation of contracts. Section 157 BGB thus provides that "contracts are to be interpreted as required by good faith, taking customary practice into consideration."[998]

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996 Section 123 BGB provides in the German original as follows: "(1) *Wer zur Abgabe einer Willenserklärung durch arglistige Täuschung oder widerrechtlich durch Drohung bestimmt worden ist, kann die Erklärung anfechten*. (2) *Hat ein Dritter die Täuschung verübt, so ist eine Erklärung, die einem anderen gegenüber abzugeben war, nur dann anfechtbar, wenn dieser die Täuschung kannte oder kennen musste. Soweit ein anderer als derjenige, welchem gegenüber die Erklärung abzugeben war, aus der Erklärung unmittelbar ein Recht erworben hat, ist die Erklärung ihm gegenüber anfechtbar, wenn er die Täuschung kannte oder kennen musste*." ("(1) A person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid his declaration. (2) If a third party committed this deceit, a declaration that had to be made to another may be avoided only if the latter knew of the deceit or ought to have known it. If a person other than the person to whom the declaration was to be made acquired a right as a direct result of the declaration, the declaration made to him may be avoided if he knew or ought to have known of the deceit.") (translation available at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0364, accessed 1 March 2023).

997 DCFR Commentary, 523.

998 Section 157 BGB provides in the German original as follows: "*Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*." For the distinction between Sections 157 and 242 BGB, see LOOSCHELDERS/OLZEN, §§352–361.

566. According to the German legal doctrine and case law, good faith is an objective criterion of interpretation.[999] This means that it is a notion which is independent of the intent of the parties. As a result, good faith allows the judge to interpret the contract in accordance with elements that make up the notion of good faith and which are external to the contract.[1000]

567. First, an interpretation in good faith takes into account the legitimate expectations of the recipient of the declaration.[1001] The recipient of the declaration may therefore not rely on the fact that the declaration will be applied as it understood it or that it will have the meaning most favourable to it. The recipient must take due care to investigate the meaning of the declaration on the basis of all discernible circumstances.[1002]

568. Second, an interpretation in good faith should not lead to an interpretation which contradicts another contractual clause or the purpose of the contract.[1003]

569. Third, an interpretation in good faith imposes a duty to take into account the interests of both parties and thus entails a comprehensive weighing of the parties' interests.[1004]

570. Fourth, an interpretation in good faith also means that where there are several possible interpretations, preference should be given to the one which gives practical significance to a contractual provision and does not prove to be meaningless.[1005]

571. Fifth, an interpretation in good faith also requires the interpreter to attempt to give a meaning to the contractual terms that is compatible with the prevailing legal ethics in the economic and social order.[1006] However, the interpreter

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999 DÖRNER, §1; JALUZOT, 172, §631; MARKESINIS/UNBERATH/JOHNSTON, 134; SINGER, §§5, 64; BGH 22.04.1952 – II ZR 143/52, BGHZ 9, 273 et seq.: "*Für die Vertragsauslegung verweist §157 BGB auf die Erfordernisse von Treu und Glauben mit Rücksicht auf die Verkehrssitte. Dieser objektive Auslegungsmaßstab ist aber nach feststehender Rechtsprechung bei der ergänzenden Vertragsauslegung zugleich unter Berücksichtigung des anzunehmenden Willens der Vertragsparteien anzuwenden, da eine solche Auslegung nur den Vertragsinhalt, nicht auch den Vertragswillen zu ergänzen hat*."

1000 JALUZOT, 172, §631.

1001 SINGER, §§18, 64.

1002 SINGER, §18; BGH NJW 1981, 2295, 2296.

1003 PRÜTTING/WEGEN/WEINREICH, Section 157, §6; BGHZ 146, 318, 327, NJW 01, 2622; BGH ZIP 05, 296; see also JALUZOT, 173, §633.

1004 BUSCHE, §7; DÖRNER, §2; JALUZOT, 173, §634; PRÜTTING/WEGEN/WEINREICH, Section 157, §6; SINGER, §§54, 64; BGH NJW-RR 2003, 1053 (1054).

1005 DÖRNER, §2; BGH NJW 02, 440.

1006 BUSCHE, §10; SINGER, §§56, 64.

should not set aside an unambiguous and permissible intent of the parties in favour of a contractual meaning that is more conducive to the common good.[1007]

572. Sixth, an interpretation in good faith allows the values guaranteed by fundamental rights to be taken into account[1008] and requires the interpreter to favour an interpretation which is lawful and in conformity with the constitution.[1009]

573. Finally, the principle of interpretation *contra proferentem* is a consequence of good faith.[1010] Hence, contractual provisions which are drafted and enforced by a party in a superior position are to be interpreted to its disadvantage if they are ambiguous.[1011]

b. Good faith as the basis for filling gaps in the parties' contract

574. Certain authors consider that good faith is the basis which allows gaps to be filled in the parties' contract (*ergänzende Vertragsauslegung*).[1012] Other authors consider that the parties' intent is the basis for allowing gaps in the parties' contract to be filled by the courts.[1013]

575. When there is a gap in the parties' contract which is necessary to be filled in order to render a decision, a court will complete the contract by inserting a term on which the parties would have agreed had they actually considered the unforeseen situation (the so-called hypothetical intention of the parties, *hypothetischer Parteiwille*).[1014]

576. Good faith is referred to by the courts in determining what the parties would have agreed on in good faith as honest contracting parties taking into account their interests if they had considered the situation.[1015] Such creative interpretation based on good faith must not, however, be contrary to the actual intention of the parties or unduly alter the object of the contract.[1016]

1007 BUSCHE, §11.

1008 BUSCHE, §13.

1009 BUSCHE, §14; JALUZOT, 172–173, §631; SINGER, §§61, 64; BGHZ 134, 245 (248), NJW 1997, 1577.

1010 PRÜTTING/WEGEN/WEINREICH, Section 157, §7.

1011 BUSCHE, §8; PRÜTTING/WEGEN/WEINREICH, Section 157, §7.

1012 JALUZOT, 183, §671.

1013 JALUZOT, 183, §672.

1014 MARKESINIS/UNBERATH/JOHNSTON, 141; BGH 22.04.1953 – II ZR 143/52, BGHZ 9, 273, 278.

1015 MARKESINIS/UNBERATH/JOHNSTON, 141; BGH 03.07.1981 – V ZR 100/80, NJW 1981, 2241.

1016 MARKESINIS/UNBERATH/JOHNSTON, 141; BGH 22.04.1953 – II ZR 143/52, BGHZ 9, 273, and BGH 01.02.1984 – VIII ZR 54/83, NJW 1984, 1177.

577. In addition, such an interpretation should avoid contradictions.[1017] An interpretation that would prevent a party who is willing to perform from adhering to the contract and allow the other party to withdraw from the contract would therefore be contrary to good faith.[1018]

c. Good faith as informing the manner in which obligations should be performed

578. Good faith determines the manner in which the parties must perform their contractual obligations.[1019] Accordingly, the debtor must not, for example, perform at an inopportune moment (e.g., repaying a loan at the lender's house at 2 am in the morning) and must also refrain from any action that could hinder the fulfilment of the obligation.[1020]

d. Good faith as the basis for imposing ancillary duties

579. Case law imposed ancillary duties (*Nebenpflichten*) drawn from good faith on both parties during the performance of the contract.[1021] This is often referred to as the supplementing function or *Ergänzungsfunktion* of good faith.[1022]

580. Prior to 2002, recourse was had to Section 242 BGB in order to establish ancillary duties.[1023] However, today, such ancillary rights are regulated by Sections 241(2), 311(2) and (3) as well as 280(1) BGB.[1024] Accordingly, Section 242 BGB, in its direct area of application, no longer has a supplementary function.[1025]

581. There are six principal categories of ancillary duties.[1026]

– The first category is composed of obligations of care or diligence (*Sorgfaltspflichten*) which prescribe certain conduct in order to ensure the

[1017] BUSCHE, §6.

[1018] BGH DB 1990, 1158(1159), NJW-RR 1990, 817, 819; see also BUSCHE, §6 and PRÜTTING/WEGEN/WEINREICH, Section 157, §5.

[1019] LOOSCHELDERS/OLZEN, §181, §571.

[1020] LEIBLE, 27; LOOSCHELDERS/OLZEN, §185; SCHLECHTRIEM, Good Faith, 9; WITZ, 111.

[1021] MARKESINIS/UNBERATH/JOHNSTON, 125; SCHLECHTRIEM, Good Faith, 14; WHITTAKER/ZIMMERMANN, surveying the landscape, 24; WITZ, 111.

[1022] MARKESINIS/UNBERATH/JOHNSTON, 125.

[1023] LOOSCHELDERS/OLZEN, §186, §211; SCHUBERT, §79.

[1024] LOOSCHELDERS/OLZEN, §190, §211; SCHUBERT, §79.

[1025] LOOSCHELDERS/OLZEN, §198, §341.

[1026] JALUZOT, 511, §1756 but noting at 511, §1755 that there is no agreement in the legal doctrine with respect to the classification of these ancillary obligations.

diligent performance of the contract. These include the obligation to retain (*Aufbewahrungspflicht)*, the obligation to safeguard the item (*Erhaltungspflicht*) and the obligation to take under one's protection (*Obhutspflichten*);[1027]

– The second category is composed of obligations of protection (*Schutzpflichten*) which aim to prevent the object of the contract, the items necessary for the performance, as well as the parties, from being damaged or injured.[1028] There is a violation of such obligations, for example, when a seller supplies a defective object thereby causing physical damage to other property of the buyer or to his health.[1029]
– The third category is composed of obligations to provide information (*Auskunftspflichten*);[1030]
– The fourth category is composed of obligations to inform and clarify (*Aufklärungspflichten*) which include the obligation to warn (*Anzeigepflicht*), the obligation to notify (*Mitteilungspflicht*) and the obligation to explain (*Erklärungspflicht*);[1031]
– The fifth category is composed of obligations to cooperate (*Mitwirkungspflichten*). These obligations aim to aid the performance of the contract, in particular, by helping the other party to overcome hindrances during the performance.[1032] Both parties are under a duty to cooperate in the performance of the contract and must therefore help the other party obtain an authorisation, and possibly also help the other party when a third party threatens its rights;[1033] and
– The sixth category is composed of duties of care/assistance/protection (*Fürsorgepflicht*) which arise most frequently in employment and company law.[1034]

1027 EBKE/STEINHAUER, 177–178; JALUZOT, 511, §1757; SCHLECHTRIEM, Good Faith, 14–15.

1028 EBKE/STEINHAUER, 178; JALUZOT, 511–512, §1758.

1029 MARKESINIS/UNBERATH/JOHNSTON, 126.

1030 EBKE/STEINHAUER, 178; JALUZOT, 512, §1759; MARKESINIS/UNBERATH/JOHNSTON, 129 referring to the example where a claimant is excusably ignorant of the fact that his trademark rights are violated but he does not possess enough information to quantify his claim. In such a case, the defendant may be under a duty to supply it to him (RGZ 108, 1, 7, case no 41).

1031 EBKE/STEINHAUER, 178; JALUZOT, 512, §1760.

1032 EBKE/STEINHAUER, 178; JALUZOT, 512, §1761.

1033 MARKESINIS/UNBERATH/JOHNSTON, 128–129; BGH, 13.02.1992 – IX ZR 105/91, NJW 1992, 1695 where a party was under an obligation to provide documentation where this was necessary in dealing with the tax authorities; BGH 01.06.1973 – V ZR 134/72, NJW 1973, 1793 where documentation was needed to procure a loan; BGH 03.02.1989 – V ZR 224/87, NJW 1989, 1607 where a party was obliged to cooperate in a case where the performance of the contract hinged on the required authorities' approval of the transaction.

1034 JALUZOT, 512, §1762; MARKESINIS/UNBERATH/JOHNSTON, 129.

582. Some authors make a distinction between, on the one hand, obligations which are closely linked to the principal contractual obligation (*Nebenleistungspflichten*) and whose aim is to ensure performance which satisfies the creditor and, on the other hand, obligations whose aim is to protect the assets of both parties (*Schutzpflichten/Verhaltenspflichten*).[1035] The former of these obligations imposes, for example, an obligation on the seller to insure the goods during transport, to provide all documents to the buyer necessary for its use and to warn the latter of risks involved in using it.[1036] Specific performance of these obligations can be sought.[1037] Conversely, the violation of the latter obligations only gives rise to a claim for damages.[1038]

e. Good faith as limiting the manner in which contractual rights should be exercised

583. Section 242 BGB also limits the manner in which rights are exercised (*unzulässige Rechtsausübung/Rechtsmißbrauch*).[1039] Indeed, every right is subject to the requirement that it must be exercised in accordance with good faith (known as the internal limit of rights or *Schrankenfunktion*).[1040]

584. In order for the doctrine of abuse of rights to come into play, there must be a situation which, after careful consideration of the interests involved, makes it appear unacceptable to accept the consequence resulting from the application of the law.[1041] One should look at the interests of the parties and the meaning and purpose of the norm.[1042] The conduct or interests of third parties or the public may also be included in the weighing of interests.[1043]

585. The following are examples of conduct which are prohibited on the ground of good faith:

1035 JALUZOT, 512–513, §1764.
1036 PÉDAMON, 133, §168.
1037 *Ibid*.
1038 *Idem*, 133, §169.
1039 JALUZOT, 404–405, §1412 affirming that Section 242 BGB limits the manner in which rights are exercised and at 405, §1413 stating that the notion of an abuse of rights is considered to be derived from good faith; MARKESINIS/UNBERATH/JOHNSTON, 123; SCHUBERT, §145; WHITTAKER/ZIMMERMANN, surveying the landscape, 24.
1040 MARKESINIS/UNBERATH/JOHNSTON, 123.
1041 LOOSCHELDERS/OLZEN, §219.
1042 *Idem*, §221.
1043 *Idem*, §224.

- exercise of a right acquired dishonestly (*exceptio dolis specialis*);[1044]
- exercise of a right contrary to its goal (*exceptio dolis generalis*);[1045]
- contradictory behaviour (*venire contra factum proprium*);[1046]
- requesting something which has to be given back immediately (*dolo agit qui petit quod statim redditurus est*);[1047]
- an agent seriously harming the interests of the principal when concluding a contract (*Missbrauch der Vertretungsmacht*);[1048]
- in certain circumstances, invoking a lack of compliance with formal requirements;[1049]
- acting in a disproportionate manner in response to a certain event (*Übermaßverbot*);[1050] and

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[1044] LOOSCHELDERS/OLZEN, §234 et seq; MARKESINIS/UNBERATH/JOHNSTON, 124; BGH 06.10.1997 – VIII ZR 165/69, BGHZ 57, 108 where a creditor allegedly secured its superior right in insolvency proceedings by unfair means; WHITTAKER/ZIMMERMANN, surveying the landscape, 25; WITZ, 112 referring to the example of a creditor who gets a debtor to not pay its debt so that it can request the money from the guarantor.

[1045] WITZ, 112 referring to the example of the use of a right of way which is onerous for the landowner when a public right of way is available.

[1046] LEIBLE, 28; LOOSCHELDERS/OLZEN, §202, §284, §372 (referring to Section 162 BGB according to which no one may benefit from a condition which it has prevented or brought about in bad faith); MARKESINIS/UNBERATH/JOHNSTON, 123; BGH 26.10.1955 – VI ZR 145/54 BGHZ 18, 340 holding that a lawyer was not entitled to charge more than on earlier occasions; BGH NJW 2003, 2448 et seq; WHITTAKER/ZIMMERMANN, surveying the landscape, 25; WITZ, 112.

[1047] JALUZOT, 303–304, §§1095–1097; LEIBLE, 28; LOOSCHELDERS/OLZEN, §279 et seq (stating that there is a *venire contra factum proprium* when one party has caused the other to rely on a certain factual or legal situation in a way that is worthy of protection and there is a irresolvable contradiction between the present and previous conduct of the rightholder); MARKESINIS/UNBERATH/JOHNSTON, 123; BGH NJW 1990, 1289; SCHUBERT, §146; WHITTAKER/ZIMMERMANN, surveying the landscape, 25; WITZ, 112.

[1048] LOOSCHELDERS/OLZEN, §203, §517 et seq.; MARKESINIS/UNBERATH/JOHNSTON, 124; BGH 29.06.1999 – XI ZR 277/98, NJW 1999, 2883 case no 35.

[1049] LOOSCHELDERS/OLZEN, 202 (stating that a creditor must accept minor deviations from the agreement and performance and stating that a party cannot reject an almost complete performance contrary to Section 266 BGB if only a relatively small part is outstanding) §§445–452; MARKESINIS/UNBERATH/JOHNSTON, 124; RG 21.05.1927 – Rep. V 476/26, RGZ 117, 121, case no 21 (condemning the promisors to pay reliance damages for transactions which were not specifically enforceable due to lack of compliance with formal requirements; BGH 27.09.1967 – V ZR 153/64, BGHZ 48, 396, case no 22 (ordering specific performance of agreements lacking the required form on the ground of good faith).

[1050] LOOSCHELDERS/OLZEN, §255 et seq; MARKESINIS/UNBERATH/JOHNSTON, 124 stating that a breach of contract with only slight consequences may not always give rise to the full range of secondary rights and BGH 25.06.1976 – II ZR 101/55, BGHZ 21, 122, 135 concerning the late payment of a minuscule debt of insurance premium; WHITTAKER/ZIMMERMANN, surveying the landscape, 25.

– acting ruthlessly in plain disregard of the other party's interest (*inciviliter agere*).[1051]

586. Furthermore, if a right is not exercised within a certain period of time, even before the statute of limitations has expired, a party may lose such a right (*Verwirkung*).[1052]

587. The legal consequence of an abuse of rights is that the exercise of the right or assertion of the legal position by the creditor is inadmissible.[1053] An abuse of rights cannot be directly sanctioned by the award of damages, even though damages may be awarded for loss suffered following an abuse of rights.[1054]

f. Good faith as the initial basis for modification or termination of a contract due to a change of circumstances

588. The corrective function of the principle of good faith gave rise to the infamous theory of the disappearance of the foundation of the transaction (*Wegfall der Geschäftsgrundlage*).[1055] This theory, propounded by Profesor OERTMANN of the University of Göttingen, was recognized by the German courts in the 1920s in order to remedy the disruptions caused in contractual relationships as a result of the devaluation of the German mark.[1056]

589. If the conditions of this theory were fulfilled (namely (i.) a violation of the foundation of the contract which is so fundamental that an injustice would be caused if the judge did not intervene; (ii.) a violation caused by an event which occurred after the formation of the contract; and (iii.) a violation which did not fall into

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1051 LOOSCHELDERS/OLZEN, §202 stating that a creditor cannot demand performance from its debtor that the latter cannot reconcile with its conscience or which is economically impossible for it; WHITTAKER/ZIMMERMANN, surveying the landscape, 25.

1052 LOOSCHELDERS/OLZEN, §300 et seq. stating that this is a specific application of the prohibition of contradictory conduct whereby a creditor loses a right which it has not exercised for a certain period of time and which led to the debtor reasonably believing that no claim would be made against it); MARKESINIS/UNBERATH/JOHNSTON, 123; BGH 15.06.1956 – 1 ZR 71/54, BGHZ 21, 66, case no 37; WHITTAKER/ZIMMERMANN, surveying the landscape, 25; WITZ, 112.

1053 LOOSCHELDERS/OLZEN, §204; see also JALUZOT, 407, §1421;

1054 JALUZOT, 408, §1425.

1055 LOOSCHELDERS/OLZEN, §204; MARKESINIS/UNBERATH/JOHNSTON, 23 giving the theory of the foundation of the transaction as an example of how good faith is used to mold private law and infer new 'specific-abstract' rules; SCHLECHTRIEM, Good Faith, 16; WHITTAKER/ZIMMERMANN, surveying the landscape, 25–26; WITZ, 103.

1056 EBKE/STEINHAUER, 182–183; JALUZOT, 102, §366, 450, §1556. This doctrine was first recognized by the German courts in a decision of 19 May 1920 in a case concerning inflation (RGZ 99, 115 et seq); see also above para. 283.

the sphere of risk of one of the parties[1057]), the judge could first attempt to modify the contract and if this failed it could terminate the contract.[1058]

590. Section 313 BGB 'Interference with the basis of the transaction' (introduced by a law of 26 November 2001) has now codified this theory. It allows a party to request the adaptation of the contract, or if this is not possible, to revoke or terminate the same when circumstances which formed the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with a different content if they had foreseen this change.[1059]

[1057] JALUZOT, 451–463, §1560–§1598.

[1058] JALUZOT, 463, §1599, 464, §1603; See e.g., BGH 07.05.1997- IV ZR 179/96, BGHZ 135, 333, 339: "*führt das Fehlen oder die Änderung der Geschäftsgrundlage grundsätzlich nicht zur Auflösung des Vertrags, sondern zur Anpassung seines Inhalts an die veränderten Umstände in einer Form, die den berechtigten Interessen der Parteien Rechnung trägt. Aus Gründen der Vertragstreue und der Vertragssicherheit ist der Vertrag nach Möglichkeit aufrechtzuerhalten*." ("the absence or change of the basis of the contract does not lead to its dissolution, but to the adaptation of its content to the changed circumstances in a form that takes into account the legitimate interests of the parties. For the sake of contractual compliance and contractual security, the contract shall be maintained as far as possible.") (Informal English translation of the German original).

[1059] Section 313 BGB provides in English translation as follows: "(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration. (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect. (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke." Section 313 BGB provides in the German original as follows: "(1) *Haben sich Umstände, die zur Grundlage des Vertrags geworden sind, nach Vertragsschluss schwerwiegend verändert und hätten die Parteien den Vertrag nicht oder mit anderem Inhalt geschlossen, wenn sie diese Veränderung vorausgesehen hätten, so kann Anpassung des Vertrags verlangt werden, soweit einem Teil unter Berücksichtigung aller Umstände des Einzelfalls, insbesondere der vertraglichen oder gesetzlichen Risikoverteilung, das Festhalten am unveränderten Vertrag nicht zugemutet werden kann. (2) Einer Veränderung der Umstände steht es gleich, wenn wesentliche Vorstellungen, die zur Grundlage des Vertrags geworden sind, sich als falsch herausstellen. (3) Ist eine Anpassung des Vertrags nicht möglich oder einem Teil nicht zumutbar, so kann der benachteiligte Teil vom Vertrag zurücktreten. An die Stelle des Rücktrittsrechts tritt für Dauerschuldverhältnisse das Recht zur Kündigung.*" See also LOOSCHELDERS/OLZEN, §212, §§385–386.

4. Post-contractual stage

591. Good faith sometimes imposes ancillary duties of care (*Schutzpflichten*) on the parties after the contract has been performed (e.g., an employee who is prevented from disclosing confidential information/business secrets which it became aware of during its employment).[1060] The violation of these duties gives rise to a claim for damages.[1061]

5. Rationalization attempts

592. German commentators have led the way in attempting to rationalize good faith through the tripartite functional theory (a.) and the *Fallgruppen* methodology (b.).

a. Tripartite functional theory

593. In an attempt to rationalize the application of good faith in Germany, Professor WIEACKER distinguished in 1956 between three functions of the principle of good faith. This theory became known as the tripartite functional theory.[1062]

594. First, good faith has an interpretative function when it is employed to interpret a contract.[1063]

595. Second, good faith has a supplementing function when it is used to imply and impose additional duties on the parties such as the duty of loyalty, the duty of care, the duty to protect, the duty to inform, and the duty to cooperate.[1064]

596. Third, good faith has a corrective function when it is used to prohibit an abuse of rights and contradictory behaviour (*venire contra factum proprium non valet*).[1065]

597. Some authors refer to four functions of good faith: (i.) the concretization function which concerns the manner of performance; (ii.) the supplementary function relating to ancillary duties; (iii.) the barrier function concerning the abuse

[1060] PÉDAMON, 134, §169; WHITTAKER/ZIMMERMANN, surveying the landscape, 24; WITZ, 103.
[1061] PÉDAMON, 134, §169; WHITTAKER/ZIMMERMANN, surveying the landscape, 24, 27.
[1062] FRANZ WIEACKER, *Zur Rechtstheoretischen Präzisierung des §242* (Mohr 1956) 1–53. See also HESSELINK, Good Faith, 626 and LOOSCHELDERS/OLZEN, §87 with respect to the functional theory.
[1063] HESSELINK, Good Faith, 627.
[1064] *Ibid*.
[1065] *Ibid*.

of rights; and (iv.) the corrective function relating to the content control of legal transactions.[1066]

b. *Fallgruppen* methodology

598. German authors have also attempted to rationalize the concept of good faith by using the *Fallgruppen* methodology i.e., determining the different functions of good faith and organizing the different judgments concerning good faith into different categories.[1067] An "inner system" of good faith setting out the content of the standard of good faith is therefore formed containing specific duties, prohibitions, subrules and doctrines.[1068]

599. The aim of this methodology is to make the application of good faith more objective, rational and therefore predictable, as it has arguably done in Germany.[1069] However, it is underlined that this "inner system" should not become a straitjacket given the important role of good faith in importing flexibility into the law.[1070]

600. In addition, it has been argued that the "inner system" of good faith may have to be destroyed as it will become unmanageable and that legal doctrine should relate the rules developed on the basis of the general principle of good faith to the more specific rules and doctrines already elaborated.[1071]

B. Law of the PRC

601. This section explores the role of good faith under the contract law of the PRC (1.). The role of good faith will be examined at the pre-contractual stage (2.), the contractual performance stage (3.) as well as at the post-contractual stage (4.).

[1066] LOOSCHELDERS/OLZEN, §181–204; SCHUBERT, 136.

[1067] LOOSCHELDERS/OLZEN, §86; SCHUBERT, §§4–5, §§41–45, §139–144; see also HESSELINK, Good Faith, 623; WHITTAKER/ZIMMERMANN, surveying the landscape, 23.

[1068] SCHUBERT, §137; see also HESSELINK, Good Faith, 623–624.

[1069] HESSELINK, Good Faith, 624.

[1070] *Ibid*.

[1071] *Idem*, 644.

1. Good faith in general

602. The principle of good faith (城市新永, *chengshi xinyong*; literally, honesty and trustworthiness)[1072] under the law of the PRC is deemed, by the courts and the majority of the legal doctrine, to constitute a necessary and essential part of Chinese contract law.[1073]

603. The principle of good faith is described as the "highest guiding principle or the 'royal/king principle' of the law of obligations."[1074] Responding to the numerous lacunae in Chinese civil law, the principle of good faith has been employed to fill in many legislative and doctrinal gaps.[1075]

604. Numerous provisions of Chinese civil and commercial law refer to good faith[1076] and it is frequently cited by the courts.[1077] Notwithstanding, the reference to good faith is often superfluous. [1078] Indeed, there is a tendency to invoke the principle of good faith together with other more specific provisions of law.[1079] For example, the courts have used the principle as a basis for their decision when there was a clear breach of contract and when they could have merely resorted to the principle of *pacta sunt servanda*.[1080]

605. The principle of good faith found in Chinese law is said to have evolved from Chinese moral traditions and the principle of good faith found in other Civil law countries.[1081] Law and morality have traditionally been intertwined in China.[1082]

1072 LING, 50, §2.035; MCKENDRICK/LIU, Good Faith, 77.

1073 LEONHARD, 309; LING, 50, §2.035; see also MCKENDRICK/LIU, Good Faith, 75.

1074 LEONHARD, 309; LING, 50, §2.035, 52, §2.037; MCKENDRICK/LIU, Good Faith, 75 describing the principle of good faith as a fundamental principle of Chinese civil law; NOVARETTI, 953 stating that the principle of good faith has become known as the 'king clause' (*diwang tiaokuan*) among Chinese scholars and at 963 stating that good faith is one of the fundamental principles of civil law.

1075 LEONHARD, 317 referring to the example of where the Chinese courts relied on Article 60 CCL to find a bank liable for the loss of money from a customer's account as a result of criminal activity; MCKENDRICK/LIU, Good Faith, 76; NOVARETTI, 977.

1076 LING, 50, §2.035; NOVARETTI, 954.

1077 MCKENDRICK/LIU, Good Faith, 76.

1078 *Idem*, 79, 81.

1079 *Ibid*.

1080 LEONHARD, 316; NOVARETTI, 972–973 stating that *xin* identifies the duty to fulfil a promise and that this may explain why judges often refer to good faith when a party fails to comply with its contractual obligations.

1081 LEONHARD, 309.

1082 *Idem*, 326

In this regard, the principle of good faith is seen as a means of enforcing traditional Chinese notions of morality and business ethics.[1083]

606. The importance of collectivism and strong government grounded in Confucianism explain the ease with which Chinese scholars and the courts have accepted the principle of good faith and the associated discretion with which judges are endowed.[1084]

607. In addition, consistent with the importance of collectivism, the principle of good faith has allowed the interests of the parties to be balanced against the interests of society as a whole.[1085]

608. Good faith was first found in Article 219 Republican Civil Code (*Zhonghua minguo minfa*) of 1931 which provided that everyone is obliged to perform its obligations and to exercise its rights in accordance with the rules on loyalty and reciprocal trust.[1086] Thereafter, the principle of good faith was found in the General Principles of the Civil Law (*Zhonghua renmin gongheguo minfa tongze*) in 1986.[1087] Provisions on good faith were also found in the Economic Contract

[1083] LEONHARD, 310; NOVARETTI, 967 stating that good faith is deemed fundamental in order to guarantee justice and fairness in contractual relationships and at 980 stating that according to the legal doctrine and the legislators, good faith infuses civil relationships with morality through the 'honest businessman criterion'.

[1084] LEONHARD, 325; see further LEONHARD, 310 referring to Professor XU GUODONG who appears to approve the vagueness of the principle which endows the judges with a large amount of discretion but referring at 311 to Professor MENG, QUINGUO who warns that the broad application of the doctrine could lead to a situation in which thousands of judges rely on the doctrine of good faith to render judgments without regard for the applicable law; MCKENDRICK/LIU, Good Faith, 76 stating that the legal doctrine does not appear concerned by the vast discretion that is conferred on judges by the principle of good faith, at 80 that Chinese law has embraced good faith due to Confucianism and the socialist value system and at 81 stating that the long lasting tradition of rule by men, paternalistic government and collectivism has meant that a boundless and indeterminate notion of good faith has been embraced with its associated conferral of broad discretion upon judges and disregard for individual autonomy.

[1085] LING, 53, §2.038; MCKENDRICK/LIU, Good Faith, at 78 stating that according to some scholars, good faith should be accepted as a mechanism to confer upon judges a discretion to balance the interests between contracting parties and between contracting parties and the wider community and at 81 stating that every contractual relationship is regarded as embedded in a deeper and wider societal relationship; NOVARETTI, 962, 963, 970, 980.

[1086] NOVARETTI, 961.

[1087] Article 4 GPCL provides that, "in civil activities, the principles of voluntariness, fairness, compensation for equal value, and good faith shall be observed." Article 7 of the Chinese Civil Code now provides that: "Civil subjects engaging in civil activities shall follow the principles of good faith, adhere to honesty and keep their commitments." The Chinese Civil Code took effect on 1 January 2021. The Chinese Civil Code consists of six parts: the general

Law of 1981.[1088] Under this law, the parties were required to conform to the principles of equality and mutual benefit in contracting.[1089] In 1999, the Chinese Contract Law explicitly adopted the doctrine of good faith as a general principle. Article 6 of this law provided that, "parties should abide by the doctrine of good faith when exercising their rights or fulfilling their obligations."[1090] Today, Article 509 of the Chinese Civil Code which entered into force on 1 January 2021 provides in Chapter IV on 'Performance of Contracts' that "The parties shall comply with the principle of good faith […]."[1091] Article 7 of the Chinese Civil Code, which consecrates the principle of good faith more generally in civil law provides that: "When conducting a civil activity, a person of the civil law shall, in compliance with the principle of good faith, uphold honesty and honor commitments."[1092]

609. Chinese courts and scholars often appeared to equate good faith with fairness,[1093] a principle which was set out in Article 5 of the Chinese Contract Law[1094] and is now found in Articles 6, 288, 496 and 533 of the Chinese Civil Code.[1095] However, it has been submitted that the two concepts should be

provisions, property, contract, tort liability, marriage and family, and inheritance. See further XIANCHU ZHANG, The New Round of Civil Law Codification in China (2016) University of Bologna Law Review 106–137. An English version of the Chinese Civil Code can be found here: <http://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html>, accessed 1 March 2023.

1088 The ECL can be found here: <http://www.lawinfochina.com/display.aspx?lib=law&id=18&CGid=>, accessed 1 March 2023.

1089 See Article 5 ECL. See also MATHESON, 344.

1090 The CCL can be found here: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/52923/108022/F1916937257/CHN52923%20Eng.pdf>, accessed 1 March 2023.

1091 An English version of the Chinese Civil Code can be found here: <http://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html>, accessed 1 March 2023.

1092 *Ibid.*

1093 MCKENDRICK/LIU, Good Faith, 80.

1094 Article 5 CCL provided that "The parties shall observe the principle of fairness in determining their respective rights and duties." See also LING, 50, §2.036.

1095 Article 6 CCC provides as follows: "When conducting a civil activity, a person of the civil law shall, in compliance with the principle of fairness, reasonably clarify the rights and obligations of each party." Article 288 CCC provides as follows: "The persons entitled to adjacent rights in immovable property shall properly deal with adjacent relationships in accordance with the principles of facilitation to production, convenience for daily lives, solidarity and mutual assistance, and fairness and reasonableness." Article 496 CCC provides, in relevant part, as follows: "Upon concluding a contract, where a standard clause is used, the party providing the standard clause shall determine the parties' rights and obligations in accordance with the principle of fairness, and shall, in a reasonable manner, call the other party's attention to the clause concerning the other party's major interests and concerns, such as a clause that

distinguished by confining the aim of good faith to ensuring fair dealing and the concept of fairness to ensuring substantive fairness in the determination of the contracting parties' pre-supposed rights and obligations through a number of specific rules.[1096]

610. Good faith is considered to form part of public policy. Accordingly, an arbitral award may be set aside if it does not respect the principle of good faith.[1097]

2. Pre-contractual stage

611. Under the law of the PRC, good faith applies to contractual negotiations and has been frequently employed by the courts at this stage.[1098]

612. Good faith imposes ancillary duties on the parties at the pre-contractual stage such as the duty of loyalty, the duty of mutual care and assistance, the duty of honesty and non-deception, the duty to keep a promise and the duty of confidentiality.[1099]

613. In this regard, Article 500 CCC (former Article 42 CCL) provides as follows: "During the course of concluding a contract, the party that falls under any of the following circumstances and causes loss to the other party shall bear the liability for compensation: (1) under the guise of concluding a contract, engaging in consultation with malicious intention;[1100] (2) intentionally concealing material facts

exempts or alleviates the liability of the party providing the standard clause, and give explanations of such clause upon request of the other party." Article 533 CCC provides as follows: "After a contract is formed, where a fundamental condition upon which the contract is concluded is significantly changed which are unforeseeable by the parties upon conclusion of the contract and which is not one of the commercial risks, if continuing performance of the contract is obviously unfair to one of the parties, the party that is adversely affected may re-negotiate with the other party; where such an agreement cannot be reached within a reasonable period of time, the parties may request the people's court or an arbitration institution to rectify or rescind the contract. The people's court or an arbitration institution shall rectify or rescind the contract in compliance with the principle of fairness, taking into account the actual circumstances of the case."

1096 See LING, 50–52, §2.036 and MCKENDRICK/LIU, Good Faith, 80.

1097 WEI SUN/MELANIE WILLEMS, Chapter 20: Judicial Review over Arbitration, in Wei Sun/Melanie Willems (eds), Arbitration in China (Kluwer Law International 2015) 362.

1098 LING, 213, §4.101.

1099 LEONHARD, 310; LING, 213, §4.101; WANG/XU, 17–19.

1100 WANG/XU, 17–18 giving the example of where a party enters into negotiations with another party in order to prevent the latter from negotiating with a third party. A party will violate Article 42(i) CCL (now Article 500(1) CCC) if the other party shows that it had no intention to make the contract. It is not sufficient if the defendant extends the negotiations without

or providing false information concerning the conclusion of the contract;[1101] or (3) conducting any other acts contrary to the principle of good faith."

614. The catch all category of Article 500(3) CCC (former Article 42(iii) CCL) will be violated if a party breaches its duty to obtain approval or registration for the contract to take effect.[1102] It is further suggested that the following conduct may constitute a violation of Article 500(3) CCC (former Article 42(iii) CCL): (i.) attempting to revoke an irrevocable offer; (ii.) breaching a precontractual promise causing the other party to incur a loss; (iii.) violating a preliminary agreement; (iv.) violating the other party's expectations under a conditional contract or contract subject to a time limit; (v.) refusing to deliver after indicating that it agreed to an executed contract (a contract that only becomes effective after delivery); (vi.) negligently misrepresenting or failing to disclose material information relevant to the conclusion of the contract; and (vii.) violating the duty to take care of property or person of the other party whilst in its custody or care.[1103] Withdrawing an offer after the offeree has received the offer and reasonably relied on it would also appear likely to fall within the category of Article 500(3) CCC (former Article 42(iii) CCL).[1104]

615. In order for a party to be liable under Article 500 CCC (former Article 42 CCL), a fault in engaging in the conduct in question would seem to be required.[1105] In this regard, it is uncertain whether a withdrawal from negotiations without good reason or failure to notify, assist or protect the other party would be considered conduct contrary to good faith.[1106] Similarly, it is also unclear whether Article

agreeing to make a contract. An insistence on unacceptable terms, capricious reversal of previous positions, persistent requests for irrelevant information and unjustified delay of decisions may be taken into account in determining malice (see LING, 216, §4.104).

1101 A party will violate Article 42(ii) CCL (now Article 500(2) CCC) if it fails to inform the other party of an impossibility in fact or in law (LING, 217, §4.104).

1102 MCKENDRICK/LIU, Good Faith, 77. Article 8 of the Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China issued in 2009 provides that: "[a]fter the formation of a contract which does not become effective until it is approved or registered under a relevant law or administrative regulation, if the party which has the obligation to apply to go through the approval or registration formalities fails to do so under the relevant law or contractual provisions, such failure shall fall within the scope of 'taking any other act contrary to the principle of good faith', and the people's court may, as the case may be, and upon the request of the opposite party, rule that the opposite party shall go through the relevant formalities by itself. However, the other party shall be liable for compensating the opposite party for the expenses incurred thereof and the losses actually caused to the opposite party."

1103 LING, 217–219, §4.106.

1104 WANG/XU, 18.

1105 LING, 214, §4.102; MCKENDRICK/LIU, Good Faith, 77.

1106 MCKENDRICK/LIU, Good Faith, 77.

500(3) CCC (former Article 42(iii) CCL) would extend to the situation where a party has not done its best to reach an agreement.[1107]

616. The usual remedy for breach of the precontractual duty to act in good faith is reliance damages.[1108] If the defendant's conduct causes the failure of the conclusion or effectiveness of the contract, the aggrieved party should be compensated for its reliance on the contract being concluded or effective which includes actual expenditure incurred in the negotiation and preparation for the performance of the contract and lost opportunities of alternative contracts with other parties.[1109]

617. If the contract is concluded and the intentional non-disclosure or misstatement constitutes fraud, the aggrieved party may rescind the contract pursuant to Article 150 CCC (former Article 54 CCL).[1110] According to Article 157 CCC (former Article 58 CCL), in such a case, restitution is made and the party at fault must indemnify the aggrieved party for its loss.[1111]

3. Contractual performance stage

618. Under the law of the PRC, good faith is a factor which applies to the interpretation of contracts (a.). It also informs the manner in which a parties' obligations should be performed (b.) and imposes ancillary obligations on the parties (c.). Finally, good faith limits the exercise of contractual rights (d.) and is the basis for the doctrine of changed circumstances (e.).

1107 *Ibid*.

1108 SHIYUAN HAN, Culpa in Contrahendo in Chinese Contract Law, (2004) Tsinghua China Law Review, 164, 167; LING, 215, §4.103.

1109 LING, 215, §4.103.

1110 LING, 216–217, §4.104. Article 150 CCC provides, in relevant part, as follows: "Where a party performs a civil juristic act against its true intention owing to duress of the other party or a third person, the coerced party has the right to request the people's court or an arbitration institution to revoke the civil juristic act."

1111 Article 157 CCC provides as follows: "Where a civil juristic act is void, revoked, or is determined to have no legal effect, the property thus obtained by a person as a result of the act shall be returned, or compensation be made based on the appraised value of the property if it is impossible or unnecessary to return the property. Unless otherwise provided by law, the loss thus incurred upon the other party shall be compensated by the party at fault, or, if both parties are at fault, by the parties proportionally." See also in this regard, NOVARETTI, 970.

a. Good faith as a factor in the interpretation of contracts

619. Good faith is considered to be a general principle guiding the interpretation of contracts.[1112] An interpretation in good faith means that the contract will be interpreted in conformity with the applicable moral, social and commercial standards.[1113]

620. In this regard, Article 142 CCC[1114] (former Article 125 CCL) provides that: "Where an expression of intent is made to another person, the meaning of the expression shall be interpreted according to the words and sentences used, with reference to the relevant terms, the nature and purpose of the civil juristic act, the custom, and the principle of good faith. Where an expression of intent is not made to any specific person, the true intent of the person performing a civil juristic act shall not be interpreted solely on the words and sentences used, but along with the relevant terms, the nature and purpose of the civil juristic act, custom, and the principle of good faith."

621. Hence, good faith appears to be only one of the factors, and not the dominant one, which must be taken into account when interpreting a contract.[1115]

622. Good faith obliges the judge when interpreting the contract to ensure that the rights and obligations of the parties are proportionate, that the parties' interests are balanced and to determine the terms of the contract fairly and reasonably. For example, in the case of a gratuitous contract (*zengyu hetong*), the interpretation should favour a less burdensome obligation by the obligor, whereas in a contract for consideration, the interpretation should generally be equitable to both parties.[1116]

623. An interpretation in good faith may permit a court to depart from the literal meaning of the contract in order to reach a fair and equitable result.[1117] Thus in one case, concerning a brokerage contract which provided that the fee was payable when the buyer had paid the entire amount of the price for the houses, the court held that the principal was liable to pay the broker on the basis of funds

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1112 LING, 230, §5.011.

1113 *Idem*, 55, §2.040.

1114 Article 142 CCC should be read in conjunction with Article 466 CCC which provides as follows: "Where the parties have a dispute on the understanding of a contract clause, the meaning of the disputed clause shall be determined according to the provisions in the first paragraph of Article 142 of this Code."

1115 MCKENDRICK/LIU, Good Faith, 77.

1116 LING, 230, §5.011; WANG/XU, 22.

1117 LING, 230–231, §5.011.

received even though it had not recovered the full price for the sale of the house.[1118]

b. Good faith as informing the manner in which the parties' obligations should be performed

624. Good faith informs the manner in which the parties' obligations should be performed. Indeed, good faith requires parties to follow such standards of conduct that are generally expected of a reasonable cooperating person in the community concerned.[1119]

625. Accordingly, a debtor should not intentionally deliver goods or services of inferior quality when there is no provision in the contract specifying the quality of the goods or services.[1120]

626. In addition, if there is no contractual provision specifying the time for performance, the debtor must give the creditor a reasonable period of time to prepare prior to performing.[1121] A debtor may perform before the deadline as long as such advance performance does not harm or seriously inconvenience the creditor.[1122] If the creditor rejects the goods and this causes the debtor to incur substantial expense, it is very likely that both parties will be held liable and the liability will be apportioned between them. If the creditor accepts the goods, damages may be awarded for any actual loss sustained.[1123]

627. A party who performs its obligations under the contract in a manner contrary to good faith may be disentitled from claiming the contract price or only be awarded a reduced contract price if the contract is not substantially performed.[1124]

1118 *Idem*, 231, §5.011 referring to the case of *Zhang Aihua v Qingdao West Coast Real Estate Development Co* (Qingdao Intermediate People's Court and Shandong High People's Court 1996) RJDC 1997 Economic and Administrative Cases 117.

1119 *Idem*, 231, §5.012.

1120 WANG/XU, 20.

1121 MCKENDRICK/LIU, Good Faith, 86; WANG/XU, 20.

1122 MCKENDRICK/LIU, Good Faith, 86–87; WANG/XU, 20.

1123 MCKENDRICK/LIU, Good Faith, 87.

1124 MCKENDRICK/LIU, Good Faith, 89 in relation to the case where a reward was promised by a wedding company for anyone who entered into an online competition and was voted by all participants to be the most popular. Yang who registered 2000 accounts and who voted for himself 10,000 times every day won the competition but his claim for the reward was rejected as his conduct was deemed contrary to the principle of good faith.

c. Good faith as the basis for imposing ancillary duties

628. Good faith imposes ancillary duties (扶绥义乌, *fusui yiwu*) on the parties.

629. In this regard, Article 509 CCC (former Article 60 CCL) provides, in relevant part, as follows: "The parties shall comply with the principle of good faith, and perform such obligations as sending notices, rendering assistances, and keeping confidentiality in accordance with the nature and purpose of the contract and the course of dealing."

630. The various obligations that arise are context specific.[1125] The function of these ancillary duties is to facilitate the performance of the principal obligations so that the reasonable expectations of the parties may be satisfied.[1126] Such ancillary duties must not, however, contradict the express or implied terms of the contract.[1127]

631. The duties imposed by good faith include the duty to disclose defects and to notify the other party of information that is material to the performance of the contract,[1128] the duty to cooperate with, and assist, each other,[1129] as well as the duty to convey instructions for use.[1130]

632. Good faith also imposes an obligation on the parties not to disclose to third parties the commercial secrets of the other party that it has become aware of during the performance of the contract.[1131]

633. Good faith further requires a party not to hinder the performance by the other party, to take reasonable steps to preserve goods after rejecting them, and if

[1125] LING, 231, §5.012.

[1126] *Idem*, 232, §5.013.

[1127] *Ibid*.

[1128] LING, 232, §5.014 stating that any information the lack of which would cause impossibility or hardship in the performance by the other party is within the scope of this duty e.g., a seller of goods is required to inform the buyer of the name of the ship delivering the goods and the time and place of its arrival.

[1129] *Idem*, 233–234, §5.016 stating that assistance is required where it is reasonably expected by virtue of the nature and purpose of the contract and usages of the transaction and includes the assistance or cooperation that is necessary for the other party's performance of the contract or the assistance that is required to fully exercise its contractual rights. As the signing of the contract is seen as the beginning of the parties' real business relationship, it is not objectionable to raise beyond the terms of a contract, an expectation that parties cooperate and help out when needed (see, in this regard, MATHESON, 345).

[1130] MCKENDRICK/LIU, Good Faith, 92; WANG/XU, 20.

[1131] LING, 234, §5.017 stating that whether the duty arises depends on the nature of the information, the nature and purpose of the contract, the relationship of the parties and usages of the transaction; MATHESON, 354.

multiple means of performing are available, a party is obliged to perform in the way that is most conducive to the purpose of the contract.[1132]

634. Article 60 CCL (now Article 509 CCC) was invoked frequently by the courts and was usually invoked to prevent parties from relying on a literal interpretation of the contract[1133] and to ensure that contracting parties did what is reasonable and necessary so that the other party enjoyed the full bargained-for benefits under the contract.[1134]

635. As for the breach of a contractual term, the breach of such ancillary duties gives rise to contractual liability.[1135]

d. Good faith as limiting the manner in which contractual rights should be exercised

636. Good faith applies to the exercise of contractual discretion. Hence good faith would prevent a party from withholding its approval of works carried out on the basis of a trivial defect.[1136]

637. Good faith also applies to the exercise of the contractual right to performance. Hence, good faith may prevent a party from insisting on the performance of the contract when it would be injurious to the interests of the other party.[1137]

1132 LING, 234, §5.017.

1133 NOVARETTI, 973.

1134 MCKENDRICK/LIU, Good Faith, 93. For example, in one case concerning a contract for the renovation of an apartment, the court held that the renovators should have coordinated their efforts with the air conditioning company that had been employed afterwards to install an air conditioning system and that as it failed to do so, it was liable for 50% of the damage caused to the property when the apartment flooded due to the fact that the air conditioner's pipe was insufficient to drain the large amounts of water. In another case, it was held that a management company had a duty under Article 60 CCL (now Article 509 CCC) to deliver a letter to one of the residents or notify the resident in a timely fashion even though there was no express contractual duty to do so. In a further case, a company was ordered to continue to perform an insurance contract when it had previously posted a premium notice every year which was paid by the insured and then stopped posting the notice leading to the insured failing to pay the premium on time. See with respect to this case, NOVARETTI, 973–974 and MCKENDRICK/LIU, Good Faith, 93, 95 holding that there was a trade practice established between the parties upon which Ms Lu relied to make due payment and which placed the company under a duty to send the notice to Ms Lu.

1135 LING, 232, §5.013.

1136 MCKENDRICK/LIU, Good Faith, 98–99.

1137 *Idem*, 101–102 concerning a case where an owner of a shop in a shopping mall refused to sell her shop back to the developer when the shopping mall was closed down which meant that the developer could not redevelop the mall.

638. Good faith further applies to the exercise of the right to terminate the contract. Hence, a party cannot terminate a contract with the sole aim of injuring the other party or a third party.[1138] In addition, a party should not terminate a contract for the mere reason that a very small part of the order contains defective items.[1139] Furthermore, with respect to the termination of a long-term contract, a party should notify the other party as far in advance as possible in the event that it decides to terminate in accordance with the contract.[1140]

e. Good faith as the basis for the doctrine of changed circumstances

639. The doctrine of changed circumstances is deemed to constitute the primary example of the judicial application of the principle of good faith.[1141]

640. The doctrine of changed circumstances (情势变更, *qingshi biangeng)* can be traced back to the case of *Wuhan Gas Co v Chongqing Measuring Instrument Plant* in which the price of aluminium ingot (the main material for manufacturing the contracted for measuring instruments) increased fourfold following the conclusion of the contract of sale in question.[1142] The doctrine of changed circumstances was applied in accordance with the principles of fairness and good faith found under Article 4 GPCL and Article 27 ECL (provision on *force majeure*).[1143] Applying this doctrine, the court deemed that it would be manifestly unfair to require the plant to supply the instruments at the originally agreed price given the unforeseeable and unpreventable surge of cost.[1144]

641. The drafters of the CCL did not include this doctrine in the CCL due to concerns about excessive judicial discretion and difficulties in application.[1145] However Article 26 of Interpretation II to the CCL stated that a contract may be varied or terminated at the request of a party where a major change of objective circumstances after the conclusion of the contract, which was unforeseeable by the parties at the time of contract, not caused by force majeure and not a commercial risk, renders continuing performance of the contract manifestly unfair to a party or renders it impossible to fulfill the purpose of the contract.[1146] Today, Article 533 CCC contains a specific provision setting out this doctrine which provides

1138 LING, 336, §7.011.
1139 WANG/XU, 20–21.
1140 LING, 336, §7.011; WANG/XU, 21.
1141 NOVARETTI, 965.
1142 LING, 292, §5.087; MCKENDRICK/LIU, Good Faith, 105.
1143 MCKENDRICK/LIU, Good Faith, 106.
1144 *Ibid*.
1145 LING, 293, §5.088; MCKENDRICK/LIU, Good Faith, 106.
1146 MCKENDRICK/LIU, Good Faith, 106.

as follows: "After a contract is formed, where a fundamental condition upon which the contract is concluded is significantly changed which are unforeseeable by the parties upon conclusion of the contract and which is not one of the commercial risks, if continuing performance of the contract is obviously unfair to one of the parties, the party that is adversely affected may re-negotiate with the other party; where such an agreement cannot be reached within a reasonable period of time, the parties may request the people's court or an arbitration institution to rectify or rescind the contract. The people's court or an arbitration institution shall rectify or rescind the contract in compliance with the principle of fairness, taking into account the actual circumstances of the case."

642. Although the parties are not required to renegotiate a contract after a change of circumstances, if they do so, they must conduct the renegotiations in good faith.[1147]

4. Post-contractual stage

643. Good faith imposes post-contractual obligations (侯后月义乌, *hou qiyue yiwu*) including the duties of loyalty and confidentiality on the contracting parties.[1148]

644. Article 558 CCC (former Article 92 CCL) provides in this regard that "[a]fter the parties' claims and obligations are terminated, the parties shall, in compliance with the principle of good faith and the like, perform such obligations as sending notification, rendering assistance, keeping confidentiality, and retrieving the used items according to the course of dealing." This provision, however, has not been frequently applied in practice.[1149]

1147 LING, 299, §5.093; MCKENDRICK/LIU, Good Faith, 106.

1148 LEONHARD, 310; MATHESON, 354–355 stating that good faith at the post-contractual stage requires an employee to maintain the confidentiality of its former employer's trade secrets; NOVARETTI, 975–976.

1149 NOVARETTI, 975 referring to Article 92 CCL.

Chapter 2. The Role and Content of Good Faith Under Non-National Law

645. This Chapter first explores and attempts to clarify the role and content of good faith as a general principle of law/trade usage (I.). It then turns to the role and content of good faith under certain international conventions (II.) and international academic restatements (III.). This Chapter concludes with an examination of the various attempts employed by scholars to rationalize the role and content of good faith under non-national law (IV.).

I. General Principles of Law and Trade Usages

646. This section discusses the meaning of the term "general principles of law" (A.) before examining the principle of good faith as a general principle of law (B.). The specific rules derived from the general principle of good faith at both the pre-contractual stage (C.) and the contractual performance stage (D.), will thereafter be explored in turn. Finally, the recourse to trade usages as a source of the general principle of good faith will be discussed (E.).

A. Meaning of General Principles of Law

647. The term "general principles of law" in international commercial arbitration is considered by the majority of commentators to mean the principles of law common to leading national legal systems.[1150] They are considered to be transnational principles which apply irrespective of a party's nationality or residence and which are not confined to the territory of one or more determined States.[1151] It is sufficient if they are recognized in the majority of States or in the most important States and therefore constitute the dominant solution in international trade.[1152]

648. Whilst the PICC might to a certain extent represent a restatement of these general principles, this is not true for all the rules contained therein. This is because some rules were chosen, even if they were not the majority, as they were considered to be the best solution, and some entirely new solutions were created when the solutions of all legal systems seemed inappropriate.[1153] It must therefore be assessed on a case-by-case basis whether a specific provision in the PICC reflects the common core of current global contract law.[1154]

[1150] BORN, 2970–2971; see also DASSER, Mouse or Monster? 135 stating that their source is national legal systems; DASSER, Rare Bird, 149; EMMANUEL GAILLARD, General Principles of Law in International Commercial Arbitration – Challenging the Myths (2011) 5 W Arb & Med Rev 161–172, 162 arguing that general principles of law are rooted in national legal systems and identified through a comparative law analysis; KOTUBY/SOBOTA, 22 stating that "general principles primarily derive from commonalities of positive law in domestic legal orders around the world." POUDRET/BESSON, 591, §692 stating that they are "general rules drawn from a comparison of national laws and international sources of law, notably international treaties."

[1151] POUDRET/BESSON, 591–592, §692.

[1152] *Ibid*, 592, §692.

[1153] MICHAELS, 26–27, §4; see also SCHERER, 119–120, §17.

[1154] SCHERER, 120, §17.

649. The TransLex Principles (authored by the CENTRAL research facility at the University of Cologne)[1155] are deemed to make the general principles of law more accessible for international arbitrators and counsel[1156] and are distinguishable from other international academic restatements, such as the PICC, due to the fact that they are not "carved in stone" but are "subject to constant review, textual refinement, and adaptation to new developments in international business practice."[1157]

650. The TransLex Principles are thus discussed below when exploring the content of good faith as a general principle of law whilst the PICC are discussed in the separate section below on international academic restatements.[1158]

651. General principles of law are considered to form part of the so-called *lex mercatoria*, whether one adopts a narrow[1159] or broad[1160] definition of the *lex mercatoria*.[1161]

1155 Available at <www.trans-lex.org>, accessed 1 March 2023.

1156 BERGER, General Principles, 140.

1157 *Idem*, 103.

1158 See below, paras. 652 et seq.

1159 DASSER, Mouse or Monster? 132–133 submitting that the *lex mercatoria* is composed of trade usages and general principles of law; BERTHOLD GOLDMAN, The Applicable Law: General Principles of Law: the Lex Mercatoria, in Julian D M Lew (ed) Contemporary Problems in International Arbitration (1986) 113, 116 who defined the *lex mercatoria* as: "a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular system of law"; ROY GOODE, Usage and Its Reception in Transnational Commercial Law (1997) 46 Intl & Comp L Q 4; MUSTILL, 92 referring to the "general proposition" that "the prime sources of the lex mercatoria are the principles of law common to trading nations and the usages of international trade".

1160 OLE LANDO, The Lex Mercatoria in International Commercial Arbitration (1985) 34 Intl & Comp L Q 749–751 who adopts a broad definition of the term *lex mercatoria* and lists public international law, uniform laws, general principles of law, the rules of international organizations, customs and usages, standard form contracts and reporting of arbitral awards as elements of the *lex mercatoria*. For an intermediary definition, see POUDRET/BESSON, 606, §704 arguing that that the *lex mercatoria* is "a convenient name for rules drawn from pre-existing, heterogeneous sources of unequal status. These sources are essentially the general principles of law, international treaties, trade usages, and arbitral practice."

1161 Cf GOODE/KRONKE/MCKENDRICK, 43, §1.70 stating that "While general principles of law are undoubtedly a source of transnational commercial law, their relevance to the lex mercatoria as reflected in the usages of merchants is questionable. If there were such a thing as general principles of commercial law that would certainly qualify for inclusion in the lex mercatoria! But such principles are not to be found, which is why scholars almost invariably refer to general principles of law, not to general principles of commercial law. There is a strong argument for confining the lex mercatoria to international trade usage and treating general principles of law as a distinct source of law, in the same way that public international lawyers treat general

B. Good faith as a general principle of law

652. The principle of good faith is considered by legal doctrine to be a general principle of law in international commerce.[1162] Indeed, it is considered to be "the most general of all general principles of law."[1163]

653. Despite the differences in the role and content of good faith found, in particular, in the Common law and Civil law legal systems,[1164] the assumption of a general principle of good faith is deemed justified from a functional comparative point of view.[1165]

654. Many arbitral awards have held that the principle of good faith is one of the general principles of law (and, moreover, one of the most fundamental) applicable in international commerce:

– Hence, according to ICC Case No 5953: "certain principles are derived from natural morality, since even if business is not subject to all the requirements of morality, it cannot escape those ethical norms which constitute part of life in society and have therefore the value of universally recognized positive law, notably in international commerce […] among these principles, the most general is undoubtedly good faith. This fundamental requirement of good faith is found in both national and international legal systems. It is the essence of the *lex mercatoria*";[1166]

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principles of international law separately from customary international law. It is interesting to note that almost all the rules said to form part of the lex mercatoria are general principles of law common to most states and owe nothing to the spontaneous generation of rules and practices of the mercantile community, which are hardly to be found in the lists of lex mercatoria rules. Moreover, most such rules are not confined to international transactions but are equally applicable to domestic contracts, a number apply to contracts generally, not merely commercial contracts, and some are not dependent on a contractual relationship at all."

1162 ALEXANDRE, 561; FOUCHARD/GAILLARD/GOLDMAN, 819, §1460; LALIVE, *bonne foi*, 432, 435; ROBIN, 695. With respect to good faith as a general principle of international public law, see ANDREAS R ZIEGLER/JORUN BAUMGARTNER, Good Faith as a General Principle of (International) Law in Andrew Mitchell/M Sornarajah/Tania Voon (eds), Good Faith and International Economic Law (Oxford University Press 2015) 9–36; ROBERT KOLB, Good Faith in International Law (Bloomsbury Publishing 2017) 1–280 and ELIZABETH ZOLLER, *La bonne foi en droit international public* (A. Pédone 1977) 1–392.

1163 BERGER, General Principles, 114.

1164 See above, Part III, Chapter one.

1165 BERGER, General Principles, 116 stating that this is justified by the fact that the English courts have implied good faith as a term into the parties' contracts in certain cases and therefore have indirectly acknowledged the existence of a general principle of good faith in the performance of the parties' contract. See also OSMAN, 20.

1166 ICC Case No 5953 of 1989, ICC Arbitral Awards 1986-1990, 437–444, 441.

– In addition, in ICC Case No 5030, it was held that there is a general obligation to behave in a loyal fashion in contractual relationships which constitutes an essential principle of international economic relationships;[1167] and
– Further, in ICC Case No 3131, the arbitral tribunal held that the principle of good faith was one of the principles which inspires the *lex mercatoria* and that the emphasis placed on contractual good faith is one of the dominant trends revealed by the convergence of national legislation in this area.[1168]

655. The principle of good faith and fair dealing in international trade is also the first principle listed in the TransLex Principles at Article I.1.1. This Article provides as follows:

> (a) Parties to international business transactions must act in accordance with good faith and fair dealing in international trade. This standard applies to the negotiation, formation, performance and interpretation of international contracts.
>
> (b) The standards and requirements imposed on the parties by this Principle vary depending on the individual circumstances involved, such as the trade sector in which the parties are operating, their size and degree of professional sophistication, and the nature and duration of the contract.
>
> (c) The parties may not exclude or limit the application of this Principle to their legal relationship.[1169]

656. Hence, according to the TransLex Principles, the principle of good faith and fair dealing imposes a general (and mandatory) duty on contracting parties to act in accordance with good faith and fair dealing at both the pre-contractual and contractual performance stage, the application of which will vary depending on the circumstances. According to the commentary on Article I.1.1, there will almost always be increased duties of good faith in long-term relational contracts as compared to one-off exchange contracts.[1170]

[1167] ICC Case No 5030 (1993) JDI 1004, 1011: "*Appartenant au fond commun des droits nationaux, l'obligation de se comporter loyalement dans les relations contractuelles constitue naturellement un principe essentiel des rapports économiques internationaux*."

[1168] ICC Case No 3131 (1984) 9 YB Comm Arb 109, 110: "*L'un des principes qui inspirent cette dernière* [la lex mercatoria] *est celui de la bonne foi qui doit présider à la formation et à l'exécution des contrats. L'accent mis sur la bonne foi contractuelle est d'ailleurs l'une des tendances dominantes que révèle « la convergence des législations nationales en la matière»*."

[1169] See Article I.1.1 of the TransLex Principles available at <https://www.trans-lex.org/901000/_/good-faith-and-fair-dealing-in-international-trade/>, accessed 1 March 2023.

[1170] *Ibid*.

657. KAHN considers that the general principle of good faith is more of a philosophical directive of evaluation rather than a real rule due to its lack of precision.[1171] This lack of precision is, however, remedied at the stage where specific rules derived from good faith are employed to regulate the situation.[1172] In this regard, the commentary to the TransLex Principles states that one should always seek to apply the more specific and concrete principles and rules derived from the general principle of good faith rather than resort to the overriding principle of good faith.[1173]

C. Good faith at the pre-contractual stage

658. It is argued, and it has been held, that the general principle of good faith obliges the negotiating parties to pursue negotiations in good faith (1.) and to also act in accordance with good faith at the time of the formation of the contract (2.). Furthermore, good faith controls the content of the contract (3.).

1. Duty to negotiate in good faith

659. The duty to negotiate in good faith includes a duty:

– not to enter into, or continue, negotiations without intending to reach an agreement (the so-called prohibition of sham negotiations);[1174]

[1171] PHILIPPE KAHN, *Les principes généraux du droit devant les arbitres du commerce international* (1989) JDI 305–327, 319: "*Ainsi l'utilisation si fréquente du principe général de droit du respect de la bonne foi qui est le pivot du raisonnement de beaucoup de tribunaux arbitraux est plus une directive philosophique d'évaluation d'un comportement qu'une véritable règle en raison de son imprécision. Mais en tant que principe donnant une base à des principes dérivés régulant des situations concrètes, on arrive à un système dont on peut prendre la mesure exacte et évaluer la solidité de la texture ainsi réalisée*."

[1172] *Ibid*.

[1173] See <https://www.trans-lex.org/901000/_/good-faith-and-fair-dealing-in-international-trade/>, accessed 1 March 2023.

[1174] In this regard, Article IV.8.1 of the TransLex Principles 'Principle of pre-contractual liability' available at < https://www.trans-lex.org/939000/_/principle-of-pre-contractual-liability/>, accessed 1 March 2023 provides in relevant part that: "(c) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party while leaving the other party under the justified assumption that a contract would be concluded."

– not to make unreasonable proposals with the sole aim of causing the negotiations to fail;[1175]
– not to delay negotiations without a valid reason;[1176]
– not to conduct parallel negotiations;[1177] and
– to keep confidential the information that one has received throughout the negotiations.[1178]

2. Duty to act in accordance with good faith at the formation stage

660. The obligation to act in accordance with good faith at the formation stage includes a duty:

– to inform the other party of information that is important for its decision to contract[1179] (the fraudulent non-disclosure of such information allowing the other party to avoid the contract[1180]); and

[1175] ALEXANDRE, 563; MORIN, 11, ROBIN, 717; In this regard, Article IV.8.1 of the TransLex Principles 'Principle of pre-contractual liability' available at <https://www.translex.org/939000/_/principle-of-pre-contractual-liability/>, accessed 1 March 2023 provides in relevant part that: "(c) It is bad faith, in particular […] if a party insists on contract terms so clearly unreasonable that they could not have been advanced with any expectation of acceptance, provided that there is some demonstrable advantage to be gained for that party by avoiding the contemplated transaction."

[1176] ALEXANDRE, 563; MORIN, 11, ROBIN, 717.

[1177] *Ibid*.

[1178] ALEXANDRE, 564; MORIN, 11. See, in this regard, the commentary to Article IV.6.13 'Duty of confidentiality' of the TransLex Principles available at < https://www.translex.org/936800/_/duty-of-confidentiality/>, accessed 1 March 2023 which states that in the absence of a clear indication that information is confidential, a duty of confidentiality may exist if, in light of the circumstances of the case, it would be contrary to the general principle of good faith and fair dealing to disclose information which one party has received from the other or to use it for own purposes once the negotiations are terminated or broken off.

[1179] ALEXANDRE, 563; MORIN, 11, ROBIN, 717.

[1180] In this regard, Article No. IV.7.4 of the TransLex Principles available at <https://www.translex.org/938550/_/right-to-avoid-the-contract-for-fraudulent-misrepresentation/>, accessed 1 March 2023 provides that a party has a right to avoid the contract for fraudulent misrepresentation if the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, required that party to disclose. It is further stated that in determining whether good faith and fair dealing require a party to disclose particular information, regard should be had to all the circumstances, including whether that party had special expertise and good commercial practice in the situation concerned. See also KOTUBY/SOBOTA, 145.

– to inform the other party of its mistake if it knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error.[1181]

661. The application of the principle of good faith at the formation stage also underlies the rule that a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror without undue delay, objects to the discrepancy.[1182]

3. Good faith as controlling the content of the contract

662. The application of the principle of good faith further means that a party will not be bound by standard terms and conditions that it could not have reasonably expected[1183] and that an unfair standard term will be void "if it significantly disadvantages the other party and is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing."[1184]

[1181] See Article IV.7.3 'Right to avoid the contract for mistake of fact or law' of the TransLex Principles (<https://www.trans-lex.org/938500/_/right-to-avoid-the-contract-for-mistake-in-fact-or-law/>, accessed 1 March 2023).

[1182] See Article IV.2.6 'Modified acceptance' of the TransLex Principles available at <https://www.trans-lex.org/922600/_/modified-acceptance/>, accessed 1 March 2023. Similarly, if a writing in confirmation does not contain a material alteration of the terms of the contract, good faith dictates that the recipient must object to the discrepancy without undue delay. If he does not object without undue delay the content of the contract is fixed by the writing in confirmation even if that writing in confirmation deviates from the terms of the contract as initially agreed upon by the parties, see <https://www.trans-lex.org/922700/_/writings-in-confirmation/>, accessed 1 March 2023.

[1183] See Article IV.3.3 'No surprising terms' of the TransLex Principles which provides as follows: "No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party. In determining whether a term is of such a character regard shall be had to its content, language and presentation." (see <https://www.trans-lex.org/922810/_/no-surprising-standard-terms/>, accessed 1 March 2023).

[1184] See Article IV.3.5 'Unfair standard terms' of the TransLex Principles which provides in relevant part as follows: "(a) A standard term that is unfair is not binding on the party who did not supply it. (b) A standard term in a b2b contract is unfair only if it significantly disadvantages the other party and is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing. When assessing the unfairness of a term for the purposes of this Subsection, regard is to be had to the nature of what is to be provided under the contract, to the circumstances prevailing during the conclusion of the contract, to the other terms of the contract and to the terms of any other contract on which the

D. Good faith at the performance stage

663. At the performance stage, it has been held, and argued, that the *lex mercatoria* includes the general principle that contracts should be performed in good faith.[1185]

664. At the performance stage, there are many specific rules derived from the general principle of good faith.

665. Good faith underlies many of the rules governing the interpretation of the parties' contract (1.) and also informs the manner in which the parties should perform their obligations (2.).

666. Good faith is also a basis for implying additional obligations into the parties' contract (3.) and imposes a duty on the parties to cooperate (4.), as well as a duty of confidentiality (5.).

667. Good faith further restricts the manner in which the parties exercise their rights (6.). Moreover, it is good faith which justifies the right to withhold performance in certain circumstances (7.) and also arguably encompasses a duty to adapt or terminate the contract in case of a change of circumstances (8.).

668. Finally, many specific rules relating to legal remedies are derived from good faith (9.).

1. Good faith as underlying the rules on contractual interpretation

669. The principle of good faith underlies many of the rules on the interpretation of the parties' contract.

670. Thus when interpreting the parties' contract, one should seek the common intention of the parties at the time of the conclusion of the contract.[1186] If the

contract depends." (See <https://www.trans-lex.org/922830/_/unfair-standard-terms/,> accessed 1 March 2023).

[1185] ICC Case No 8365 (1997) JDI 1079–1080; MUSTILL, 111 cited as one of the rules of the *lex mercatoria*. See further Article I.1.1 of the TransLex Principles which provides that the parties are under a duty to act in accordance with good faith and fair dealing *during the performance of the contract* (emphasis added).

[1186] KOTUBY/SOBOTA, 140. See also in this regard Article IV.5.1 of the TransLex Principles, available at < https://www.trans-lex.org/924000/_/intentions-of-the-parties/>, accessed 1 March 2023 which provides as follows: "The construction of a contract has to determine the common intention of the parties or, if no such intention can be determined, the meaning that reasonable parties of the same kind as the parties would give to it in the same circumstances, taking into account, in particular, the nature and purpose of the contract, the conduct of the

wording of the contract is clear, then good faith requires one to follow this meaning.[1187] However, if the contract is ambiguous, good faith may require one to depart from the literal meaning of the contract in order to ensure an interpretation that is in line with the parties' common intent.[1188]

671. If no common intention is ascertainable, good faith directs that one must ascertain what a reasonable person would have understood the parties to have meant.[1189]

672. Indeed, the parties must be presumed to have proposed nothing which is illusory or nominal or which leaves it to the discretion of the other party or to have intended anything which is unreasonable, absurd or contradictory or which leads to impossible consequences.[1190] Good faith requires that an interpretation is followed which leads to the contract having appropriate effects (*ut res magis valeat quam pereat*).[1191] Derived from this principle is the rule that an agreement should be interpreted as a whole to achieve its purpose and aim which ensures that individual words or phrases within the agreement are given meaning, force and effect (principle of effectiveness).[1192]

673. Finally, the rule of *contra proferentem* – which precludes a party from proposing a provision and then not honouring it on the ground that it is ambiguous and which interprets ambiguous phrases against their author – is also said to be derived from the general principle of good faith.[1193]

2. Good faith as informing the manner in which the parties' obligations should be performed

674. With respect to the manner in which the parties' obligations should be performed, good faith requires first and foremost that agreements must be kept.

parties and the meaning commonly given to contract terms and expressions in the trade concerned." According to the commentary, this principle results from the application of the overriding general principle of good faith.

1187 CHENG, 116; KOTUBY/SOBOTA, 141.

1188 CHENG, 114, 116; KOTUBY/SOBOTA, 141–142.

1189 CHENG, 107 stating that "good faith requires that one party should be able to place confidence in the words of the other, as a reasonable man might be taken to have understood them in the circumstances."; See in this regard Article IV.5.1 of the TransLex Principles available at < https://www.trans-lex.org/924000/_/intentions-of-the-parties/>, accessed 1 March 2023.

1190 CHENG, 106. See also DE BRANDERE/VAN DAMME, 39 stating that an interpretation that is arbitrary, unreasonable, illogical, unfair, dishonest, deceptive, abusive or excessive is not a good faith interpretation.

1191 KOTUBY/SOBOTA, 143.

1192 KOTUBY/SOBOTA, 143. See also DE BRANDERE/VAN DAMME, 44.

1193 CHENG, 108; KOTUBY/SOBOTA, 144.

Indeed, the rule that a contract is binding on the parties (*pacta sunt servanda*) is said to be derived from the general principle of good faith.[1194]

675. Second, good faith informs the manner in which the parties should perform their contractual obligations.[1195] This means that their obligations should be performed honestly and loyally.[1196]

676. In this regard, the duty of the parties to act reasonably during the performance of the contract is said to be derived from the general principle of good faith.[1197] Thus Article I.2.1 TransLex Principles provides that: "The parties always have to act according to what is reasonable in view of the particular nature of their transaction and the circumstances involved, in particular, the economic interests and expectations of the parties."[1198]

3. Good faith as a basis for implying obligations

677. The application of the general principle of good faith may lead to the implication of obligations into the parties' contract derived from good faith and fair dealing.[1199]

[1194] CHENG, 113: "Pacta sunt servanda, now an indisputable rule of international law, is but an expression of the principle of good faith which above all signifies the keeping of faith […]"; See also <https://www.trans-lex.org/919000/_/sanctity-of-contracts/>, accessed 1 March 2023 stating that "The Principle is an expression of the general Principle of good faith which above all signifies the keeping of faith. Without such a rule international contract law would be a mere mockery." See further, KOTUBY/SOBOTA, 138 *et seq* and OSMAN, 29–35.

[1195] See <https://www.trans-lex.org/919000/_/sanctity-of-contracts/>, accessed 1 March 2023 which provides that: "The respect for this Principle requires parties to execute their contractual undertakings. However, the modalities of this execution are not indicated by this general Principle. It is the Principle of good faith which provides this precision in a way that one can merge both Principles into one when it comes to the performance of a contractual obligation: "*pacta sunt servanda bona fide*".

[1196] CHENG, 115.

[1197] See the commentary to Article I.2.1 TransLex Principles available at <https://www.trans-lex.org/902000/_/standard-of-reasonableness/>, accessed 1 March 2023.

[1198] See <https://www.trans-lex.org/902000/_/standard-of-reasonableness/>, accessed 1 March 2023.

[1199] See, for example, Article IV.6.1 of the TransLex Principles 'Express and implied obligations' available at < https://www.trans-lex.org/928900/_/express-and-implied-obligations/>, accessed 1 March 2023 which provides as follows: "(a) The contractual obligations of the parties may be express or implied. (b) Implied obligations stem from i) the nature and the purpose of the contract; ii) practices established between the parties and usages; iii) good faith and fair dealing; or iv) reasonableness." See also KOTUBY/SOBOTA, 142–143.

4. Good faith as imposing the general duty to cooperate

678. The duty to perform contracts in good faith means that the parties must cooperate and behave fairly.[1200]

679. LOQUIN argues that this duty to cooperate is more extensive under non-national law than in domestic transactions governed by national law.[1201]

680. This duty encompasses a negative obligation to not act so as to harm the other party.[1202]

681. It also encompasses a positive obligation to inform the other party, inform oneself, assist the other party and to discuss and work with the other party.[1203]

682. In this regard, Article IV.6.9 'Duty to notify/to cooperate' TransLex Principles provides as follows:

> (a) Each party is under a good faith obligation to notify in a timely fashion the other party of any problems that occur in the performance of the contract and of any other facts or circumstances on whose knowledge the other party is discernibly dependent, provided that such information can reasonably be expected from that party.
>
> (b) Each party is under a good faith obligation to cooperate with the other party when such cooperation can reasonably be expected for the performance of that party's obligations.[1204]

683. The duty to cooperate requires that if difficulties arise during the performance of the contract, then the parties must negotiate in order to overcome these

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[1200] ICC Case No 2443 of 1975 referred to in the observations of YVES DERAINS on ICC Case No 2291 (1976) JDI 991 in which the arbitral tribunal held that "*les parties […] devaient être parfaitement conscientes que seule une collaboration loyale, totale et constante entre elles pouvait éventuellement permettre de résoudre, au-delà des difficultés inhérentes à l'exécution de tout contrat les nombreux problèmes résultant de l'extrême complexité dans la formulation et l'enchevêtrement des engagements litigeux […] cette obligation de coopération, qu'à juste titre la doctrine moderne retrouve dans la bonne foi qui doit gouverner l'exécution de toute convention s'impose*." ALEXANDRE, 564; LOQUIN, *règles anationales*, 98, §38; MORIN, 15 stating that the duty to cooperate is one of the principal elements of the general principle of good faith; ROBIN, 717.

[1201] LOQUIN, *règles anationales*, 98–99, §38.

[1202] ICC Case No 2291 (1978) JDI 989, 990: "*Les conventions doivent s'interpréter de bonne foi, chaque partie ayant l'obligation d'avoir à l'égard de l'autre un comportement qui ne puisse lui nuire* […]". See also <https://www.trans-lex.org/901000/_/good-faith-and-fair-dealing-in-international-trade/>, accessed 1 March 2023 stating that the general duty to act in accordance with good faith and fair dealing encompasses a duty to not act so as to harm the other.

[1203] JARVIN, 168.

[1204] See https://www.trans-lex.org/936000/_/duty-to-notify-to-cooperate/, accessed 1 March 2023.

difficulties.[1205] In this regard, the parties are under a duty to renegotiate in a reasonable manner and not cause harm to the other contracting party, to make offers of readaptation which do not make the performance of the contract manifestly inequitable and to not make offers which will surprise the other party. It does not, however, oblige the parties to come to a successful negotiation.[1206]

684. Furthermore, it is argued that the duty to cooperate encompasses an obligation to preserve the essence of the contract.[1207] As an example, it has been submitted that in case of *force majeure*, good faith obliges the parties to cooperate to stop the effects of the *force majeure* and to restart their contractual relationship as soon as possible once the *force majeure* event has ended.[1208] The application of good faith at this stage also means that no party may derive an advantage from a *force majeure* event.[1209] This "no profit-no loss" rule is an expression of an international standard of fairness, which has its roots in the principle of good faith.[1210]

5. Good faith as imposing a duty of confidentiality

685. It is argued that the duty to perform contracts in good faith includes an obligation to respect business secrets.[1211]

[1205] LOQUIN, *règles anationales*, 99, §39; MUSTILL, 112: "If unforeseen difficulties intervene in the performance of a contract, the parties should negotiate in good faith to overcome them, even if the contract contains no revision clause; ICC Case No 8365 (1997) JDI 1078, 1080 (holding that the lex mercatoria includes the rule that if unforeseen difficulties arise in the performance of the contract, the parties should negotiate in good faith in order to overcome them); In ICC Case No 6219 (1990) JDI 1047, 1051, the sole arbitrator referred to international arbitration doctrine in holding that the obligation to discuss and actively cooperate in order to overcome serious difficulties during the performance of the contract was an obligation flowing from the general principles of international commercial law. Article IV.7.5 'Severability of contract provisions' of the TransLex Principles provides that parties are obliged to negotiate in good faith in order to replace an invalid, illegal or unenforceable provision with a valid, legal and enforceable provision the economic effect of which comes as close as possible to that of the invalid, illegal or unenforceable provision. A party may however not claim renegotiation if the invalidity, illegality or unenforceability of the clause is due to its own serious misconduct or fault, (<https://www.trans-lex.org/938750/_/severability-of-contract-provisions/>, accessed 1 March 2023).

[1206] MORIN, 13.

[1207] MORIN, 14.

[1208] *Ibid.*

[1209] See commentary 6 to Article VI.3 'Force Majeure' of the TransLex Principles (<https://www.trans-lex.org/944000/_/force-majeure/>, accessed 1 March 2023).

[1210] *Ibid*.

[1211] ALEXANDRE, 564; MORIN, 14.

6. Good faith as limiting the manner in which contractual rights should be exercised

686. The general principle of good faith restricts the manner in which rights are exercised.

687. The doctrine of abuse of right, which arguably flows from the general principle of good faith,[1212] is considered to be a general principle forming part of the *lex mercatoria*.[1213] This doctrine means that the parties must not abusively exercise their rights.[1214]

688. The doctrine of piercing the corporate veil which prevents a party from invoking the principle of the independence of corporate entities in certain circumstances is also said to be derived from the general principle of good faith.[1215]

689. The doctrine of abuse of right also appears to underlie the rule that a party has, in principle, the right to reject early performance unless such a rejection would constitute the exercise of a mere formal legal position, because the creditor's interests would not be unreasonably prejudiced by the debtor's premature performance.[1216]

[1212] According to CHENG, 119, "the principle of good faith requires a party to refrain from abusing such rights…" and at 121, "the principle of good faith which governs international relations controls also the exercise of rights by States. The theory of abuse of rights (*abus de droit*) […] is merely an application of this principle to the exercise of rights." According to KOTUBY/SOBOTA, 149, "[t]he negative corollary of the good faith exercise of a legal entitlement is the universal prohibition on abuse of rights." According to the commentary to Article I.1.4 'Abuse of Rights' of the TransLex Principles (<https://www.trans-lex.org/906500/_/abuse-of-rights/>, accessed 1 March 2023), conduct which constitutes an abuse of right is considered to be a classic example of conduct which is contrary to good faith. See also OSMAN, 37–40.

[1213] KOTUBY/SOBOTA, 149; MUSTILL, 111: "The first general principle (that of *pacta sunt servanda*) may also be subject to the concept of *abus de droit*."

[1214] ROBIN, 717–718. In this regard, Article I.1.4 – 'Abuse of rights' of the TransLex Principles provides as follows: "A party may not exercise a right merely to damage the other party or to achieve a result which is disproportionate to the result intended by the legal principle out of which the right arises." (<https://www.trans-lex.org/906500/_/abuse-of-rights/>, accessed 1 March 2023).

[1215] See commentary 1 to Article X.2 'Piercing the Corporate Veil' TransLex Principles available at <https://www.trans-lex.org/962000/_/piercing-the-corporate-veil/>, accessed 1 March 2023: "The Principle reflects situations in which the idea of the nature of corporations which constitute entities that are separate and distinct from its members, who are liable only to the extent that they have contributed to the company's capital, must be disregarded due to the application of the Principle of good faith."

[1216] See commentary 2 to Article V.1.3 'Early Performance' TransLex Principles available at <https://www.trans-lex.org/940300/_/early-performance/>, accessed 1 March 2023:

690. This doctrine further appears to underlie the rule that if the contract provides that the price is to be fixed or determined by one of parties, and this determination is manifestly unreasonable, the other party may apply to a court or arbitral tribunal to have a reasonable price fixed, notwithstanding any agreements to the contrary.[1217]

691. Moreover, it is argued that the general principle of good faith prevents a party from contradicting itself to the detriment of the other party.[1218]

692. In this regard, Article I.1.2 'Prohibition of inconsistent behaviour' TransLex Principles, which is considered to flow from the principle of good faith and fair dealing, provides as follows:

> (a) A party cannot set itself in contradiction to its previous conduct vis-à-vis another party if that latter party has acted in reasonable reliance on such conduct ("*venire contra factum proprium*"; "*l'interdiction de se contredire au détriment d'autrui*").
>
> (b) Violation of this Principle may result in the loss, suspension, or modification of rights otherwise available to the party violating this Principle or in the creation of rights otherwise not available to the aggrieved party.[1219]

"However, as any other right, the creditor's right of rejection is subject to the general Principle of good faith. The creditor may therefore not reject earlier performance by the debtor if that rejection must be qualified as the exercise of a mere formal legal position, because the creditor's interests would not unreasonably prejudice by the debtor's premature performance."

[1217] See Article IV.6.3 – 'Fixing of price by one of the parties' TransLex Principles (<https://www.trans-lex.org/930000/_/fixing-of-price-by-third-party/>, accessed 1 March 2023). The commentary to this Article states that this principle is derived from the general principle of good faith.

[1218] BERGER, General Principles, 108; CHENG, 141 et seq; KOTUBY/SOBOTA, 156–157; ROBIN, 724–725; with respect to the distinction between the principle of estoppel and the principle of good faith in international commercial law, see PHILIPPE PINSOLLE, *Distinction entre le principe de l'estoppel et le principe de bonne foi dans le droit du commerce international* (1998) JDI 905–931. PINSOLLE argues that the principle of estoppel is closely linked to the general principle of good faith and is used to protect the good faith of the party who is affected by the other party's contradictory behaviour.

[1219] See commentary 1 which states that this principle follows from the general principle of good faith and fair dealing (https://www.trans-lex.org/907000/_/prohibition-of-inconsistent-behavior/, accessed 1 March 2023).

693. Articles I.1.3 'Forfeiture of rights'[1220] and I.1.6 'No damage claim in case of consent'[1221] TransLex Principles as well as the general prohibition of a State or State entity to deny its contractual obligations with reference to its domestic law, are deemed to be derived from the prohibition of inconsistent behaviour.[1222]

694. In addition, the doctrine of apparent authority which prevents a principal from relying on the lack of authority of an agent is said to be derived from the general principle of good faith and the prohibition of inconsistent behaviour.[1223] Thus Article II.4 TransLex Principles provides as follows:

> Where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent ("agency by estoppel", "*Anscheinsvollmacht*").[1224]

695. Finally, a corollary of the prohibition of inconsistent behaviour, and a facet of the prohibition of an abuse of right, is the prohibition of taking advantage of

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[1220] Article I.1.3 of the TransLex Principles provides as follows: "A party that has not raised voluntarily a right to which it is entitled under the law for a certain period of time is precluded from asserting that right against another party that has justifiably relied on such conduct and will suffer injury if the former party is allowed to repudiate its conduct." The commentary to this principle states that this principle is derived from the principle of good faith and the prohibition of inconsistent behaviour (https://www.trans-lex.org/906000/_/forfeiture-of-rights/, accessed 1 March 2023).

[1221] Article I.1.6 of the TransLex Principles provides as follows: "A party suffering damage or another prejudice may not raise claims arising out of this if it has consented to the act leading to the damage or prejudice ("*volenti non fit iniuria*")." The commentary to this principle states that this principle is derived from the principle of good faith and the prohibition of inconsistent behaviour (https://www.trans-lex.org/908000/_/no-damage-claim-in-case-of-consent/, accessed 1 March 2023).

[1222] BERGER, General Principles, 108.

[1223] See the commentary to Article II.4 of the TransLex Principles, available at <https://www.trans-lex.org/914000/_/agency-by-estoppel-apparent-authority/>, accessed 1 March 2023.

[1224] See <https://www.trans-lex.org/914000/_/agency-by-estoppel-apparent-authority/>, accessed 1 March 2023.

one's own wrongs[1225] as exemplified by TransLex Principle No. I.1.5 'No advantage in case of own unlawful acts'.[1226]

7. Good faith as allowing the withholding of performance in certain circumstances

696. The rule that one party may be entitled to treat itself as discharged from its obligations when the other has committed a substantial breach is considered to be derived from the general principle of good faith (*exceptio non inadimpleti contractus*).[1227]

697. The exercise of the right to withhold performance, however, is itself subject to the principle of good faith.[1228] Indeed, it would be contrary to good faith (and

[1225] CHENG, 149 et seq; KOTUBY/SOBOTA, 163–164. Derived from this principle are the rules that immoral agreements are unenforceable (KOTUBY/SOBOTA, 167–168), that no party can be allowed by its own act to bring about the non-performance of a condition precedent to its own obligation (KOTUBY/SOBOTA, 168) and the rule against unjust enrichment (KOTUBY/SOBOTA, 169 et seq.). The prohibition of contradictory conduct would also appear to prevent a seller from invoking the deadline for the notice of defects when the lack of conformity relates to facts of which the seller knew or could be expected to have known and which the seller did not disclose to the buyer (See Article VI.2 'Deadline for notice of defects' of the TransLex Principles available at <https://www.trans-lex.org/943000/_/deadline-for-notice-of-defects/>, accessed 1 March 2023).

[1226] This Principle provides as follows: "A party may not derive an advantage from its own unlawful acts ("*nullus commodum capere potest de iniuria sua propria*", "*ex iniuria non oritur ius*", "clean hands theory")." The commentary to this Principle states that it is derived from the general principle of good faith (https://www.trans-lex.org/904000/_/no-advantage-in-case-of-own-unlawful-acts/, accessed 1 March 2023). See also Article IX.6 'No restitution in case of knowledge of illegality of performance' of the TransLex Principles which provides as follows: "No one may claim restitution of what he has rendered to the other party while knowing the illegality of his performance ("nemo auditur turpitudinem suam allegans") (<https://www.trans-lex.org/960000/_/no-restitution-in-case-of-knowledge-of-illegality-of-performance/>, accessed 1 March 2023).

[1227] KOTUBY/SOBOTA, 145.

[1228] The commentary to Article V.1.4(b) of the TransLex Principles states as follows: "Subsection (b) makes it clear that the exercise of the right to withhold performance is always subject to the Principle of good faith (Trans-Lex Principle I.1.1). The principle of proportionality mentioned in Subsection (b) is derived from the Principle of good faith. It would be contrary to good faith (and amount to an abuse of right) to rely on the non-performance of a relatively minor obligation by the other side in an attempt to avoid performance of an essential obligation of the party invoking the right to withhold performance, see Fouchard Gaillard Goldman On International Commercial Arbitration, 1999, No. 1486. 4 The relative triviality of non-performance by one party, however, is but one illustration of a more general restriction of the scope of subsection (b) by the requirement of good faith. The overriding Principle of good

would amount to an abuse of right) to rely on the non-performance of a relatively minor obligation by the other side in an attempt to avoid performance of one's own essential obligation.[1229]

8. Good faith as the basis for the doctrine of changed circumstances

698. According to the doctrine of *rebus sic stantibus*, the modification or termination of the contract may be justified where there is a fundamental and unforeseen change of circumstances in a case where the maintenance of the original circumstances constituted an essential basis of the contractual bargain, and the effect of the change is to significantly transform the extent of the obligations still to be performed.[1230]

699. Whilst some authors argue that *rebus sic stantibus* is a general principle of law,[1231] other authors are of the view that the obligation to perform the contract in good faith does not entail an obligation to modify the contract when

faith may restrict a party's right to invoke a right to withhold performance also in other scenarios outside the ambit of Subsection (b)." (https://www.trans-lex.org/941000/_/principle-of-simultaneous-performance-right-to-withhold-performance/, accessed 1 March 2023.

1229 See in this regard, Article V.1.4(b) - 'Principle of simultaneous performance; right to withhold performance' of the TransLex Principles provides in relevant part as follows: "(b) If performance of an obligation by one party is dependent upon performance of another obligation arising out of the same contract by the other party, each party may withhold performance until tender of performance by the other party. Where one party has performed in part, the other party cannot refuse to perform if to do so would be contrary to good faith, having regard in particular to the relatively slight or trivial nature of the default ("exceptio non adimpleti contractus", "inadimplenti non est adimplendum")." (https://www.trans-lex.org/941000/_/principle-of-simultaneous-performance-right-to-withhold-performance/, accessed 1 March 2023.

1230 KOTUBY/SOBOTA, 146. See also CHRISTOPH BRUNNER, Force Majeure and Hardship under General Contract Principles – Exemption for Non-Performance in International Arbitration (Kluwer Law International 2009) 391 et seq.

1231 CHENG, 118–119 stating that "the doctrine of *clausula rebus sic stantibus* is founded on the principle of good faith"; see also Article IV.6.7 'Duty to renegotiate' of the TransLex Principles which provides that "each party has a good faith obligation to renegotiate the contract if there is a need to adapt the contract to changed circumstances and the continuation of performance can reasonably be expected from the parties.", available at < https://www.trans-lex.org/935000/_/duty-to-renegotiate/>, accessed 1 March 2023; MUSTILL, 111; HANS VAN HOUTTE, Changed Circumstances and Pacta Sunt Servanda in Emmanuel Gaillard (ed), Transnational Rules in International Commercial Arbitration (ICC Publication No 480) (Paris 1993) 115; KOTUBY/SOBOTA, 145–146.

circumstances have significantly changed since the conclusion of the contract altering the balance of the contract.[1232]

700. Notwithstanding, in ICC Case No 4761, the arbitral tribunal held that the *lex mercatoria* recognized the doctrine of hardship as the rule of *pacta sunt servanda* is limited by the superior principle of good faith. The arbitral tribunal held that it would be inequitable to maintain the contractual obligations in force when the circumstances existing at the conclusion of the contract have fundamentally changed, thereby turning upside down the economy of the latter.[1233]

9. Good faith as underlying rules on legal remedies

701. The general principle of good faith underlies certain rules concerning legal remedies including the duty to compensate the other as a result of a contractual breach (a.), the duty to mitigate one's loss (b.) and the right to set off mutual claims (c.).

a. Duty to compensate as a result of a contractual breach

702. The duty to compensate the other party for loss incurred as a result of a contractual breach is said to be derived from the general principle of good faith. Indeed, it is argued that the violation of a contractual obligation leads to a duty to make reparation so that each party can place entire confidence in the good faith of the other.[1234]

b. Duty to mitigate one's loss

703. It is submitted that the principle of good faith requires the aggrieved party to mitigate its loss in the event that the other party does not perform its obligations under the contract.[1235]

1232 ALEXANDRE, 565; GOLDMAN, 494–495.

1233 ICC Case No 4761 (1987) JDI 1012–1018, 1015: "the Lex mercatoria […] gives effect to the theory of the unforeseen (imprevision) which arises from the principle that the rule "pacta sunt servanda" is superseded by the higher principle of good faith."

1234 CHENG, 113–114; KOTUBY/SOBOTA, 147–148.

1235 ALEXANDRE, 566; GOLDMAN, 495; LALIVE, *bonne foi*, 449; LOQUIN, *règles anationales*, 99, §40; MORIN, 14; MUSTILL, 113 referring to this rule as one of the rules of the lex mercatoria in its own right; ROBIN, 718; see also Article VII.4 'Duty to mitigate' of the TransLex Principles which provides that "A party who relies on a breach of contract by the other party must

c. Right to set off mutual claims

704. The right to set off mutual claims is also said to be derived from good faith as it is deemed contrary to good faith to require performance of an obligation from a debtor if the creditor would have to return immediately what it has received from the debtor.[1236]

E. Trade usages as a source of the principle of good faith?

705. In certain cases, an arbitral tribunal may be obliged to consider trade usages whose aim is to ensure that the parties' dispute is resolved in accordance with commercial expectations and practices.[1237]

take such measures as are reasonable in the circumstances to mitigate its loss, including loss of profit, resulting from the breach. If it fails to take such measures, the party in breach may claim a reduction in the damages in the amount at which the loss should have been mitigated." (https://www.trans-lex.org/949000/_/duty-to-mitigate/, accessed 1 March 2023).

1236 BERGER, General Principles, 108. See also Article III.1 'Set-off' of the TransLex Principles which provides as follows: "If parties have mature and liquidated claims of an identical nature vis-à-vis each other, each party may declare the set-off of these claims. Set-off is not admissible if the contract contains an explicit or implicit (e.g. a "net cash against..." clause) prohibition of set-off. The parties may also agree on the set-off of these claims by contractual consent." (https://www.trans-lex.org/916000/_/set-off/, accessed 1 March 2023). The commentary to this Principle states that "The right to set-off reciprocal claims is based on the idea that it would be against good faith if a creditor requires performance of an obligation from his debtor if the creditor would have to return immediately what he has received from the debtor because that debtor has a cross-claim against it ("*dolo agit, qui petit, quod statim redditurus est*")." See also above, para. 167 with respect to set off in good faith causes of action under Roman law.

1237 BORN, 2985.

706. The law applicable to the parties' substantive contract,[1238] the applicable arbitration rules[1239] or the *lex arbitri*[1240] may direct the arbitral tribunal to consider trade usages.

707. A trade usage has been defined as "a method of dealing or a way of conduct generally observed in a particular line of business with such regularity that it is accepted as binding by those engaged in that line of business"[1241] and, in the context of ICC arbitration, as "constant and repeated practices, which bear a normative force by virtue of their ubiquity and repetition."[1242]

[1238] Some national laws contain an obligation for judges and arbitrators to take trade usages into consideration. Hence Article 1-303 UCC provides that a course of performance, course of dealing between the parties or usage of trade in the vocation or trade in which the parties are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. Section 346 German Commercial Code also provides that "[d]ue consideration shall be given to prevailing commercial customs and usages concerning the meaning and effect of acts and omissions among merchants." ("*Unter Kaufleuten ist in Ansehnung der Bedeutung und Wirkung von Handlungen und Unterlassungen auf die im Handelsverkehre geltenden Gewohnheiten und Gebräuche Rücksicht zu nehmen*."). The CISG and the PICC also state that the parties are bound by trade usages. Article 1.9(2) PICC, for example, provides that "[t]he parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable." Similarly, Article 9(2) CISG provides that "[t]he parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

[1239] With respect to institutional arbitration rules, Article 35(3) UNCITRAL Arbitration Rules 2021 provides that "in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction." Similarly, Article 21(2) ICC Rules of Arbitration 2021 provides that "the arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages."

[1240] Article 28(4) UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006, provides, for example, that "in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction." Article 1511 French Code of Civil Procedure similarly provides that "the arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, where no such choice has been made, in accordance with the rules of law it considers appropriate. In either case, the arbitral tribunal shall take trade usages into account."

[1241] CLIVE SCHMITTHOFF, International Trade Usages, ICC Publication 440/4, Paris 1987, 14; Trade usage has been further defined as "a practice that has evolved into a commonly used and widely known dealing in a specific trade, profession, region or business – to the point that it justifies a legitimate expectation that it will be observed by the parties to a given transaction," see GAMA, 160.

[1242] JOLIVET/MARCHISIO/GÉLINAS, 211.

708. According to a strict conception of trade usages, only repeated, industry specific practices constitute trade usages.[1243] A broader conception, however, considers both trade usages in the aforementioned sense as well as general principles of law to constitute trade usages.[1244] Whilst most commentators agree with the strict conception,[1245] some commentators appear to follow the broader conception.[1246]

709. It is rightly argued that a strict conception of trade usages should be followed and that arbitrators should not be allowed to extend or modify the provisions of the applicable law on the ground that they are applying trade usages.[1247] Indeed, this would allow the arbitral tribunal to apply a law which the parties had not agreed on, and in the event that the arbitrators have to choose the applicable law, they can apply transnational law without relying on provisions on trade usages.[1248]

710. Despite the preferability of a strict conception of trade usages, some arbitral tribunals have, however, employed an extensive conception of trade usages and, as a result, have applied the general principle of good faith as a trade usage.[1249]

[1243] FOUCHARD/GAILLARD/GOLDMAN, 844 et seq, §1513 and §1514; JOLIVET/MARCHISIO/GÉLINAS, 212.

[1244] *Ibid*.

[1245] FOUCHARD/GAILLARD/GOLDMAN, 846, §1514; POUDRET/BESSON, 594–595, §694.

[1246] YVES DERAINS, observations following ICC Case No 3380 (1981) 108 JDI 927, 930; GOLDMAN, 478; ERIC LOQUIN, *La réalité des usages du commerce international*, 1989 RID ÉCO 163.

[1247] FOUCHARD/GAILLARD/GOLDMAN, 846, §1514; POUDRET/BESSON, 594–595, §694.

[1248] GAILLARD, 213, §21, and 215, §23.

[1249] See below, para. 1200.

II. International Conventions

711. The role and scope of good faith will be examined under the CISG (A.) as well as under other international conventions (B.)

A. CISG

712. Following a brief introduction to the CISG (1.), the role (2.) and the content of good faith (3.) under the CISG will be explored in turn.

1. In general

713. The CISG contains uniform rules which govern contracts for the international sale of goods.[1250]

714. The CISG was a project of UNCITRAL which in the early 1970s undertook to create a successor to the Convention relating to a UNIDROIT Uniform Law on the Formation of Contracts for the International Sale of Goods 1964 and the UNIDROIT Convention relating to a Uniform Law for the International Sale of Goods 1964.[1251] The CISG was approved on 11 April 1980 and came into force on 1 January 1988.[1252]

715. To date, the CISG has been ratified by 93 countries, with the notable exceptions of the UK, South Africa and India.[1253] An estimated three quarters of the world's trade is governed by the CISG.[1254]

716. The CISG applies to contracts of sales of goods between parties from different contracting States (Art. 1(1)(a)) or where the rules of private international law lead to the application of the law of a contracting State (Art. 1(1)(b)).

[1250] CISG, Preamble, point 3.

[1251] See Explanatory Note by the UNCITRAL Secretariat on the CISG, §§2–3.

[1252] See Explanatory Note by the UNCITRAL Secretariat on the CISG, §§3–4.

[1253] See <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status>, accessed 1 March 2023. An additional two countries have signed but not ratified the CISG.

[1254] ULRICH MAGNUS, Introduction, in Ulrich Magnus (ed), CISG vs Regional Sales Law Unification (De Gruyter 2012) 2–3.

2. Role of good faith under the CISG

717. As noted by one commentator, "[a]lmost everybody disagrees as to the impact, if any, that the principle of good faith may have on the behaviour of the parties to an international contract for the sale of goods."[1255]

718. Notwithstanding, a clear understanding of the duty to act in good faith is vital in international commercial transactions where mutual trust and confidence is of significant importance and parties often conclude their transactions *à distance*.[1256]

719. The present section thus aims to elucidate the role of good faith within the framework of the CISG.

720. In this regard, the role of good faith in the interpretation provision of Article 7(1) CISG will first be examined (a.) before turning to the role of good faith as a gap-filler pursuant to Article 7(2) CISG (b.) and as an applicable practice or usage pursuant to Article 9 CISG (c.).

a. Good faith as an interpretative tool of the CISG pursuant to Article 7(1) CISG

721. The notion of good faith is only explicitly referred to in one provision of the CISG, namely Article 7(1) concerning the interpretation of the CISG.

722. Article 7(1) CISG provides that:

> 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.[1257]

723. Following a discussion of the history surrounding the adoption of this provision (i.), both the literal (ii.) and broad (iii.) interpretations attributed to this provision will be discussed in turn.

[1255] GARRO, 467–468.

[1256] KLEIN, 115.

[1257] Emphasis added. The text of the CISG can be found at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf>, accessed 1 March 2023.

i. History

724. As will be shown below, Article 7(1) CISG had "a troubled history"[1258] and a "tortuous and difficult birth".[1259] Indeed, the negotiations surrounding the reference to good faith in the CISG have been described as "hotly contested",[1260] "long and arduous"[1261] and "fierce"[1262].

725. It was as early as 1964 at the Hague Diplomatic Conference – at which the ULIS and the ULFC were adopted – that the notion of good faith with respect to international sales transactions was first raised.[1263] The French delegate, Professor TUNC opposed a reference to the general principle of good faith on the basis that it would lead to arbitrary decisions.[1264]

726. The inclusion of the notion of good faith with respect to the interpretation of the ULIS was subsequently raised by Spain in 1972.[1265]

727. However, it was not until the 9th session of the Working Group on the International Sale of Goods (19–30 September 1977) that the inclusion of a provision in the Draft Convention on the Formation of Contracts for the International Sale of Goods obliging parties to observe the principles of good faith and fair dealing in the formation of the contract was discussed.[1266]

728. The majority supported the inclusion of the notion of good faith in this provision citing the fact that this principle was contained in many national laws and that it was therefore appropriate to include a similar provision in an international convention. It was also pointed out that good faith provisions had been "useful regulators of commercial conduct" in national legal systems and could therefore

1258 FARNSWORTH, Good Faith, 55.

1259 ZELLER, International Trade, 138.

1260 KLEIN, 122.

1261 BELL, 11.

1262 SIM, 44.

1263 Hague Records and Documents of the Diplomatic Conference on The Unification of Law Governing the International Sale of Goods 100 (2–25 April 1964).

1264 *Ibid*. The discussion arose in relation to draft provisions relating to 'Other Obligations of the Seller'. Mr DABIN (Belgium) suggested that this section should be deleted and that a general principle of good faith be enunciated. Mr TUNC (France) replied that while this general principle might give excellent results in municipal law, it might lead to arbitrary decisions in the international framework and allow a judge to easily restrict or extend the obligations of the seller.

1265 Analysis of comments and proposals relating to Articles 1–17 of the Uniform Law on the International Sale of Goods (ULIS): note by the Secretary General, (1972) YB UN Comm'n on Intl Trade L 76, §52 (UN Doc. A/CN.9/WG.2/WP.11); see also EÖRSI, General Provisions, 2-6 and SIM, 15.

1266 Report on Nineth Session, 61, 66, §70. This provision had been proposed by the Hungarian delegation at the 8th session of the Working Group.

play a similar role at the international level. They addressed concerns over uniformity in the interpretation of this provision by the argument that national courts had also initially faced this problem when the concepts of good faith were first introduced in their respective systems and that the very existence of a uniform law might in any event encourage uniformity in its interpretation.[1267]

729. Those who opposed the inclusion of the notion of good faith pointed to its vague and imprecise nature, in particular, the meaning of the principle of fair dealing, as well as the fact that the elucidation of its meaning would be subject to value judgments and that it would not be useful until it had been subjected to a sustained period of judicial interpretation. It was also argued that some countries might leave out this provision as it would not add anything to national law. Following a lengthy discussion, this provision was, however, adopted by the Working Group.[1268]

730. Unsurprisingly, the inclusion of such a provision in the Draft Convention on the Formation of Contracts for the International Sales of Goods gave rise to a heated debate at the 11th session of the UNCITRAL.[1269]

731. Opponents pointed to the moral nature of the principle of good faith and fair dealing and argued that national courts would be influenced by their own national interpretations of this principle, thus leading to uncertainty. It was also argued that the principle of good faith was, in any event, already implicit in all laws regulating business activity. In addition, they submitted that there was no provision made for a remedy in case of the breach of such a principle and that the remedies would therefore be left to national law leading to a lack of uniformity.[1270]

732. Conversely, proponents argued that there would be no harm in including such a provision as the principle of good faith was universally recognized and had played an important role in regulating commercial conduct in domestic legal systems and that it would therefore be valuable to extend it to international trade. Moreover, they argued that if this provision was deleted, critics would potentially argue that the UNCITRAL opposed this principle when it is evident that such a principle is required in international trade particularly with respect to trade in developing countries. In addition, they submitted that remedies for the breach of such principle could be determined by the courts depending on the circumstances of the given case, that the development of a body of case law

[1267] Report on Nineth Session, 61, 66–67, §71, §73; SIM, 15.

[1268] Report on Nineth Session, 61, 67, §§74–76; SIM, 15.

[1269] Report on Eleventh Session, 35, §§44–45.

[1270] Report on Eleventh Session, 35, §§44–45; BONELL, CISG, 69; FELEMEGAS, CISG, 105; SIM, 16.

would reduce uncertainty and that, even in the absence of remedies, the existence of the provision would underline the high standards of conduct expected in international commerce. Furthermore, it was hoped that the inclusion of such a provision would promote some of the aspirations of the proposed "new international economic order" and lessen discriminatory or undesirable trade practices.[1271]

733. Following extensive debate, it was decided that a compromise solution should be found. It was firstly advocated that the principle of good faith and fair dealing could be placed in the preamble. However, it was objected that this would devoid it of any effect. It was secondly proposed that this principle could be placed in the rules concerning the interpretation of the statements and conduct of the parties. However, it was objected that this principle had nothing to do with the intent of the parties but rather their conduct. A third suggestion was to include the principle in the article on the interpretation and application of the convention. However, it was objected that it was inappropriate to address this requirement to the courts rather than to the parties. UNCITRAL therefore decided to refer the provision to an ad-hoc working group composed of six members to draft a compromise proposal.[1272]

734. This ad-hoc working group came up with a "realistic compromise solution" adopting the third compromise proposal made above. Thus, the notion of good faith was incorporated into the provision concerning the interpretation and application of the draft Convention on Contracts for the International Sale of Goods.[1273]

735. By incorporating the notion of good faith into the provision on the interpretation and application of the draft Convention, the working group meant "to direct the attention of the courts in resolving disputes to the fact that the acts and omissions of the parties must be interpreted in the light of the principle that they observe good faith in international trade" and clarified that this "provision was intended to apply to both the rules on formation and the rules on sales."[1274] It was noted, however, that this "proposal did not make it clear that the need to observe good faith in international trade was also directed to the parties to an international sales transaction."[1275] This recommendation was adopted[1276] "even

[1271] Report on Eleventh Session, 35, §§46–48; BONELL, CISG, 69; FELEMEGAS, CISG, 105; SIM, 16.

[1272] Report on Eleventh Session, 35–36, §§54–55. The ad-hoc working group was composed of the representatives of Finland, Hungary, Mexico, Singapore, Uganda and the UK.

[1273] Report on Eleventh Session, 36, §56; BONELL, CISG, 70; FELEMEGAS, CISG, 106.

[1274] Report on Eleventh Session, 36, §57.

[1275] Report on Eleventh Session, 36, §58.

[1276] Report on Eleventh Session, 36, §60.

though practically everybody was convinced that the clause was dead."[1277] Indeed, according to one commentator, the principle of good faith was "consign[ed] to the ghetto […] giving it an honorable burial."[1278]

736. Two propositions were subsequently made at the Vienna Conference in 1980. First, Norway suggested that the principle of good faith should be included in the provision on the interpretation of the parties' conduct. Second, Italy suggested that this principle should be included in a separate provision and apply to the formation, interpretation and performance of the contract.[1279] Although these propositions garnered some support, the compromise solution proposed by the working group was adopted. The prevailing view was that the discussion on this subject should not be re-opened given the already extensive debate.[1280]

737. This provision was thus the result of "a hard-won compromise"[1281] or "statesmanlike compromise"[1282] between those representatives who wanted a provision directly imposing on the parties a duty to act in good faith and those who objected to the very mention of good faith.[1283]

738. Article 7(1) CISG has been referred to as a "peculiar"[1284], "strange",[1285] and "unusual"[1286] provision.

739. As put by one commentator, "it was widely thought that the rule was vague, or at least would remain vague for a long time and, because of the laconic language [of the Convention], would never become unambiguous."[1287] Notwithstanding, the principle of good faith gained "a foothold" within the CISG and it was hoped that "this meager result [would] represent a modest start".[1288]

1277 EÖRSI, General Provisions, 2-7.
1278 *Ibid*.
1279 Report of the First Committee, UN Doc. A/CONF.97/11 (1980) reprinted in Official Records, 82, 87.
1280 BONELL, CISG, 71; FELEMEGAS, CISG, 106–107.
1281 BONELL, CISG, 83.
1282 FARNSWORTH, Common Law, 19.
1283 BONELL, CISG, 83–84; FERRARI, 210.
1284 BONELL, CISG, 83.
1285 EÖRSI, CISG, 349.
1286 AUDIT, *La vente internationale*, 49.
1287 *Ibid*.
1288 EÖRSI, CISG, 349.

ii. Literal interpretation

740. According to a literal interpretation of Article 7(1) CISG, good faith can only be resorted to by judges and arbitrators when interpreting the CISG.[1289] Such a literal interpretation has been followed by some national courts.[1290]

741. It is only one of three guidelines which may be employed to interpret the CISG, the others being the promotion of uniformity and the international character of the CISG.[1291] However, it is submitted that the good faith guideline may trump the other guidelines when these guidelines lead to different interpretations.[1292]

742. This literal interpretation is supported by the drafting history of the CISG.[1293] However, ZELLER, in particular, argues that the drafting history carries little

[1289] LARRY A. DIMATTEO/ANDRÉ JANSSEN, Interpretive methodologies in the interpretation of the CISG in Larry A DiMatteo (ed), International Sales law: a global challenge (New York, Cambridge University Press 2014) 95; This is the view adopted by AUDIT, *La vente internationale*, 49; BRIDGE, goods, 600, §10.42 stating that it does not impose on the parties a general duty of good faith and fair dealing in the formation and performance of contracts although arguing at 601 that the PICC which contain an express duty of good faith and fair dealing could be used to fill the gap; ENDERLEIN/MASKOW, 56–57 referring to the limited role of good faith and stating that: "In applying the Convention to the agreements of the parties, the former has to be interpreted in such a way that the conduct prescribed coincides with the principle of good faith, so that deviating conduct must be qualified as unlawful." FARNSWORTH, Good Faith, 55; FLECHTNER/HONNOLD, 163, §119: "[t]he Convention was intended to reject "good faith" as a general obligation imposed on the parties and to use "good faith" solely as a principle for interpreting the provisions of the Convention.; SCHLECHTRIEM, Uniform Sales, 38–39; SCHWENZER/HACHEM, 127, §17; WALT, 2; and WINSHIP, 631 (however noting at page 635 that despite his initial support of the literal interpretation, he is convinced by the "conviction of the critics that over time a general obligation on contracting parties to act in good faith will be accepted").

[1290] See Oberlandesgericht Hamburg, 28 February 1997, 1 U 167/95, available at < https://cisg-online.org/search-for-cases?caseId=6235>, accessed 1 March 2023; Oberlandsgericht München, 15 September 2004, 7 U 2959/04, available at < https://cisg-online.org/search-for-cases?caseId=6937>, accessed 1 March 2023; Hof 'S-Hertogenbosch, 16 October 2002, available at < https://cisg-online.org/search-for-cases?caseId=6742>, accessed 1 March 2023; *BP Oil International and BP Exploration & Oil Inc. v. Empresa Estatal Petroleos de Ecuador /PetroEcuador et al.*, 11 June 2003, US Court of Appeals for the Fifth Circuit, 02-20166, available at <http://www.unilex.info/cisg/case/924 >, accessed 1 March 2023; Oberlandesgericht Köln, 21 May 1996, 22 U 4/96, available at <http://www.unilex.info/cisg/case/227>, accessed 1 March 2023; see also *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.,* et al., 10 May 2002, U.S District Court, S.D., New York, 98 Civ. 861, 99 Civ. 3607, available at < http://www.unilex.info/cisg/case/739 >, accessed 1 March 2023.

[1291] FARNSWORTH, Good Faith, 55; SHEEHY, 17–18.

[1292] HUBER, 229–230.

[1293] See above, paras. 724 et seq.; WINSHIP, 631, 633.

weight as the solution reached was a compromise and because it represents a view which is "frozen in time" whilst the CISG is a living instrument.[1294]

743. This literal interpretation, however, is supported by the fact that other instruments such as the PICC, PECL and the DCFR not only contain a provision directing good faith to be taken into account when interpreting the relevant instrument but also include a separate provision imposing a duty of good faith and fair dealing on the parties.[1295]

744. Some authors argue that a literal interpretation of Article 7(1) CISG would make the provision redundant given that this is already a principle applicable to the interpretation of treaties under the Vienna Convention on the Law of Treaties 27 January 1980.[1296] WALT, however, convincingly argues that this provision is not redundant as Article 7(1) CISG directs the interpreters to *promote good faith in international trade* – an objective which does not apply to non-commercial treaties.[1297]

745. Within the framework of this literal interpretation, there are two potential readings of Article 7(1) CISG.

746. The first reading obliges the judge or arbitrator to interpret the CISG "so that the party who has deviated from good faith behaviour should not be looked upon favorably".[1298] Good faith should therefore be used when interpreting the CISG in order that the "conduct prescribed coincides with the principle of good faith, so that deviating conduct must be qualified as unlawful"[1299] and to "neutralize the danger of reaching inequitable results" in a given case.[1300]

747. The second reading obliges the judge or arbitrator to interpret the CISG taking into consideration the need to *promote* good faith in international trade "so that the holding will not necessarily be limited to the instant facts of the case".[1301] Judges and arbitrators should therefore attempt to advance the goal of good faith by interpreting the CISG so as to discourage bad faith by all potential parties to international sales transactions.[1302]

1294 ZELLER, International Trade, 138.
1295 SCHWENZER/HACHEM, 127, §17. See below, paras. 823, 879 et seq., and 927 et seq.
1296 SHEEHY, 12; ZELLER, International Trade, 137.
1297 WALT, 4.
1298 KONERU, 139.
1299 ENDERLEIN/MASKOW, 56–57.
1300 FELEMEGAS, CISG, 116; FERRARI, 210.
1301 KONERU, 139.
1302 HILLMAN, 29.

748. These two readings are largely academic to the extent that they both converge towards the point that the interpretation of the CISG, in light of the good faith requirement, will indirectly affect the parties' conduct.[1303]

749. Indeed, even though literally, Article 7(1) CISG does not impose on the parties a general duty of good faith and fair dealing in the formation and performance of their contract,[1304] when interpreting the provisions of the CISG in line with good faith, the courts or arbitral tribunals will no doubt be applying good faith, albeit indirectly, to the conduct of the parties.[1305] Indeed, how can arbitrators promote good faith other than by requiring the parties to act in good faith?[1306] As stated by KONERU, "good faith cannot exist in a vacuum and does not remain in practice as a rule unless the actors are required to participate."[1307] As further stated by EÖRSI, "[i]nterpretation of the two [CISG and contracts] cannot be separated since the Convention is necessarily interpreted by the parties also; after all, the Convention constitutes the law of the parties insofar as they do not make use of Article 6 on freedom of contract."[1308]

750. Moreover, the ad-hoc working group who proposed Article 7(1) CISG meant "to direct the attention of the courts in resolving disputes to the fact that the *acts and omissions of the parties* must be interpreted in the light of the principle that they observe good faith in international trade".[1309] In its role as an interpretative guideline, it can thus act to prevent abuse by the parties and regulate their conduct[1310] and may prevent a party from invoking its usual rights and remedies.[1311]

751. A few examples will help to illustrate how good faith indirectly affects the parties when one interprets the provisions of the CISG in accordance with the need to promote good faith in international trade:

– Commentators agree that good faith has a role to play with respect to Article 8 CISG which sets out the rules to be applied to the interpretation

[1303] KONERU, 139.

[1304] Indeed, the imposition of such an obligation was objected to by some of the representatives during the drafting stage of the CISG, see BRIDGE, goods, 600, §10.42.

[1305] BONELL, CISG, 84; BRIDGE, goods, 600–601, §10.42; HILLMAN, 30; KEILY, 24–25; SCHWENZER/HACHEM, 127, §17; ZACCARIA, 107; ZELLER, Scarlet Pimpernel, 12; ZELLER, International Trade, 139.

[1306] KEILY, 24; SHEEHY, 13.

[1307] KONERU, 140.

[1308] EÖRSI, General Provisions, 2-9.

[1309] Emphasis added, Report on Eleventh Session, 36, §57.

[1310] VISCASILLAS, 121, §23.

[1311] BONELL, CISG, 84.

of the parties' statements and conduct.[1312] An interpretation of this Article in accordance with good faith would mean that unfair clauses must be interpreted (only in the case of doubt and not if the clause is clear) in favour of the disadvantaged party;[1313]

– Article 9(1) CISG provides that "[t]he parties are bound by any usage to which they have agreed and by any practices which they have established between themselves." However, one could envisage that if this provision is interpreted in line with good faith, then such usages would not be applicable in a case where their application on the facts of a specific case would be contrary to good faith.[1314] Indeed, it has been argued that a usage should not be impliedly incorporated into contracts under Article 9(2) CISG where such usage entrenches the domination of the more powerful trader as it would be contrary to good faith;[1315]

– Article 22 CISG provides that the "indication of intention reaches the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address." If Article 22 CISG is interpreted in good faith, then in a case where a party knows that the other party will be absent for a long time from his residence yet still sends a declaration to this address it might be considered that such declaration was not "delivered" and therefore ineffective. Another example is a case where one party usually sent communications to the other party at a given address and thereafter sends a declaration to a second address of the other party with the intention that it would not reach the addressee in time. If Article 22 CISG is interpreted in good faith, then the place of business may be considered as the first address and not the second thus rendering the delivery ineffective;[1316]

[1312] AUDIT, CISG and Lex Mercatoria. 189, who states that: "Good faith is certainly a factor in the application of article 8 […]"; and SCHWENZER/HACHEM, 127, §17, stating that good faith "may influence the reading of individual communications under Article 8." See, for example, Handelsgericht Zürich, 30 November 1998, HG 930634, available at < https://cisg-online.org/search-for-cases?caseId=6386>, accessed 1 March 2023: "In that event, the seller's subsequent reliance on the buyer's failure to give notice within reasonable time does not constitute an abusive exercise of its right under the principle of good faith […], which -- as can easily be drawn from Art. 8 CISG -- equally applies within the scope of the Vienna Convention."

[1313] ENDERLEIN/MASKOW, 57.

[1314] BONELL, CISG, 84–85.

[1315] KASTELY, 613.

[1316] GYULA EÖRSI, Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods (1979) 27 Am J Comp L 314–315.

– Article 29(1) CISG allows a contract to be modified by agreement.[1317] In order to promote good faith when interpreting this Article, a modification agreement should not be enforced when one party takes advantage of the other in so modifying the contract;[1318]
– Article 47 CISG provides that "[t]he buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations." If this provision is interpreted in good faith, it will prevent a party from thereafter refusing to accept performance during the additional period of time;[1319] and
– An interpretation of Article 77 CISG (which requires an aggrieved party to mitigate its loss) in accordance with good faith may require, depending on the circumstances of the case, the aggrieved party to re-negotiate with the breaching party in order to mitigate its loss.[1320]

752. Despite this indirect application, there may be cases where bad faith conduct will not be caught by an interpretation of the provisions of the CISG in good faith.[1321] In such a case, a general duty of good faith imposed on the parties would be necessary.[1322] Indeed, as noted by ZELLER, if a party fails to act in good faith but is not in breach of the provisions of the CISG, Article 7(1) CISG does not allow the creation of principles or remedies to sanction such conduct.[1323]

753. SIM criticizes the indirect application of good faith set out above,[1324] arguing that it "crosses the line of legitimate interpretation" to the extent that it makes good faith a prerequisite to the exercise of any of the rights or remedies in the CISG.[1325] She argues that "[i]t is tantamount to "gap-filling" or implying qualifications into the CISG which the instrument has not expressly provided for."[1326] According to SIM, only the specific manifestations of the principle of good faith found in the CISG can be used to interpret the Convention to resolve questions of textual ambiguity in the text of the CISG.[1327] SIM argues that "the most natural and ordinary meaning of "interpret" should be adopted i.e. "to

[1317] Article 29(1) CISG provides as follows: "(1) A contract may be modified or terminated by the mere agreement of the parties."
[1318] HILLMAN, 29–30.
[1319] BONELL, CISG, 84.
[1320] SCHWENZER/HACHEM, 128, §19.
[1321] KEILY, 26.
[1322] *Ibid*.
[1323] ZELLER, Scarlet Pimpernel, 8.
[1324] See above, paras. 749 et seq.
[1325] SIM, 64.
[1326] *Ibid*.
[1327] SIM, 64, 68, 83, 92.

explain or tell the meaning of" or "to make understandable" and that a provision is ambiguous either because it has a number of different meanings or because it has to be applied to a previously unforeseen situation.[1328]

754. Such a restricted role of this interpretation provision, however, is contrary to the wishes of the drafters who specifically meant to direct the attention of the courts in resolving disputes to the fact that the acts and omissions of the parties must be interpreted in the light of the principle that they observe good faith in international trade.[1329] In addition, how else is good faith in international trade to be promoted other than by employing it when applying the CISG.[1330] Further, the Secretariat commentary itself states that "[t]he principle of good faith […] applies to all aspects of the interpretation and *application* of the provisions of this Convention".[1331]

755. According to ENDERLEIN and MASKOW, good faith in its interpretative function has a limited role given that the provisions of the CISG themselves are already an expression of good faith.[1332] ZELLER also argues that the invocation of good faith in its interpretative function will be limited as there is no need to refer to Article 7(1) CISG in the "normal course" of interpreting the CISG as the "natural or normal state of mind when interpreting the Convention is with good faith".[1333]

756. HUBER agrees that good faith has a limited role and insists that it is not a "supreme rule towering over the ordinary provisions of the CISG" and should not be used as a "super-tool to override the rules and policies of the Convention whenever one regards the solution to a particular case or problem as inadequate."[1334]

1328 *Idem*, 29. See also in this regard, BRIDGE, good faith, 109 who submits that good faith should only be employed to clarify an ambiguous text.

1329 See above, para. 735.

1330 See LARRY A. DIMATTEO, CISG across national legal systems in Larry A DiMatteo (ed), International Sales law: a global challenge (New York, Cambridge University Press 2014) 591 stating that "if good faith is observed in international trade, then it is understandable why the good faith principle has been used in the application of the CISG."

1331 Emphasis added. Secretariat Commentary, Guide to CISG Article 7, referring to the Official Records, 17–18.

1332 ENDERLEIN/MASKOW, 56.

1333 ZELLER, Scarlet Pimpernel, 7; ZELLER, Four-Corners, 56 et seq.

1334 HUBER, 229–230.

iii. Broad interpretation

757. The broader interpretation of the concept of good faith found in Article 7(1) CISG is that good faith applies directly to the parties.[1335]

758. According to these commentators, such a broad interpretation is reinforced by the pervasive presence of specific manifestations of good faith applicable to the parties' conduct in the CISG[1336] and is "coherent with the dynamic approach to the interpretation of the Convention and its evolution in international commercial law."[1337] Indeed, it is submitted that an obligation for parties to act in good faith is found in the PICC and the *lex mercatoria*[1338] and Common law countries (previously opposed to the recognition of a general principle of good faith) are increasingly recognizing such a general principle of good faith.[1339] This broad interpretation of Article 7(1) CISG also takes into account the fact that good faith is a "leading principle" in the field of commerce and that there is even a greater need for it in international trade.[1340] It is further supported by the weight of the international case law applying the CISG.[1341]

1335 BONELL, CISG, 84; BRUNNER/WAGNER, 84, §5; described in FELEMEGAS, CISG, 116–118; described in FERRARI, 213; described in KEILY, 25; POVRZENIC, 6; described in TETLEY, 36; Cf BELL, 20 who is "uncomfortable with any reading of a substantive duty to act in good faith into Article 7(1)."

1336 KEILY, 30; KONERU, 140; POVRZENIC, 6.

1337 MICHAEL P VAN ALSTINE, Dynamic Treaty Interpretation (1998) 146 U Penn L Rev 687–793; VISCASILLAS, 121, §23. See also WINSHIP, 635, a commentator supporting a literal interpretation of Article 7(1) CISG but noting that he is "convinced by the persistence of the critics who seek to expand the operation of a good faith concept that over time a general obligation on contracting parties to act in good faith will be accepted."

1338 KEILY, 34. See also BRIDGE, goods, 601, §10.42.

1339 KEILY, 36, 40. Cf SIM, 56 stating that it is difficult to ascertain principles that are "internationally coordinated and can actually find general acceptance."

1340 POVRZENIC, 6.

1341 OLE LANDO, Is Good Faith an Over-Arching General Clause in the Principles of European Contract Law (2007) Eur Rev Priv L 841, 847 noting that courts in Austria, Belgium, France, Germany, Italy, Mexico, Netherlands and Switzerland have given a broad interpretation to the principle of good faith extending it beyond the role of interpretation of the CISG; SHEEHY, 46; VISCASILLAS, 123, §26; WALT, 4–5; See also, *Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd. , Seoulia Confectionery Co*., 30 November 1998, COMPROMEX. Comisión para la Protección del Comercio Exterior de Mexico, M/115/97, available at < https://cisg-online.org/search-for-cases?caseId=6472>, accessed 1 March 2023; Italy 25 February 2004 District Court Padova (Agricultural products case), available at < https://cisg-online.org/search-for-cases?caseId=6745>, accessed 1 March 2023 stating that "the conduct of the contracting parties must respect the principle of good faith, which -- since it is one of the general principles on which [CISG] is based must not only influence the entire regulation of the international sale but also supplies an essential standard for the interpretation of the rules set forth in the [CISG]."

759. Out of those commentators that support a broad interpretation of Article 7(1) CISG, some commentators draw the line at such a standard imposing positive obligations on the parties.[1342] Others, however, argue that the good faith standard in Article 7(1) CISG does impose positive obligations on the parties.[1343] Indeed, according to ROSETT:

> Viewed somewhat more expansively, [good faith in Article 7(1) CISG] imports affirmative obligations on the parties to communicate during performance and to cooperate in the cure of defects and the modification of obligations in unforeseen circumstances. It precludes a perfect tender approach to interpretation of the seller's obligations of delivery and does not treat minor deviations by either side as an event that terminates the contract.[1344]

760. The critiques of a broad interpretation of Article 7(1) CISG are three in number. First, such an interpretation confuses the interpretation by the court and the parties' performance of the contract. Indeed, such a broad interpretation implies that the parties as well as the judges or arbitrators are interpreters of the CISG. As such, it may be possible for the parties to exclude this provision under Article 6 CISG and thereby hinder the uniformity of interpretation of the CISG.[1345] This objection carries little weight to the extent that most commentators agree that the good faith provision is mandatory and that it can therefore not be excluded by the parties.[1346] Second, it should not be forgotten that the inclusion of a provision imposing an obligation of good faith on the parties was opposed by the drafters of the CISG.[1347] Third, an expansive use of good faith will lead to uncertainty (with respect to the extent to which a tribunal may "rewrite or rebalance a contract") and make it more likely that parties will opt out of the application of the CISG and will thereby further endanger the goal of uniformity.[1348]

1342 FELEMEGAS, CISG, 119; FERRARI, 215.

1343 POVRZENIC, 6.

1344 ARTHUR ROSETT, Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods, (1984) 45 Ohio St LJ 265, 290.

1345 FELEMEGAS, CISG, 117.

1346 KEILY, 30.

1347 BRIDGE, good faith, 109; FELEMEGAS, CISG, 119; KEILY, 26.

1348 BRIDGE, good faith, 111 stating that "A legal instrument that blows in the discretionary winds cannot provide the uniformity and certainty that prompted the quest for legal uniformity."; MAZZOTTA, 133.

b. Good faith as a principle underlying the CISG with a gap-filling function pursuant to Article 7(2) CISG

761. According to Article 7(2) CISG, general principles can be used to fill internal gaps in the CISG (i.e., an issue governed by the CISG but not expressly addressed by its provisions[1349]).

762. Some commentators are of the view that good faith is a general principle on which the CISG is based (i.) and may therefore assume a gap-filling function in accordance with Article 7(2) CISG (ii.). A few authors further argue that good faith can still perform a gap-filling function even if it is not considered to be a general principle on which the CISG is based (iii.). The recourse to Article 7(2) CISG, in order to impose a duty of good faith on the parties, is, however, debated (iv.).

i. Good faith as a principle on which the CISG is based

763. According to case law and commentary, good faith is considered to be a general principle on which the CISG is based.[1350]

764. Although some commentators refer to the express mention of good faith in Article 7(1) CISG as supporting the argument that there is a general principle of good faith underlying the CISG, SIM submits that such an argument should be dismissed outright as it must be shown that good faith is a concept that runs throughout the CISG.[1351]

765. In this regard, the Secretariat's commentary of the CISG points to certain Articles of the CISG which constitute specific applications of the principle of good faith.[1352] These include the following:

– Article 16(2)(b) CISG which provides that an offer is not revocable in circumstances where the offeree reasonably relies upon the offer and acted in reliance thereupon;

1349 ANDERSEN, 18, 23.

1350 2012 UNCITRAL Digest of Article 7 case law, §13 and the case law referred to at footnote 42; BRUNNER/WAGNER, 86, §9.

1351 SIM, 57.

1352 Secretariat Commentary on article 6 of the 1978 Draft at §3 available at < https://cisg-online.org/Travaux-preparatoires/1979-secretariat-commentary>, accessed 1 March 2023; see also 2012 UNCITRAL Digest of Article 7 case law, §9; see further ROBIN, 712–714 referring to Articles 8(2), 8(3), 18(1), 18(2), 24, 25, 29(2), 33(c), 38, 39, 40, 47(2), 48(2), 49(2), 54, 62, 63(2), 77, 85–88; ZELLER, Scarlet Pimpernel, 9–11 stating that good faith is a principle in prescribed situations under the CISG and referring specifically to Articles 40, 49(2), 29(2), 38, 39.

- Article 21(2) CISG which provides that a late acceptance is effective when it would have reached the offeror in due time if the transmission had been normal;
- Article 29(2) CISG which precludes a party from relying on a contractual provision that modification or termination should be in writing when the other party has relied on its conduct that it would not invoke such a provision;
- Article 37 CISG which allows the seller to remedy a non-conformity of goods delivered prior to the delivery date provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense;
- Article 40 CISG which prevents a seller from relying on the fact that notice of non-conformity has not been given by the buyer if it was aware or should have been aware of the facts giving rise to the non-conformity;
- Article 49(2) CISG which prevents the buyer from declaring the contract avoided once the seller has delivered the goods except in certain limited circumstances;
- Article 64(2) CISG which prevents the seller from declaring the contract avoided once the buyer has paid except in certain limited circumstances;
- Article 82 CISG which prevents the buyer from declaring the contract avoided if it is impossible for it to make restitution of the goods in the condition in which it received them; and
- Articles 85–88 CISG which impose obligations on the parties to take steps to preserve the goods.

766. In addition, case law and commentators agree that the interpretation principles set out in Article 8 CISG reflect the principle of good faith.[1353] Furthermore,

[1353] AUDIT, CISG and Lex Mercatoria, 189, who states that "Good faith is certainly a factor in the application of article 8 […]"; ICC Case No 7645 of 1995, available at < https://cisg-online.org/search-for-cases?caseId=6770>, accessed 1 March 2023; see also Switzerland 12 December 2006 Canton Appellate Court Thurgau (*Building materials case*), available at < https://cisg-online.org/search-for-cases?caseId=7485>, accessed 1 March 2023 stating that the principle of good faith applies when interpreting statements under Article 8 CISG and serves as a guideline for interpretation of the agreement concluded between the parties, whereby the defendant acknowledged certain debts, which it undertook to settle by [installments] in the form of a 5 per cent discount granted on all the plaintiff's purchases; Switzerland 5 April 2005 *Bundesgericht* [Supreme Court] (*Chemical products case*), available at < https://cisg-online.org/search-for-cases?caseId=6936>, accessed 1 March 2023 holding that Article 8(2) CISG corresponds to the principles of normative interpretation of declarations of intention in accordance with the principle of good faith; Switzerland 26 November 2008 *Handelsgericht* [Commercial Court] Aargau (*Fruit and vegetables case*), available at < https://cisg-online.org/search-for-cases?caseId=7657>, accessed 1 March 2023; France 30

Article 77 CISG setting out the duty to mitigate one's loss and Article 80 CISG providing that a party may not rely on the other's failure to perform if it was responsible for such a failure are both considered to be derived from the principle of good faith.[1354] Moreover, it has been held that Article 18 CISG (concerning the acceptance of an offer) constitutes a specific manifestation of the principle of good faith.[1355]

767. Furthermore, the concepts of "reasonableness" and "fair dealing" are found throughout the provisions of the CISG and are derived from good faith.[1356]

768. Some commentators also argue that good faith cannot be excluded by the parties and therefore submit that this mandatory nature further supports the conclusion that good faith is a general principle on which the CISG is based.[1357]

June 2004 Supreme Court (*Société Romay AG v. SARL Behr France*), available at < https://cisg-online.org/search-for-cases?caseId=6795>, accessed 1 March 2023 applying the principle that contracts should be interpreted in good faith.

1354 Germany 26 September 2012 Supreme Court (*Clay case*), available at < https://cisg-online.org/search-for-cases?caseId=8263>, accessed 1 March 2023 at §34. With respect to the view that Article 77 CISG is derived from the principle of good faith, see France 12 June 2001 Appellate Court Colmar (*Société Romay AG v. SARL Behr France*), available at < https://cisg-online.org/search-for-cases?caseId=6795>, accessed 1 March 2023.

1355 Switzerland 5 November 1998 District Court Sissach (*Summer cloth collection case*), available at <https://cisg-online.org/search-for-cases?caseId=7386>, accessed 1 March 2023 at §2.4. Article 18 CISG provides as follows: "(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance. (2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise. (3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph."

1356 KEILY, 30. See in this regard Netherlands 5 January 1978 Appellate Court Amsterdam (*Amran v. Tesa*), available at <https://iicl.law.pace.edu/cisg/search/cases>, accessed 1 March 2023, a case applying the ULIS which held that: " "reasonableness" is of the same character as "buona fede" in art. 1375 of the Italian Code Civil and "goede trouw" (good faith) in art. 1374 of the Dutch Civil Code, according to which a contract has to be executed in good faith."

1357 BONELL, CISG, 94; KEILY, 30; cf WALT, 32 arguing that Articles 7(1) and 7(2) CISG are default terms only and can thus be excluded by the parties.

ii. Gap-filling function of good faith

769. Given that good faith is a general principle on which the CISG is based, commentators argue that good faith enjoys a gap-filling function pursuant to Article 7(2) CISG in the event that issues arise which are governed, but not expressly settled, by the CISG.[1358]

770. More specifically, good faith may have a gap-filling function with respect to issues relating to the formation of the contract and the rights and obligations of the parties.[1359] However, it cannot be used with respect to issues relating to third parties, the effect of the contract on the property or ownership in the goods or the validity of the contract.[1360] Accordingly, good faith under the CISG would not extend to a situation where a party acted in bad faith in negotiations and as a result of which the contract was invalid, as this situation would be covered by national law.[1361]

771. In this role, good faith can impose additional obligations on the parties.[1362]

772. In this respect, SIM argues that the general principle of good faith in itself is not concrete enough to directly perform a gap-filling function. Citing the example of Germany, she argues that only the specific manifestations of good faith can perform such a function.[1363] These could include: the requirements that parties act for their mutual benefit as well as reasonably (although these could be viewed as principles in their own right); interpretation of a party's statements as they would be interpreted by a reasonable person; party communication of information needed by the other party; estoppel; principle disfavouring the premature termination of a contract and mitigation of loss.[1364]

773. In this regard, KLEIN also argues that the general principle of good faith can be subdivided into three main good faith duties: the duty to engage in good faith communication, the duty to refrain from conduct knowingly calculated to

[1358] 2012 UNCITRAL Digest on Case Law on the CISG, 43; BELL, 17–18; BONELL, CISG, 85; BRIDGE, goods, 601, §10.42; ENDERLEIN/MASKOW, 59; JANSSEN/CLAAS KIENE, 272; KASTELY, 597–598; LOOKOFSKY, 37; POVRZENIC, 9; SIM, 26; VISCASILLAS, 140, §64; WINSHIP, 634.

[1359] BELL, 19.

[1360] *Ibid*. See in this regard, Article 4 CISG.

[1361] BELL, 19, 21.

[1362] BONELL, CISG, 85, §2.4.1.

[1363] SIM, 58, 61.

[1364] HENRY MATHER, Choice of Law for International Sales Issues Not Resolved by the CISG (2001) 20 Journal of Law & Commerce, 155, 157. See also JANSSEN/CLAAS KIENE, 272–273, referring to the prohibition of contradictory behaviour, the duty to cooperate, the duty to supply the necessary information for the performance of the contract and the principle of estoppel.

frustrate the contract and the duty to engage in good faith efforts to save the contract or mitigate damage resulting from the breach.[1365]

iii. Good faith as a general principle on which the CISG is not based

774. Assuming that good faith is not a general principle on which the CISG is based, some commentators argue that one can still look to general principles outside the walls of the CISG when filling gaps in the Convention as long as these principles are "internationally coordinated and actually find generally acceptance".[1366]

775. Such principles could include the obligation for parties to act in good faith as found in the PICC and the *lex mercatoria*.[1367] Indeed, it is argued that there is a great deal of similarity in the provisions contained in the CISG and *lex mercatoria* and that the PICC are internationally accepted.[1368] Moreover, it is pointed out that Common law countries are increasingly recognizing the principle of good faith.[1369] Accordingly, the argument that such a principle has international acceptance is now much stronger.[1370] Furthermore, parties may by virtue of Article 6 CISG, incorporate the PICC and the *lex mercatoria* generally including the principle of good faith.[1371]

776. Commentators, however, rightly criticize this approach as violating the mandate of the CISG which only allows gap-filling on the basis of general principles *underlying the CISG*.[1372]

777. Even if one were to assume that the principle of good faith was not one on which the CISG is based, SCHLECHTRIEM has argued that the function of a good faith rule applicable to the conduct of the parties could be performed by the rule that the parties must act in accordance with the standard of a reasonable person given that the reasonable person is described in a number of the CISG provisions and therefore is a general principle of the CISG.[1373] This approach has, however, been rightly criticized on the basis that it equates the concept of reasonableness

[1365] KLEIN, 126–134. This view is endorsed by ZELLER, International Trade, 146.
[1366] MAGNUS, General Principles, 5.
[1367] KEILY, 33–34. See also BRIDGE, goods, 601, §10.42.
[1368] KEILY, 35.
[1369] KEILY, 37, 40.
[1370] KEILY, 37, 40. Cf SIM, 56 stating that it is difficult to ascertain principles that are "internationally coordinated and can actually find general acceptance."
[1371] KEILY, 36.
[1372] SIM, 56; ZELLER, Scarlet Pimpernel, 6–7.
[1373] SCHLECHTRIEM, Uniform Sales, 39.

with good faith without explaining why and without taking into consideration that good faith is much broader than the concept of reasonableness.[1374]

iv. Debated recourse to Article 7(2) CISG in order to apply good faith

778. In general, ANDERSEN argues that the use of general principles may lead to unpredictability and uncertainty when they are used in cases where there is no actual gap as they open the way to extreme judicial discretion when applying the CISG.[1375]

779. BELL, however, argues that if the duty to act in good faith is not applied as a general principle pursuant to Article 7(2) CISG then this would "lead to less uniformity and more vagueness and imprecision" and that it would be better to recognise it as a general principle so that a uniform principle can be elaborated.[1376]

780. Some commentators lament that allowing the principle of good faith to be employed as a gap-filling tool pursuant to Article 7(2) CISG imposing positive obligations on the parties is contrary to the wording of Article 7(1) CISG as well as the legislative history of the CISG with respect to the principle of good faith.[1377] As stated by FARNSWORTH, it would be "a perversion of the compromise to let a general principle of good faith in by the back door."[1378]

c. Good faith as a practice or usage of the parties or international trade pursuant to Article 9 CISG

781. A further argument made by certain commentators is that good faith may be applied either as a practice established by the parties or as an international trade usage contained in the *lex mercatoria* pursuant to Article 9 CISG.[1379]

1374 SIM, 59–60.

1375 ANDERSEN, 30. See also JANSSEN/CLAAS KIENE, 273 stating that there must be an actual gap before the principle of good faith is applied pursuant to Article 7(2) CISG.

1376 BELL, 21–22.

1377 JOHN FELEMEGAS, Comparative Editorial Remarks on the Concept of Good Faith in the CISG and the PECL (2001)13 Pace International Law Review 404–405.

1378 FARNSWORTH, Good Faith, 56; SIM, 47; see also ANDERSEN, 31 questioning whether the holding that there is a 'gap' in the CISG can justify "smuggling (good faith) in through a backdoor by way of Article 7(2) CISG", invoking in particular "the uproar which would ensue if pre-contractual liability were to be classified as a gap".

1379 BELL, 20; KEILY, 36; SIM, 52–55.

782. Indeed, the parties may have established a practice of good faith and fair dealing during their prior course of dealings or a usage may have evolved in a particular trade requiring the observance of good faith.[1380]

783. Such an approach is also supported by the argument made by certain delegates at the drafting stage that there was no need to make reference to good faith as it already was an implicit requirement of all business activity.[1381]

784. However, as rightly pointed out by SIM, one cannot apply a general international obligation of good faith as a practice or a trade usage. Only specific practices existing between the parties or specific trade usages in a particular region or sector based on the principle of good faith can be applied on the basis of Article 9 CISG.[1382]

3. Content of good faith under the CISG

785. The concept of good faith under the CISG should be given an autonomous meaning taking into account the specificities of international trade (a.). The standard of good faith, however, needs to be established (b.). Some authors have proposed abstract definitions of good faith (c.) whilst other authors have proposed definitions inspired by the CISG (d.). The content attributed to good faith under the CISG by national courts will thereafter be examined (e.).

a. Autonomous meaning taking into account the specificities of international trade

786. The reference to good faith *in international trade* in Article 7(1) CISG means that the principle of good faith should not be given the meaning attributed to it by a given domestic legal system (except to the extent that such meaning is generally accepted by the majority of domestic legal systems) but that it should be given an autonomous meaning taking into account the specificities of international trade.[1383] Such specificities include the fact that international trade is

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1380 SIM, 48.

1381 See above, para. 731. See also SIM, 48.

1382 See in this vein, SIM, 53–55.

1383 BONELL, CISG, 86; BRUNNER/WAGNER, 84, §5; ENDERLEIN/MASKOW, 57; FELEMEGAS, CISG, 120; FLECHTNER/HONNOLD, 136, §120; MAGNUS, Remarks, 91; POVRZENIC, 7; SCHWENZER/HACHEM, 127, §18; VISCASILLAS, 126, §33; ZELLER, Scarlet Pimpernel, 1; *Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd. , Seoulia Confectionery Co.,* 30 November 1998, COMPROMEX. Comisión para la Protección del Comercio Exterior de Mexico, M/115/97, available at < https://cisg-online.org/search-for-cases?caseId=6472>, accessed 1

characterized by intense competition and arm's length dealings[1384] and involves parties from different countries each conforming to different standards of business practice in their respective countries.[1385]

b. Necessity of establishing a standard of good faith

787. WALT points out that the term good faith does not set out the standard by which a parties' performance must be measured.[1386]

788. This standard accordingly needs to be established. Whilst this standard may already be established in concrete terms in certain long-standing business circles, such a standard may have to be developed in other new business circles.[1387] Whilst it is submitted that one may be able to establish such a standard from usages and trade practices, as well as from other international instruments, case law and doctrine relating to fair and reasonable behaviour in international commerce,[1388] this theory may be difficult to translate in practice.[1389]

789. In light of the specificities of international trade, commentators argue that good faith should not impose too stringent a standard.[1390] ZELLER submits that the concept of good faith in international sales transactions must be one that is "capable of treading a middle ground that is acceptable to all" and that it must therefore be both practical and general and simply require the parties to cooperate in performing their contract.[1391] Ensuring good faith in international trade should not entail ensuring substantive justice between the parties but only

March 2023; Italy 11 December 1998 Appellate Court Milan (*Bielloni Castello v. EGO*) (*Printer device case*), available at < https://cisg-online.org/search-for-cases?caseId=6400>, accessed 1 March 2023.

1384 FELEMEGAS, 122.

1385 BONELL, CISG, 87 referring to an example under German law whereby good faith requires a recipient of a written communication which is purported to be a confirmation of an oral understanding between the parties to object immediately if it does not want to be bound; FELEMEGAS, CISG, 120; MAGNUS, Remarks, 91; POVRZENIC, 7.

1386 WALT, 5.

1387 MAGNUS, Remarks, 91.

1388 HUBER, 229; see also ENDERLEIN/MASKOW, 57 stating that: "When judging what is conduct based on the principle of good faith, the usages and practice in concluding contracts cannot be left out of consideration."; SCHWENZER/HACHEM, 127–128, §18; VISCASILLAS, 126, §33.

1389 HUBER, 229.

1390 BRUNO ZELLER, Good Faith – Is It a Contractual Obligation, (2003) 15 Bond Law Review 215, 221.

1391 *Ibid*.

ensuring the "normal" standard of conduct between international tradespeople[1392] and prohibit the abuse of rights and contradictory behaviour.[1393]

790. The standard required may fluctuate depending on the parties involved. In this regard, AUDIT argues that good faith requires taking into account the respective situations of the parties. Hence, it may require a stricter standard of conduct from a more sophisticated party. For example, a seller from an industrialized country might be obliged to describe clearly and in detail the character of the goods being offered.[1394]

c. Proposed abstract definitions of the standard of good faith

791. Commentators have attempted to define the good faith standard in more abstract and workable terms.

792. POWERS attempts to define this notion of good faith in the CISG as "an expectation of each party to a contract that the other will honestly and fairly perform his duties under the contract in a manner that is acceptable in the trade community. The duty of good faith is an international doctrine that requires parties to an international transaction to act reasonably, as they would expect the other party to act. […] Good faith is a lot like the golden rule: treat others as you wish to be treated."[1395]

793. ZELLER proposes that good faith should be defined as a general duty based on judicial interpretation of community standards, reasonableness and fair play.[1396]

d. Definitions of the standard of good faith inspired by the CISG

794. The above definitions, however, do not take sufficiently into account the particularities of international sales transactions. Most commentators therefore submit that the very instrument of the CISG should be considered when coming up with a definition of good faith.

795. FELEMEGAS accordingly argues that the CISG itself is the best place to look for the meaning of good faith rather than national law.[1397] BONELL also advocates

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[1392] ENDERLEIN/MASKOW, 56; FELEMEGAS, CISG, 122–123.

[1393] MAGNUS, General Principles, 7.

[1394] AUDIT, CISG and Lex Mercatoria, 189; see also AUDIT, *La vente internationale*, 49.

[1395] POWERS, 352.

[1396] ZELLER, Scarlet Pimpernel, 7.

[1397] FELEMEGAS, CISG, 119; see also SIM, 67 arguing that a definition derived internally from the CISG is the strongest given that it is not clear that the contracting states or future contracting states will accept an "external" definition.

that one should look to the Preamble of the CISG in order to garner the meaning of good faith.[1398] The Preamble provides in relevant part that "the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States" and that "the adoption of uniform rules which […] take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade."[1399]

796. SIM agrees and argues that good faith in Article 7(1) CISG should be defined as principles in the CISG which "constrain the behaviour of contracting parties in order to promote justice, fairness and ethical behaviour".[1400] SIM defines good faith as "anything that would require contracting parties to behave in a manner that would promote justice, fairness or ethical behaviour" and refers to the specific examples of the rules against undue influence, mistake and misrepresentation.[1401] SIM submits that this definition of good faith restricts the decision maker's discretion given that it limits them to principles found in the CISG which express the notion of good faith.[1402] Hence, decision makers will be required to show that the principle is based on one found in the CISG and that it promotes justice, fairness and ethical behaviour.[1403]

e. Role and content according to national courts

797. Good faith has been attributed a wide and varied role and content by national courts. First, good faith has been employed when interpreting the parties' contract as well as the provisions of the CISG (i). Second, good faith has been invoked in order to impose additional positive duties on the parties (ii.). Third, good faith has been invoked in order to prohibit dishonest or commercially unreasonable behaviour (iii.). Fourth, good faith has been employed to prohibit an abuse of rights (v.). Finally, good faith has been employed in order to create solutions for issues which were not set out in the CISG (v.).

1398 BONELL, CISG, 88.

1399 The text of the CISG can be found here: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf>, accessed 1 March 2023.

1400 SIM, 69.

1401 *Idem*, 50–51.

1402 *Idem*, 68–69.

1403 *Ibid*.

i. Good faith as an interpretation tool

798. Good faith has been invoked frequently in order to determine whether terms, including standard terms and conditions, have been incorporated into the parties' contract:

– Good faith has thus been invoked in order to determine whether terms from subsequent order confirmations were incorporated into the parties' contract;[1404]
– Good faith has also been invoked by many courts, in particular German courts, for the proposition that a buyer is not bound by standard terms unless the seller informs the buyer of the same. Indeed, it is considered contrary to good faith for a party to make inquiries about the content of the terms, thereby delaying the conclusion of the contract, when it would require little effort for the other party to make those terms available;[1405]

[1404] Germany 12 June 2008 District Court Landshut (*Metalic slabs case*), available at < https://cisg-online.org/search-for-cases?caseId=7622>, accessed 1 March 2023 in which it was held that Article 8 CISG should be read in conjunction with the principle of good faith and that it should be considered in deciding whether a term is incorporated, whether the clause differs from the expectation of the contractual partner to such an extent that the latter cannot reasonably be expected to have anticipated that such a clause might be included. The parties had agreed on T as the place of performance in their contract. However, in the order confirmations, there was a clause according to which A was the place of performance. It was held that the buyer could not reasonably be expected to have anticipated that such a different clause would be included in the order confirmations; Switzerland 5 November 1998 District Court Sissach (*Summer cloth collection case*), available at < https://cisg-online.org/search-for-cases?caseId=7386>, accessed 1 March 2023 in which it was held that if the recipient of a commercial letter of confirmation accepts the communication without objection, the recipient must account for the content of the letter, and the contract is assumed to be implicitly modified according to the letter's content, as long as the sender was entitled under good faith to regard the silence as an acceptance. In this case, the buyer was entitled to assume that the seller consented to the content confirmed in the letter, because (a) the seller accepted the attached check, which amounted to the first installment of the payment agreement, and because (b) the seller did not object to the buyer's letter of confirmation within a reasonable time.

[1405] Hof 'S-Hertogenbosch, 16 October 2002, available at < https://cisg-online.org/search-for-cases?caseId=6742>, accessed 1 March 2023; *Fresh-Life International B.V. v. Cobana Fruchtring GmbH & Co.*, *KG*, 25 February 2009, 279354 HAZA 07-576, < https://cisg-online.org/search-for-cases?caseId=7730>, accessed 1 March 2023 stating that it is not sufficient for the terms to be referred to in the invoices but the text must be made available before or at the time of the conclusion of the contract; see also Netherlands 22 April 2014 *Gerechtshof Den Haag*, available at < https://cisg-online.org/search-for-cases?caseId=8429>, accessed 1 March 2023; *Takap B.V. v. Europlay S.r.l.*, 21 November 2007, 914/06, available at < https://cisg-online.org/search-for-cases?caseId=7509>, accessed 1 March 2023; Bundesgerichtshof, 31 October 2001, VIII ZR 60/01, available at < https://cisg-online.org/search-

– Good faith has further been invoked in the situation where both the seller and buyer have issued standard terms and conditions. According to a German court, it would be contrary to the principle of good faith for the seller, whose standard terms were sent after the buyer's, to assume that only those terms of the buyer's standard conditions more favourable to the seller would apply;[1406]
– In addition, in a case before the German courts, it was held that if the buyer was not able to read the general conditions, good faith would have required the buyer to notify the seller about this problem;[1407]
– In a further decision, a Swiss court held that the seller was under an obligation to object if it found that the confirmation of purchase contained unacceptable conditions. As it did not object, the confirmation of purchase was binding on it;[1408] and
– Finally, in a decision of the Spanish courts, it was held that it would be contrary to the principle of good faith if a choice of jurisdiction clause in the general conditions, to which the Spanish party had not given its consent and could not have reasonably expected, was considered valid.[1409]

799. Good faith was further invoked in order to determine what kind of opt-out was required by Article 6 CISG. It was accordingly held that an interpretation of Article 6 CISG (which allows the parties to exclude the application of the CISG)

for-cases?caseId=6575>, accessed 1 March 2023; Germany 25 July 2003 Appellate Court Düsseldorf (*Rubber sealing parts case*), available at < https://cisg-online.org/search-for-cases?caseId=6844>, accessed 1 March 2023; Germany 21 April 2004 Appellate Court Düsseldorf [15 U 88/03] (*Mobile car phones case*), available at < https://cisg-online.org/search-for-cases?caseId=6839>, accessed 1 March 2023; Landgericht Neubrandeburg, 3 August 2005, 10 O 74/04, available at < https://cisg-online.org/search-for-cases?caseId=7113>, accessed 1 March 2023; *Oberlandesgericht Celle*, 24 July 2009, 13 W 48/09, available at <https://cisg-online.org/search-for-cases?caseId=7823>, accessed 1 March 2023; Germany 14 January 2009 Appellate Court München (*Metal ceiling materials case*), available at <https://cisg-online.org/search-for-cases?caseId=7928>, accessed 1 March 2023; Germany 15 July 2010 Appellate Court Hamburg (*Medical equipment case*), available at <https://cisg-online.org/search-for-cases?caseId=8363>, accessed 1 March 2023; Oberlandesgericht Naumburg, 13 February 2013, 12 U 153/12, available at <https://cisg-online.org/search-for-cases?caseId=8369>, accessed 1 March 2023.

1406 Bundesgerichtshof, 9 January 2002, VIII ZR 304/00, available at < https://cisg-online.org/search-for-cases?caseId=6594>, accessed 1 March 2023.

1407 Germany 21 April 2004 Appellate Court Düsseldorf [15 U 88/03] (*Mobile car phones case*), available at <https://cisg-online.org/search-for-cases?caseId=6840>, accessed 1 March 2023.

1408 Switzerland 5 April 2005 *Bundesgericht* [Supreme Court] (*Chemical products case*), available at <https://cisg-online.org/search-for-cases?caseId=6936>, accessed 1 March 2023.

1409 Spain 27 December 2007 Appellate Court Navarra (*Case involving machine for repair of bricks*), available at <https://cisg-online.org/search-for-cases?caseId=7716>, accessed 1 March 2023.

in accordance with the promotion of good faith in international trade requires parties to expressly opt out of the CISG.[1410]

ii. Good faith as imposing additional positive duties on the parties

800. Good faith has been invoked in order to impose a duty to be open and transparent on the parties:

- It was thus held that good faith required a seller to clearly explain upon receipt of the communication requesting a maximum humidity of 14% and before the first shipment that it could not perform the agreed technical specification of 14% maximum humidity;[1411]
- It was also held that good faith required a buyer to clearly express its wish for subsequent fulfilment once it became aware of a defect. Indeed, the lack of reaction on the buyer's side with regard to the seller's call-back letter in a reasonable time limit could only be interpreted as an approval of the non-conformity;[1412]
- It was further held that good faith required a seller to warn the buyer about the dioxin content in the delivered clay;[1413] and
- Moreover, it was held that good faith would have required the seller to inform the buyer that it did not intend to apply an international standard with respect to the quality of the bread improver.[1414]

801. Good faith has also been invoked in order to impose a duty to be tolerant on the parties:

1410 *BP Oil International and BP Exploration & Oil Inc v. Empresa Estatal Petroleos de Ecuador* (PetroEcuador et al., 11 June 2003, US Court of Appeals for the Fifth Circuit, 02-20166, available at <http://www.unilex.info/cisg/case/924>, accessed 1 March 2023holding that an interpretation of Article 6 CISG (which allows parties to exclude the application of the CISG) in line with good faith, requires the parties to expressly state that the CISG does not apply and state what law shall govern the contract.

1411 Spain 20 February 2007 Appellate Court Madrid (*Sunprojuice DK, Als v. San Sebastian, S.c.A.*), available at <https://cisg-online.org/search-for-cases?caseId=7556>, accessed 1 March 2023.

1412 Germany 15 July 2010 Appellate Court Hamburg (*Medical equipment case*), available at <https://cisg-online.org/search-for-cases?caseId=8363>, accessed 1 March 2023.

1413 Germany 26 September 2012 Supreme Court (*Clay case*), available at <https://cisg-online.org/search-for-cases?caseId=8263>, accessed 1 March 2023.

1414 Netherlands 23 April 2003 Appellate Court's-Gravenhage (*Rynpoort Trading v. Meneba Meel*), available at <https://cisg-online.org/search-for-cases?caseId=6828>, accessed 1 March 2023.

– It was thus held that a seller was required to wait for the buyer's answer to its offer of partial delivery of the goods before shipping;[1415] and
– It has also been held that a party should grant a breaching party an opportunity to cure.[1416]

iii. Prohibition of dishonest or commercially unreasonable behaviour

802. Good faith has been invoked in order to prohibit the following dishonest or commercially unreasonable behaviour:

– Never intending to perform one's obligations;[1417]

[1415] Germany 24 May 1995 Appellate Court Celle (*Used printing press case*), available at <https://cisg-online.org/search-for-cases?caseId=6130>, accessed 1 March 2023.

[1416] *Tribunale di Busto Arsizio*, 13 December 2001, available at <https://cisg-online.org/search-for-cases?caseId=7246>, accessed 1 March 2023 in which it was held that the buyer's avoidance of the contract at the moment of the installation of the machine, rather than after an attempt by the seller to fix its defects, would have been contrary to the principle of good faith which governs international transactions as the failure to grant a seller the opportunity to cure defects in goods is contrary to the duty of good faith of performance in contracts under international law; Italy 25 February 2004 District Court Padova (Agricultural products case), available at <https://cisg-online.org/search-for-cases?caseId=6745>, accessed 1 March 2023 in which it was held that it was contrary to the principle of good faith to file a claim in court just a few days after the expiration of the deadline for payment of the price, without having requested the buyer to provide adequate explanations for the delay or having imparted a period for cure. Conversely, it was held that the conduct of the seller cannot be regarded as unfair, where the seller brings a claim before the judge after having waited at least six months for payment of the price, without the buyer having communicated any excuse in the meantime.

[1417] *Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd. , Seoulia Confectionery Co.,* 30 November 1998, Compromex, *Comisión para la Protección del Comercio Exterior de Mexico*, M/115/97, available at < https://cisg-online.org/search-for-cases?caseId=6472>, accessed 1 March 2023 holding that a buyer acted contrary to good faith when it placed a large order without any intention of paying the price, after having gained the seller's trust and respect through two significantly smaller operations which were conducted correctly; Serbia 31 May 2010 Foreign Trade Court attached to the Serbian Chamber of Commerce (*Mobile Shear Baler case*), available at <https://cisg-online.org/search-for-cases?caseId=8178>, accessed 1 March 2023 holding that the seller's failure to deliver the agreed machine to the buyer, while at the same time continuously promising the buyer that the delivery would occur and requesting further extensions of the time for delivery, constituted behaviour contrary to the principle of good faith, since it was obvious from the seller's behaviour that it never had any true and honest intentions to perform its part of the bargain. See further *Noridane Foods S.A. v. Anexo Comercial Importação e Distribuição Ltda*, 14 February 2017, Court of Appeal of Rio Grande do Sul, 70072362940, available at < http://www.unilex.info/case.cfm?id=2035>, accessed 1 March 2023 in which the claimant, a Danish multinational Food Company, and the defendant, a Brazilian trading company, entered into a contract according to which the defendant was to

– Declaring that the goods would be delivered to a distributor in one country, thereafter, refusing to provide the required documentary evidence that the goods had actually been delivered to this distributor and in fact delivering the goods to a distributor in another country;[1418]
– A party invoking the delay in the opening of the factory (in which the printing press was to be installed) as an excuse for its failure to pay for the printing press;[1419] and
– A buyer bringing a claim against the seller for the non-conformity of the goods when the claim against it by the end buyer for non-conformity had been time-barred.[1420]

iv. Prohibition of an abuse of right

803. Good faith has been frequently invoked to prohibit contradictory behaviour including:[1421]

deliver to the claimant in Hong Kong a certain amount of frozen chicken. The claimant made the down payment, but the defendant failed to deliver the goods at the agreed time. The claimant repeatedly tried to contact the defendant but the defendant did not even answer its messages. The claimant then fixed an additional period of time requesting the defendant to deliver the goods within that period of time, but since the defendant did not deliver even within the additional period of time the claimant terminated the contract and claimed damages. The Court found that the claimant´s termination of the contract was justified not only on the basis of Article 49 CISG, but also because the defendant by its conduct committed a major violation of the general duty to act in good faith in the performance of contracts, which constituted one of the greatest canons established by the "new lex mercatoria" and can be inferred from Article 1.7 PICC and Article 7(1) of the CISG.

[1418] *SARL Bri Production 'Bonaventure' v. Société Pan African Export*, 22 February 1995, Cour d'Appel de Grenoble, Chambre Commerciale, available at < https://cisg-online.org/search-for-cases?caseId=6129>, accessed 1 March 2023.

[1419] *Bielloni Castello S.p.A. v. EGO S.A*., 11 December 1998, *Corte di Appello di Milano*, available at < https://cisg-online.org/search-for-cases?caseId=6400>, accessed 1 March 2023in which the buyer argued that its non-performance (namely its failure to pay in full for the printing press) was excused by the fact that the new factory in which the printing press was to be installed could not be opened at the expected date, due to administrative reasons beyond its control. The court, however, rejected the buyer's argument that its non-performance was excused, holding that the principle of good faith laid down in Article 7(1) CISG precluded the possibility of taking into account such impediments to perform.

[1420] *Kunsthaus Math. Lempertz OHG v. Wilhelmina van der Geld*, 17 July 1997, Arrondissementsrechtbank Arnhem, available at < http://www.unilex.info/cisg/case/355>, accessed 1 March 2023.

[1421] Indeed, it has been recognized that the CISG contains the principle of *venire contra factum proprium* which is derived from the principle of good faith (Art. 7(1) CISG), see

- A buyer invoking the delay in delivery when it had approved the seller's request to only make delivery after payment;[1422]
- A buyer invoking the non-performance of the sales contract when it had first refused the delivery of the cars and then waited approximately two and half years before it claimed termination of the contract;[1423]
- A seller insisting that the buyer should still buy the 30,000 pagers when the parties had previously agreed to annul the order of 30,000 pagers;[1424]
- A buyer giving notice of non-conformity when it had previously signed an agreement in which it recognised the total amount of the purchase price and therefore had impliedly accepted the goods;[1425]
- A seller suspending performance and making it conditional on payment of past debts when, with respect to the redelivery of the equipment, the parties had implicitly derogated from Article 71 CISG (entitling a party to suspend performance in case of anticipated non-performance by the other party) as they had already discussed the question of the payment of the buyer's past debts, and the seller had not mentioned such a question in the agreement on modification and prompt redelivery of the machines;[1426]
- A buyer objecting that the court's decision was based on documents in Italian or English rather than Spanish, as at the time that it originally received the notices and invoices, it did not object to them and it also corresponded with the seller attaching proof of payment in English and other facts indicated that the buyer understood the content of the invoices;[1427]

Oberlandesgericht Karlsruhe, 25 June 1997, 1 U 280/96, available at < https://cisg-online.org/search-for-cases?caseId=6237>, accessed 1 March 2023; Oberlandsgericht München, 15 September 2004, 7 U 2959/04, available at < https://cisg-online.org/search-for-cases?caseId=6937>, accessed 1 March 2023. See also BRUNNER/WAGNER, 85, §5.

1422 Germany 12 November 2001 Appellate Court Hamm (*Memory module case*), available at < https://cisg-online.org/search-for-cases?caseId=7352>, accessed 1 March 2023.

1423 Germany 8 February 1995 Appellate Court München [7 U 1720/94] (*Automobiles case*), available at < https://cisg-online.org/search-for-cases?caseId=6121>, accessed 1 March 2023.

1424 Belgium 15 May 2002 Appellate Court Gent (*NV A.R. v. NV I.*) (*Design of radio phone case*), available at < https://cisg-online.org/search-for-cases?caseId=6676>, accessed 1 March 2023.

1425 Germany 26 March 1996 District Court Saarbrücken (*Ice-cream parlor furnishings case*), available at < https://cisg-online.org/search-for-cases?caseId=6363>, accessed 1 March 2023.

1426 *Oberlandesgericht Köln*, 8 January 1997, 27 U 58/95, available at < https://cisg-online.org/search-for-cases?caseId=6191>, accessed 1 March 2023.

1427 Spain 13 May 2014 *Audiencia Provincial de Barcelona*, available at < https://cisg-online.org/search-for-cases?caseId=8445>, accessed 1 March 2023.

– Conversely, a seller who did not discuss the late notice of defects during the negotiations did not waive its right to invoke the defence that notice was not timely during the trial;[1428] and
– Similarly, the seller's mere checking of the defects after the period of time for notification had expired did not prevent the seller from subsequently relying on the buyer's failure to give notice within a reasonable time.[1429]

804. Good faith has also been employed to prevent a party from, or sanction a party for, relying on a contractual right in the presence of certain circumstances[1430]:

– Hence a buyer was prevented from relying on a clause in an agreement according to which a delay by the seller in exchanging defective goods would cause any unsettled instalment payments to be forfeited as the seller had in effect honoured its essential obligations since the non-performance related solely to a minor and ancillary duty;[1431] and
– In another case, it was held *obiter* that the seller could have been prevented from relying on the contractual exclusion or set off if the buyer had been entitled to claim damages for breach of contract.[1432]

805. Good faith has also been employed to justify the non-application of provisions of the CISG in certain cases:

– Hence a seller would not be able to rely on Article 39 CISG (whereby the buyer loses its right to rely on a lack of conformity if it fails to notify the seller) if to do so would constitute an abuse of right;[1433]

[1428] Oberlandesgericht Karlsruhe, 25 June 1997, 1 U 280/96, available at <https://cisg-online.org/search-for-cases?caseId=6237>, accessed 1 March 2023: "Article 7(1) and Article 80 of the CISG do not preclude the [seller] from making reference to the [buyer's] belated notice during the trial, even though the [seller] did not make the late notice about the lack of conformity an issue during pre-trial negotiations."

[1429] *Handelsgericht Zürich*, 30 November 1998, HG 930634, available at < https://cisg-online.org/search-for-cases?caseId=6386>, accessed 1 March 2023.

[1430] See in this regard BRUNNER/WAGNER, 85, §5 who state that good faith encompasses the prohibition of an abuse of rights.

[1431] Switzerland 24 October 2003 Commercial Court Zürich (*Mattress case*), available at < https://cisg-online.org/search-for-cases?caseId=6783>, accessed 1 March 2023.

[1432] Germany 5 October 1998 Appellate Court Hamburg (*Circuit boards case*), available at < https://cisg-online.org/search-for-cases?caseId=6442>, accessed 1 March 2023.

[1433] Switzerland 30 November 1998 Commercial Court Zürich (*Lambskin coat case*), available at <https://cisg-online.org/search-for-cases?caseId=6386>, accessed 1 March 2023; see also Germany 25 November 1998 Supreme Court (*Surface protective film case*), available at < https://cisg-online.org/search-for-cases?caseId=6325>, accessed 1 March 2023.

– A seller would also not be able to rely on Article 35(3) CISG (providing that the seller is not liable for a lack of conformity when the buyer was aware or should have been aware of the lack of conformity) when the seller was aware of the non-conformity at the time of conclusion of the contract and did not inform the buyer even when the buyer could not have been unaware of the lack of conformity;[1434]
– A seller can, contrary to Article 58(1) CISG, withhold delivery until payment of the purchase price when the buyer has previously unjustifiably refused performance of the contract of sale;[1435]
– No declaration of avoidance is required to claim damages on the basis of a substitute transaction pursuant to Article 75 CISG (as is usually required) when it is clear that the other party will not perform;[1436] and
– No interest is due between the date of the invoice and the first complaint, contrary to Article 78 CISG, when the delay in filing (two years after the delivery) was due to the complainant.[1437]

v. Good faith as a creative tool

806. Good faith has been employed in order to create solutions for issues which were not set out in the CISG:

– Good faith has therefore been invoked to determine that the interest rate that should be applied to a buyer's claim for damages is the interest rate in the country of the creditor as this is the interest rate that the buyer would be entitled to if it concluded a contract with a domestic seller;[1438] and

1434 *Oberlandesgericht Köln*, 21 May 1996, 22 U 4/96, available at <http://www.unilex.info/cisg/case/227>, accessed 1 March 2023.

1435 Germany 24 April 1997 Appellate Court Düsseldorf (*Shoes case*), available at < https://cisg-online.org/search-for-cases?caseId=6357>, accessed 1 March 2023.

1436 *Oberlandesgericht Hamburg*, 28 February 1997, 1 U 167/95, available at < https://cisg-online.org/search-for-cases?caseId=6235>, accessed 1 March 2023. In this latter case, the seller had expressly stated its impossibility to delivery within the fixed time; Oberlandsgericht München, 15 September 2004, 7 U 2959/04, available at < https://cisg-online.org/search-for-cases?caseId=6937>, accessed 1 March 2023 holding that avoidance of the contract is not required in order for a party to claim damages under Article 76 CISG when the obligor conclusively declares that it is not willing to render performance.

1437 *Depuradora Servimar, S.L. v. G. Alexandridis & CO.O.E.SC*, *Audiencia Provincial de Girona*, 21 January 2016, no. 80/20152, available at < http://www.unilex.info/cisg/case/1977 >, accessed 1 March 2023.

1438 Greece 2005 Decision 165/2005 of the Single-Member Court of First Instance of Larissa, available at <https://iicl.law.pace.edu/cisg/search/cases>, accessed 1 March 2023.

– Good faith was also invoked in order to ensure that appropriate relief was granted to an aggrieved buyer when the remedies provided by the CISG would not allow the buyer to be compensated for its loss. Thus, in one case before the Shanghai High People's Court, the seller unilaterally cancelled the buyer's authorisation before the contract completed and appointed another distributor without giving the buyer a reasonable period of notice or making arrangement for the stock. In addition, the seller issued letters to its customers stating that the buyer was no longer its distributor which led to a serious adverse impact on the buyer's ability to resell its stock. Due to the seller's appointment of its new sole distributor in China, it was not possible to compensate the buyer by way of replacing goods, repair, or deduction in price as stipulated in the CISG. Therefore, based on the principle of good faith, it was held that the seller should accept the return of the goods, and refund associated payments, customs duties and fees.[1439]

B. Other international conventions

807. Most other international conventions which refer to the notion of good faith are of limited importance due to the small number of contracting States and the fact that many have not entered into force as a result.[1440]

808. Many of these international conventions include a similar provision to Article 7(1) CISG, namely a provision stating that good faith in international trade shall be observed when interpreting the convention. These include:

– Article 6(1) Unidroit Convention on Agency in the International Sale of Goods 1983;[1441]
– Article 6(1) Unidroit Convention on International Financial Leasing 1988;[1442]
– Article 4(1) Unidroit Convention on International Factoring 1988;[1443]

[1439] China 21 September 2011 Shanghai High People's Court (*Electronic equipment case*), available at <https://cisg-online.org/search-for-cases?caseId=8234>, accessed 1 March 2023.

[1440] Information concerning the number of contracting parties and whether the relevant international convention has entered into force will be provided in a footnote when the relevant convention is first mentioned.

[1441] See < https://www.unidroit.org/instruments/agency/>, accessed 1 March 2023. The Convention has 5 contracting parties that have ratified but has not entered into force, 10 ratifications being required.

[1442] See < https://www.unidroit.org/instruments/leasing/convention/>, accessed 1 March 2023. There are 10 contracting parties that have ratified.

[1443] See <www.unidroit.org/instruments/factoring>, accessed 1 March 2023. There are 9 contracting parties that have ratified.

- Article 4(1) UN Convention on International Bills of Exchange and International Promissory Note 1988;[1444]
- Article 5 UN Convention on Independent Guarantees and Stand-By Letters of Credit 1995;[1445]
- Article 7(1) UN Convention on the Assignment of Receivables in International Trade 2001;[1446]
- Article 5(1) UN Convention on the Use of Electronic Communications in International Contracts 2005;[1447] and
- Article 2 UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 ("Rotterdam Rules").[1448]

809. Interestingly, the Convention on International Interests in Mobile Equipment 2001, also known as "the Cape Town Convention"[1449] has not incorporated the notion of good faith in its interpretation provision for reasons of predictability and certainty.[1450] Such reasons are understandable given the controversy surrounding the interpretation of Article 7(1) CISG.[1451]

810. Other than in the provision on the interpretation of the relevant convention, good faith is only rarely referred to in the other provisions of these conventions.

811. First, in the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods 1964, there is a specific manifestation

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[1444] See <https://uncitral.un.org/en/texts/payments/conventions/bills_of_exchange/status>, accessed 1 March 2023. There are 5 contracting parties that have ratified but the Convention has not entered into force, 10 ratifications being required.

[1445] See <https://uncitral.un.org/en/texts/payments/conventions/independent_guarantees/status >, accessed 1 March 2023. There are 8 contracting parties that have ratified the Convention.

[1446] The Convention is available at <https://uncitral.un.org/en/texts/securityinterests/conventions/receivables/status>, accessed 1 March 2023. There are 2 contracting parties that have ratified but the Convention has not entered into force, 5 ratifications being required.

[1447] The Convention is available at <https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications/status >, accessed 1 March 2023. There are 18 contracting parties that have ratified.

[1448] The Convention can be found at <https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status>, accessed 1 March 2023. There are 5 contracting parties that have ratified but the Convention has not entered into force, 20 ratifications being required.

[1449] See <http://www.unidroit.org/instruments/security-interests/cape-town-convention,> accessed 1 March 2023. There are 8 contracting parties.

[1450] ROY GOODE, Convention on International Interests in Mobile Equipment and Luxembourg Protocol Thereto on Matters Specific to Railway Rolling Stock: Official Commentary 159 (§ 4.61) (2008): "Paragraphs 1 and 2 express what has become standard principles of interpretation as exemplified by Article 7(1) of the [CISG] except that predictability has been substituted for good faith, which in high value cross-border financing transactions is considered to create unacceptable uncertainty."

[1451] See paras. 717 et seq.

of the general principle of good faith.[1452] As an exception to the general rule that an offer can be revoked, Article 5(2) provides that an offer cannot be revoked if "the revocation is not made in good faith or in conformity with fair dealing."[1453] This Convention is, however, of limited importance due to the fact that it was as a result of its shortcomings that the CISG was drafted, which as we have seen is the leading international convention in the field of international sales transactions.[1454] In addition, although the equivalent provision in the CISG (Article 16(2)(b)) no longer mentions good faith, it is cited as one of the specific manifestations of the principle of good faith.[1455]

812. Second, in the Unidroit Convention on International Factoring 1988, a duty of good faith is imposed on the supplier in a specific situation, namely where a supplier assigns a receivable to the factor despite an agreement between the supplier and the debtor prohibiting such assignment (Article 6(3)).[1456] Given the debate surrounding Article 6(1) Unidroit Convention on International Factoring which provides that "the assignment of a receivable by the supplier to the factor shall be effective notwithstanding any agreement between the supplier and the debtor prohibiting such assignment", the affirmation of this requirement to act in good faith was considered important even though it was in fact considered implicit in this Article.[1457] This provision places an indispensable duty of good faith on the supplier who has breached a contractual clause prohibiting assignment.[1458] Thus, Article 6(1) Unidroit Convention on International Factoring does not override the supplier's obligation of good faith or prevent the supplier from being liable for such a breach.[1459]

813. Finally, a duty to act in good faith is also explicitly imposed on a guarantor in the UN Convention on Independent Guarantees and Stand-By Letters of Credit

1452 See <https://www.unidroit.org/instruments/international-sales/ulfc-1964/>, accessed 1 March 2023.

1453 *Ibid*.

1454 See para. 715.

1455 See para. 765.

1456 See Unidroit 1986, Study LVIII, Document 25, 24, §52 available at <https://www.unidroit.org/english/documents/1986/study58/s-58-25-e.pdf>, accessed 1 March 2023.

1457 *Ibid*.

1458 FRANCO FERRARI, General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Conventions and the 1988 UNIDROIT Conventions on International Factoring and Leasing (1998) 10 Pace International Law Review 157, 179.

1459 INDIRA CARR/PETER STONE, International Trade Law (Taylor & Francis 2010) 508.

of 1995.[1460] Article 14 'Standard of conduct and liability of guarantor/issuer' accordingly provides as follows:

> (1) In discharging its obligations under the undertaking and this Convention, the guarantor/issuer shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit.
>
> (2) A guarantor/issuer may not be exempted from liability for its failure to act in good faith or for any grossly negligent conduct.[1461]

814. Neither the explanatory note to this Convention nor the *travaux préparatoires* discuss the meaning of good faith in relation to this provision. However, it has been suggested – in the context of the UCC – that an issuer would act contrary to good faith if it honours a demand when it knows or should know that it is fraudulent or refuses to honour a demand when it clearly has no defence.[1462] In this regard, Article 19 of this Convention sets out in detail when a guarantor or issuer can refuse to make payment.[1463]

[1460] The text of the UN Convention on Independent Guarantees and Stand-By Letters of Credit of 1995 can be found here: < https://uncitral.un.org/en/texts/payments/conventions/independent_guarantees>, accessed 1 March 2023.

[1461] *Ibid*.

[1462] JAMES G BARNES, Defining Good Faith Letter of Credit Practices (1994) 28 Loyola of Los Angeles Law Review 101, 104.

[1463] Article 19 provides as follows: "(1) If it is manifest and clear that: (a) Any document is not genuine or has been falsified; (b) No payment is due on the basis asserted in the demand and the supporting documents; or (c) Judging by the type and purpose of the undertaking, the demand has no conceivable basis, the guarantor/issuer, acting in good faith, has a right, as against the beneficiary, to withhold payment. (2) For the purposes of subparagraph (c) of paragraph (1) of this article, the following are types of situations in which a demand has no conceivable basis: (a) The contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized; (b) The underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking; (c) The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary; (d) Fulfilment of the underlying obligation has clearly been prevented by willful misconduct of the beneficiary; (e) In the case of a demand under a counter-guarantee, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter-guarantee relates. (3) In the circumstances set out in subparagraphs (a), (b) and (c) of paragraph (1) of this article, the principal/applicant is entitled to provisional court measures in accordance with article 20."

III. International Academic Restatements

815. Good faith plays a significant role in many international academic restatements including, most notably, the PICC (A.), the PECL (B.), the DCFR (C.), the OHADAC Principles (D.), and the PLACL (E.).

816. The role of good faith under the CESL, the PACL and the OHADA draft uniform contract law will not be examined. On 16 December 2014, the European Commission officially placed the CESL on the list of proposals to be modified or withdrawn.[1464] The PACL and the OHADA draft uniform contract law are not discussed as they are still under development.

A. PICC

817. This section discusses the aims and applicability of the PICC (1.) before turning to the role and content of good faith under this instrument (2.).

1. Aims and applicability

818. The PICC are intended to be an international restatement of general principles of contract law.[1465]

819. They set forth rules for international commercial contracts[1466] and contain 211 articles.[1467]

820. As soft law, they will be applicable when the parties have agreed that their contract will be governed by them.[1468] They may also be applied by arbitrators when

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[1464] See <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-common-european-sales-law>, accessed 1 March 2023.

[1465] PICC Official Commentary, Introduction to the 1994 edition, xxviii.

[1466] PICC 2016, Preamble, point one.

[1467] PICC Official Commentary, Introduction to the 2016 edition, viii.

[1468] PICC 2016, Preamble, point two. In this regard, see also FABIO BORTOLOTTI, The PICC as a basis for alternative choice-of-law clauses, with particular reference to the ICC model contracts (2014) 19 Unif L Rev 542 at 548, in which he notes that some ICC Model Contracts contain express references to the PICC including Article 32A ICC Model International Franchising Contract (ICC Publication 712) which provides as follows: "This Agreement is governed by the rules and principles of law generally recognized in international trade together with the Unidroit Principles on International Commercial Contracts."; Article 24 Model Distributorship Contract which provides as follows: "Any questions relating to this Agreement that are not expressly or implicitly settled by the provisions contained in this Agreement shall

the parties have agreed that their contract will be governed by the *lex mercatoria* or general principles of law and when the parties have not chosen any law to govern their contract.[1469]

821. They may further be used to interpret or supplement domestic law or international uniform law instruments such as the CISG which may govern the contract in question.[1470]

2. Role of good faith and fair dealing

822. Good faith and fair dealing is both an interpretation and supplementation tool of the PICC (Article 1.6) (a.). It imposes on the parties a general duty to act in accordance with good faith and fair dealing (Article 1.7) (b.). The most general application of this duty is found in the prohibition of inconsistent behaviour (Article 1.8) (c.). Many specific applications of this duty can be found littered throughout the PICC (d.).

be governed, in the following order: • by the principles of law generally recognized in international trade as applicable to international distributorship contracts; • by the relevant trade usages; and • by the Unidroit Principles on International Commercial Contracts."; He also notes at footnote 6 that the following ICC Model Contracts contain similar provisions to the latter contract: ICC Model Agency Contract, ICC no 644, 2nd edn (2002); ICC Model Distributorship Contract, ICC no 646, 2nd edn (2002) (sole importer-distributor); ICC Model M&A Contract I: Share Purchase Agreement, ICC no 656 (2004); ICC Model Selective Distributorship Contract, ICC no 657 (2004); ICC Model Contract for the Turnkey Supply of an Industrial Plant, ICC no 653 (2003). The wording of the clause is slightly different in the latter contract.

[1469] PICC 2016, Preamble, points three and four; According to the survey carried out by LAKE sent to British and international practitioners of commercial contract law or international arbitration, in 41% of arbitral cases referring to the PICC, the latter were applied in the absence of a choice of law and in 39% of such cases, the PICC were applied as general principles of law, lex mercatoria and the like, see LAKE, 671.

[1470] Preamble, PICC 2016, points five and six.

a. Good faith and fair dealing as an implicit interpretation and supplementation tool of the PICC

823. Although not stated expressly, good faith and fair dealing is a purpose of the PICC which should be taken into account when interpreting the same, according to Article 1.6(1) 'Interpretation and Supplementation of the Principles'[1471].[1472]

824. As an example, if Article 6.1.17(2) 'Permission refused' (which provides that "[w]here the refusal of a permission renders the performance of the contract impossible in whole or in part, the rules on non-performance apply.") is interpreted in accordance with good faith and fair dealing, this would mean that in a case where performance is only rendered impossible in one country and not another, a party would not be able rely on the refusal of public permission as an excuse for non-performance in the latter country.[1473]

825. Good faith and fair dealing is also considered to be a fundamental principle which can be used to fill gaps in the PICC (Article 1.6(2)[1474]).[1475]

b. Parties' general and mandatory duty to act in accordance with good faith and fair dealing (Article 1.7 PICC)

826. Article 1.7 PICC provides that:

> [e]ach party must act in accordance with good faith and fair dealing in international trade.
>
> [t]he parties may not exclude or limit this duty.

827. Article 1.7 PICC is a provision of a fundamental and mandatory nature (i.) with an autonomous meaning and scope (ii.). Its goal is to import fairness and equity into the application of the PICC (iii.). However, it has a limited practical application (iv.) and the consequences of a violation are limited to a non-application of a provision of the PICC or the parties' contract (v.).

[1471] Article 1.6(1) PICC provides as follows: "In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application."

[1472] PICC Official Commentary, 16 stating that "the general duty of good faith and fair dealing found in Article 1.7 although imposed on the parties may be seen as the expression of the underlying purpose of the PICC to promote the observance of good faith and fair dealing in contractual relations."

[1473] PICC Official Commentary, 215 in relation to Article 6.1.17 'Permission refused.'

[1474] Article 1.6(2) PICC provides as follows: "Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles."

[1475] PICC Official Commentary, 17.

i. Fundamental and mandatory nature

828. The general duty to act in accordance with good faith and fair dealing found in Article 1.7 PICC is considered to be one of the fundamental ideas that underlies the PICC.[1476]

829. As such, it is unsurprising that parties are forbidden from derogating from this principle in Article 1.7(2) PICC which provides that "[t]he parties may not exclude or limit this duty."[1477] Putting aside the issue of whether or not provisions of "soft law" such as the PICC can ever be mandatory, it is unlikely that parties would expressly agree to derogate from this duty.[1478] Exclusions or limitations are more likely to be implicit.[1479]

ii. Autonomous meaning and scope

830. The reference to good faith and fair dealing *in international trade* makes it clear that this is an objective standard with an autonomous meaning, distinct from the meaning it has in national legal systems taking into account the specificities of international trade. The meaning of good faith and fair dealing may vary from one trade sector to another and may even vary within one trade sector "depending on the socio-economic environment in which the enterprises operate, their size and technical skill […]".[1480]

831. It has been submitted that the addition of the phrase "fair dealing" to the notion of good faith is of no significance and that it was added to ensure that US, Canadian and Australian lawyers would consider the notion of "good faith" to also encompass the notion of fair dealing.[1481]

832. It has been stated that "Art. 1.7 is certainly no 'international restatement' of the common core of global contract law."[1482] The mandatory general duty of good

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1476 VOGENAUER, Introduction, 18, §39; PICC Official Commentary, 18.

1477 With respect to the mandatory nature of this provision, see *GEC Marconi Systems Pty Ltd. v BHP Information Technology Pty Ltd. and Others*, Federal Court of Australia, NG733 of 1997, 12 February 2003, available at < http://www.unilex.info/case.cfm?id=845>, accessed 1 March 2023; *Enerchem Transport Inc. et al vs Nicolas R. Gravino et al*, Superior Court, Province of Quebec, District of Montreal, 22 August, 2005, 500-05-031756-974, available at < http://www.unilex.info/case.cfm?id=1546>, accessed 1 March 2023. See also PICC Official Commentary, 14, 20.

1478 VOGENAUER, Article 1.7, 225, §43.

1479 *Ibid*.

1480 BONELL, PICC, 132; VOGENAUER, Article 1.7, 212, §15 and 213, §17; PICC Official Commentary, 19–20.

1481 VOGENAUER, Article 1.7, 214, §19.

1482 *Idem*, 208, §4.

faith and fair dealing found at Article 1.7 PICC cannot therefore be necessarily equated with the principle of good faith as a general principle of law.[1483]

833. With respect to its scope, national courts have held that this concept is much broader than the same concept under national law.[1484]

iii. Goal of importing fairness and equity

834. The goal of this provision is to import fairness and equity into international commercial contracts[1485] and to mitigate the rigours of a strict application of the law.[1486]

iv. Limited practical application

835. Interestingly over 12% of all cases referring to the PICC (69 out of 554) on the unilex database (https://www.unilex.info/instrument/principles) involved Article 1.7 PICC.[1487] This is surprising given the purported limited practical application of Article 1.7 PICC.

836. Indeed, the provision has a limited role firstly because the PICC contain so many specific applications of the principle of good faith[1488] and secondly because the PICC do not apply to consumer-business relationships where the principle of good faith usually plays a greater role due to the unequal bargaining power between the parties.[1489]

[1483] See, in this regard, para. 648 above.

[1484] See CME *Coopérative Maritime Etaploise S.A.C.V. v. Bos Fishproducts Urk BV*, RB Zwolle, 5 March 1997, HA ZA 95-640, available at <http://www.unilex.info/case.cfm?id=640>, accessed 1 March 2023. See also *Deustsche Seereederei Rostock GMBH v. Martico SL*, Tribunal Supremo (Sala de lo Civil), 4 July 2006, RJ2006/6080, available at <http://www.unilex.info/case.cfm?id=1158>, accessed 1 March 2023, assimilating Section 242 BGB with Article 1.7 PICC and Article 1:202 PECL.

[1485] BONELL, PICC, 127–128; PICC Official Commentary, xxix. See also VOGENAUER, Article 1.7, 211, §13.

[1486] VOGENAUER, Article 1.7, 219, §26.

[1487] See also MAYER, Unidroit, 106 noting that Article 1.7 PICC (good faith and fair dealing) has met with particular success.

[1488] According to the PICC Official Commentary, 18, these include Articles 1.9(2); 2.1.4(2)(b), 2.1.15, 2.1.16, 2.1.18 and 2.1.20; 2.2.4(2), 2.2.5(2), 2.2.7 and 2.2.10; 3.2.2, 3.2.5 and 3.2.7; 4.1(2), 4.2(2), 4.6 and 4.8; 5.1.2 and 5.1.3; 5.2.5; 5.3.3 and 5.3.4; 6.1.3, 6.1.5, 6.1.16(2) and 6.1.17(1); 6.2.3(3)(4); 7.1.2, 7.1.6 and 7.1.7; 7.2.2(b)(c); 7.4.8 and 7.4.13; 9.1.3, 9.1.4 and 9.1.10(1).

[1489] VOGENAUER, Article 1.7, 221, §31.

837. According to VOGENAUER:

> it is a programmatic guideline that informs the spirit of the entire instrument and can serve as a last resort to mitigate extreme cases of hardship rather than a sharp sword that gives judges and arbitrators licence to engage in palm tree justice.[1490]

838. The scope of this provision is thus restricted to essentially three scenarios:

839. The first scenario concerns new circumstances which were not foreseen by the drafters of the PICC or parties to future contracts and that cannot be dealt with by the provisions on the interpretation and implication of terms.[1491]

840. The second scenario concerns cases where a party exercises its contractual rights in an abusive manner (doctrine of abuse of rights)[1492] or when the exercise of the right is disproportionate to the originally intended result.[1493]

841. The third scenario concerns cases requiring a more flexible and less technical application of the contract or the PICC (*de minimis non curat lex*).[1494] For example, Article 2.1.16 PICC 'Duty of confidentiality' provides that where information is given to a party as confidential, the other party is under a duty not to disclose such information. However, a more flexible interpretation of this Article may mean that even where the information is not expressly stated to be confidential, a party may still be under a duty not to disclose or use this information in view of the particular nature of the information or the professional qualifications of the parties.[1495]

iv. Consequences of a violation

842. The burden of proof lies on the party alleging that the other party has failed to act in accordance with good faith and fair dealing.[1496] Given the difficulty of

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1490 *Ibid*.

1491 VOGENAUER, Article 1.7, 221, §32.

1492 PICC Official Commentary, 19. This was the case in *AB „Specializuota komplektavimo valdyba" v. Vilniaus „?žuolyno" gimnazija*, 9 January 2015, Supreme Court of Lithuania, 3K-3-63/2015, available at <http://www.unilex.info/case.cfm?id=1889>, accessed 1 March 2023. The court referred to Article 1.7 PICC and the good faith provision under Lithuanian law when holding that the customer could not refuse to return the money deposit due to the delays in the works as this was a guarantee for the proper final performance of the contact whilst the penalty clause was for delays in the works.

1493 PICC Official Commentary, 19.

1494 VOGENAUER, Article 1.7, 222–223, §§36–37.

1495 PICC Official Commentary, 64. See also ZULOAGA RIOS, Article 2.1.15, 367, §11.

1496 VOGENAUER, Article 1.7, 225, §44.

reaching a consensus on the content of good faith at this level, it is sufficient to show that the standard is common and well accepted.[1497]

843. The only consequence that is attached to Article 1.7 PICC is the non-application of a contractual provision or a provision of the PICC.[1498]

844. For example, a party may not be able to invoke Article 7.1.3 PICC 'Withholding performance'[1499] (which entitles a party to withhold performance in the event that the other party only performs partially) if to do so would be contrary to the duty to act in accordance with good faith and fair dealing.[1500] In addition, a party may not be able to rely on Article 7.3.1(2)(c) PICC 'Right to terminate the contract' (allowing a party to terminate when the failure of the party to perform an obligation amounts to fundamental non-performance and the non-performance is intentional or reckless) when the non-performance, even though committed intentionally, is insignificant.[1501]

845. In case of an abuse of a contractual right, the scope of the contractual right that is exercised abusively can be restricted.[1502]

c. General application of the general duty to act in accordance with good faith and fair dealing: the prohibition of inconsistent behaviour (Article 1.8 PICC)

846. Article 1.8 PICC provides that "[a] party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party has acted in reliance to its detriment."[1503] This Article is considered to be the most general application of the principle of good faith and fair dealing contained at Article 1.7 PICC.[1504]

1497 *Idem*, 212, §16.

1498 *Idem*, 220, §§28 and 29; 223–224, §40.

1499 Article 7.1.3 PICC provides as follows: "(1) Where the parties are to perform simultaneously, either party may withhold performance until the other party tenders its performance. (2) Where the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party has performed."

1500 PICC Official Commentary, 230 in relation to Article 7.1.3 'Withholding performance.'

1501 *Idem*, 255.

1502 VOGENAUER, Article 1.7, 222, §35.

1503 The text of the PICC can be found here: <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>, accessed 1 March 2023.

1504 VOGENAUER, Article 1.8, 227, §2; PICC Official Commentary, 21. For examples of national court decisions referring to the prohibition of inconsistent behaviour under the PICC, see Tribunal Supremo, 12 December 2011, 872/2011, available at <

847. Article 1.8 PICC is the equivalent to the concept of *venire contra factum proprium* or *théorie de l'apparence* in Civil law legal systems and to the doctrine of estoppel in Common law legal systems.[1505]

848. This provision made its first appearance in the 2004 edition of the PICC in order to meet concerns that commercial users and Common law lawyers would not consider the duty to act in accordance with good faith and fair dealing at Article 1.7 PICC to encompass the prohibition of inconsistent behaviour.[1506]

849. Specific applications of this prohibition of inconsistent behaviour[1507] can be found throughout the PICC.[1508]

http://www.unilex.info/case.cfm?id=1651>, accessed 1 March 2023; *Jose Luis Andres Manzoni Wasmosy vs Indert S/Obligacion de Hacer Escritura Publica y Otros*, Tribunal de Apelación en lo Civil y Comercial de Asunción, 24 October 2014, SENTENCIA Nº95, available at < http://www.unilex.info/case.cfm?id=1866>, accessed 1 March 2023; *Hydro-Québec c. Construction Kiewit cie*, 16 May 2014, Cour d'Appel, Province de Québec, District of Montreal, 500-09-021377-114, available at <http://www.unilex.info/case.cfm?id=1922>, accessed 1 March 2023.

1505 BONELL, PICC, 134; VOGENAUER, Article 1.8, 226, §1.

1506 VOGENAUER, Article 1.8, 227, §3.

1507 With respect to the specific applications of the prohibition of inconsistent behaviour, see *Jose Luis Andres Manzoni Wasmosy vs Indert S/Obligacion de Hacer Escritura Publica y Otros*, Tribunal de Apelación en lo Civil y Comercial de Asunción, 24 October 2014, Sentencia Nº95, available at < http://www.unilex.info/case.cfm?id=1866>, accessed 1 March 2023.

1508 This includes: (i.) the rule which prevents an offer from being revoked when it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has in fact acted in reliance on the offer (Article 2.1.4(2)(b) PICC); (ii.) the rule which prevents a party from invoking surprising terms contained in standard terms which the other party could not reasonably have expected and would not have accepted had it been aware of them (Article 2.1.20 PICC 'Surprising terms'); (iii.) the rule which prevents a party from invoking contractual clauses requiring modifications or termination to be in a particular form when its conduct has caused the other party to believe that it will not insist on such formalities and it has acted in reliance on such conduct (Article 2.1.18 PICC 'Modification in a particular form'); (iv.) the rule which prevents a principal from relying on the lack of authority of its agent in the case that the principal caused the third party to believe that the agent had authority to act and was acting within the scope of its authority (Article 2.2.5(2) PICC 'Agent acting without or exceeding authority'); (v.) the rule which prevents a party from modifying or revoking rights conferred by the contract on the beneficiary when the beneficiary has accepted them or reasonably acted in reliance on them (Article 5.2.5 PICC 'Revocation'); and (vi.) the rule which prevents a party from alleging non-performance of the other party when it caused the non-performance (Article 7.1.2 PICC 'Interference by the other party').

d. Specific applications of the general duty to act in accordance with good faith and fair dealing

850. Many specific applications of the general duty to act in accordance with good faith and fair dealing can be found littered throughout the PICC.[1509] Whilst some still refer to "good faith and fair dealing",[1510] "reasonable commercial standards of fair dealing"[1511] or "bad faith"[1512], others have become independent rules in their own right and do not refer to good faith (and fair dealing).[1513] Only the

[1509] According to the PICC Official Commentary, 18, these include Articles 1.9(2); 2.1.4(2)(b), 2.1.15, 2.1.16, 2.1.18 and 2.1.20; 2.2.4(2), 2.2.5(2), 2.2.7 and 2.2.10; 3.2.2, 3.2.5 and 3.2.7; 4.1(2), 4.2(2), 4.6 and 4.8; 5.1.2 and 5.1.3; 5.2.5; 5.3.3 and 5.3.4; 6.1.3, 6.1.5, 6.1.16(2) and 6.1.17(1); 6.2.3(3)(4); 7.1.2, 7.1.6 and 7.1.7; 7.2.2(b)(c) ; 7.4.8 and 7.4.; 9.1.3, 9.1.4 and 9.1.10(1) PICC.

[1510] Article 4.8 PICC 'Supplying an omitted term', Article 5.1.2 PICC 'implied obligations', Article 5.3.3 PICC 'interference with conditions' and Article 5.3.4 PICC 'duty to preserve rights'.

[1511] Article 3.2.2 PICC 'Relevant mistake', Article 3.25 PICC 'Fraud' and Article 3.27 PICC 'Gross disparity'.

[1512] Article 2.1.15 PICC 'Negotiations in bad faith'.

[1513] These include Articles 1.9(2) PICC (whereby parties are not bound by a usage which is widely known and regularly observed in international trade by parties in the particular trade concerned where the application would be unreasonable); 2.1.16 PICC (the duty of confidentiality); 2.1.4(2)(b) PICC (whereby an offer cannot be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer); 2.1.18 PICC (providing that a party may be precluded by its conduct from asserting a form requirement for a modification or termination to the extent that the other party has reasonably relied on that conduct); 2.1.20 PICC (providing that terms contained in standard terms that the other party could not have reasonably expected are not effective); 2.2.4(2) PICC (providing that a third party may exercise its rights against the agent and also the real owner of the business when it discovers the real owner of the business); 2.2.5(2) PICC (providing that a principal may not invoke the lack of authority of its agent against the third party when it has caused the third party reasonably to believe that the agent has authority to act on behalf of the principal); 2.2.7 PICC (providing that a contract may be avoided if a contract concluded by an agent involves the agent in a conflict of interests with the principal); 2.2.10 PICC (providing that termination of authority is not effective in relation to the third party unless the third party knew or ought to have known of it); 4.1(2) PICC (the objective rule of interpretation according to which the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances); 4.2(2) PICC (the objective rule of interpretation of statements and other conduct); 4.6 PICC (the contra proferentem rule); 5.1.1 PICC (providing that "the contractual obligations of the parties may be express or implied" (PICC Official Commentary, 151)); 5.2.5 PICC (providing that parties may not modify or revoke rights conferred by the contract on the beneficiary when the latter has relied on them); 6.1.3 PICC (providing that an obligee may reject an offer to perform in part at the time performance is due unless it has no legitimate interest in doing so); 6.1.5 PICC (providing that an obligee may reject an earlier performance unless it has no legitimate

former, as well as the duty to cooperate (Article 5.1.3) (the main specific application of the duty to act in accordance with good faith and fair dealing) are discussed below.

851. These specific applications cover the entire life of a contractual relationship,[1514] from the pre-contractual stage to the performance stage of the contract.[1515] The PICC thus follow the approach taken by the majority of Civil law legal systems which apply the principle of good faith to pre-contractual negotiations.[1516]

852. The duty to act in accordance with good faith and fair dealing prohibits bad faith conduct both during the contractual negotiations (i.) and at the time of the formation of the contract (ii.). One may have recourse to good faith and fair dealing when supplementing the parties' contract (iii.) and implying terms into the same (iv.). The main specific application of the duty to act in accordance with good faith and fair dealing at the performance stage is the duty to cooperate (v.).

interest in doing so); 6.1.16(2) PICC (providing that when the permission only affects some terms only, it may be reasonable in light of the circumstances to uphold the remaining contract even if the permission is refused); 6.1.17(1) PICC (providing that if the refusal of a permission affects the validity of some terms only of the contract, then it may be reasonable to uphold the remaining contract in light of the circumstances); 6.2.3(3)(4) PICC (providing that the court may intervene to terminate the contract or adapt the contract in case of hardship); 7.1.2 PICC (providing that a party may not rely on the non-performance of the other party to the extent that it caused or bore the risk of this non-performance), 7.1.6 PICC (providing that exemption clauses may not be invoked if it would be grossly unfair to do so); 7.1.7 PICC (force majeure clause); 7.2.2(b)(c) PICC (providing that performance of a non-monetary obligation cannot be sought where performance is unreasonably burdensome or expensive or where performance may reasonably be obtained from another source); 7.4.8 PICC (rule concerning the duty to mitigate one's loss); 7.4.13 PICC (concerning clauses providing for an agreed payment for non-performance); 9.1.3 PICC (providing that a right to non-monetary performance may be assigned only if the assignment does not render the obligation significantly more burdensome); 9.1.4 PICC (providing that a right to non-monetary performance may be partially assigned only if the assignment does not render the obligation significantly more burdensome) and 9.1.10(1) PICC (providing that until the obligor receives a notice of the assignment from either the assignor or the assignee, it is discharged by paying the assignor). Articles 2.1.4(2)(b), 2.1.18, 2.1.20, 2.2.5(2), 5.2.5, and 7.1.2 PICC are also deemed to be derived from the prohibition of inconsistent behaviour (Article 1.8 PICC).

1514 PICC Official Commentary, 18.

1515 VOGENAUER, Article 1.7, 209, §8.

1516 BONELL, PICC, 129; ZULOAGA RIOS, Article 2.1.15, 354, §24. See also, Part III, Chapter one.

i. The prohibition of bad faith negotiations

853. Article 2.1.15 PICC 'Negotiations in bad faith' is considered to be a specific application of the general duty to act in accordance with good faith and fair dealing.[1517] It provides as follows:

> (1) A party is free to negotiate and is not liable for failure to reach an agreement.
>
> (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
>
> (3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.[1518]

854. According to the Official Commentary, a party negotiates in bad faith if it deliberately or negligently misleads the other party as to the nature or terms of the proposed contract either by actually misrepresenting facts or by not disclosing facts which, given the nature of the parties and/or the contract, should be disclosed.[1519]

855. Pursuant to Article 2.1.15(2) PICC, a party may further be liable if it breaks off negotiations abruptly, at a certain point of the negotiations, without justification.[1520] In determining whether a party is liable for breaking off negotiations, emphasis will, in particular, be placed on the conduct of the party breaking off the negotiations and whether such conduct induced justifiable reliance by the other party on the successful outcome of the negotiations.[1521] In addition, the more advanced the negotiations, the longer that the negotiations have gone on and the greater the number of issues agreed on, the more likely that a party will be held liable for breaking off the negotiations.[1522] However, good reasons such as a better offer from another party or disloyal conduct by the other party may justify the breaking off of negotiations.[1523]

856. Article 2.1.15(3) PICC specifically prohibits the entering into, or the continuation, of negotiations without any intention of contracting, so-called "sham negotiations". Examples include cases where a party enters into negotiations in order to prevent the other party from entering into negotiations with a competitor, to escalate the price through parallel negotiations with a third party or with

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1517 PICC Official Commentary, 18.

1518 The text of the PICC can be found here: <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>, accessed 1 March 2023.

1519 PICC Official Commentary, 60.

1520 *Idem*, 62.

1521 ZULOAGA RIOS, Article 2.1.15, 358, §34.

1522 *Idem*, 359, §§38–39.

1523 *Idem*, 360, §39.

the sole aim of obtaining confidential information from the other party.[1524] In this regard, the duty not to continue negotiations when intending not to reach an agreement obliges the parties to put an end to the negotiations as soon as it becomes apparent that the negotiations will fail.[1525]

857. If there is an express agreement to negotiate in good faith, this gives rise to a duty to negotiate seriously with an intent to conclude an agreement but does not mean that an agreement must be reached.[1526] However, there is a heightened duty imposed on the parties to an express agreement to negotiate in good faith and it would therefore be bad faith for a party in these circumstances to refuse to continue the negotiations only after preliminary contacts.[1527]

858. The burden of proof lies with the party alleging that the other party acted in bad faith during the negotiations.[1528]

859. In the event that a party is liable for negotiating in bad faith or for breaking off negotiations in bad faith, only the losses incurred during the negotiations are recoverable.[1529] The profit that would have been obtained if the contract had been concluded is not recoverable except if the parties had expressly agreed on a duty to negotiate in good faith.[1530] The right to request performance of the obligation to negotiate in good faith is only available if the parties had expressly agreed on a duty to negotiate in good faith.[1531]

ii. The prohibition of bad faith conduct at the time of the formation of the contract

860. The duty to act in accordance with good faith and fair dealing also applies at the time of the formation of the contract.

861. The duty to act in accordance with good faith and fair dealing accordingly prevents a party from knowingly benefiting from the mistaken party's error. Hence, Article 3.2.2(1)(a) PICC 'Relevant mistake' allows a party in error to avoid a contract for mistake if "the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the

1524 ZULOAGA RIOS, Article 2.1.15, 355, §26.

1525 HANS VAN HOUTTE, The Unidroit Principles of International Commercial Contracts (1995) 11 Arb Intl 377.

1526 PICC Official Commentary, 61.

1527 ZULOAGA RIOS, Article 2.1.15, 357, §30.

1528 *Idem*, 363, §48.

1529 *Idem*, 361, §42.

1530 ZULOAGA RIOS, Article 2.1.15, 361, §43. See also PICC Official Commentary, 61, stating that remedies entitling a party to the expectation or positive interest can be sought.

1531 *Ibid*.

contract on materially different terms or would not have concluded it at all" and "the other party […] knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error."[1532]

862. Similarly, Article 3.2.5 PICC 'Fraud' allows a party to avoid a contract for fraud when it has been "led to conclude the contract by the other party's fraudulent representation which according to reasonable commercial standards of fair dealing, the latter party should have disclosed." A party is more likely to be obliged to disclose information if it concerns its own performance, if its performance is of a professional nature, if the information is particularly difficult to obtain or if it is particularly important for achieving the aims of the contract.[1533]

863. Finally, Article 3.2.7(2) PICC 'Gross Disparity' allows a court to adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing when a contract or term gives one of the parties an excessive advantage.[1534]

iii. Good faith and fair dealing as a supplementation tool of the parties' contract (Article 4.8(2)(c) PICC)

864. Article 4.8 PICC allows terms to be supplied into a contract when a term which is important for the determination of the parties' rights and duties has been omitted.[1535] In determining the appropriate term to supply, Article 4.8(2)(c) PICC provides that regard shall be had to good faith and fair dealing.[1536]

1532 HUBER, Article 3.2.2, 483, §18.

1533 DU PLESSIS, Article 3.2.5, 501 §19.

1534 *Idem*, 513, §5. Article 3.2.1(1) PICC provides in relevant part that "A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage." Article 3.2.7(2) PICC provides as follows: "Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing."

1535 Article 4.8(1) PICC provides as follows: "Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied."

1536 Article 4.8(2)(c) PICC provides as follows: "In determining what is an appropriate term regard shall be had, among other factors to good faith and fair dealing."

iv. Good faith and fair dealing as a source of implied obligations (Article 5.1.2 PICC)

865. Article 5.1.2(c) PICC provides that good faith and fair dealing is one of the sources of implied obligations.[1537]

v. Main specific application of the duty to act in accordance with good faith and fair dealing: the duty to cooperate (Article 5.1.3 PICC)

866. The duty to act in accordance with good faith and fair dealing primarily imposes a duty on the parties to cooperate with each other during the performance of the contract, as espoused at Article 5.1.3 PICC.[1538] Whilst seen as a specific application of the principle of good faith and fair dealing, the duty to cooperate is emerging as a general principle in its own right.[1539]

867. Although this duty applies to all contracts, it comes to the fore in long-term contracts.[1540]

868. The duty to cooperate has two aspects.

869. The first aspect is passive and imposes a duty on the parties not to do anything which may thwart the performance of the other party.[1541] This is reflected in Article 5.3.3 PICC 'Interference with condition' which prevents a party from relying on the non-fulfilment or fulfilment of a condition in the event that it has prevented or brought about the fulfilment contrary to the duty of good faith and fair dealing.[1542] This is further reflected in Article 5.3.4 PICC 'Duty to preserve rights' which prevents a party from acting contrary to good faith and fair dealing so as to prejudice the other party's rights pending fulfilment of a condition.[1543]

1537 Article 5.1.2(c) PICC provides as follows: "Implied obligations stem from good faith and fair dealing."

1538 VOGENAUER, Article 5.1.3, 620, §1. See also PICC Official Commentary, 153.

1539 VOGENAUER, Article 5.1.3, 620–621, §2.

1540 *Idem*, 620, §1.

1541 *Idem*, 622, §4.

1542 This Article is also deemed to be a specific application of the general rule on good faith and fair dealing (Article 1.7 PICC) and the prohibition of contradictory conduct (Article 1.8 PICC), see PICC Official Commentary, 18; ROWAN, Article 5.3.3, 701, §4.

1543 PICC Official Commentary, 18, 182; ROWAN, Article 5.3.4, 709, §§5–6. It should be noted that this is also a specific application of the prohibition of contradictory behaviour (Article 1.8 PICC).

870. The second aspect is active and imposes a duty on the parties to aid performance by the other party.[1544] This may include a duty to disclose certain information.[1545]

871. For example, good faith and fair dealing may require a party who is located in a State which requires a public permission to inform the other party of the existence of this requirement (Article 6.1.14 PICC 'Application for public permission').[1546] In addition, in case of a change of place of business which occurs after the conclusion of the contract, the duty to act in accordance with good faith and fair dealing may impose on a moving party the duty to inform the other in due time so as to enable the latter to make such arrangements as may be necessary, especially given the importance of the place of business for the place of performance (Article 6.1.6 PICC 'Place of performance').[1547] Further, in a case where the non-performing party has asked the aggrieved party whether it will accept late performance or the aggrieved party has discovered from another source that the non-performing party intends to perform, the duty to act in accordance with good faith and fair dealing may require the aggrieved party to inform the non-performing party if it does not wish to accept the late performance, failing which it may be liable for damages (Article 7.3.2(2) PICC 'Notice of termination').[1548] The extent to which a party is obliged to inform the other depends on its degree of professionalism.[1549] Thus, the more professional a purchaser is the less the constructor is under a duty to warn the purchaser that its order will not produce the purchaser's wanted end result.[1550]

872. Contracting parties, however, are not required to act selflessly. Parties are only under a duty to cooperate to the extent that the cooperation envisaged can be reasonably expected.[1551] Drawing the line on what type of cooperative behaviour can be reasonably expected of the parties, however, is no easy task and will obviously depend on the circumstances of the case.

873. The principle of good faith and fair dealing and, in particular, the duty on the parties to cooperate with each other, also inspires Article 6.2.3 PICC which entitles a disadvantaged party to request renegotiations in case of hardship.[1552]

1544 VOGENAUER, Article 5.1.3, 622, §5.

1545 *Idem*, 623, §7.

1546 PICC Official Commentary, 206–207 in relation to Article 6.1.14 PICC 'Application for public permission.'

1547 *Idem*, 194.

1548 *Idem*, 257.

1549 *Högsta Domstolen* (Supreme Court), 23 December 20123, NJA s. 117423, available at <http://www.unilex.info/case.cfm?id=1827>, accessed 1 March 2023.

1550 *Idem*.

1551 VOGENAUER, Article 5.1.3, 624, §8.

1552 MCKENDRICK, Article 6.2.3, 819, §1.

Both the request and the conduct of the parties during the renegotiation are subject to the general principle of good faith and fair dealing and the duty of cooperation. A party will hence be acting contrary to good faith and fair dealing if it requests negotiations without honestly believing that a case of hardship exists or requests negotiations in order to obtain a tactical advantage. Bad faith conduct will also be established if a party fails to act in a constructive manner during the negotiations, by for example, obstructing the negotiations or failing to provide all necessary information.[1553]

B. PECL

874. This section discusses the aims and applicability of the PECL (1.) before turning to the role of good faith and fair dealing (2.) under the PECL.

1. Aims and Applicability

875. The PECL are soft law rules[1554] established by a commission of leading European contract law academics, known as the Lando Commission[1555], and set out the general common rules which apply to contracts in Europe (Article 1:101(1) PECL[1556]). The Lando Commission aimed to restate European contract law.[1557] Compared to the PICC, the PECL aim to harmonize European contract law rather than global contract law and also cover contract law in general rather than just international commercial contracts.[1558]

876. According to Article 1:101(2) PECL, the PECL will apply if the parties have agreed that their contract is governed by them. They may also be applied by the arbitral tribunal when the parties have agreed that their contract is governed by general principles of law or the *lex mercatoria* or the like (Article 1:101(3)(a) PECL) and when they have not chosen a law to govern their contract (Article 1:101(3)(b) PECL). They may also apply in the case where an issue arises which is not dealt with by the applicable law (Article 1:101(4) PECL).[1559]

1553 PICC Official Commentary, 225.

1554 FLECHTNER, 297; ZIMMERMANN, PECL, 35.

1555 ZIMMERMANN, PECL, 4. This Commission consisted of 23 members from all member states of the European Union.

1556 Article 1:101(1) PECL provides as follows: "These Principles are intended to be applied as general rules of contract law in the European Communities."

1557 ZIMMERMANN, PECL, 6.

1558 *Idem*, 7.

1559 The text of the PECL can be found here: < https://www.trans-lex.org/400200/_/pecl/>, accessed 1 March 2023.

2. Role of good faith and fair dealing

877. Good faith and fair dealing is used as a tool for the interpretation and supplementation of the PECL (a.). In addition, contracting parties have a general duty to act in accordance with good faith and fair dealing (b.), which includes an implicit prohibition of contradictory conduct (c.).

878. The general duty to act in accordance with good faith and fair dealing has many specific applications. These include firstly those specific applications that have evolved into independent rules in their own right.[1560] Other specific applications of the general duty to act in accordance with good faith and fair dealing refer explicitly to "good faith and fair dealing".[1561] Only the latter specific applications will be discussed below as well as the main specific application of the duty to act in accordance with good faith and fair dealing, namely, the duty to cooperate. These specific applications can be found at both the pre-contractual stage (d.) and the performance stage (e.) and are discussed in the relevant section below.

[1560] These include Article 2:302 PECL, whereby parties are under a duty not to disclose confidential information; Article 8:104 PECL which allows the debtor to cure a defective performance before the time for performance; Article 9:102(2)(b) PECL which prevents a party from requesting specific performance of an obligation when this would cause unreasonable effort and expense to the debtor; Article 9:201(1) PECL which allows a party to withhold performance until the other party has performed but only to the extent that is reasonable in the circumstances; Article 9:505(1) PECL, according to which the right to damages is limited to the recovery of losses that the aggrieved party could not have avoided by taking reasonable steps to look after its own interests. Good faith and fair dealing also obliges the parties to have due regard for the interests of the other party when circumstances arise during the performance of their contract which are not foreseen in the contract or by the law governing the contract. One example of this is found in Article 6:111 PECL, which provides that if performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating the contract (see PECL Official Commentary, Chapter I, 113, 115). Good faith and fair dealing also underlies Article 2:104 PECL which imposes a reinforced duty to draw terms to the other party's attention when such terms have not been individually negotiated (see ASSOCIATION HENRI CAPITANT/SLC, contractual fairness, 517). Good faith and fair dealing further underlines the rule that restitution and damages can be refused when the party knew or ought to have known of the reason for the ineffectiveness of the contract (Articles 15:104 and 15:105 PECL) (see ASSOCIATION HENRI CAPITANT/SLC, contractual fairness, 518).

[1561] Articles 1:102, 2:301, 1:305, 4:103, 4:107, 4:109, 4:110, 4:118, 5:102, 6:102, 6:111, 8:109, 16:102 PECL.

a. Good faith and fair dealing as an interpretation and supplementation tool of the PECL

879. Good faith and fair dealing operates as a rule of interpretation and supplementation of the PECL.[1562]

880. Accordingly, Article 1:106(1) PECL 'Interpreting and Supplementation' provides, in relevant part, as follows:

> (1) These Principles should be interpreted and developed in accordance with their purposes. In particular, regard should be had to the need to promote good faith and fair dealing, certainty in contractual relationships and uniformity of application.

b. Parties' general and mandatory duty to act in accordance with good faith and fair dealing (Article 1:201 PECL)

881. Article 1:201 PECL 'Good Faith and Fair Dealing' is the main (and mandatory[1563]) provision on good faith in the PECL. It provides as follows:

> (1) Each party must act in accordance with good faith and fair dealing.
>
> (2) The parties may not exclude or limit this duty.

882. According to the PECL Official Commentary, the principle of good faith and fair dealing is a basic principle which runs through the PECL and applies to the formation and performance of the parties' contract as well as to the enforcement of the parties' duties and the exercise of their rights.[1564] Its application will depend on the type of contract in question and will undisputedly play a greater role in long-term contracts.[1565]

883. According to the PECL Official Commentary, the term "good faith" represents a subjective concept meaning honesty and fairness in mind whilst the term "fair dealing" represents an objective concept requiring the objective observance of

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[1562] PECL Official Commentary, Chapter I, 108.

[1563] With respect to the mandatory nature of this provision, see *GEC Marconi Systems Pty Ltd. v BHP Information Technology Pty Ltd. and Others*, Federal Court of Australia, NG733 of 1997, 12 February 2003, available at < http://www.unilex.info/case.cfm?id=845>, accessed 1 March 2023. See also PECL Official Commentary, Chapter I, 116. It is clear that the Lando Commission has favoured a Civil law perception of the general principle of good faith and fair dealing, which is shown notably by the fact that the principle of good faith may override express contractual provisions.

[1564] PECL Official Commentary, Chapter I, 113.

[1565] *Idem*, Chapter I, 114.

fairness.[1566] The addition of "fair dealing" to "good faith" distinguishes it from "good faith" in the subjective sense as discussed above.[1567]

884. According to the Official Commentary, the duty of good faith and fair dealing is not limited to specific rules but applies generally and is seen as a companion to the provision on usages (Article 1:105 PECL[1568]) with its purpose being to enforce community standards of decency, fairness and reasonableness[1569] in commercial transactions.[1570]

885. In this regard, BEALE submits that good faith and fair dealing is not a source for the development of new norms in the PECL[1571] and argues that there would be no point in having specific provisions which apply good faith in certain circumstances if there was a general control mechanism set out in Article 1:201(1) PECL.[1572] However, LANDO convincingly argues that Article 1:201 PECL is an over-arching principle, which a court can directly apply to enforce community standards of decency, fairness and reasonableness even when there is no specific provision in the PECL.[1573]

1566 *Idem*, Chapter I, 115–116.

1567 *Idem*, Chapter I, 116. With respect to the subjective meaning of good faith, see para. 8.

1568 Article 1:105 PECL provides as follows: "(1) The parties are bound by any usage to which they have agreed and by any practice they have established between themselves. (2) The parties are bound by a usage which would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable."

1569 With respect to reasonableness, Article 1:302 PECL provides as follows: "Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account."

1570 PECL Official Commentary, Chapter I, 113.

1571 BEALE, good faith, 210 arguing that this is the case because there is an independent basis for new developments in Article 1:106 PECL.

1572 *Idem*, 211–212.

1573 LANDO, 851–853, arguing that this is shown by its placing in the first chapter and by its general terms. He argues that this provision has the same function as under German and Dutch law and applies to the interpretation of the contract, imposes positive obligations and renders a contract term non-binding to the extent that this would be unacceptable according to reasonableness and equity. He further argues that the technique of mentioning good faith in specific articles is a technique employed in the German, US and Dutch systems and that in none of these systems has it been asserted that these provisions deprive the general clause of its overarching function. These specific applications are instructional, avoid misunderstandings and often have a limited field of application such as Article 4:110 PECL which applies to unfair non-individually negotiated terms. He also states that this was the view of some of the drafters who did not raise this issue for discussion as they believed others were of the same view; See

886. According to the PECL Official Commentary, the application of the general duty of good faith and fair dealing will depend on the weighing of the need for certainty and predictability against the need to do justice in a given case.[1574]

887. It will also depend, as stated in the PECL Official Commentary, on what the parties have agreed in their contract. For example, although usually, it would be contrary to good faith and fair dealing for a party to refuse performance on the ground of a technical breach, this will not be the case when the parties have agreed that a technical breach entitles the aggrieved party to refuse performance.[1575]

888. In this regard, it has been noted that there is a tension between the principle of party autonomy and the principle of good faith and fair dealing in the PECL.[1576] Thus, on the one hand, Article 1:102 PECL provides that the parties' freedom to contract is limited by the duty of good faith and fair dealing and the Official Commentary states that good faith and fair dealing may take precedence over the provisions of the PECL when a strict adherence would lead to a manifestly unjust result.[1577] On the other hand, the Official Commentary states that what will be considered contrary to good faith and fair dealing will be dependent, to a certain extent, on what the parties have agreed.[1578]

889. According to the Official Commentary, the burden of proof of a violation of the general duty to act in accordance with good faith and fair dealing, lies on the party asserting that the other party has acted contrary to its duty to act in accordance with good faith and fair dealing.[1579]

890. In this regard, conduct of a person which is contrary to good faith and fair dealing may be imputed to a contracting party when the person in question is

also HESSELINK, Common Frame, 15–16 arguing that it would be incorrect to clarify that this provision is not an over-arching principle and in addition it would remove what has served as the basis for most of judge-made social private law. Moreover, he adds that this would be in vain as "courts will not be limited by the wording of the good faith clause but will exercise what they regard as their task when applying abstract rules to concrete cases: they will interpret, supplement and correct the abstract rules where, in their view, fairness requires this for the type of case at hand"; STORME, 7–8 stating that *prima facie* good faith is a superfluous concept for the solutions which are found in more specific provisions but that these provisions give guidance for future interpretation of the same principle.

1574 PECL Official Commentary, Chapter I, 116.

1575 PECL Official Commentary, Chapter I, 116.

1576 MACQUEEN, 46–47.

1577 PECL Official Commentary, Chapter I, 113.

1578 *Idem*, Chapter I, 116.

1579 *Ibid*.

involved in making a contract or performed with the contracting party's assent (Article 1:305 PECL).[1580]

891. There are three identified consequences of a violation of the duty to act in accordance with good faith and fair dealing.

892. First, the application of the general duty to act in accordance with good faith and fair dealing may prevent a party from insisting on compliance with a condition set out in an offer or from relying on a contractual provision.[1581]

893. Second, according to the PECL Official Commentary, the application of the general duty of good faith and fair dealing may lead to the non-application of other provisions of the PECL when strict compliance with these provisions would lead to a manifestly unjust result.[1582] As an example, where a party commits a breach which is considered fundamental as it concerns the essence of the contract under Article 8:103 PECL[1583], good faith and fair dealing may prevent a party from terminating the contract because there has only been a trivial breach of this obligation.[1584] In addition, although Article 1:303 PECL provides that in certain cases, a notice must reach the intended recipient in order to be effective, a party would not be able to complain that it has not received the notice if it has deliberately evaded receiving it.[1585] Furthermore, good faith and fair dealing also prevents a contract from being avoided in a case where a party has mistakenly sent an acceptance to a local agent instead of to the headquarters of the company as agreed thus thereby arriving four days late.[1586]

894. Third, it appears that a failure to act in accordance with good faith and fair dealing may also lead to the aggrieved party being able to claim damages. Hence, according to the PECL Official Commentary, in the case where a car manufacturer gives a distributor a one-month notice (in accordance with the contractual

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[1580] This Article provides as follows: "If any person who with a party's assent was involved in making a contract, or who was entrusted with performance by a party or performed with its assent: (a) knew or foresaw a fact, or ought to have known or foreseen it; or (b) acted intentionally or with gross negligence, or not in accordance with good faith and fair dealing, this knowledge, foresight or behaviour is imputed to the party itself."

[1581] See examples referred to at PECL Official Commentary, Chapter I, 114.

[1582] *Idem*, Chapter I, 113.

[1583] Article 8:103 PECL provides as follows: "A non-performance of an obligation is fundamental to the contract if: (a) strict compliance with the obligation is of the essence of the contract; or (b) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or (c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance."

[1584] BEALE, good faith, 213.

[1585] *Ibid*.

[1586] PECL Official Commentary, Chapter I, 114.

provisions) that the contract will not be renewed in circumstances where the contract has been previously renewed annually for fifty years, the distributor will be entitled to damages.[1587]

c. General application of the duty to act in accordance with good faith and fair dealing: the implicit prohibition of inconsistent behaviour

895. The rule of the prohibition of inconsistent behaviour is said to govern the PECL even though there is no general provision prohibiting inconsistent behaviour, contrary to the PICC which contains an express provision at Article 1.8 PICC.[1588] According to this rule, a party cannot rely on the invalidity or non-binding effect of an act when it has induced the other party to act based on the validity or binding effect of the act.[1589]

896. There are, however, many specific applications of the prohibition of inconsistent behaviour in the PECL including: Article 2:202(3) PECL which provides that an offer cannot be revoked if it was reasonable for the offeree to rely on the offer and it did so; Articles 2:105(3) and 2:106(2) PECL pursuant to which a party may not invoke a merger clause or a no-oral modification clause to the extent that the other party has reasonably relied on this party's conduct or statements to the contrary; and Article 3:201(3) PECL which provides that a principal will be bound by the acts of an agent whose apparent authority the principal has established by its statements or conduct.[1590]

d. Good faith and fair dealing and its specific applications at the pre-contractual stage

897. Specific applications of the parties' general duty to act in accordance with good faith and fair dealing which can be found at the pre-contractual stage include the prohibition of bad faith negotiations (i.) as well as the prohibition of bad faith conduct at the time of the formation of the contract (ii.). Good faith and fair dealing also acts as a limit on the parties' freedom to agree on certain contractual terms (iii.).

1587 *Ibid*.

1588 PECL Official Commentary, Chapter I, 114–115. For an example of a national court decision referring to the prohibition of inconsistent behaviour under the PECL referring to Article 1:201 and 1:106, see Tribunal Supremo, 12 December 2011, 872/2011, available at <http://www.unilex.info/case.cfm?id=1651>, accessed 1 March 2023.

1589 PECL Official Commentary, Chapter I, 114–115.

1590 *Ibid*.

i. Prohibition of bad faith negotiations

898. The parties' duty to act in accordance with good faith and fair dealing imposes a duty to negotiate in good faith at the pre-contractual stage.

899. Hence, Article 2:301 PECL 'Negotiations Contrary to Good Faith' provides as follows:

> (1) A party is free to negotiate and is not liable for failure to reach an agreement.
>
> (2) However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.
>
> (3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

900. In principle therefore, a party is free to decide whether to conclude a contract or not (Article 2:301(1) PECL). It may enter into negotiations even though it is unsure whether it will eventually enter into a contract and it may break off negotiations without disclosing why.[1591]

901. Good faith and fair dealing, however, forbids parties from entering into sham negotiations or continuing negotiations after they have decided not to conclude the contract as well as from breaking off the negotiations in certain circumstances (Article 2:301(2) and (3)).[1592]

902. Parties who breach this duty will only be liable for the losses suffered by the other party including expenses incurred, work carried out, loss on transactions made in reliance upon the expected contract and in some cases, compensation for loss of opportunities. However, a party cannot ask to be placed in the position that it would have been in if the contract had been duly concluded and performed (Article 2:301(2) PECL).[1593]

ii. Prohibition of bad faith conduct at the time of the formation of the contract

903. Good faith and fair dealing is a factor to be taken into consideration when deciding whether a contract may be avoided for mistake of fact or law (Article 4:103 PECL). Indeed, a contract may only be avoided for mistake of fact or law

[1591] PECL Official Commentary, Chapter II, 189.
[1592] *Idem*, Chapter II, 190.
[1593] *Idem*, Chapter II, 191.

when it was contrary to good faith and fair dealing to leave the mistaken party in error.[1594]

904. In addition, a contract may be avoided on the ground of fraud in the case of non-disclosure of certain information (rather than a positive fraudulent representation) when good faith and fair dealing required the party to disclose the relevant information.[1595]

905. Good faith and fair dealing also underlies the rule allowing a contract to be avoided for excessive benefit or unfair advantage. Hence, good faith and fair dealing is taken into account when modifying the contract in order to adapt the contract in accordance with what might have been agreed had good faith and fair dealing been observed (Article 4:109 PECL).[1596]

iii. Good faith and fair dealing as a limit on the content of the contract

906. Good faith and fair dealing acts as a limit on the parties' freedom to agree to certain terms of the contract including certain terms deemed to be unfair or an exclusion or restriction of remedies.

907. Hence, according to Article 1:102(1) PECL:

[1594] Article 4:103 PECL 'Fundamental Mistake as to Facts or Law' provides that "a party may avoid a contract for mistake of fact or law existing when the contract was concluded if the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error and the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms."

[1595] Article 4:107 PECL on 'Fraud' provides that a party may avoid a contract when it has been led to conclude it by the other party's fraudulent representation, whether by words or conduct, or fraudulent non-disclosure of any information which in accordance with good faith and fair dealing it should have disclosed. In determining whether good faith and fair dealing required that a party disclose particular information, regard should be had to all the circumstances, including: (a) whether the party had special expertise; (b) the cost to it of acquiring the relevant information; (c) whether the other party could reasonably acquire the information for itself; and (d) the apparent importance of the information to the other party. It is contrary to good faith and fair dealing for a party to remain silent on a point which might influence the other party's decision on whether to enter into the contract or not (PECL Official Commentary, Chapter IV, 253). Whether the duty of good faith and fair dealing obliges a party to disclose will depend on whether it is a professional party or not and whether the information concerns its own performance or the other party's performance (PECL Official Commentary, Chapter IV, 254).

[1596] Article 4:109 PECL allows a party to avoid a contract for 'Excessive Benefit or Unfair Advantage'. This provision provides that "upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been followed."

> Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles.

908. Accordingly, a party cannot enforce a contract or contractual provision when it would be unconscionable to do so.[1597]

909. The fact that good faith and fair dealing acts as a limit on the parties' freedom to contract[1598] is seen in the specific provisions on terms which were not individually negotiated (Article 4:110 PECL)[1599] as well as the provisions on contractual exclusions or restrictions of remedies for mistake and incorrect information (Article 4:118(2) PECL)[1600] as well as for non-performance (Article 8:109 PECL).[1601]

e. Good faith and fair dealing and its specific applications at the performance stage

910. At the performance stage, good faith and fair dealing is a relevant circumstance to be taken into account when interpreting the parties' contract (i.) and is a source of implied terms (ii.). The main specific application of the duty to act in

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1597 PECL Official Commentary, Chapter I, 99.

1598 See in this regard, MACQUEEN, 45.

1599 According to Article 4:110 PECL 'Unfair Terms not Individually Negotiated': a party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded.

1600 According to Article 4:118(2) PECL 'Exclusion or Restriction of Remedies', remedies for mistake and incorrect information may be excluded or restricted unless the exclusion or restriction is contrary to good faith and fair dealing. This provision is mandatory. To give an example, such a contractual exclusion or restriction may be contrary to good faith and fair dealing when it was made in small print in the contract or was imposed on a contracting party (PECL Official Commentary, Chapter IV, 284).

1601 According to Article 8:109 PECL 'Clause Excluding or Restricting Remedies', remedies for non-performance may be excluded or restricted unless it would be contrary to good faith and fair dealing to invoke the exclusion or restriction. This provision is also mandatory (PECL Official Commentary, Survey of Chapters 1-9, xxx.). This provision applies to clauses which have been negotiated, although the fact that it has been negotiated will often mean that it is not contrary to good faith and fair dealing to conclude it (PECL Official Commentary L, Chapter VIII, 386). However, it may still be contrary for a party to invoke the clause when it, for example, performs the contract in a way which is not in accordance with its terms, when it intentionally disregards the other terms of the contract (except if such an intention breach was considered as a breach that a party might have to make) and when the party invoking the clause only made marginal concessions and the other party had no real choice but to accept the clause (PECL Official Commentary, Chapter VIII, 386–388).

accordance with good faith and fair dealing at the performance stage is the duty to cooperate (iii.).

i. Good faith and fair dealing as a relevant circumstance when interpreting the parties' contract

911. Good faith and fair dealing is a relevant circumstance to be considered when interpreting the parties' contract (Article 5:102(g)).[1602]

ii. Good faith and fair dealing as a source of implied terms

912. Terms stemming from good faith and fair dealing may be implied into the parties' contract (Article 6:102(c)).[1603] For example, if a contract would lead a party to incur significant risks unless a term is implied, then this term should be implied in order to give such party some protection.[1604]

913. This is an example of where good faith and fair dealing may take precedence over the principle of freedom of contract as terms may be implied on the basis of good faith and fair dealing which are inconsistent with the express terms of the contract.[1605] This is notably different to the position taken in Common law legal systems.[1606]

iii. Main specific application of the general duty to act in accordance with good faith and fair dealing: the duty to cooperate (Article 1:202 PECL)

914. In Civil law systems, the duty to cooperate is derived from the principle of good faith and fair dealing.[1607] In the PECL, this duty is set out as a general duty in its own right next to the general duty to act in accordance with good faith and fair dealing at Article 1:201 PECL. This Article provides that "[e]ach party owes to the other a duty to cooperate in order to give full effect to the contract."

[1602] Article 5:102(g) PECL provides as follows: "In interpreting the contract, regard shall be had, in particular, to: (g) good faith and fair dealing."

[1603] Article 6:102(c) PECL provides as follows: "In addition to the express terms, a contract may contain implied terms which stem from: (c) good faith and fair dealing."

[1604] PECL Official Commentary, Chapter VI, 303.

[1605] MACQUEEN, 45.

[1606] See above Part III, Chapter one.

[1607] PECL Official Commentary, Chapter I, 121.

915. This duty to cooperate includes a negative duty to allow the other party to perform its obligations and thereby obtain the fruits of its contractual performance.[1608]

916. Indeed, it incorporates the duty not to do anything which may hinder the performance of the other party including a duty not to obstruct the other party's performance by failing to perform a correlative obligation or any other act which prevents the other party from performing.[1609]

917. The duty to cooperate also incorporates a positive duty to inform the other of risks of harm to persons or property.[1610]

918. Good faith and fair dealing imposes a duty on the parties to observe reasonable standards of fair dealing and to show due regard for the interests of the other party, in particular, with respect to unforeseen contingencies. For example, in a case where a constructor has asked for an extension of one month to complete a liquor store and the owner has denied such an extension, the latter is thereafter required to notify the constructor that it will not need to complete the liquor store on time when its license to sell alcohol has been delayed.[1611]

919. The negotiations which the parties are bound to enter into upon a change of circumstances are subject to the duty of good faith and fair dealing. This duty obliges the party suffering the hardship to commence negotiations within a reasonable period of time, indicating the effect that the changed circumstances has had upon the contract. This duty also imposes on the parties an obligation not to protract or abusively break off the negotiations as well as to bring up every point of dispute. A party will act contrary to this duty if it continues to negotiate after it has entered into an incompatible contract with a third party. If a party refuses to negotiate or breaks off negotiations contrary to good faith and fair dealing, then damages may be awarded, which may include, for example, the costs of bringing the action.[1612]

C. DCFR

920. This section discusses the aims and applicability of the DCFR (1.) before turning to the role and content of good faith and fair dealing (2.) under such instrument.

[1608] *Idem*, Chapter I, 119.
[1609] *Idem*, Chapter I, 120.
[1610] *Ibid*.
[1611] PECL Official Commentary, Chapter I, 115.
[1612] PECL Official Commentary, Chapter VI, 326.

1. Aims and applicability

921. In 2009,[1613] the Study Group on a European Civil Code and the Research Group on Existing EC Private Law (Acquis Group) published the DCFR.[1614] The DCFR is an academic soft law[1615] text which extends to over 4795 pages containing principles, definitions and model rules in ten books.[1616]

922. Its scope is wider than that of the PECL[1617] as it includes a series of model rules which encompass not only general provisions (Book I), contracts and other juridical acts (Book II), obligations and corresponding rights (Book III) but also a series of model rules on specific contracts (Book IV), benevolent intervention in another's affairs (Book V), non-contractual liability arising out of damage caused to another (Book VI), unjustified enrichment (Book VII), acquisition and loss of ownership of goods (Book VIII), proprietary security in moveable assets (Book IX) and trusts (Book X).[1618] Books II and III cover the matters governed by the PECL.[1619] According to the Official Commentary, Book II deals with contracts as juridical acts whilst Book III deals with the obligations

[1613] The outline edition was published in 2009 and the annotated text with comments was published in 2010.

[1614] In July 2001, the European Commission issued a communication on European contract law which launched a process of consultation and discussion about the way in which problems resulting from divergences between national contract laws in the EU should be dealt with at the European level (Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final, 11.7.2001 (OJ C 255, 13.9.2001, page 1)). In 2003, the European Commission issued another communication entitled "A more coherent European contract law - An action plan." The Commission sought to increase the coherence of the EC contract law *acquis*. In order to do so, the Commission proposed that a common frame of reference be drafted from which proposals could be drawn. The Commission specified that this common frame of reference should provide for the best solutions in terms of common terminology and rules, i.e., the definition of fundamental concepts and abstract terms like "contract" or "damage" and of the rules that apply for example in the case of non-performance of contracts. The second objective of the common frame of reference was to form the basis for further reflection on an optional instrument in the area of European contract law (Communication from the Commission to the European Parliament and the Council - A more coherent European contract law - An action plan (COM/2003/0068 final), §59).

[1615] MEKKI, 340 stating that the DCFR is 'soft law'; see also DCFR Official Commentary, 16–17.

[1616] CHRISTIAN VON BAR/ERIC CLIVE/HANS SCHULTE-NÖLKE (eds), Principles, Definitions and Model Rules of European Private Law, DCFR Outline Edition (Sellier European Law Publishers 2009) 1–643.

[1617] DCFR Official Commentary, 20.

[1618] *Idem*, 23, 27–30 (with respect to the differences between the PECL and the DCFR).

[1619] *Ibid*.

and rights resulting from contracts seen as juridical acts, as well as with non-contractual obligations and rights.[1620]

923. The hope of the academic groups was to publish a framework set of annotated rules which national legislators and courts, as well as arbitral tribunals, could refer to when searching for a commonly acceptable solution to a given problem.[1621]

2. Role of good faith and fair dealing

924. The drafters of the DCFR decided that the underlying principles of the DCFR were freedom, security, justice and efficiency.[1622] In this regard, it is submitted that, on the one hand, contractual security is increased by imposing the duty to act in accordance with good faith.[1623] However, it is also noted that, on the other hand, good faith may lead to a decrease in contractual security due to the open-ended nature of this concept.[1624] The duty to act in accordance with good faith and fair dealing is also considered to be an aspect of the underlying principle of justice[1625] as well as the principle of solidarity and social responsibility.[1626]

925. Good faith and fair dealing is a factor to be taken into account when interpreting and developing the DCFR (a.). The notion of good faith and fair dealing is defined in the 'General Provisions' book of the DCFR (b.) and encompasses the prohibition of inconsistent behaviour (c.).

926. There are many specific applications of the principle of good faith and fair dealing which have become independent rules in their own right.[1627] The other

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1620 DCFR Official Commentary, 24.

1621 CHRISTIAN VON BAR, A Common Frame of Reference for European Private Law – Academic Efforts and Political Realities, (2008) 23 Tul Eur & Civ L F 37; see also DCFR Official Commentary, 9.

1622 DCFR Official Commentary, 13.

1623 *Idem*, 13, 60.

1624 *Ibid*.

1625 DCFR Official Commentary, 60.

1626 *Idem*, 14 stating that in the contractual context, solidarity is often used to mean loyalty or security.

1627 At the pre-contractual stage, good faith and fair dealing may also impose upon a party a duty to disclose information about the goods, other assets and services (Article II.–3:101 DCFR: 'Duty to disclose information about goods, other assets and services'). A party is likely to be more obliged to disclose information if it is a professional party and if it concerns information about its own performance rather than the other party's performance (DCFR Official Commentary, 520). Good faith and fair dealing (and more precisely, its most general application in the form of the rule prohibiting inconsistent behaviour) also underlies the interpretation

rule that if a common intention of the parties as to the interpretation of a contract cannot be established, the contract is to be understood according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances (DCFR Official Commentary, 136–137). Good faith and fair dealing is also said to inspire the interpretation rule that one should look for the parties' common intention even if this is contradicted by the literal wording of the contract (MEKKI, 353, §20). Good faith and fair dealing (and more precisely, its most general application in the form of the rule prohibiting inconsistent behaviour) also underlies the rule which prevents a party, who knows that the maker of an act attached a particular meaning to an expression and who does not object, from later arguing that this expression has a different meaning from that which the recipient could reasonably be expected to give to the expression. In such circumstances, the act is to be interpreted in the way intended by the maker (Article II.–8:201 (2) DCFR) (DCFR Official Commentary, 600). Good faith and fair dealing may require a creditor to give notice of the breach to the debtor as one of the facets of the duty to exercise remedies in accordance with good faith and fair dealing (Article III.-3:107 DCFR 'Failure to notify non-conformity') (DCFR Official Commentary, 830, 835). Indeed, if a buyer inexcusably failed to notify the seller of a defect for an unreasonable length of time with the effect that the seller was seriously prejudiced by the delay then, the buyer might be precluded by the general rule on good faith and fair dealing from relying on the non-conformity (DCFR Official Commentary, 1366). However, there is an exception for those cases where the failure to notify relates to facts which the debtor knew or could reasonably be expected to have known and which the debtor did not disclose to the creditor. For example, a supplier who has knowingly concealed defects should not be able to insist on being notified of them (Article III.-3:107(3) DCFR) (DCFR Official Commentary, 831). Good faith and fair dealing also obliges a party, when the other is in default, to answer the debtor's call without delay when the latter asks whether performance is still wanted (DCFR Official Commentary, 901). A specific application of the duty to act in accordance with good faith and fair dealing includes the requirement that a creditor should limit as far as possible any loss which will be suffered as a result of a non-performance of the obligation by the debtor, thereby reducing the amount of damages (DCFR Official Commentary, 705). Another specific application of the duty to act in accordance with good faith and fair dealing includes the debtor's right to refuse to make specific performance of a contractual obligation if this would entail unreasonable effort and expense (DCFR Official Commentary, 705). Good faith and fair dealing also underlies the rule that a creditor may not cumulate incompatible remedies (Article III.–3:102 DCFR: 'Cumulation of remedies'). Hence, a party cannot terminate the contract and thereafter request specific performance and vice versa (DCFR Official Commentary, 802).Thus, a party may be prevented from pursuing a right even before the limitation period has run out. This may be the case if a party has led the other party to believe that it would no longer pursue its right contrary to the principle of good faith and fair dealing (DCFR Official Commentary, 1166). In addition, it would be contrary to good faith and fair dealing for a debtor to prevent the creditor from pursuing the right in good time, particularly where the debtor has waived the right to raise the statute of limitation defence (DCFR Official Commentary, 1223). Furthermore, a specific application of the general principle of good faith and fair dealing is found in Article III.–7:304 DCFR: 'Postponement of expiry in case of negotiations' which provides that if the parties enter into negotiations, then the limitation period only expires one year after the last communication has been made in the negotiations (DCFR Official Commentary, 1202).

specific applications of the notion of good faith and fair dealing refer to "good faith and fair dealing". Only the latter as well as the main specific application of the duty to act in accordance with good faith and fair dealing, namely the duty to cooperate, are discussed below. These specific applications of the duty to act in accordance with good faith and fair dealing can be found at the pre-contractual stage (d.), and at the contractual performance stage (e.).

a. Good faith and fair dealing as an interpretation and supplementation tool of the DCFR

927. The DCFR contains a provision stipulating that good faith and fair dealing is to be considered when interpreting and developing the DCFR. Thus, Article I-1:102(3) DCFR 'Interpreting and Development' provides as follows:

> (3) In their interpretation and development regard should be had to the need to promote:
>
> (a) uniformity of application;
>
> (b) good faith and fair dealing; and
>
> (c) legal certainty.

928. This provision was included as it was recognized that good faith and fair dealing has played an important role in the development of many useful principles and rules in national private laws.[1628]

929. In this regard, it is noted that the consideration of "legal certainty" at Article 1:102(3)(c) DCFR is a useful counterweight to the uncertainty engendered by the taking into account of good faith and fair dealing when interpreting the DCFR.[1629]

b. Good faith and fair dealing defined as a standard of conduct characterised by honesty, openness and consideration for the interests of the other party

930. Unlike other international conventions and academic restatements, the DCFR contains a definition of good faith and fair dealing. Hence Article I-1:103(1) DCFR 'Good faith and fair dealing' provides as follows:

> The expression "good faith and fair dealing" refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.

[1628] DCFR Official Commentary, 135.

[1629] *Ibid*.

931. Regrettably, the DCFR Official Commentary does not elaborate explicitly on why the phrase "good faith and fair dealing" instead of just "good faith" is employed.[1630] The fact that "good faith" on its own is defined as "a subjective mental attitude characterized by honesty and an absence of knowledge that an apparent situation is not the true situation"[1631] suggests that the phrase of "good faith and fair dealing" corresponds to good faith in the objective sense and is used in order to distinguish it from good faith in the subjective sense.[1632]

932. The DCFR Official Commentary states that the reference to honesty in the definition excludes any cheating or dishonest behaviour,[1633] whilst the reference to openness requires transparency in a party's conduct.[1634]

933. The reference to "consideration for the interests of the other party" does not require a party to give preference to the other party's interests. However, it does prevent a party from committing an abuse of right, for example, when a party out of pure malice exercises a remedy which is of no benefit to anyone and the only purpose is to harm the other party.[1635]

934. What is required will depend on the circumstances, in particular, the nature of the contract. In this respect, the DCFR Official Commentary underlines that in commercial contracts, good faith and fair dealing will play a minor role as the rights and obligations of the parties will be so carefully regulated.[1636]

1630 MEKKI, 345, §11.

1631 DCFR Official Commentary, 4784.

1632 For the distinction between objective and subjective good faith, see para. 8.

1633 DCFR Official Commentary, 136. Hence, in the context of an assignment, a debtor cannot ask the assignor to clarify whether there has been as assignment and withhold performance if it did not believe that the right had been assigned and this was just a delaying tactic. In this regard, a debtor cannot ask from the assignor for a new notice in textual form which contains adequate information and withhold performance if it is acting contrary to the duty of good faith and fair dealing (see DCFR Official Commentary, 1090).

1634 DCFR Official Commentary, 136. An example of the duty to act openly is given with respect to the giving of notice (Article I. –1:109 DCFR). It is stated that although notice may be in oral form, it would be contrary to good faith for a party to rely on a casual remark as notice (see DCFR Official Commentary, 159).

1635 DCFR Official Commentary, 136.

1636 *Ibid*.

c. Good faith and fair dealing as prohibiting contradictory behaviour

935. The second part of Article I-1:103(2) DCFR containing the definition of 'good faith and fair dealing' prohibits contradictory behaviour.[1637] It provides as follows:

> It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party's prior statements or conduct when the other party has reasonably relied on them to that other party's detriment.

936. The prohibition of inconsistent behaviour is reflected in more specific rules found in the DCFR.[1638]

d. Good faith and fair dealing and its specific applications at the pre-contractual stage

937. At the pre-contractual stage, good faith and fair dealing prohibits bad faith negotiations (i.) as well as bad faith conduct at the time of the formation of the contract (ii.). It also acts as a limit on the parties' freedom to agree on certain contractual terms (iii.).

[1637] It should be noted that this provision was not included in the interim outline edition as it was thought that it flowed from the general duty of good faith and fair dealing, see DCFR Official Commentary, 60–61. It was inspired by the *principes directeurs* of the Association Henri Capitant and the Société de législation comparée published in early 2008. For an example of a national court decision referring to the prohibition of inconsistent behaviour under the DCFR, see Tribunal Supremo, 12 December 2011, 872/2011, available at <http://www.unilex.info/case.cfm?id=1651>, accessed 1 March 2023.

[1638] DCFR Official Commentary, 136–137. For example, an offeror is prevented from revoking an offer if it was reasonable for the offeree to rely on the offer as being irrevocable, and the offeree has acted in reliance on the offer (DCFR Official Commentary, 136–137). A party is also prevented from revoking a third party beneficiary's right (revocable under the relevant contract) if the latter had reasonably acted in reliance on the right (Article II.–9:303(3) DCFR: 'Rejection or revocation of benefit') (DCFR Official Commentary, 654). Another example is the rule that an apparent authority of a representative which has been established by a principal's statements or conduct will bind the principal to the acts of the representative (DCFR Official Commentary, 136–137). A further example is the rule that the debtor cannot invoke a defence against an assignee if it has led the latter to believe that there was no such defence (DCFR Official Commentary, 1076.). A further application of the prohibition of inconsistent behaviour includes the rules under which a party by statement or conduct may be precluded from asserting a merger clause or a no-oral modification clause to the extent that the other party has reasonably relied on the statement or conduct (DCFR Official Commentary, 136–137). Finally, with respect to secret agreements, good faith and fair dealing prevents a party from relying on the secret agreement in a relationship with a third party when the latter has reasonably and in good faith relied on the simulated contract (Article II.–9:201 DCFR) (DCFR Official Commentary, 641).

i. Prohibition of bad faith negotiations

938. Good faith and fair dealing applies to the pre-contractual negotiations. Hence, Article II-3:301 DCFR 'Negotiations contrary to good faith and fair dealing' provides as follows:

> (1) A person is free to negotiate and is not liable for failure to reach an agreement.
>
> (2) A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing and not to break off negotiations contrary to good faith and fair dealing. This duty may not be excluded or limited by contract.
>
> (3) A person who is in breach of the duty is liable for any loss caused to the other party by the breach.
>
> (4) It is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

939. Thus, a party is free to decide whether or not to enter into contractual negotiations and whether or not to enter into a contract (Article II-3:301(1) DCFR). A party may therefore enter into negotiations even though it is uncertain as to whether or not it will conclude a contract and it may also break off negotiations without disclosing the reason.[1639]

940. However, a party must negotiate in accordance with good faith and fair dealing and must not break off negotiations in a manner which is contrary to good faith and fair dealing (Article II-3:301(2) DCFR). A party who enters into negotiations or continues negotiations knowing that it will never conclude a contract will therefore be liable (Article II-3:301(4) DCFR).[1640]

941. This duty to negotiate in accordance with good faith and fair dealing is mandatory (Article II-3:301(2) DCFR).

942. As a duty, the remedies of specific performance or the withholding of performance of reciprocal obligations are not available. However, damages may be available for breach of this duty including for expenses incurred, work done and loss on transactions made in reliance on the expected contract. In certain circumstances, damages may be claimed for loss of opportunities. However, the aggrieved party cannot claim to be put into the position in which that party would have been if the contract had been duly concluded and if the obligations under it had been duly performed (Article II-3:301(3) DCFR).[1641]

1639 DCFR Official Commentary, 271.

1640 *Idem*, 271–272.

1641 *Idem*, 273.

ii. Prohibition of bad faith conduct at the time of the formation of the contract

943. Good faith and fair dealing also prohibits bad faith conduct at the time of the formation of the contract.

944. First, where there is a failure to comply with formal requirements, good faith and fair dealing prevents a party from standing by, knowing that a contract is invalid due to a failure to comply with formal requirements, and letting the other party suffer a loss in the mistaken and reasonable belief that it was valid. In such a case, the former is liable for the loss suffered by the latter (Article II.-1:106(2) DCFR).[1642]

945. Second, in case of mistake, if the creditor caused the mistake, or knew or could reasonably be expected to have known of the mistake and left the debtor in error contrary to good faith and fair dealing, then the debtor may be able to avoid the contract (Article II.-7:201 DCFR).[1643]

946. Third, good faith and fair dealing underlies Article II.–7:205 DCFR on 'Fraud' and prevents a party from remaining silent with the deliberate intention of deceiving the other party, on some point which might influence the other party's decision on whether or not to enter the contract unless there is a good reason not to disclose.[1644]

[1642] Article II.-1:106(2) DCFR provides as follows: "Where a contract or other juridical act is invalid only by reason of non-compliance with a particular requirement as to form, one party (the first party) is liable for any loss suffered by the other (the second party) by acting in the mistaken, but reasonable, belief that it was valid if the first party: (a) knew it was invalid; (b) knew or could reasonably be expected to know that the second party was acting to that party's potential prejudice in the mistaken belief that it was valid; and (c) contrary to good faith and fair dealing, allowed the second party to continue so acting."

[1643] DCFR Official Commentary, 485–486, 1112 (allowing a new debtor to avoid a contract). Article II.-7:201 DCFR provides as follows: "1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if: (a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different terms and the other party knew or could reasonably be expected to have known this; and (b) the other party; (i) caused the mistake; (ii) caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake; (iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors; or (iv) made the same mistake."

[1644] DCFR Official Commentary, 519. Article II.–7:205 DCFR provides as follows: "(1) A party may avoid a contract when the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any

947. Finally, good faith and fair dealing comes into play when a party is entitled to avoid a contract in case of unfair exploitation (Article II.–7:207 DCFR 'Unfair exploitation'). Indeed, if a party is entitled to avoid on this ground, it may instead of requesting the avoidance, request the court to adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been observed (Article II.–7:207(2) DCFR).[1645]

iii. Good faith and fair dealing as a limit on the content of the contract

948. Good faith and fair dealing acts as a limit on the parties' freedom to agree to certain terms of the contract including terms deemed to be unfair or terms excluding or restricting remedies.

949. According to Article II.–9:408(1) DCFR 'Effects of unfair terms', a term which is deemed to be "unfair" is not binding on the party who did not supply it.[1646] In contracts concluded between businesses, a term will be deemed unfair if it is a term forming part of standard terms supplied by one party and it is of such a nature that its use grossly deviates from good commercial practice, contrary to

information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose. (2) A misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false and is intended to induce the recipient to make a mistake. A non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake. (3) In determining whether good faith and fair dealing required a party to disclose particular information, regard should be had to all the circumstances, including: (a) whether the party had special expertise; (b) the cost to the party of acquiring the relevant information; (c) whether the other party could reasonably acquire the information by other means; and (d) the apparent importance of the information to the other party."

[1645] Article II.–7:207(2) DCFR provides as follows: "(1) A party may avoid a contract if, at the time of the conclusion of the contract: (a) the party was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill; and (b) the other party knew or could reasonably be expected to have known this and, given the circumstances and purpose of the con- tract, exploited the first party's situation by taking an excessive benefit or grossly unfair advantage. (2) Upon the request of the party entitled to avoidance, a court may if it is appropriate adapt the contract in order to bring it into accordance with what might have been agreed had the requirements of good faith and fair dealing been observed. (3) A court may similarly adapt the contract upon the request of a party receiving notice of avoidance for unfair exploitation, provided that this party informs the party who gave the notice without undue delay after receiving it and before that party has acted in reliance on it."

[1646] Article II.–9:408(1) DCFR provides as follows: "(1) A term which is unfair under this Section is not binding on the party who did not supply it. (2) If the contract can reasonably be maintained without the unfair term, the other terms remain binding on the parties."

good faith and fair dealing (Article II.–9:405 DCFR 'Meaning of "unfair" in contracts between businesses').[1647] In addition, pursuant to Article III.–3:711 DCFR 'Unfair terms relating to interest', a term on interest which allows a business or debtor to pay interest from a later date or at a lower rate is unfair and therefore not binding if it grossly deviates from good commercial practice, contrary to good faith and fair dealing.[1648]

950. Although parties may agree to exclude or restrict remedies in case of mistake, such an exclusion or restriction must not be contrary to good faith and fair dealing (Article II.–7:215 DCFR Exclusion or restriction of remedies).[1649] For example, an exclusion or restriction in small print or which was imposed by the other party may be ineffective. The burden of proving that the clause is contrary to good faith and fair dealing lies on the party seeking to avoid its effect.[1650]

951. Good faith and fair dealing may also prevent a party from invoking a contractual provision which excludes or restricts remedies (Article III.–3:105(2) DCFR 'Term excluding or restricting remedies').[1651] It is stated that this provision is unnecessary as it flows from the duty to exercise rights in accordance with good faith and fair dealing. However, it was explicitly included because of its practical importance and because it is useful to make clear the potentially powerful effect of the good faith requirement in this area.[1652] This provision is mandatory and cannot be contracted out of by the parties.[1653]

[1647] DCFR Official Commentary, 670–671. Article II.–9:405 DCFR provides as follows: "A term in a contract between businesses is unfair for the purposes of this Section only if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing."

[1648] Article III.–3:711 DCFR provides as follows: "(1) A term whereby a business pays interest from a date later than that specified in the preceding Article paragraph (2) (a) and (b) and paragraph (3), or at a rate lower than that specified in paragraph (4), is not binding to the extent that this would be unfair. (2) A term whereby a debtor is allowed to pay the price for goods, other assets or services later than the time when interest starts to run under the preceding Article paragraph (2)(a) and (b) and paragraph (3) does not deprive the creditor of interest to the extent that this would be unfair. (3) Something is unfair for the purposes of this Article if it grossly deviates from good commercial practice, contrary to good faith and fair dealing."

[1649] This Article provides in relevant part as follows: "(2) Remedies for mistake may be excluded or restricted unless the exclusion or restriction is contrary to good faith and fair dealing."

[1650] DCFR Official Commentary, 558.

[1651] Article III.–3:105(2) DCFR provides, in relevant part, as follows: "(2) A term excluding or restricting a remedy for non-performance of an obligation, even if valid and otherwise effective, having regard in particular to the rules on unfair contract terms in Book II, Chapter 9, Section 4, may nevertheless not be invoked if it would be contrary to good faith and fair dealing to do so."

[1652] DCFR Official Commentary, 818.

[1653] *Idem*, 821.

952. Article III.–3:105(2) DCFR may be invoked, for example, in the case where the term has been individually negotiated and where it was not contrary to good faith and fair dealing to include the term in the contract but where a party performs a contract in a different uncontemplated way which is not in accordance with its other terms.[1654] Intentionally violating the provisions of the contract may further mean that it is contrary to good faith and fair dealing to invoke the restriction or exclusion provision.[1655] This provision may, moreover, be invoked where a party relies on a very broad limitation of liability when the term has not been negotiated. However, if the same term was negotiated, it may not be contrary to good faith and fair dealing to invoke it in a particular case.[1656] This provision may further be invoked where there has been some negotiations over a term, but where the party invoking it refused to make more than marginal concessions and the other party had no real choice but to accept.[1657]

e. Good faith and fair dealing and its specific applications at the performance stage

953. Good faith and fair dealing plays a role both when interpreting the parties' contract (i.) and when implying terms into the same (ii.). It also imposes a general duty to act in accordance with good faith and fair dealing (iii.), from which the duty to cooperate is derived (iv.).

i. Good faith and fair dealing as a factor in interpreting the parties' contract

954. According to Article II.-8:102(1)(g) DCFR, good faith and fair dealing is a factor to be taken into account when interpreting the parties' contract.[1658]

1654 *Idem*, 819.
1655 *Idem*, 820.
1656 *Ibid*.
1657 DCFR Official Commentary, 821.
1658 Article II.-8:102(1)(g) DCFR provides, in relevant part, as follows: "(1) In interpreting the contract, regard may be had, in particular, to: […] (g) good faith and fair dealing. […]."

ii. Good faith and fair dealing as a source of implied terms

955. According to Article II.-9:101(2)(c) DCFR, obligations may also be implied into the parties' contract on the basis of good faith and fair dealing.[1659] This provision is seen as evidencing the supplementing function of good faith and fair dealing.[1660] For example, if an unacceptable risk would be suffered by a party if a term is not implied, then this term should be implied.[1661]

956. As noted below,[1662] if an obligation is implied on the basis of good faith and fair dealing, the breach of this obligation will give rise to the usual remedies that are open to parties in case of a breach of an obligation.

iii. General duty to act in accordance with good faith and fair dealing

957. Article III.–1:103 DCFR 'Good faith and fair dealing' sets out the main duty of the parties to act in accordance with good faith and fair dealing during the performance of an obligation or contractual relationship. It provides as follows:

> (1) A person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship.
>
> (2) The duty may not be excluded or limited by contract or other juridical act.
>
> (3) Breach of the duty does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have.

958. This provision is intended to serve as a direct and general guide for the parties and to give effect to community standards of decency and fairness.[1663] It will be

[1659] Article II.-9:101(2)(c) DCFR provides in relevant part as follows: "(2) Where it is necessary to provide for a matter which the parties have not foreseen or provided for, a court may imply an additional term, having regard in particular to: (a) the nature and purpose of the contract; b) the circumstances in which the contract was concluded; and (c) the requirements of good faith and fair dealing."

[1660] MEKKI, §20, 353–354.

[1661] DCFR Official Commentary, 607.

[1662] See below, para. 964.

[1663] DCFR Official Commentary, 705.

particularly significant for long-term contracts.[1664] Indeed, good faith and fair dealing underlies many of the rules on specific contracts found in Book IV.[1665]

959. This duty prohibits dishonest behaviour[1666] and also prevents a party from, without any good reason, insisting on compliance with formalities.[1667]

960. It is stated that what will be in accordance with good faith and fair dealing will depend on the terms of the parties' contract.[1668]

961. The DCFR Official Commentary insists that the concept of good faith and fair dealing is not the same as the concept of reasonableness (Article I.-1:104). It is thus stated that a party may be acting reasonably but contrary to good faith and fair dealing and vice versa. The DCFR Official Commentary gives, as an example, the case where one party leads the other party to believe that a certain right would not be exercised and then exercises that right. In such a case, although such conduct is contrary to good faith and fair dealing, the exercise of the right might be reasonable in the absence of inconsistent conduct. A further example given by the DCFR Official Commentary of conduct which is unreasonable but

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1664 *Idem*, 707.

1665 *Ibid*. For example, with respect to service contracts, Article IV.C. 2:108 DCFR 'Contractual obligation of the service provider to warn' (DCFR Official Commentary, 1693–1694) and Article IV.C.-5:107 DCFR 'Post-storage obligation to inform' (DCFR Official Commentary, 1851); With respect to mandate contracts, Article IV.D.-6:103 DCFR 'Termination by principal for extraordinary and serious reason' (DCFR Official Commentary, 2255); With respect to commercial agency, franchise and distributorship, Article IV.E.-2:02 DCFR 'Information during performance' (DCFR Official Commentary, 2308) and Article IV.E.-3:305 DCFR 'Entitlement to commission extinguished' (DCFR Official Commentary, 2375 stating that it would be contrary to good faith for a principal to try to exercise the right to extinguish the commission if there was still time for the client to perform); With respect to personal security, Article IV. G.-1:107 DCFR 'Several security providers: recourse against debtor' (DCFR Official Commentary, 2552, stating that a security provider which fails to consider the interests of the others may find its rights against them reduced or extinguished and that a security provider who deprives the others of their right to share benefits yet still claims a right to share in their benefits is acting contrary to good faith and fair dealing) and Article IV. G-2:109 DCFR: 'Limiting security without time limit' (DCFR Official Commentary, 2631 stating that a security provider is protected by good faith against undue increases of the secured obligations agreed between debtor and creditor and that the creditor might in certain cases be prohibited from relying on a security running over an excessively lengthy period of time on the basis of good faith).

1666 DCFR Official Commentary, 706.

1667 *Ibid* referring to the example of where a party sends its acceptance to the wrong address and stating that it would be contrary to good faith and fair dealing for the offeror to rely on this lack of compliance with a technicality to deny a contract.

1668 DCFR Official Commentary, 705 stating that: "Thus, parties may agree that even a technical breach by one party will entitle the other party to refuse performance, when, for instance, that party's representatives can ascertain a technical breach but not whether it is a trifle or not."

is not contrary to good faith and fair dealing is the case where a party insists on a severe penalty clause being inserted into a contract, warns the other party about the dangers of accepting the clause and the other party accepts such clause freely.[1669]

962. As set out in the second paragraph of Article III.–1:103 DCFR, the duty to act in accordance with good faith and fair dealing is mandatory and thus a party cannot stipulate in the contract that it reserves its right to ignore any duty to act in accordance with good faith and fair dealing without this having any consequences.[1670]

963. A specific application of the duty to act in accordance with good faith and fair dealing includes the debtor's rights to cure a defective performance. However, according to Article III.–3:203(b) DCFR, a creditor need not, under paragraph (2) allow the debtor a period in which to attempt to cure if the creditor has reason to believe that the debtor's performance was made with knowledge of the non-conformity and was not in accordance with good faith and fair dealing. This ensures that the conduct of bad faith debtors is not sanctioned.[1671]

964. Interestingly, it is specified in the third paragraph of Article III.–1:103 DCFR, that a breach of this duty does not give rise to the normal remedies for non-performance of obligations but may prevent (partially or wholly) the breaching party from exercising or relying on a right, remedy or defence.[1672] However, if a term is implied based on good faith and fair dealing, then a breach of this contractual obligation will give rise to the usual remedies for breach of an obligation.[1673] This policy decision was taken in order to attach more importance to party autonomy and to restrict the role of the judge and because it was deemed as unsuitable to grant the normal remedies for non-performance of an obligation such as an order compelling a party to act fairly or a party stating that it will not perform its obligation to act fairly until the other party does the same.[1674]

iv. Main specific application of the duty to act in accordance with good faith and fair dealing: the obligation to cooperate (Article III.-1:104 DCFR)

965. According to Article III.–1:104 DCFR 'Co-operation': "The debtor and creditor are obliged to cooperate with each other when and to the extent that this can

[1669] DCFR Official Commentary, 138.
[1670] DCFR Official Commentary, 175.
[1671] *Idem*, 840.
[1672] *Idem*, 705.
[1673] *Idem*, 705–706.
[1674] *Idem*, 706.

reasonably be expected for the performance of the debtor's obligation." This is considered to be a specific application of the general principle of good faith and fair dealing.[1675] Indeed, there is considered to be an overlap between the duty of good faith and fair dealing and the obligation on the parties to cooperate.[1676]

966. Specific applications of this obligation to cooperate can be found in other provisions of the DCFR.[1677]

967. The negative aspect of the obligation to cooperate prevents a party from interfering with events so as to bring about the fulfilment or non-fulfilment of a condition to that party's advantage. In such a case, the other party may treat the condition as not having been fulfilled or as having been fulfilled as the case may be (Article III.–1:106(4) DCFR[1678]).

968. An example of the positive aspect of the obligation to cooperate would appear to be the duty to attempt, reasonably and in good faith, to negotiate with the other party in case of a change of circumstances in order to modify the terms of the contract accordingly.[1679]

1675 *Idem*, 713.

1676 *Idem*, 706.

1677 For example, an assignor is obliged to disclose to the assignee indications that the debtor may be insolvent (see DCFR Official Commentary, 1065).

1678 Article III.–1:106(4) DCFR provides as follows: "(4) When a party, contrary to the duty of good faith and fair dealing or the obligation to co-operate, interferes with events so as to bring about the fulfilment or non-fulfilment of a condition to that party's advantage, the other party may treat the condition as not having been fulfilled or as having been fulfilled as the case may be."

1679 See Article III – 1:110 DCFR 'Variation or termination by court on a change of circumstances' provides in relevant part as follows: "(2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may: (a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or (b) terminate the obligation at a date and on terms to be determined by the court. (3) Paragraph (2) applies only if: (a) the change of circumstances occurred after the time when the obligation was incurred, (b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances; (c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and (d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation."

D. OHADAC Principles

969. This section discusses the aims and applicability of the OHADAC Principles (1.) before turning to the role of good faith (2.) under such instrument.

1. Aims and Applicability

970. The OHADAC[1680] was created as an institution whose main objective is the convergence, harmonization or unification of commercial law in the Caribbean countries.[1681]

971. The OHADAC Principles are a soft law instrument with the single aim of harmonizing the law of Caribbean countries with respect to international commercial contracts.[1682]

972. According to the Preamble, these provisions will be applied when the parties have agreed on their application.[1683]

2. Role of good faith

973. The OHADAC Principles do not include a general principle of good faith (a.). Prevalence is given to party autonomy (b.). Notwithstanding, good faith underlies many of the provisions found in the OHADAC Principles (c.).

a. No inclusion of a general principle of good faith

974. Interestingly, the OHADAC Principles decided not to include a provision imposing on the parties a duty to act in accordance with good faith.

975. The reasons given for this approach are firstly that the OHADAC Principles do not regulate pre-contractual obligations where good faith plays a significant role

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1680 The member states include Anguilla, Bahamas, Belize, Collectivity of St Barthélemy, Colombia, Cuba, Dominican Republic, Grenada, Guatemala, Haiti, Jamaica, Mexico, Netherlands Antilles, Panama, St Kitts and Nevis, Saint Vincent and the Grenadines, Trinidad and Tobago, Antigua and Barbuda, Barbados, Bermuda, Collectivity of St Martin, Costa Rica, Dominica, French Guiana, Guadeloupe, Guyana, Honduras, Martinique, Montserrat, Nicaragua, Puerto Rico, Saint Lucia, Suriname, and Venezuela.

1681 See <http://www.ohadac.com/textes/2/ohadac-principles-on-international-commercial-contracts.html?lang=en>, accessed 1 March 2023.

1682 *Ibid*.

1683 Article 1 of the Preamble provides as follows: "The OHADAC Principles on International Commercial Contracts will be applied, in whole or in part, when the parties have so agreed."

in Civil law systems.[1684] The second reason is that such a general principle does not respect the minimum common denominator principle which forms the basis of the OHADAC Principles as the scope of good faith diverges depending on whether a Civil law or Common law perspective is adopted.[1685] It is also stated that the possibility of including such a general principle was not advisable for proportionality reasons and that such general principles were not usual in the legal culture of the Caribbean Common law countries.[1686] Indeed, it was pointed out that the judges in these countries do not have sufficient experience in applying such general principles and this would lead to a lack of uniformity.[1687]

b. Prevalence of party autonomy over good faith

976. Prevalence is given to party autonomy over the principle of good faith. Hence if the parties wish the principle of good faith to govern certain aspects of their contractual relationship, they may do so as illustrated by the following examples.

977. First, the OHADAC Principles do not require the necessary incorporation of non-agreed obligations inspired by good faith.[1688] The commentary, however, suggests the wording of a clause (which is compatible with English law) which may be included in the parties' contract if they wish good faith to govern the implication of terms into their contract.[1689]

978. Second, with respect to fraud, the commentary to the OHADAC Principles suggests the wording of a clause which may be included in the parties' contract if they wish to ensure that the non-disclosure of circumstances contrary to good faith and fair dealing is considered to be fraudulent.[1690]

1684 OHADAC Principles, 37–38.

1685 OHADAC Principles, 38.

1686 OHADAC Principles, 38.

1687 OHADAC Principles, 38.

1688 OHADAC Principles, 201.

1689 OHADAC Principles, 202. The suggested wording of the clause is as follows: "This contract will be interpreted in accordance with the requirements of good faith. Each party shall observe good faith towards the other party and hereby warrants that in its dealings with the other it shall not perform any act or omission, which may prejudice or detract from the rights, potential assets or interests of the other party. Each party shall co-operate with the other party to the fullest extent in assisting each other to the benefit of both parties."

1690 OHADAC Principles, 159. The suggested wording of the clause is as follows: "The parties agree that not only positive actions but also non-disclosure of circumstances, which according to reasonable commercial standards of fair dealing and good faith a party should have previously disclosed, shall be considered as fraudulent."

c. Good faith as underlying many provisions

979. Notwithstanding the absence of a general provision on good faith, good faith underlies many of the provisions found in the OHADAC Principles. These include: (i.) Article 2.1.5(2) OHADAC Principles concerning the impossibility of revoking an offer when the offeree has reasonably believed that the offer was irrevocable and has started to perform acts of execution;[1691] (ii.) Article 2.3.2(2) OHADAC Principles whereby a principal is bound by an agent's acts when it has led the third party to believe that the apparent agent has authority to act;[1692] (iii.) Article 3.4.3 OHADAC Principles which allows a party to avoid a contract if it was mistaken and the other party knew of the mistake and it was contrary to fair dealing to leave the mistaken party in error;[1693] (iv.) Article 4.3.8 OHADAC Principles which prevents a party from relying on the non-fulfilment of a condition when it has brought about the non-fulfilment;[1694] and (v.) Article 7.17 OHADAC Principles which prevents a party from invoking an exemption clause if it would be grossly unfair to do so[1695.]

[1691] Article 2.15(2) OHADAC Principles provides as follows: "However, an offer cannot be revoked if it establishes a period of irrevocability or the offeree could reasonably have believed that the offer was irrevocable and has started to perform acts of execution."

[1692] Article 2.3.2(2) OHADAC Principles provides as follows: "A person is to be treated as having granted authority to an agent if the person's statements or conduct induce a third party acting in good faith reasonably to believe that the apparent agent has been granted authority to perform certain acts."

[1693] Article 3.4.3 OHADAC Principles provides in relevant part as follows: "1. A party may avoid the contract if, at the time the contract was concluded, it made a relevant mistake either of fact or of law, which determined its consent and if: […] the other party knew or ought to have known of the mistake, and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error."

[1694] Article 4.3.8 OHADAC Principles provides as follows: "1. Prior to fulfilment of a condition, a party cannot, without legitimate interest, behave so as to prejudice the rights of the other party if the condition is fulfilled. 2. If fulfilment of a condition is prevented by a party, without legitimate interest, this party may not rely on the non-fulfilment of the condition. 3. If fulfilment of a condition is brought about by a party, without legitimate interest, this party may not rely on the fulfilment of the condition."

[1695] Article 7.17 OHADAC Principles provides as follows: "A clause that limits or excludes one party's liability for non-performance or which allows one party to render performance substantially different from what the other party reasonably expected, may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract and to the circumstances under which the non-performance took place." See also OHADAC Principles, 378–379.

E. PLACL

980. This section discusses the aims and applicability of the PLACL (1.) before turning to the role of good faith (2.) under such instrument.

1. Aims and Applicability

981. The PLACL is a recent soft law instrument in the field of contract law.[1696] It is an academic project which was initiated by legal scholars from Argentina, Colombia and Chile. The main purpose of the PLACL is to provide a source of inspiration for the reform and modernisation of contract law in Latin America.[1697]

982. Article 1(2)(a) PLACL provides that the PLACL apply when the parties subject themselves to the instrument and Article 1(2)(b) PLACL provides that the PLACL will also apply when the parties have agreed that their contract will be governed by general principles of law, the *lex mercatoria*, or the like.[1698]

2. Role of good faith

983. The PLACL impose a mandatory duty on the parties to act in accordance with good faith (a.). Specific applications of this duty can be found at the pre-contractual stage (b.) as well as at the contractual performance stage (c.).

a. Mandatory duty to act in accordance with good faith

984. Article 7 PLACL is the main article on good faith and it imposes on the parties a mandatory duty to act in accordance with good faith as follows:

> (1) The parties must act in accordance with the requirements of good faith.
>
> (2) Agreements limiting good faith shall have no effect whatsoever.

985. The duties derived from good faith such as fairness, diligence, confidentiality and reasonableness underly many other provisions found in the PLACL.[1699]

1696 MOMBERG/VOGENAUER, 144.

1697 *Idem*, 147.

1698 For the text of the PLACL, see RODRIGO MOMBERG, The Principles of Latin American Contract Law: text, translation and introduction (2018) 23 Unif L Rev 144–170.

1699 LANNI, 245–246. These include e.g. Articles 12 PLACL (duty of confidentiality), 17 PLACL (providing that if acceptance of an offer consists of a conduct differing from a declaration of

986. It is noteworthy that the formal role of good faith appears to be stronger than in the PICC and PECL. Indeed, the PLACL only refer to good faith and not to "good faith and fair dealing" as the PICC and the PECL do.[1700]

987. Indeed, the more frequent recourse to good faith instead of to the notion of reasonableness is said to be due to the "civil law nature of Latin American contract law, where the notion of good faith, traditionally, has been widely used by the courts and legal doctrine both as a principle and as a rule, as opposed to the more recent (and, maybe, more Anglo-American) concept of reasonableness."[1701]

b. Specific applications of good faith at the pre-contractual stage

988. With respect to contractual negotiations, parties are free to negotiate and to withdraw from negotiations at any time, as long as they do so in accordance with good faith (Article 10 PLACL 'Freedom of Negotiation').[1702] If a party withdraws from negotiations in bad faith, or initiates or continues negotiations when not able, or not intending, to reach an agreement, it is obliged to provide compensation for loss incurred thereby. However, this does not extend to loss for the expected benefits under a contract that is not concluded (Article 11 PLACL 'Harm caused in the negotiation of contract').[1703]

989. Good faith also applies to the formation of the contract. Good faith accordingly prevents an offeror from revoking its offer if the offeree has relied in good faith on the offer being irrevocable (Article 18 PLACL).[1704]

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acceptance, it may be revoked until the contract is concluded), 20 PLACL (providing that any statement or conduct of the offeree indicating assent to an offer constitutes acceptance), 37 PLACL (referring to the relationship of trust between the parties which must be taken into account in case of a gross disparity).

1700 MOMBERG/VOGENAUER, 149.

1701 *Idem*, 150.

1702 Article 10 PLACL provides as follows: "The parties are free to negotiate the contract and to withdraw from the negotiations at any time, in accordance with good faith."

1703 Article 11 PLACL provides as follows: "(1) Compensation must be provided for harm caused by withdrawing from negotiations in bad faith. (2) A party that initiates or continues negotiations when not able or not intending to reach an agreement is also required to provide this compensation. (3) In no event shall compensation be provided for the loss of expected benefits under a contract that is not concluded."

1704 Article 18 PLACL provides as follows: "An offer is irrevocable if: (1) The offeror has indicated that it is irrevocable. (2) The offeror has fixed a time for its acceptance and the offeror does not expressly reserve the power to revoke it. (3) The offeree has been able to rely, in good faith, on the offer being irrevocable."

990. Good faith is referred to in order to set a time limit within which an offer will expire (Article 19 PLACL)[1705] and within which an acceptance will be effective (Article 23 PLACL)[1706] when no time limit has been agreed upon.

991. Conduct contrary to good faith at the time of the formation of the contract may lead to the other party being entitled to request the annulment of the contract or its adaptation. Thus Article 29(1)(b) PLACL provides that a contract may be avoided when "the other party knew or should have known of the mistake and did not disclose it against good faith." Article 37(1) PLACL provides that: "(1) A party may seek the adaptation of a contract or any of its clauses, or to annul the contract, if it or they give the other party an excessive advantage in contravention of the requirements of good faith" and Article 37(3) PLACL provides that: "(3) Upon request of the aggrieved party, the court may adapt the contract in order to make it consistent with the agreement that would have been reached by the parties in accordance with good faith."

992. Article 42(2) PLACL also endows a court with the power to adapt the contract in case of a partial nullity "in accordance with the requirements of good faith."[1707]

c. Specific applications of good faith at the contractual performance stage

993. Good faith plays a role in the interpretation of the parties' contract. Indeed, according to Article 76 PLACL, "[c]ontracts must always be interpreted in accordance with good faith."

994. Regard is also to be had to good faith when fixing the time of performance (Article 79(2) PLACL).[1708]

[1705] Article 19 PLACL provides, in relevant part, as follows: "The offer will expire in the following cases, even if it is irrevocable: […] (4) When it is not accepted within the time fixed by the offeror or, if no time is fixed, within a time that may be expected in good faith."

[1706] Article 23(1) PLACL provides, in relevant part, as follows: "(1) Any form of acceptance is effective when it reaches the offeror within the fixed time or, if no time is fixed, within a time period that is in accordance with good faith, having regard to the circumstances of the negotiation and to the means of communication employed by the offeror."

[1707] Article 42(2) PLACL provides in relevant part as follows: "(2) As to partial nullity, if necessary, a court may adapt the contract in accordance with the requirements of good faith."

[1708] Article 79(2) PLACL provides as follows: "(2) If it is not possible to fix the time of performance in accordance with these rules, the contract must be performed at the time resulting from its nature, usages, or good faith."

995. When a party fails to take reasonable measures to mitigate its loss in accordance with good faith, its compensation is reduced to the amount by which the loss could have been mitigated (Article 109 PLACL 'Mitigation of harm').[1709]

996. Good faith also plays a role in determining the start date for the running of interest. Thus, interest will start to run from the date of payment if the party that has received the money has acted in bad faith (Article 120 PLACL 'Restitution of a sum of money').[1710]

[1709] Article 109 PLACL provides as follows: "(1) Compensation is subject to reduction when the obligee has failed to take reasonable measures to mitigate harm in good faith. Reduction shall correspond to the amount by which the harm could have been mitigated."

[1710] Article 120 PLACL provides as follows: "(2) Interest accrues from payment if the party that has received the sum of money has acted in bad faith. If a party that has received a sum of money has acted in good faith, interest accrues from the time of notice of the lawsuit or from the time of termination."

IV. Rationalization Attempts

997. Various attempts have been made to rationalize the application of good faith at the level of non-national law. These include the contractual proportionality approach (A.), the cooperation theory (B.), the theory of micro and macro good faith (C.) and the pretext theory (D.).

A. Contractual proportionality approach

998. MUNUKKA puts forward the view that contractual proportionality is the common denominator of the differing views on good faith and thus is a rationalization attempt which can be adopted by any legal order.[1711]

999. According to this approach, good faith is employed to ensure that the obligations of each party are proportional to each other taking into account all the circumstances and the stage of the contract.[1712]

1000. He argues that it is less obscure than the notion of morality[1713] and, in particular, is useful in explaining the doctrine of abuse of rights.[1714]

1001. This approach may have been inspired by the principle of contractual equality espoused by ARISTOTLE and THOMAS AQUINAS.[1715] It may also have been inspired by the similar approach of BALDUS who argued that *bona fides* meant that one should not be enriched at another's expense which in turn explained, according to BALDUS, why parties were obliged to comply with obligations implied into their contract by natural equity.[1716]

1002. Whilst this approach is helpful in identifying the goal of the application of good faith – which is to achieve some form of equality, or at least proportionality, between the interests of the parties[1717] – the author is of the view that, in and of itself, this theory does not sufficiently rationalize all aspects of the application of good faith.

[1711] MUNUKKA, 249–250.
[1712] *Idem*, 250.
[1713] *Ibid*.
[1714] MUNUKKA, 249.
[1715] See above, para. 201.
[1716] See above, para. 201.
[1717] See above, para. 14.

B. Cooperation theory

1003. CARVAJAL-ARENAS advocates that the principle of good faith in international commercial contracts governed by the *lex mercatoria* basically equates to co-operation between the parties. Her submission, in this regard, is based on the evolution in contract law, from the *laissez faire*, individualistic approach of the 19th century through to the collectivist, cooperative approach which prevails today.[1718]

1004. According to CARVAJAL-ARENAS, good faith requires the parties to take effective steps to fulfil the legitimate expectations of the other party and does not only forbid undesirable conduct.[1719]

1005. Whilst cooperation may be one of the (main) facets of the principle of good faith in international commercial contracts, it is not the only one. The cooperation theory apparently ignores or, by its very title, does not readily encompass the facet of the principle of good faith which prohibits undesirable conduct.[1720] In addition, it fails to take into account the fact that while cooperation may be the main component of the principle of good faith in long-term international commercial contracts (as CARVAJAL-ARENAS herself emphasizes[1721]), it is less so in one-off commercial transactions such as a contract for the sale of goods.

C. Macro and Micro good faith

1006. MANIRUZZAMAN attempts to rationalize the application of good faith by distinguishing between macro and micro good faith.

1007. According to MANIRUZZAMAN, macro good faith is a generic notion which operates at a higher level of abstraction as a major interpretative principle. It signifies honesty, fairness and reasonableness and is understood differently depending on the facts.[1722]

1008. Conversely, according to MANIRUZZAMAN, micro good faith is a functional or objective notion which comes into play when the particular context of a case is

[1718] CARVAJAL-ARENAS, 152.

[1719] CARVAJAL-ARENAS, 160.

[1720] Indeed CARVAJAL-ARENAS refers at 153 to DIEZ-PICAZO who "considers good faith, not just as hindering acts that harm others but also, as imposing a positive behaviour of cooperation". It is not clear, however, whether CARVAJAL-ARENAS' cooperation theory is meant to also encompass this negative element.

[1721] CARVAJAL-ARENAS, 160 referring to "partnering, strategic alliances, joint venture, franchising, construction, groups of companies and technology cooperation".

[1722] MANIRUZZAMAN, 17.

taken into account and is guided by the ideal of cooperation as the underlying current.[1723]

1009. As an example, the general rule of *pacta sunt servanda* is a manifestation of macro good faith. Micro good faith however may limit the application of this rule depending on the facts of the given case, as in the case of a change of circumstances.[1724]

1010. This theory is useful in understanding how good faith as a standard, abstract and open norm works in practice and in showing how the content of good faith can only be determined when it is applied to the circumstances of a particular case.

D. Pretext theory

1011. According to HESSELINK, the three functions of good faith, namely the supplementing, interpretative and corrective functions of good faith,[1725] are the tasks of the judge.[1726] He argues that good faith is not a norm and that it "may be applied in any factual situation to establish any legal effect. In other words: any rule could be based on it."[1727] According to HESSELINK, the reason why good faith is no longer a norm is because the three functions of good faith are in fact the tasks of the judge.[1728] He concludes by submitting that "good faith is not a norm but a mouthpiece (a *porte parole*) for new rules".[1729]

1012. HESSELINK compares good faith to equity in old English law and to the *ius honorarium* in Roman law: its role being to remedy the flaws of a legal system.[1730] He concludes by stating that the principle of good faith is a mere cover or pretext for a judge to create new rules.[1731]

1013. This theory is dangerous to the extent that it would make large inroads into the principle of legal certainty. Indeed, if it were to be broadly accepted, there would be no limit to the application of good faith.[1732]

[1723] *Ibid*.
[1724] *Ibid*.
[1725] See above, para. 593 et seq.
[1726] HESSELINK, Good Faith, 638–639.
[1727] *Idem*, 639–640.
[1728] *Idem*, 640.
[1729] *Idem*, 641.
[1730] *Idem*, 643.
[1731] *Idem*, 645 et seq.
[1732] ASSOCIATION HENRI CAPITANT/SLC, good faith, 161–162.

Chapter 3 Conclusion

1014. This Chapter sets out the conclusion from the above review of the notion of good faith under national law (I.) and non-national law (II.).

I. Good Faith under National Law

1015. The above review has highlighted the various nuances in the role and content of good faith under the different national legal systems examined (A.). Notwithstanding these nuances, there is a common general trend to an increased role and scope of good faith under national law (B.). The above review has also underlined that the role and scope of good faith is dependent on a particular legal system's position with respect to judicial discretion (C.) and whether it attaches more importance to altruism or individualism (D.). These conclusions are informative for the application of good faith by arbitral tribunals to the parties' contract on the basis of a national law (E.).

A. Nuances in the role and content of good faith under national legal systems

1016. It has been noted that "[t]here is […] a considerable difference between the legal systems as to how extensive and how powerful the penetration of the principle [of good faith] has been."[1733] It has also been stated that the meanings of good faith "do differ within and among the legal systems and even where a particular meaning of good faith is accepted in two systems, this does not entail that they will take the same view of what it in fact requires in any given situation."[1734]

1017. From the above review of the role and scope of good faith in both the Civil law and Common law legal traditions, one can conclude that the role and content of good faith varies significantly not only between the Civil law and Common law legal traditions (1.) but also within each legal tradition, namely within the Common law legal tradition (2.) and within the Civil law legal tradition (3.).

1. Differences between the Civil law and Common law legal traditions

1018. With respect to the differences between the notion of good faith in the Civil law and Common law legal traditions, it is first of all apparent, that the notion of good faith has a much more extensive role and scope in the Civil law legal tradition than in the Common law legal tradition.

1019. At the one end of the spectrum, there is English, Hong Kong and Singapore law where good faith has a limited role and scope. Conversely, at the other end of

[1733] PECL Official Commentary, Chapter I, 116.

[1734] WHITTAKER/ZIMMERMANN, surveying the landscape, 699.

the spectrum, there is Swiss law and German law where good faith has an extensive role and scope.[1735] The notion of good faith under the other legal systems examined in Chapter one falls somewhere between these two extremes with the Common law legal systems converging towards the restrictive end of the spectrum and the Civil law legal systems converging towards the extensive end of this spectrum.

1020. Indeed, the inclusion of good faith in the codes of many Civil law countries gives good faith a so-called "institutional" or "formal" role which it does not have in Common law countries.[1736]

1021. The main differences between the application of good faith in the Common law and Civil law legal traditions can be seen at the pre-contractual stage and the post-contractual stage.

1022. Indeed, all Civil law legal systems agree that rules derived from good faith apply to the pre-contractual stage.[1737] Conversely, in the Common law legal systems, there is no general duty to observe good faith at the pre-contractual stage.[1738] Moreover, in most of the Common law legal systems, even an express obligation to negotiate in good faith at the pre-contractual stage will only be enforceable in limited circumstances, namely where the parties have agreed on the essential elements of the contract.[1739]

1023. In addition, whilst in many Civil law legal systems, good faith applies at the post-contractual stage, there is no duty to act in good faith at the post-contractual stage in the legal systems belonging to the Common law legal tradition.[1740]

1024. The difference is less stark with respect to the application of good faith to the performance of the contract. In Civil law legal systems, good faith applies generally to all contracts at the performance stage.[1741] In certain Common law legal systems (including England, Hong Kong and Singapore), a duty of good faith

[1735] See in this regard, PECL Official Commentary, Chapter I, 116–117.

[1736] O'CONNOR, 85.

[1737] See paras. 428 et seq. (Swiss law); paras. 472 et seq. (French law); paras. 557 et seq. (German law) and paras. 611 et seq. (law of the PRC).

[1738] See paras. 324 et seq. (English law); paras. 373 et seq. (New York law); para. 509 (Canadian law), para. 524 (Australian law); para. 535 (Hong Kong law) and para. 540 (Singapore law). See also CREMADES, 777 on the differences between the Common and Civil law legal traditions with respect to pre-contractual liability.

[1739] See paras. 326 et seq. (English law), paras. 376 et seq. (New York law), para. 510 (Canadian law), para. 525 (Australian law), para. 536 (Hong Kong law) and para. 541 (Singapore law).

[1740] See paras 464 et seq. (Swiss law), paras. 505 et seq. (French law), para. 591 (German law) and paras. 643 et seq. (law of the PRC).

[1741] See paras. 442 et seq. (Swiss law), paras. 483 et seq. (French law), paras. 564 et seq. (German law) and paras. 618 et seq. (law of the PRC).

does not generally apply at the contractual performance stage.[1742] Parties may, however, expressly provide for this duty to apply to their contract, it may be implied in law if their contract is a specific type of contract or it may be implied in fact to their contract based on the circumstances of the case.[1743] Conversely, in other Common law legal systems (including the US, Canada and parts of Australia), the courts have implied a general duty of good faith into all contracts.[1744] However, even where they have done so, the role of good faith at the performance stage is much more restrictive than in Civil law legal systems. As we have seen, under New York law, the implied covenant of good faith and fair dealing has mainly a negative role and is restricted in its application.[1745] In addition, although Canadian law now recognizes a general organizing principle of good faith which applies to all contracts, this principle only imposes a duty of honesty and does not encompass a duty of loyalty or disclosure.[1746] Conversely, in Civil law legal traditions, good faith imposes positive ancillary obligations on the parties and restricts the manner in which parties may exercise their rights.[1747]

1025. Significantly, in Common law legal systems, the implied term of good faith is derived from the presumed intention of the parties whereas in Civil law systems, the duty to act in accordance with good faith is externally imposed on the parties. As a result, the Civil law approach is that parties cannot exclude or limit the application of the principle of good faith, whilst the Common law approach is that good faith is an implied duty which is subordinate to the parties' express agreement. Indeed, in Common law legal systems, good faith is linked to the parties' intentions or reasonable expectations and is thus in accordance with the principle of freedom of contract whereas in Civil law legal systems, it is linked

[1742] See para. 332 (English law), para. 537 (Hong Kong law) and para. 542 (Singapore law).

[1743] See paras. 333 et seq., 337 et seq., 342 et seq. (English law), para. 538 (Hong Kong law) and para. 543 (Singapore law).

[1744] See paras. 388 et seq. (New York law), paras. 516 et seq. (Canadian law), paras. 529 et seq. (Australian law).

[1745] See para. 394 and paras. 397 et seq.

[1746] See para. 520.

[1747] See paras. 451 et seq. and 455 et seq. (Swiss law), paras. 493 et seq. and 499 et seq. (French law), paras. 579 et seq. and 583 et seq. (German law), and paras. 628 et seq. and paras. 636 et seq. (law of the PRC). See also in this regard, BRIDGE, good faith, 99 stating that "At one end of a graduated scale, good faith amounts to honesty. At the other end, it amounts to paying proper regard to the interests of the other contracting party, perhaps even at the expense of one's own practical interests."

to the value of fairness and places a limit on the principle of freedom of contract.[1748]

1026. Notwithstanding the above, it has been noted that systems which recognize a general principle of good faith sometimes produce divergent results when such principles are applied to a particular fact situation and that there is sometimes a greater similarity of outcome between a jurisdiction which does not recognize a duty of good faith and one that does.[1749]

1027. It has further been noted that in a variety of fact patterns examined under various legal systems, most legal systems arrived at the same result, either by using the principle of good faith or other legal doctrines.[1750]

1028. The most significant noted difference in terms of outcome occurs in the situation where a party terminates a contract in accordance with the terms of the contract in circumstances where the terminating party had repeatedly renewed the contract for a number of years. Under English law, such an action is considered permissible whereas under German law, such action would be considered contrary to good faith.[1751]

2. Differences within the Common law legal tradition

1029. In the legal systems which belong to the Common law legal tradition, diverging approaches have been taken with respect to the role and scope of good faith.[1752] Indeed, as stated by Lord BROWN-WILKINSON: "throughout the common law world it is a matter of controversy to what extent obligations of good faith are to be found in contractual relationships."[1753] It has further been stated that "there is no such thing as a single common law view of good faith in contract law […] Different common law legal systems have adopted different approaches at

[1748] See in this regard, STEVEN J BURTON, Reply to Ewan McKendrick, Good Faith in the Performance of a Contract in English Law in Larry DiMatteo/Martin Hogg (eds), Comparative Contract Law: British and American Perspectives (Oxford University Press 2016) 221.

[1749] MCKENDRICK, Good Faith, 199.

[1750] WHITTAKER/ZIMMERMANN, coming to terms, 653. See also, in this regard, SAINTIER, 441 stating that the distinction between the Common law and Civil law traditions with respect to good faith should not be overplayed and who attempts in her article to highlight the similarities between French and English laws concerning the notion of good faith.

[1751] See SIMON WHITTAKER/REINHARD ZIMMERMANN, Case 23: Long-term business relationships in Simon Whittaker/Reinhard Zimmermann (eds) Good Faith in European Contract Law (Cambridge 2000) 532–539.

[1752] See paras. 316 et seq. (English law), paras. 362 et seq. (New York law) and paras. 507 et seq. (Canadian, Australian, Hong Kong and Singapore law).

[1753] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2002] 2 All ER (Comm) 849 (PC) at 54.

different points in time."[1754] Indeed, among the Common law legal systems, there are differences in how the duty is defined.[1755]

1030. The US has taken the most extensive approach with respect to the role and scope of good faith in the performance of contracts.[1756] On the other hand, England, Hong Kong and Singapore have taken the most restrictive approach with Australia and Canada taking an intermediary position.[1757] Some legal systems recognize that good faith is generally applicable to the performance of all contracts (US, Canada, certain jurisdictions of Australia)[1758] whilst others reject the general implication of such a duty, only enforcing an express duty to act in good faith or recognizing an implied term in law or an implied term in fact depending on the circumstances of the case (England, Singapore, Hong Kong).[1759]

3. Differences within the Civil law legal tradition

1031. It is interesting to note that even within the Civil law legal tradition – as within the Common law legal tradition – the role and scope of good faith is not unified.

1032. Whilst all of these legal systems accept that there is a general pre-contractual duty to act in good faith, there is no uniform view concerning to what extent: (i.) one party is obliged to inform the other; (ii.) one party should inform the other of parallel negotiations; and (iii.) one party is liable for an intentional or inadvertent misrepresentation of the facts.[1760]

1033. In addition, even within a single legal system, the role and scope to be attributed to good faith at the pre-contractual stage is debated. Such a debate was noted in ICC Case No 9613 of 1999 where the arbitral tribunal, which was applying the principle of good faith under Italian law, stated that it would follow the broader approach adopted by the Italian legal doctrine rather than the narrower approach

[1754] MCKENDRICK/LIU, Good Faith, 74.

[1755] *Ibid*, 75 stating that "An English court may define the duty [of good faith] differently from its American counterpart."

[1756] BEALE, Chitty, 97, §2-033. See also above paras. 362 et seq. (New York law).

[1757] See paras. 316 et seq. (English law), and paras. 507 et seq. (Canadian, Australian, Hong Kong and Singapore law).

[1758] See paras. 388 et seq. (New York law), paras. 516 et seq. (Canadian law), paras. 529 et seq. (Australian law).

[1759] See para. 332, paras. 333 et seq., 337 et seq., 342 et seq. (English law), para. 537–538 (Hong Kong law) and para. 542–543 (Singapore law).

[1760] See in this regard, HANS VAN HOUTTE, The Unidroit Principles of International Commercial Contracts (1995) 11 Arb Intl 376–377.

of the case law with respect to the scope of good faith at the pre-contractual stage.[1761]

1034. In relation to the approach of the Civil law legal systems concerning the role and scope of good faith at the contractual performance stage, good faith has been employed to supplement the parties' intentions and to fill contractual gaps with the parties' hypothetical intentions in the Swiss and German legal systems whilst it has not been attributed this role under French and PRC law.[1762] Furthermore, there is no uniform view concerning the extent to which good faith imposes obligations at the post-contractual stage.[1763]

B. General trend to an increased role and scope attributed to good faith

1035. It has been said that there is a "global trend towards an increasing role for the principle of good faith in contract law".[1764] This trend is said to have been prompted by the desire to import elements of morality into contract law.[1765]

1036. Indeed, the above review has shown that, despite the differences in the role and scope attributed to good faith by the various legal systems examined, there is a general trend to an increased role and scope of good faith.

1037. In particular, in France, we have seen how good faith has taken on an increasingly extensive role and has recently been further codified in the French Civil Code.[1766] Similarly, in Canada, we have seen how the Supreme Court has recently recognized a general organizing principle of good faith applicable to all contracts.[1767] Furthermore, in Australia, there is an increasing recognition of a general duty to act in good faith which is applicable to all contracts.[1768]

[1761] ICC Case No 9613 (2007) 32 YB Comm Arb 42–59, 45. For a description of this case, see below, para. 1143.

[1762] See paras. 449 et seq. (Swiss law) and paras. 574 et seq. (German law).

[1763] See paras 464 et seq. (Swiss law), paras. 505 et seq. (French law), para. 591 (German law) and paras. 643 et seq. (law of the PRC).

[1764] VOGENAUER, Article 1.7, 205, §1.

[1765] PAUL-ANDRÉ CRÉPEAU/ELISE CHARPENTIER, *Les Principes d'UNIDROIT et le Code civil du Québec: valeurs partagées?* (Scarborough 1998) 53.

[1766] See paras. 469–470.

[1767] See paras. 516 et seq.

[1768] See paras. 529–530.

C. Role and scope of good faith dependent on position regarding judicial discretion

1038. The above review has also underlined how the role and scope of good faith is dependent on a particular legal system's position with respect to how much discretion decision makers should have.[1769]

1039. As we have seen, under the law of the PRC, Chinese scholars and courts have accepted with ease the principle of good faith and the associated discretion with which judges are endowed due to the importance of collectivism and strong government grounded in Confucianism in the PRC.[1770] In addition, we have seen, on the one hand, how the role and scope of good faith waned in 19th century France and Germany where distrust of the judiciary was high.[1771] On the other hand, we have seen how in 20th century Germany, the role of good faith increased in line with the promotion of judicial freedom which was expounded by the *Freirechtsbewegung*.[1772]

D. Role and scope of good faith dependent on preference for individualism or altruism

1040. The above review has also underlined how the role and scope of good faith is dependent on whether a particular legal system attaches more importance to individualism or altruism.[1773]

1041. As we have seen under English law, one of the main objections to the recognition of a general principle of good faith is that it would be contrary to adversary individualism, whereby parties are free to pursue their own self-interest when performing a contract, as well as the autonomy of the parties and the principle of freedom of contract.[1774] Conversely, under French law, the ideal of solidarity has led to an increasing role being attributed to good faith since the second half of the 20th century.[1775]

[1769] See, in this regard, AUER, 297.
[1770] See para. 606.
[1771] See paras. 270 et seq.
[1772] See paras. 282 et seq.
[1773] See, in this regard, AUER, 288–294.
[1774] See para. 356.
[1775] See paras. 279 et seq.

E. Lessons for the application of good faith on the basis of a national law to the parties' contract by arbitral tribunals

1042. As we have seen, there is a general trend towards the increased role and scope of good faith under national law. Thus, in international commercial arbitration, where the vast majority of contracts are subject to a national law,[1776] good faith will also have an increased role and scope in line with the approach taken by the relevant national laws.

1043. Although the differences between national laws with respect to the role and scope of good faith should not be overstated, the above review has confirmed that such nuances do exist. Accordingly, in the author's view, arbitral tribunals should exercise extra caution when applying good faith on the basis of a national law with which they are not familiar in order to ensure that they are applying good faith in accordance with the applicable law.[1777]

[1776] See para. 1097.

[1777] See paras. 1169 et seq.

II. Good Faith Under Non-National Law

1044. The above review in Chapter two has highlighted that there is a trend of adopting the Civil law approach to good faith and attributing an extensive role and scope to the notion of good faith under the various sources of non-national law (A.). The above review has also highlighted the various nuances in the role and content of good faith under the different sources of non-national law (B.) and the tension between this principle and the principle of party autonomy (C.). The above review has further highlighted that the general duty to act in accordance with good faith and fair dealing has a limited scope in practice given the codification of the specific applications of this duty under certain non-national law instruments (D.). In addition, with respect to good faith as a general principle of law, the source and content of this principle are unclear (E.). These conclusions are informative for the application of good faith by arbitral tribunals to the parties' contract on the basis of a non-national law (F.).

A. Majority adoption of Civil law approach

1045. Most sources of non-national law have adopted the Civil law approach with respect to the role and scope of good faith.

1046. Indeed, the PICC, PECL, DCFR and PLACL have all adopted a Civil law approach with respect to good faith by incorporating a general (and mandatory) overarching duty on the parties to act in accordance with good faith (and fair dealing) as well as a prohibition of bad faith pre-contractual negotiations.[1778] Conversely, the OHADAC Principles have followed the Common law approach by refusing to recognize a general principle of good faith which governs the contractual performance stage as well as the pre-contractual stage.[1779]

1047. On the other hand, the good faith provision in the CISG is seen as a compromise between the Common law and Civil law approaches.[1780]

[1778] See paras. 822 et seq. (PICC), paras. 877 et seq. (PECL), paras. 924 et seq. (DCFR), paras. 983 et seq. (PLACL).

[1779] See paras. 969 et seq.

[1780] See paras. 712 et seq.

B. Nuances in the role and content of good faith under non-national sources of law

1048. From the above review of good faith under international conventions, international academic restatements and as an uncodified general principle of law, one can conclude that the role and scope of good faith varies significantly depending on the applicable non-national legal source. There is a whole spectrum of notions of good faith with the most restrictive being the ones found under the CISG and the OHADAC Principles and the most extensive being the ones found under the PECL, PICC, PLACL and the DCFR.

1049. As we have seen, the OHADAC Principles do not include a general principle of good faith[1781] and the CISG only includes a provision applying good faith to the interpretation of the provisions of the CISG.[1782]

1050. The PICC is the only instrument to employ good faith as a tool to supplement the parties' intentions[1783] although – contrary to the PECL, PLACL and DCFR – it does not expressly refer to good faith as a criterion for the interpretation of the parties' contract.[1784]

1051. The DCFR is the only instrument which attempts to define the concept of good faith and fair dealing.[1785] It is also unique in its clarification of the remedies which a breach of the duty (and not obligation) of good faith and fair dealing gives rise to.[1786] Indeed, a breach of such a duty will only prevent a party from exercising or relying on a right, remedy or defence which that person would otherwise have and will not lead to the usual remedies that are open in case of a breach of an obligation.[1787]

1052. This rule is seen as a clear attempt to curtail the courts' possibility to develop new obligations, such as the duty to inform which would be contrary to social justice.[1788] It is submitted, however, that positive obligations may be imposed on the parties if a term is implied on the basis of good faith and fair dealing by virtue of Article II-9:101(2)(c) DCFR and that the courts may still develop new obligations on this basis.

[1781] See paras. 969 et seq.
[1782] See paras. 712 et seq.
[1783] See para. 864.
[1784] See paras. 822 et seq.
[1785] See paras. 930 et seq.
[1786] See para. 964.
[1787] See para. 964.
[1788] HESSELINK, Common Frame, 16.

1053. The role of good faith and fair dealing in the DCFR also differs due to the absence of a general provision which imposes a duty of good faith on the contracting parties throughout the life of the contract. Indeed, the main provision on good faith and fair dealing (Article III.–1:103 DCFR 'Good faith and fair dealing'), outside of the provision defining good faith, only imposes a duty of good faith and fair with respect to the performance stage.[1789]

C. Tension between good faith and party autonomy

1054. In the DCFR and the PECL, there is a noted underlying tension between the principle of party autonomy and the general principle of good faith and fair dealing.

1055. Indeed, on the one hand, according to Article III.–1:103(2) DCFR, the duty to act in accordance with good faith and fair dealing is mandatory and therefore a party cannot stipulate in the contract that it reserves its right to ignore any duty to act in accordance with good faith and fair dealing without this having any consequences.[1790] However, on the other hand, it is stated that what will be in accordance with good faith and fair dealing will depend on the terms of the parties' contract[1791] and that good faith and fair dealing will play a minor role in commercial contracts as the rights and obligations of the parties will be so carefully regulated.[1792]

1056. A similar tension has been noted in the PECL.[1793] Thus, on the one hand, Article 1:102 PECL provides that the parties' freedom of contract is limited by the duty of good faith and fair dealing and the Official Commentary states that good faith and fair dealing may take precedence over the provisions of the PECL when a strict adherence would lead to a manifestly unjust result.[1794] On the other hand, the Official Commentary states that what will be considered contrary to good faith and fair dealing will be dependent, to a certain extent, on what the parties have agreed.[1795]

1789 See paras. 957 et seq.

1790 DCFR Official Commentary, 175.

1791 *Idem*, 705 stating that: "Thus, parties may agree that even a technical breach by one party will entitle the other party to refuse performance, when, for instance, that party's representatives can ascertain a technical breach but not whether it is a trifle or not."

1792 *Idem*, 136.

1793 MACQUEEN, 46–47.

1794 PECL Official Commentary, Chapter I, 113.

1795 *Idem*, 116.

D. Limited practical application given the codification of specific manifestations

1057. It is significant that in the majority of non-national law instruments, the general duty to act in accordance with good faith (and fair dealing) plays a limited role due to the fact that the specific manifestations of this duty have been explicitly spelt out in the relevant instrument.[1796]

1058. Indeed, most instruments explicitly prohibit contradictory behaviour and impose a duty on the parties to cooperate[1797] which are the two main specific manifestations of the general principle of good faith and fair dealing.

E. Unclear source and content of the general principle of good faith

1059. As we have seen, due to the uncodified nature of the general principles of law, the contours of the general principle of good faith lack clarity.[1798] Indeed, the general principle of good faith has been employed extensively to justify, for example, many of the rules on contractual interpretation as well as certain rules relating to legal remedies.[1799]

1060. In addition, the source of the general principle of good faith is unclear. Indeed, despite the preferability of a strict conception of trade usages, some arbitral tribunals have employed an extensive conception of trade usages and as a result have applied the general principle of good faith as a trade usage.[1800]

F. Lessons for the application of good faith to the parties' contract by international arbitral tribunals

1061. Although the differences between non-national laws with respect to the role and scope of good faith should not be overstated, the above review has shown that such nuances do exist.

[1796] See e.g., para. 836 (PICC), para. 878 (PECL) and para. 926 (DCFR).

[1797] See paras. 846 et seq. and paras. 866 et seq. (PICC); see paras. 895 et seq. and paras. 914 et seq. (PECL); see paras. 935 et seq. and paras. 965 et seq. (DCFR).

[1798] See paras. 652 et seq.

[1799] See paras. 669 et seq. and paras. 701 et seq.

[1800] See para. 1200.

1062. In the author's view, arbitral tribunals should therefore exercise caution when applying good faith on the basis of a non-national law in order to ensure that good faith is applied in accordance with the applicable non-national law.[1801]

1063. In addition, as we have seen,[1802] there is a noted tension between the principle of good faith and fair dealing and the principle of party autonomy in some of the non-national law sources, in particular, the PECL and the DCFR. In this regard, arbitral tribunals should be aware that in international commercial relationships – where the parties' rights and obligations are often very carefully regulated – there may be little room for the application of the principle of good faith and fair dealing.

1064. Arbitral tribunals should further be aware that the general duty to act in accordance with good faith and fair dealing has a limited role under the majority of non-national law sources due to the fact that most of its specific manifestations have been codified in the relevant non-national legal source. In such cases, arbitral tribunals should therefore take care to ensure that they give preference to the application of the codified specific manifestation of the general duty to act in accordance with good faith and fair dealing rather than directly having recourse to this general duty in the instrument in question.[1803]

1065. Finally, given the unclear content of good faith as a general principle of law, the author is of the view that arbitral tribunals should – wherever possible – give preference to codified sources of non-national law.[1804]

[1801] See below, paras. 1305 et seq. (CISG), para. 1312 (PICC), paras. 1320 et seq. (General Principles of Law).

[1802] See paras. 1054 et seq.

[1803] See below, para. 1308.

[1804] See below, para. 1313.

Part IV: Good Faith and its Application by Arbitral Tribunals to the Parties' Contract

1066. This Part examines the application of good faith by arbitral tribunals to the parties' contract. In Chapter one, the application of good faith based on a contractual source, namely an express contractual good faith provision, will be examined. Chapter two will explore the application of good faith based on a national law. In Chapter three, the application of good faith on the basis of non-national legal sources, namely international conventions (notably, the CISG), international academic restatements (notably, the PICC), as well as uncodified sources (such as the general principles of law and trade usages) will be explored. Finally, Chapter four will analyze the application of good faith by arbitral tribunals to the parties' contract when the arbitral tribunal is endowed with the power to rule *ex aequo et bono* or as *amiable compositeur*.

Chapter 1: Application of Good Faith on the Basis of an Express Contractual Provision

1067. International contracts often contain clauses expressly providing that the parties will act or perform their contractual obligations in accordance with good faith.[1805]

1068. This Chapter will explore the types of contractual clauses expressly imposing good faith obligations on contracting parties (I.) before turning to the application of such clauses by arbitral tribunals (II.) and thereafter proposing guidelines for the application of these clauses by arbitral tribunals (III.).

[1805] LALIVE, *bonne foi*, 435.

I. Types of Express Good Faith Clauses

1069. Some of the clauses expressly imposing good faith obligations on contracting parties are general in that the duty to act in good faith applies generally to the performance of the contract (A.), whilst some of these clauses are specific, obliging the parties to act in good faith with respect to a specific obligation or right under the contract (B.).

A. General clause to perform the contract in good faith

1070. Some good faith clauses oblige the parties to act in good faith in general when performing their obligations under the contract.

1071. A few examples of such clauses are set out below:

> The Partners shall carry out the terms and provisions of this Joint Venture Agreement *in accordance with the principle of mutual goodwill and good faith* and respect the spirit as well as the letter of the said terms and provisions.[1806]

> Both parties shall execute this contract *in accordance with acknowledged business practices and good faith*. Such obligation shall extend to include all activities rendered as part of the contract requirements under generally accepted business practices (1983).[1807]

> Each of Party A and Party B *shall perform this Contract in good faith*. If either party breaches any provision herein, it shall be regarded as a default. Unless otherwise agreed herein, if either party defaults, making it impossible to perform this Contract, the other party may terminate this Contract and the breaching party shall compensate the non-breaching party for all the losses sustained thereby (2010).[1808]

1072. Standard form contracts also contain general clauses obliging the parties to perform the contract in good faith. Hence, Article 2 of the ICC Model Commercial Agency Contract 2002 contains an express general clause obliging the parties to act in good faith. This clause provides that:

> [i]n carrying out their obligations under this contract, the parties will act in accordance *with good faith and fair dealing*. The provisions of this agreement, as well as any statements made by the parties in connection with this agency relationship shall be interpreted in good faith.[1809]

[1806] Emphasis added. Example referred to in FONTAINE/DE LY, 180.

[1807] Emphasis added. Example listed at < http://www.trans-lex.org/901000>, accessed 1 March 2023.

[1808] *Ibid*.

[1809] Emphasis added. FONTAINE/DE LY, 181 referring to ICC Model Commercial Agency Contract, ICC Publication No 644, Paris ICC Publishing 2002 and ICC Model Distributorship

1073. One contract contained a clause stating that the principle of good faith and fair dealing would act as a limit to the enforceability of the contract. It was therefore implicit that the parties could only exercise and enforce their rights in general under the relevant agreement if they did so in accordance with good faith.[1810]

B. Specific clause to perform a certain obligation or exercise a right in good faith

1074. Some good faith clauses oblige the parties to act in good faith in relation to a certain specific obligation or to exercise a certain right in good faith.

1075. Some agreements include a specific obligation imposing on the parties the duty to negotiate a contract in good faith. For example, in the *AT& T Corp & Anor v Saudi Cable Co* case, the Pre-bid agreement expressly required the parties on award of the project to negotiate in good faith mutually satisfactory supply and service agreements.[1811] Other clauses include a specific obligation imposing on the parties the duty to negotiate a particular term of the contract in good faith.[1812]

Contract, ICC Publication No 646, Paris ICC Publishing 2002 which contains a similar clause at Article 2.

[1810] The relevant clause provided that: "[...] this Agreement […] shall constitute [...] a valid and legally binding obligation [...] enforceable [...] with its respective terms and conditions [...] except as enforceability may be limited [...] by general principles relating to enforceability, including principles of [...] good faith and fair dealing (2009). Example listed at < http://www.trans-lex.org/901000>, accessed 1 March 2023.

[1811] *AT& T Corp & Anor v Saudi Cable Co* [2000] EWCA Civ 154 (15 May 2000) [3]. See also examples listed at < http://www.trans-lex.org/901000>, accessed 1 March 2023: "On or prior to the Closing Date, Buyer or a Buyer Designee shall execute and deliver to Seller, and Seller or the applicable Subsidiary shall execute and deliver to Buyer or a Buyer Designee, the Collateral Agreements. In addition, on or prior to the Closing Date Buyer and Seller shall negotiate in good faith an arm's-length customer and technical support agreement from Buyer to Seller related to X Products currently used by Seller in its information technology infrastructure (2011)"; "The Company and Sony will act in good faith to negotiate, complete and enter into a definitive Option Agreement, Loan Agreement, and related closing documents reflecting the terms and conditions hereof as soon as reasonably possible, with a goal of executing the Loan Agreement, Option, and related closing documents within X days hereof"; "[…], the Company and its shareholders, officers, directors and agents and Y shall negotiate in good faith with X for a period of {X} days (the "Due Diligence Period"), with respect to transactions contemplated hereby. Such negotiations shall reflect the terms set forth in this Term Sheet [...]";. "The Company and X or an Affiliate of X shall in good faith negotiate the terms and conditions of the Ancillary Agreements (2007)."

[1812] Examples listed at < http://www.trans-lex.org/901000>, accessed 1 March 2023: [...] The Company and Purchaser shall endeavor in good faith to agree, as soon as reasonably

1076. Some clauses were found which required the parties to negotiate in good faith in the case of the occurrence of a certain event. For example, a multi-currency Euro credit contract included an obligation on the parties to renegotiate in good faith the interest rate in case of a change of circumstances.[1813] Another example is a clause in an asset management agreement which obliged the parties to negotiate in good faith upon a determination that a term or provision of the contract was invalid, illegal or incapable of being enforced.[1814] A further clause in a sales and purchase contract required the parties to negotiate in good faith if a specification conformity could not be achieved in order to determine what actions or remedies were appropriate.[1815]

1077. Many clauses were found requiring the parties to cooperate in good faith in performing the contract. For example, clauses requiring the parties to cooperate in good faith with respect to the testing and evaluation of products,[1816] the

practicable, to an allocation of the purchase price hereunder between the Notes and Warrants [...] (2013)"; "The X Parties are hereby granting to Y, subject to relevant PRC government approvals, the right to acquire up to its entire 49% of the Joint Venture, at such time as agreed upon by the Parties. The consideration for this acquisition shall be determined by the Parties, acting in good faith, or based upon a valuation performed by an independent valuator satisfactory to the Parties (2005)."

[1813] "The Agent (in consultation with each Bank) and the Borrower shall thereupon enter into negotiations in good faith with a view to agreeing an alternative mutually acceptable basis for funding the Loan and for determining the interest rates from time to time applicable to the Loan." Example referred to in MORIN, 22. See also similar example listed at <http://www.trans-lex.org/901000>, accessed 1 March 2023: "The Parties will confer and attempt in good faith to agree upon appropriate modifications to this Agreement."

[1814] Example listed at <http://www.trans-lex.org/901000>, accessed 1 March 2023: "[...] Upon such determination that any term or other provision is invalid, illegal, or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in an acceptable manner in order that the transactions contemplated hereby are consummated as originally contemplated to the greatest extent possible (2008)."

[1815] Example listed at < http://www.trans-lex.org/901000>, accessed 1 March 2023: "X will take such actions as shall be necessary to achieve specification conformity. If specification conformity cannot be achieved, Steel and Cliffs shall negotiate in good faith to determine what actions or remedies, if any, are appropriate [...] (2002)."

[1816] Examples listed at < http://www.trans-lex.org/901000>, accessed 1 March 2023: "Prior to the commercial distribution of any Y Products, X will perform appropriate testing (and mutually agree in writing to the completion of such testing) for proper device, software and system behavior when loaded or used with Y content, as well as proper integration and interoperability between the Y Products and the Y Service. The Parties shall cooperate with each other in good faith with regard to all such testing and evaluation" and "[t]he parties will cooperate in good faith to test the implementations developed in these projects against reasonable functional requirements to be defined by Y."

appointment of an accountant to issue a binding opinion on the net profit,[1817] the maximizing of tax benefits and minimizing of tax costs,[1818] and the development of mutually agreed service levels.[1819]

1078. Some clauses oblige only one party to performs its obligations in good faith.[1820] For example, in ICDR Case No 236-04, the parties included an obligation requiring the respondent to proceed in good faith with the transactions needed in

[1817] Example listed at < http://www.trans-lex.org/901000>, accessed 1 March 2023: [...] If the determination of the Net Profit is not challenged by the parties within such term, the payment obligation eventually arising therefrom for Buyer or Sellers shall be fulfilled before the last day of March of each year. If such amount is challenged, the aforementioned certified accountant or that to be appointed by mutual agreement of the Parties shall review such determination within ten (10) days following the expiration of the term specified for challenge and shall issue a final opinion which shall be binding on both Parties. Any payments to be made by the parties shall be made within ten (10) days following the final report issued by the certified accounting after such review. As aforesaid, the Parties shall mutually appoint the person responsible for the determination of the Net Profit or the review of such determination. To such end, the Parties shall act in good faith, through mutual consultation, for such appointment and shall attempt to reach an agreement on that matter [...] (2010)."

[1818] Example listed at < http://www.trans-lex.org/901000>, accessed 1 March 2023: "The Parties shall cooperate in a good faith, commercially reasonable manner to maximize tax benefits or minimize tax costs of the Joint venture company."

[1819] Examples listed at < http://www.trans-lex.org/901000>, accessed 1 March 2023: "The parties will work in good faith to develop mutually agreed service levels for this delivery, based on the performance and reliability characteristics of such delivery mechanism." (2009); "The Company and the Board of Directors shall work in good faith with the Trustees to ensure corporate governance arrangements satisfactory to the Trustees" (2009); "At the Initial Repurchase Closing, Purchaser and each Seller shall execute and deliver to the other the New Shareholders Agreement and Purchaser shall adopt the Amended and Restated Articles. The parties shall cooperate in good faith to, within thirty (30) days of the date hereof, prepare a form of the Amended and Restated Articles which form shall be reasonably acceptable to each of the Company and X [...]"(2012); "The Parties agree to work together and to cooperate with each other in good faith to develop an annual budget to reflect the estimated annual Service Costs to each Party for each of the Services to be provided and/or procured by the other Party as contemplated by this Agreement [...] the Parties will negotiate in good faith to have the Quarterly Service Cost modified to reflect the actual cost [...]" (2007). [...] Promptly after receipt of notice of Yahoo!'s election to exercise the {*} Option in a given country, the parties will work together in good faith to determine a reasonable implementation schedule for the {*} Services in such country and a fair and equitable allocation of the foregoing costs [...]" (2009).

[1820] Example listed at <http://www.trans-lex.org/901000>, accessed 1 March 2023: " [...] In furtherance of such purposes, X will act in good faith in providing the Services and fulfilling its obligations under this Agreement, including fulfilling the spirit of parity, throughout the Term and as the Services (and Additional Services and Other Platform Services, if applicable) evolve during such time [...]" (2009).

order to complete the closing.[1821] In another case, the relevant clause provided that in case the licensee did not comply with its obligation to manufacture, distribute or sell the products in good faith, the licensor would be entitled to terminate the contract.[1822]

[1821] ICDR Case No 236-04 in GRANT HANESSIAN (ed), ICDR Awards and Commentaries (Juris 2012) 137–153, 148. Although the claimant alleged that the respondent has breached this provision, the arbitral tribunal did not address this claim as this provision did not survive the termination of the contract. See also example listed at <http://www.trans-lex.org/901000>, accessed 1 March 2023: "The Committee shall be obliged only to use good faith and to exercise its honest judgment as to what investments are from time to time in the best interests of the Trust Fund and the Participants and their Beneficiaries." (2002).

[1822] "The licensor shall have the right to terminate this Agreement without prejudice to any rights which it may have upon the occurrence of any of the following events: [...] the licensee does not commence in good faith to manufacture, distribute or sell the Licensed Products throughout the Licensed Territory [...]." Example referred to in LARRY A. DIMATTEO, International Contracting: Law and Practice (Kluwer Law International 2009), 371, §10.18.

II. Application by Arbitral Tribunals

1079. Six awards were found in which arbitral tribunals considered the application of good faith on the basis of an express good faith clause.[1823]

1080. The first case was ICDR Case No 236-04 (unknown applicable law), in which the claimant sought damages for breach by the respondent of a contractual provision requiring him to proceed in good faith with the transactions needed to effect the closing. The arbitral tribunal, however, did not address this claim as another provision of the contract stated that the express good faith clause did not survive the termination of the contract.[1824]

1081. The second case was ICC Case No 8540 (New York law). This case concerned a pre-bid agreement in which the parties expressly undertook to negotiate in good faith for the supply of cables in the event that the claimant's bid to become prime contractor for a telecommunications expansion project succeeded. In the extract available, the arbitral tribunal only considered the validity of this express agreement to negotiate in good faith and held that such an obligation was valid and enforceable under the applicable New York law as well as under the PICC.[1825]

1082. The third case was *Telenor Mobile Communications v Storm LLC* (New York law). In this case, the parties' Shareholders' Agreement contained an express provision requiring one of the parties to "act in a good faith and constructive manner such as to give effect to the provisions of this Agreement, including, without limitation through participating in and voting at the General Meeting of Shareholders and the Board." Thus, in this case, the relevant express good faith clause helpfully elaborated on the type of conduct which would be considered to be contrary to good faith, namely the failure to participate and vote in the General Meeting of Shareholders and the Board. The arbitral tribunal held that this provision had been breached as the relevant party had indeed failed to attend Board and shareholder meetings. As a result of this breach, the arbitral tribunal

[1823] These awards were found in the following sources: GRANT HANESSIAN (ed), ICDR Awards and Commentaries (Juris 2012), unilex database, arbitrator intelligence database, and ICCA Yearbook of Commercial Arbitration.

[1824] GRANT HANESSIAN (ed), ICDR Awards and Commentaries (Juris 2012) 137–153, 148.

[1825] ICC Case No 8540, available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=644&step=FullText>, accessed 1 March 2023.

ordered that the respondent should participate in good faith in the direction and management of the company's business.[1826]

1083. The fourth case was ICC Case No 18701 of 2014 (law of Massachusetts), in which the relevant good faith clause in the License and Distribution Agreement provided that the respondent would be able to terminate the contract if: (i.) the claimant committed a breach of the contract which entitled the respondent to terminate the contract; (ii.) the claimant was not making good faith efforts to cure such breach or could not cure such breach; and (iii.) such a breach had a material adverse impact on the respondent's business. The arbitral tribunal held that the respondent was entitled to terminate the contract pursuant to this provision as the claimant had breached the contract by failing to pay the amount due under the letter of credit, the claimant did not make any good faith efforts to cure the breach as it refused without a valid reason to repay the amounts due under the letter of credit and the breach had a material adverse impact on the respondent's business.[1827]

1084. The fifth case was ICDR Case No. 01-15-0002-9056 (law of Florida) in which the sole arbitrator found that the respondent had breached its contractual duty to act in good faith under the Operating Agreement by cutting the claimant out of the operation of the clinic, by causing the Articles of Organization to be amended without the claimant's knowledge, by bringing State court proceedings, by accusing the claimant of criminal conduct and by refusing to give the claimant access to the books and records. However, the sole arbitrator did not award damages as a result of this breach as the claimant did not prove that it had suffered any loss as a result of this breach.[1828]

1085. The final case was ICC Case No 6515 (Greek law), in which the arbitral tribunal held that the respondents did not comply with their contractual obligation to negotiate in good faith in case of a change of circumstances and that, as a result, the claimant was entitled to damages. The arbitral tribunal went on to hold that

[1826] *Telenor Mobile Communications AS v. Storm LLC* (JOANNE BARAK (US) (Presiding Arbitrator); RAYMOND J. JR. BURKE (US); PETER LAITMON (US)), Final Award, 2 July 2007, Arbitrator Intelligence Materials, 55–58.

[1827] *Berkeley Heart Europe AS v. Berkeley Heartlab, Inc*. (PIERRE BIENVENU (Presiding Arbitrator) (Canada); JOE SMOUHA (UK); THOMAS WEBSTER (Canada)), Final Award, ICC Case No. 18701/VRO/AGF, 14 February 2014, Arbitrator Intelligence Materials, §435.

[1828] *Combo Ltd. v. GIGERMD Movement Physical Therapy Center LLC*, (Lucy Greenwood (UK) (Sole Arbitrator)), Final Award, ICDR Case No. 01-15-0002-9056, 10 February 2016, Arbitrator Intelligence Materials, §§105–106.

such conduct also constituted a violation of the requirement set out at Article 288 Greek Civil Code that contracts should be performed in good faith.[1829]

1086. Out of the above six arbitral awards, the arbitral tribunal only discussed a party's compliance with an express good faith clause in four awards.

1087. In these four cases, the arbitral tribunals found that such good faith clauses had been violated.

1088. In two of these four cases,[1830] the arbitral tribunal appears to have directly applied the notion of good faith to the facts without first elaborating on the meaning of this notion either by reference to the parties' intent or by reference to the applicable law.

1089. Conversely, in ICDR Case No. 01-15-0002-9056,[1831] the relevant good faith clause helpfully set out the type of conduct which would be deemed to be contrary to good faith. The parties' intent with respect to the meaning of this good faith clause was therefore ascertainable.

1090. In addition, in ICC Case No 6515,[1832] the arbitral tribunal equated the violation of the express good faith clause with a violation of the requirement under Greek law to act in accordance with good faith when performing contracts. The arbitral tribunal thus appeared to equate the meaning of the notion of good faith in the express contractual clause with the meaning of good faith under the applicable Greek law.

1091. It is interesting to note that in two of the cases, damages were the awarded or foreseen remedy for the violation of the express good faith clause.[1833] In one case, a lack of good faith in attempting to cure a breach was a condition for the termination of the contract by the non-breaching party.[1834] In the remaining

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[1829] *Engineering Company v Engineering Company*, ICC Case No 6515 (1999) 24 YB Comm Arb 66–79, §§63–64.

[1830] *Telenor Mobile Communications AS v. Storm LLC* (Final Award, 2 July 2007, Arbitrator Intelligence Materials and *Berkeley Heart Europe AS v. Berkeley Heartlab, Inc*., Final Award, ICC Case No. 18701/VRO/AGF, 14 February 2014, Arbitrator Intelligence Materials.

[1831] *Combo Ltd. v. GIGERMD Movement Physical Therapy Center LLC*, Final Award, ICDR Case No. 01-15-0002-9056, 10 February 2016, Arbitrator Intelligence Materials.

[1832] *Engineering Company v Engineering Company*, ICC Case No 6515 (1999) 24 YB Comm Arb 66–79.

[1833] *Engineering Company v Engineering Company*, ICC Case No 6515 (1999) 24 YB Comm Arb 66–79 and *Combo Ltd. v. GIGERMD Movement Physical Therapy Center LLC*, Final Award, ICDR Case No. 01-15-0002-9056, 10 February 2016, Arbitrator Intelligence Materials. It should be noted that no damages were awarded by the arbitral tribunal in this case as no loss had been suffered.

[1834] *Berkeley Heart Europe AS v. Berkeley Heartlab, Inc*., Final Award, ICC Case No. 18701/VRO/AGF, 14 February 2014, Arbitrator Intelligence Materials.

case, the arbitral tribunal ordered specific performance of the express good faith clause in order to stop the continuing violation of the said clause.[1835]

1092. The nationality of the arbitrators was known in two cases.[1836] With respect to the application of good faith on the basis of an express contractual provision, one can surmise that any influence of an arbitrator's legal background will be less apparent – at least with respect to express contractual provisions to act in accordance with good faith at the contractual performance stage – as both Common law and Civil law systems take a similar approach with respect to such provisions.[1837] Indeed, in ICC Case No 18701 of 2014 an express contractual good faith clause was enforced by a panel, the majority of which had a Common law background.[1838] Conversely, with respect to express contractual provisions to negotiate in good faith at the pre-contractual stage,[1839] it can be expected that the influence of an arbitrator's legal background may be more pronounced given the differing approaches taken by Common law and Civil law systems with respect to such provisions.[1840]

[1835] *Telenor Mobile Communications AS v. Storm LLC* (Final Award, 2 July 2007, Arbitrator Intelligence Materials and *Berkeley Heart Europe AS v. Berkeley Heartlab, Inc*., Final Award, ICC Case No. 18701/VRO/AGF, 14 February 2014, Arbitrator Intelligence Materials.

[1836] *Berkeley Heart Europe AS v. Berkeley Heartlab, Inc*. (PIERRE BIENVENU (Presiding Arbitrator) (Canada); JOE SMOUHA (UK); THOMAS WEBSTER (Canada)), Final Award, ICC Case No. 18701/VRO/AGF, 14 February 2014, Arbitrator Intelligence Materials and *Telenor Mobile Communications AS v. Storm LLC* (JOANNE BARAK (US) (Presiding Arbitrator); RAYMOND J. JR. BURKE (US); PETER LAITMON (US)), Final Award, 2 July 2007, Arbitrator Intelligence Materials.

[1837] See Part III, Chapter one of the present thesis with respect to the role and scope of good faith under different national laws.

[1838] *Berkeley Heart Europe AS v. Berkeley Heartlab, Inc*. (PIERRE BIENVENU (Presiding Arbitrator) (Canada); JOE SMOUHA (UK); THOMAS WEBSTER (Canada)), Final Award, ICC Case No. 18701/VRO/AGF, 14 February 2014, Arbitrator Intelligence Materials.

[1839] It is noted that pre-contractual disputes are rarely arbitrated due to the lack of an arbitration agreement. However, see in this regard, SFSCD 4A_84/2015 of 18 February 2016 in which the Swiss Federal Supreme Court held the Parties were bound by an arbitration agreement contained in the draft unsigned contract exchanged between them.

[1840] See Part III, Chapter one of the present thesis with respect to the role and scope of good faith under different national laws.

III. Proposed Guidelines

1093. In cases where the parties' contract expressly provides that one or both parties are obliged to act in good faith, either in general or with respect to a specific obligation, and a party alleges that this provision has been breached, an arbitral tribunal should first elaborate on the meaning of good faith in this provision.

1094. Such provisions should be construed in line with the parties' intentions, in so far as such an intention is ascertainable and, to the extent that it is not, in line with the applicable law to the contract, be it a national law or non-national law.

1095. Such an approach would enhance certainty and predictability with respect to the application of such express good faith provisions.

Chapter 2: Application of Good Faith on the Basis of a National Law

1096. Parties frequently choose a national law as the law applicable to their contract (I.). This Chapter reviews the application of good faith by arbitral tribunals to the parties' contract on the basis of a national law (II.) and concludes with proposed guidelines for its application by arbitral tribunals (III.).

I. Popularity of National Law as the Law Applicable to the Parties' Contract in International Commercial Arbitration

1097. In the majority of international commercial arbitrations, a national law is applicable to the parties' contract.[1841]

1098. Indeed, when parties to ICC arbitrations have incorporated a choice of law clause in their contract, in 97–99% of cases, they choose a national law.[1842]

[1841] BORN, 2959. See also PIERRE MAYER, Conclusion in Dossier of the ICC Institute of World Business Law: The Application of Substantive Law by International Arbitrators (2014) 145: "[…] almost always the law chosen by the parties is that of a State."; REDFERN/HUNTER, §3.125.

[1842] In 2010, in 99% of cases, parties chose a national law (2010 Statistical Report (2011) 22 ICC Bull 14); In 2011, in 98% of cases, parties chose a national law (2011 Statistical Report (2012) 23 ICC Bull 14); In 2012, in 97% of cases, the parties chose a national law (2012 Statistical Report (2013) 24 ICC Bull 13). In 2013, in 97% of cases, the parties chose a national law (2013 Statistical Report (2014) 25 ICC Bull 13). In 2014, in 98% of cases, the parties chose a national law (2014 Statistical Report (2015) ICC Disp Res Bull 15). In 2015, in 99% of cases, the parties chose a national law (2015 Statistical Report (2016) ICC Disp Res Bull 9). In 2016, in 97% of cases, the parties chose a national law (2016 Statistical Report (2017) ICC Disp Res Bull 98). In 2017, in 99% of cases, the parties chose a national law (2017 Statistical Report (2018) ICC Disp Res Bull 61). In 2018, in 98% of cases, the parties chose a national law (ICC Dispute Resolution 2018 Statistics, p. 13). In 2019, in 99% of cases, the parties chose a national law (ICC Dispute Resolution 2019 Statistics, p. 15). In 2020, in 98% of cases, the parties chose a national law (ICC Dispute Resolution 2020 Statistics, p. 17).

II. Application by Arbitral Tribunals

1099. One hundred and sixty-seven arbitral awards were found in which the arbitral tribunal considered the application of good faith to the parties' contract primarily on the basis of a national law.

1100. A table listing all these awards along with their references can be found at Appendix A. These awards were found in the following sources:

- ICCA Yearbook of Commercial Arbitration;
- *Journal de droit international*;
- ICC Bulletin and ICC Dispute Resolution Bulletin;
- ICC Special Supplement 2011: Interim, Conservatory and Emergency Measures in ICC Arbitration;
- JEAN-JACQUES ARNALDEZ/YVES DERAINS/DOMINIQUE HASCHER (eds), Collection of ICC Arbitral Awards 2008-2011, Vol VI (Kluwer Law International 2013);
- M. E. I. ALAM ELDIN (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I, (Kluwer Law International 2000);
- M. E. I. ALAM ELDIN (ed) Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration II, (Kluwer Law International 2003);
- *Gazette du Palais*;
- GUY KEUTGEN (ed), Collection of CEPANI Arbitral Awards 1996-2001 (Bruylant 2008);
- CISG database[1843];
- unilex database[1844];
- Arbitrator intelligence database[1845];
- Milan Chamber of Commerce arbitral awards[1846];
- International Commercial Arbitration Review;
- GRANT HANESSIAN (ed), ICDR Awards and Commentaries (Juris 2012); and

[1843] <https://iicl.law.pace.edu/cisg/cisg>, accessed 1 March 2023.

[1844] <http://www.unilex.info/>, accessed 1 March 2023.

[1845] Available on Kluwer Arbitration, see < https://www.wolterskluwer.com/en/solutions/kluwerarbitration>, accessed 1 March 2023.

[1846] <https://www.camera-arbitrale.it/en/studies-and-documentation-centre/library/arbitral-awards.php?id=262>, accessed 1 March 2023.

– Contributions by the ITA Board of Reporters, Kluwer Law International[1847].

1101. In the cases where an argument based on good faith was invoked by the parties, it was – in most instances – rejected by the arbitral tribunal (A.). In the majority of awards, good faith was invoked by arbitral tribunals *sua sponte* (B.). However, such references were often superfluous (C.).

1102. Out of all the cases in which good faith was applied by arbitral tribunals on the basis of a national law, it appears that – in many cases – good faith may not have been applied in accordance with the applicable law (D.).

1103. Finally, with respect to disputes involving State parties, good faith appears to be frequently employed by arbitral tribunals in order to address the inequality between the parties in such cases (E.).

A. Good faith argument often rejected by arbitral tribunals

1104. It is interesting to note that in the cases where one or more of the parties invoked an argument based on good faith, it was in most instances rejected by the arbitral

[1847] Available on Kluwer Arbitration, see < https://www.wolterskluwer.com/en/solutions/kluwerarbitration>, accessed 1 March 2023.

tribunal.[1848] The same phenomenon has been noted in cases where parties raise good faith arguments before a national court.[1849]

1105. This may be an indicator of the general weakness of the good faith argument in these cases. Indeed, an argument based on good faith is often seen as a 'last

[1848] The references for the following cases can be found in Appendix A. In the sixty-one awards in which the good faith argument was clearly raised by the parties, it was rejected in forty-six awards: see CRCICA Case No 730/2011 (18 December 2013); ICC Case No 13730 of 2013; ICDR Case No 152-04; CAM Case No 10915 (14 November 2016); ICC Case No 14637 of 2008; ICC Case No 13954 of 2007; ICC Case No 12198 of 2004; NAI arbitration dated 1 August 2003; CRCICA Case No 43/1995 (15 November 1995); ICC Case No 16394 of 2013; ICC Case No 16982 of 2014; ICC Case No 19222 of 2016 (both of the claimant's and respondent's arguments based on good faith were rejected. However, the arbitral tribunal agreed with the claimant that good faith requires notice of a *force majeure* event but agreed with the respondent that the absence of notice does not prevent reliance on *force majeure* but just gives rise to a right to damages); ICC Case No 16240 of 2012; ICC Case No 18701 of 2014; ICC Case No 18807 of 2013; ICC Case No 17521 of 2011; ICC Case No 15900 (Second Partial Award) of 2013; JAMS Case No. 1425012160; LCIA Case No 101571 of 2012; *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc* (23 January 2015); ICDR Case No. 50 517 T 00339 09 (April 2011); ICDR Case No. 50 148 T 00650 09 (14 October 2011); ICDR Case No. 50 122 T 00481 09 (12 October 2010) (in which the arbitral tribunal did not decide the claim of a violation of the implied covenant of good faith and fair dealing); ICDR Case No. 50-20-1300-1142 (29 July 2015); ICDR Case No. 50 1S4 TOOQ07 11 (6 February 2014); ICDR Case No. 50 421 T 00325 09 (2 June 2011); ICDR Case No. 50 117 T 00845 13 (18 April 2014); ICDR Case No. 50 148 T 00299 11 (10 July 2013); ICDR Case No. 50 114 T 00267 12 (21 March 2014); ICC Case No 5946 of 1990; ICC Case No 6955 of 1993; Ad hoc arbitration of 27 May 1991 (good faith argument raised by party-appointed expert); CRCICA Case No 24/1995 (21 December 1995); ICC Case No 9029 of 1998 (in this case, the arbitral tribunal considered that it did not have jurisdiction to address the claim based on good faith as it concerned an issue of pre-contractual liability); ICC Case No 9839 of 1999; CEPANI Case No 2106 of 1999; ICC Case No 9613 of 1999; ICC Case No 10188 of 1999; AIA Case No 76/98 (24 November 1999) (with respect to the good faith claim raised by the claimant; conversely good faith was raised by the arbitral tribunal in connection with another claim); ICC Case No 18981; ICC Case No 11045 of 2002 (in which the respondent raised its loss of trust in the claimant. The arbitral tribunal held that this could constitute a violation of the claimant's obligation of good faith. The arbitral tribunal, however, noted that a bidding war was used to justify the loss of trust and refused to draw any conclusion with respect to the violation of the claimant's obligation of good faith); ICC Case No 15949 of 2012; ICC Case No 16958 of 2012; ICC Case No 14500 of 2009; ICC Case No 20065 (rejecting the distributor's argument that the decision of the manufacturer to exercise its contractual right not to renew the agreement was a violation of its duty to act in good faith); ICC Case No 16920 of 2016.

[1849] See BURTON, History and Theory, 210 who states that hardly a complaint is filed stating a claim in contract without including an allegation of bad faith but that most of these claims are rejected by the courts.

ditch' argument which is made as an alternative or 'back-up' argument in case a party's primary legal arguments prove unsuccessful.[1850]

1106. This may also be due to a noted preference by many arbitral tribunals for upholding the principle of *pacta sunt servanda* and a cautiousness when faced with good faith arguments which attempt to circumvent an unwanted result laid down in, or mandated by, the parties' contract.[1851]

B. Frequent invocation of good faith by arbitral tribunals *sua sponte*

1107. It is noteworthy that – in most cases – good faith seems to be raised by the arbitral tribunal of its own accord. Indeed, it was only clear in approximately one third of cases that the parties had invoked the argument based on good faith.[1852] One must, however, be cautious with this conclusion given that most

[1850] This proposition is inspired by discussions at the ASA PhD day held at the University of Neuchâtel in December 2017 where it was suggested that an argument based on good faith is often made by parties as a 'last ditch' argument.

[1851] JULIA GROTHAUS, DIS Autumn Conference 2014: Global Pond or Single Playing Field: How international should international arbitration really be? in Jörg Risse/Günter Pickrahn et al. (eds), (2015) 13 SchiedsVZ 37 referring to the view expressed by EDUARDO SILVA ROMERO concerning arbitration in Latin America: "Other than in Europe, the parties consider these [good faith] arguments to be valid and strong – and are disappointed if they are not accepted by the tribunals. Yet, arbitrators, in general, tend to uphold the contractual agreement (*pacta sunt servanda*) and are extraordinarily cautious when confronted with arguments based on the principle of good faith, […]. For Latin American parties, it means, however, that they must carefully choose and nominate their party-appointed arbitrators to have a decent chance of prevailing with their good faith arguments."

[1852] The references for the following cases can be found in Appendix A. In sixty-one out of the one hundred and sixty-seven cases reviewed, it was clear that good faith had been raised by the parties: CRCICA Case No 730/2011 (18 December 2013); ICC Case No 13730 of 2013; ICDR Case No 152-04; CAM Case No 10915 (14 November 2016); ICC Case No 14637 of 2008; ICC Case No 13954 of 2007; ICC Case No 12198 of 2004; NAI arbitration dated 1 August 2003; CRCICA Case No 43/1995 (15 November 1995); ICC Case No 16394 of 2013; ICC Case No 16982 of 2014; ICC Case No 19222 of 2016; ICC Case No 16240 of 2012; ICC Case No 18701 of 2014; ICC Case No 18807 of 2013; ICC Case No 17521 of 2011; ICC Case No 15900 (Second Partial Award) of 2013; JAMS Case No. 1425012160; LCIA Case No 101571 of 2012; *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc* (23 January 2015); ICDR Case No. 50 517 T 00339 09 (April 2011); ICDR Case No. 50 148 T 00650 09 (14 October 2011); ICDR Case No. 50 122 T 00481 09 (12 October 2010); ICDR Case No. 50-20-1300-1142 (29 July 2015); ICDR Case No. 50 1S4 TOOQ07 11 (6 February 2014); ICDR Case No. 50 421 T 00325 09 (2 June 2011); ICDR Case No. 50 117 T 00845 13 (18 April 2014); ICDR Case No. 50 148 T 00299 11 (10 July 2013); ICDR Case No. 50 114 T 00267 12 (21 March

published arbitral awards are extracts which include, most frequently, only the reasoning of the arbitral tribunal. It is therefore possible that the argument based on good faith may have, in fact, been invoked by the parties in their submissions and referred to in the unpublished part of the award.

1108. Notwithstanding, this conclusion is in line with the noted frequent recourse to good faith by arbitral tribunals.[1853]

1109. As already discussed above, this frequent resort to good faith by arbitrators may be explained by the discretion with which good faith endows them allowing them to depart from the strict rigours of the applicable law or contract and to "do justice" in a given case.[1854]

1110. However, the *sua sponte* recourse to good faith by arbitral tribunals raises an issue of due process, namely whether arbitral tribunals can invoke and apply good faith without first inviting the parties to discuss the application of this principle.[1855]

1111. Under English law, in order to comply with their duty to act fairly under Section 33 EAA, an arbitrator must accord a party an opportunity to submit its argument

2014); ICC Case No 5946 of 1990; ICC Case No 6955 of 1993; Ad hoc arbitration dated 27 May 1991; CRCICA Case No 24/1995 (21 December 1995); ICC Case No 9029 of 1998; ICC Case No 9839 of 1999; CEPANI Case No 2106 of 1999; ICC Case No 9613 of 1999; ICC Case No 10188 of 1999; AIA Case No 76/98 (24 November 1999); ICC Case No 18981; ICC Case No 5073 of 1986; ICC Case No 7006 of 1992; ICC Case No 8362 of 1995; ICC Case No 9593 of 1998; ICC Case No 10335 of 2000; ICC Case No 12827 of 2005; China 7 December 2005 CIETAC Arbitration proceeding (Heaters case); ICC Case No 13646 of 2007; ICC Case No 12502 of 2009; ICC Case No 11961 of 2009; ICC Case No 16257 of 2013; CAP Case No 3203 of 17 July 2013; SCC Case No 196/2011 (9 December 2013); ICDR Case No 50 110 T 00731 11 (28 February 2014); ICC Case No 19134 of 2014; ICC Case No 19114; ICC Case No 11045 of 2002; ICC Case No 2020-001 of 2008; ICC Case No 2020-002 of 2009; ICC Case No 16920 of 2016; SCC Case No 2017/164.

1853 See para. 33 et seq.

1854 See para. 37 et seq.

1855 ILA, Committee on International Commercial Arbitration, International Law Association Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration, ILA Resolution 6/2008, Annex, ¶8 (2008) ("Before reaching their conclusions and rendering a decision or an award, arbitrators should give parties a reasonable opportunity to be heard on legal issues that may be relevant to the disposition of the case. They should not give decisions that might reasonably be expected to surprise the parties, or any of them, or that are based on legal issues not raised by or with the parties."); UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 149, §68 (2012): "It has been held that decisions which came as a surprise to both parties as they were based on considerations or legal doctrines which had not been raised or pleaded by the parties, may constitute a violation of the right to be heard."

on a point of law.[1856] Indeed, it has been held that an arbitral tribunal must give the parties an opportunity to be heard if it raises a legal ground *sua sponte* if such legal ground is an essential building block in the tribunal's conclusion.[1857]

1112. Under US law, US courts must accord the parties fair notice and an opportunity to present their positions if they decide to invoke a legal ground *sua sponte*.[1858] Similarly, arbitral tribunals must also accord the parties an opportunity to be heard with respect to a legal ground that they have raised *sua sponte*.[1859]

1113. Under Swiss law, the rule is that an arbitral tribunal is only obliged to give the parties an opportunity to discuss a legal ground that it raises *sua sponte* if its application could not reasonably have been foreseen by the parties to be relevant for the decision in the case at hand.[1860] In this regard, it has been argued that, in general, the more fundamental a certain legal concept is, the higher the threshold for the application of such legal concept to come as a surprise.[1861] In this regard,

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1856 LOUKAS MISTELIS/METKA POTOCNIK, *Iura Noviter Arbiter* in England and Wales: The Exercise of Arbitral Discretion in Franco Ferrari/Giuditta Cordero-Moss (eds), Iura Novit Curia in International Arbitration (Juris 2018) 147; *Modern Engineering v Miskin* [1981] 1 Lloyd's Rep 135 (CA).

1857 *OAO Northern Shipping Co. v Remolcadores De Marin SL* (Remmar) [2007] EWHC 1821 at [22]; see also *ABB AG v Hochtief Airport GmbH* [2006] EWHC 388 (Comm) at [72] in which TOMLINSON J found that whilst it is not necessary for an arbitral tribunal to refer back to the parties each and every legal inference which it intends to draw from the primary facts on the issues placed before it, the tribunal must give the parties "a fair opportunity to address its arguments on all of the *essential building blocks* in the tribunal's conclusion." (emphasis added).

1858 AARON D SIMOWITZ, Jura Novit Arbiter in the United States in Franco Ferrari/Giuditta Cordero-Moss (eds), Iura Novit Curia in International Arbitration (Juris 2018) 406; *Wood v Milyard*, 132 S Ct 1826, 1834 (2012); *Greenlaw v United States*, 128 S Ct 2559, 2562 (2008); *Day v McDonough*, 547 US 198, 202 (2006).

1859 Restatement of the Law, The US Law of International Commercial and Investor-State Arbitration, Proposed Final Draft (24 April 2019), 616, lines 27–29: "An arbitral tribunal is not precluded from raising factual or legal issues *sua sponte* during the proceedings. However, the tribunal must then afford the parties an opportunity to address and respond to those issues."

1860 SFSCD 142 III 360 of 26 April 2016 [361–362]; SFSCD 4A_322/2015 of 27 June 2016 c. 4.1. See also SFSCD 4A_136/2016 of 3 November 2016 c. 5.2 in which it was held that the application of the principle summed up by the adage *jura novit curia* and the exceptions to this principle may not depend on the citizenship of counsel for the parties; indeed, the parties submitted the contracts to Swiss law and chose to waive the assistance of Swiss legal counsel and took this risk in the circumstances. See also ANDREA BONOMI/DAVID BOCHATAY, Iura Novit Arbiter in Swiss Arbitration Law in Franco Ferrari/Giuditta Cordero-Moss (eds), Iura Novit Curia in International Arbitration (Juris 2018) 388–393; for the case law of the Swiss Federal Supreme Court in this regard, see CHRISTOPH MÜLLER/SABRINA PEARSON, Swiss Case Law in International Arbitration (3rd edn Schulthess 2019) 223.

1861 GISELA KNUTS, Jura Novit Curia and the Right to Be Heard – An Analysis of Recent Case law (2012) 28 Arb Intl 669, 683.

it is argued that by choosing to submit their contract to a certain law, parties accept the fundamental concepts inherent in that law with the result that these concepts should not therefore come as a surprise to the parties.[1862] Following this reasoning, it is arguable that the application of good faith (as such a fundamental legal concept in the Swiss legal system[1863]) is foreseeable and that arbitral tribunals do not therefore need to invite the parties to discuss its application prior to applying it.

1114. With respect to French law, the general rule is that an arbitral tribunal must give the parties an opportunity to present their arguments on the impact of the legal rules that the arbitral tribunal intends to apply *sua sponte*.[1864] However, it has been argued that the principle of good faith in the performance of contracts is considered to be a general rule which is implicitly included in the parties' submissions and, accordingly, as a result, there is no need for an arbitral tribunal to give the parties an opportunity to discuss the application of this principle.[1865] This view is also supported by case law of the Paris Court of Appeal.[1866]

1115. In sum, on the one hand, under English and US law, the *sua sponte* application of good faith by an arbitral tribunal without inviting the parties to comment on

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1862 *Ibid*.

1863 See para. 422 et seq.

1864 GILLES CUNIBERTI/NICOLINA BORDIAN, Jura Novit Arbiter in France in Franco Ferrari/Giuditta Cordero-Moss (eds), Iura Novit Curia in International Arbitration (Juris 2018) 171; YVES DERAINS, commentary under *Lemeur v SARL Les cites interdites*, Paris Court of Appeal, 13 November 1997 (1998) Rev Arb 709, 711.

1865 FOUCHARD/GAILLARD/GOLDMAN, 950, §1639: "It is only where the rule relied on by the arbitrators is so general in nature that it must have been implicitly included in the pleadings that the arbitrators can dispense with the need to call for a specific discussion on that point. This will be the case, for example, of the principle of good faith in the performance of contracts, which will necessarily be among the elements taken into account–at least implicitly–by arbitrators who have been instructed to apply French law." This view has subsequently been endorsed by other authors, see ANTONIAS DIMOLITSA, The equivocal power of the arbitrators to introduce ex officio new issues of law (2009) 27 ASA Bull 426, 433 at fn 15; CAROLE MALINVAUD, *Le pouvoir de l'arbitre de relever des moyens d'office: incertitudes et considérations pratiques* in Peter Gauch/Franz Werro/Pierre Pichonnaz (eds), Mélanges en l'honneur de Pierre Tercier (Schulthess 2008), §24 who argues that arbitrators should have a broad obligation to invite the parties to discuss the application of principles which are not universally recognized as general.

1866 Decision of the Paris Court of Appeal of 25 November 1993 (1994) Rev Arb 730 holding as follows: "*Ne viole pas le principe de la contradiction le tribunal arbitral se référant au principe d'exécution de bonne foi des conventions – d'ordre public vraiment international – lequel était nécessairement dans le débat*." ("Does not violate the principle of adversarial proceedings, the arbitral tribunal referring to the principle of good faith performance of contracts – a principle of truly international public policy – which was necessarily in the debate.") (Informal English translation of the French original).

its application may be considered as contrary to due process. On the other hand, this may not be the case under Swiss and French law, depending on whether the application of good faith is seen as surprising or not, or whether good faith is considered to be implicitly included in the parties' submissions.

C. Superfluous reference to good faith in many cases

1116. In more than one third of the cases in which the arbitral tribunal appeared to apply good faith *sua sponte*, the reference to good faith was not required.[1867]

1117. In some cases, this was because it was an alternative or additional ground for the decision reached (1.) or was mere *dictum* (2.). In other cases, the reference to good faith was superfluous as it would have been sufficient to invoke a more specific and recognized manifestation of the principle of good faith, notably the principle of *pacta sunt servanda* (3.). Such superfluous references can perhaps be explained by a desire of the arbitral tribunal to morally sanction a parties' conduct or to show that the decision reached accords with values of fairness and justice (4.).

[1867] The references for the following cases can be found in Appendix A. Out of the one hundred and six cases in which the arbitral tribunal appeared to raise good faith *sua sponte*, in thirty-nine identified cases, such reference was superfluous: see ad hoc arbitration of 9 September 1983; ICC Case No 10341 of 2001; ICC Case No 12127 of 2003; ICC Case No 10671 of 2006; *Company Z and others v State Organization ABC* (April 1982); ICC Case No 7639 of 1994; ICC Case No 7314 of 1995; China 8 November 2002 CIETAC Arbitration Proceeding (*Canned Asparagus* case); ICC Case No 14841 of 2009; ICC Case No 12112 of 2009; ICC Case No 15913 of 2011; ICC Case No 15900 (Third Partial Award) of 2012; ICC Case No 17768 of 2013; ICC Case No 16765 of 2013; ICAC Case No 89/2015 (22 March 2016); ICC Case No 11539 of 2003; ICC Case Nos 3099/3100 of 1979; ICC Case No 5080 of 1985; ICC Case No 6998 of 1994; CRCICA Case No 40/1992 (15 December 1995); CRCICA 145/1999 (4 April 2000); ICC Case No 10377 of 2002; ICC Case No 13504 of 2002; ICC Case No 12456 of 2004; ICC Case No 13790 of 2009; ICC Case No 14046 of 2010; ICDR 50-180 T0087111; ICDR 50-155 T0053011; ICDR 50 117 T0019913; CAM Case No. 7813 (10 October 2014); ICDR 50-133 T 00751 13 (18 December 2014); ICC Case No 7365 of 1997; ICAC at RFCCI 100/2011 (30 December 2011); *Baxter v Abbott*; ICC Case No 15583 of 2010; ICAC Case No 244/2014 (6 August 2015); CRCICA Case No 32/1992 (30 June 1993); CRCICA Case No 34/1992 (30 June 1993); ICC Case No FA-2020-226.

1. Good faith as an alternative or additional ground for the decision reached

1118. The recourse to good faith was firstly superfluous because it was not the ground on which the decision was based but was rather an alternative, or additional, ground for the decision reached.

1119. For example, in ICC Case No 6998 of 1994 (German law), the arbitral tribunal held that the respondent company had assumed a debt pursuant to the relevant legal provisions and that this conclusion was "strengthened by considerations derived from the overriding requirement of good faith."[1868]

1120. In addition, in ICC Case No 7639 of 1994 (Qatari law), concerning a sponsorship agreement, the arbitral tribunal found on the facts of the case that the award of the contracts was not due to the efforts of the sponsor and therefore rejected the sponsor's claim for a fixed percentage commission on the contracts.[1869] Good faith was invoked as an equity argument by the arbitral tribunal in order to comfort the conclusion reached.[1870]

1121. Further, in ICC Case No FA-2020-226, the arbitral tribunal held that the buyer had the right to avoid the contract because of the supplier's fundamental breach due to erroneous certifications and excessive specification. The arbitral tribunal went on to hold that even though it was not strictly necessary for the tribunal to deal with the alternative grounds for avoidance, the supplier's clear breaches of its duty of loyalty by failing to give to the buyer all pertinent information relating to the true performance of the product would also have entitled the buyer to avoid the contract.[1871]

1868 ICC Case No 6998 (1996) 21 YB Comm Arb 54–78; §§43–53.

1869 ICC Case No 7639 (1998) 23 YB Comm Arb 66–79, §§1–11.

1870 *Idem*, §§31–42; see also ICC Case No 12127 (2008) 33 YB Comm Arb 82–101, §§17–19 (French law), in which the arbitral tribunal held that the respondent was under a duty to inform the claimant which was both an implied term of the contract and, in addition, a general obligation flowing from the duty to perform contracts in good faith; see further ICC Case No 15583 (2016) ICC Disp Res Bull (UAE law), §§306–315 in which the arbitral tribunal held that the respondent was liable to pay commission on indirect sales for four reasons. One of these reasons was that the respondent's attempt to avoid paying commission on indirect sales was contrary to its duty to perform its obligations in good faith.

1871 ICC-FA-2020-226, (2020) YB Comm Arb 1–24, §§35–41.

1122. In this regard, good faith was often used as an alternative ground in cases where it was argued that a contract was not valid or that a representative did not have the requisite authority to enter into the contract.[1872]

2. Good faith as mere *dictum*

1123. In some cases, the reference to good faith was superfluous as it appears to have been mere *dictum* (i.e., it was not required for the decision reached or no legal conclusion was drawn from the noted violation).[1873]

[1872] For example, in ICC Case No 10671 (2006) 133 JDI 1417–1429, §53, (Swiss law), the arbitral tribunal held that even if the contract was invalid (which it was not), its lack of validity could not be raised by the respondent on the grounds of good faith. In addition, in ICC Case No 7314 (1998) 23 YB Comm Arb 49–65, §33 (Greek law), the arbitral tribunal held that under the contract, the termination and waiver clauses were valid and thus claimant's claims for compensation or damages due to the termination were excluded. The arbitral tribunal then went on to hold that, in any event, the claimant could not base its claim for compensation on the contract even if the provisions were invalid as it implemented the contract for the entire contractual period of 18 months and such behaviour would be a *venire contra factum proprium* and a breach of good faith which is not permitted in the applicable Greek law or in other legal systems where this might fall under the estoppel principle. Further, in ICC Case No 5080 (1987) 12 YB Comm Arb 124–128, §§1–2 (Swiss law), the sole arbitrator held that Mr X did have the authority to conclude on behalf of the respondent the new agreement to include other territories within the sales representation agreement but that, in any event, good faith would have prevented it from relying on any such lack of authority. Moreover, in ICC Case No 16257, Final Award, 21 January 2013, Arbitrator Intelligence Materials, §271 (French law), the arbitral tribunal found that the signatories did have authority to bind the State party but that, even if they did not have such authority, it would be contrary to good faith to raise such a lack of authority when they gave an appearance that they validly entered into the agreement. Finally, in ICC Case No 12456 of 2004, Collection of ICC Arbitral Awards 2008-2011 at 811 et seq, 818 (law of country X close to French law), the arbitral tribunal questioned, but did not decide the issue of, whether the claimant acted contrary to good faith by arguing that the assignment of credit to a third party was invalid given the clear text of the assignment contract as well as other texts signed by the claimant.

[1873] In the China 8 November 2002 CIETAC Arbitration proceeding (Canned asparagus case) available at <https://iicl.law.pace.edu/cisg/search/cases>, accessed 1 March 2023 (Chinese law), the seller alleged that the "soft terms" in the letter of credit were the main reason for its refusal to make delivery. The arbitral tribunal relied primarily on Article 8(3) CISG and on its discussion of the facts in holding that these requirements were not the main reason for the seller to refuse to make delivery of the goods and that the seller had breached the contract by failing to deliver the goods. It however noted *obiter* that the seller violated the principle of good faith under Chinese law by failing to contact the buyer for further modifications to the letter of credits; In ICC Case No 10377 (2006) YB Comm Arb 72–94, §58 (German law), which concerned the sale of the respondent's business, the arbitral tribunal held *obiter* that if

the respondent, even though it was in fact aware of the Y2K issue, were to insist that it should have been formally notified of this issue by the claimant, then the arbitral tribunal would have rejected such an argument as contrary to good faith; In ICDR Case No. 50 133 T 00751 13 (18 December 2014), Arbitrator intelligence materials, 14 (Connecticut Law), the sole arbitrator held that the licensee did not provide adequate evidence of an intellectual property infringement which was required in order to invoke its contractual right to withhold royalties. The sole arbitrator then went on to state, in what would seem to be *dictum*, that the implied duty of good faith obliged the parties to cooperate to enforce intellectual property rights and that an abbreviated notice such as the one given by the licensee did not allow the licensor to have a good faith basis for concluding that there had been an infringement; In ICDR Case No. 50 155 T 00530 11 (4 April 2014), Arbitrator intelligence materials, 22 (law of California), the sole arbitrator held that the respondent acted reasonably in terminating the contract as the claimant did not supply wiper blades which met the contractual standards. The sole arbitrator, however, also noted, without appearing to draw any legal conclusions, that there had been instances of failure by both parties to comply with the implied covenant of good faith and fair dealing. Indeed, the claimant appeared to have lied in denying that it paid a third party in settling a claim and the respondent failed to advise the claimant of its negotiations and agreement with this third party; In ICAC Case No 244/2014 (6 August 2015) (2015) International Commercial Arbitration Review (laws of the Russian Federation), the arbitral tribunal held that although the goods delivered were not defective under the contract, the delivery of the goods with detected drawbacks violated the terms and conditions of the contract for performance of works and provision of services because such drawbacks "impeded or affected the safe and smooth operation of the plant" in which the goods were to be used. Referring to the duty of good faith and fair dealing found in the PICC, the arbitral tribunal then held *obiter* that the respondent, as an experienced entity, should have warned the claimant of the drawbacks of the goods and of the potential expenses which could arise for their correction; In ICC Case No 13790 (2014) 25 ICC Bull 55, §213 (Swiss law), the arbitral tribunal was faced with the issue of whether or not the contractor's requests received by a sub-contractor were either variations orders or resource loading requests and, consequently, which party should bear the costs. The arbitral tribunal decided that the issue of whether the requests were variation orders or resource loading requests was ultimately a question of fact but it also stated as *obiter dictum* that good faith would have required the sub-contractor upon receiving the request, if it considered it to be a variation order, to clearly state that it considered the request as a variation of costs which were to be borne by the contractor; In CRCICA Case No 145/1999 in M. E. I. Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I (Kluwer Law International 2000), 141–146, 143 (Egyptian law), the claimant alleged that under the contract of maritime transport it was entitled to double the payment for the return trip than for the going trip. The arbitral tribunal, based on an interpretation of the contract, held that there had been a typing error contained in the contract (the word double was used instead of the word meaning return trip to have the same freight as going trip) and ordered the rectification of the contract. However, it also noted in *obiter dictum* that the respondent had told the claimant to rectify the error at the time of the signing of the contract but that the claimant had kept silent and this was deemed to be contrary to good faith in contractual matters; In ICC Case No 11539 (2013) 24 ICC Bull 65, §145 (Swiss law), the arbitral tribunal, in relation to one argument, held *obiter* that the respondent would be in violation of the principle of good faith if it invoked the warranty provided by the claimant seller that the

1124. As an example, in ICDR Case No. 50-180 T 00871 11 (29 July 2013) (law of Iowa), the sole arbitrator held that the kidnapping of the claimant by the respondent, subjecting the claimant to mistreatment, and coercing the claimant to sign new agreements was a clear violation of the inherent obligation of good faith. However, no legal conclusions appear to have been drawn from this violation with the sole arbitrator finding that the respondent had complied with its obligation to properly manufacture and distribute the BTW Brand Products under the contract in question.[1874]

1125. In three cases where a State party raised a defence based on *force majeure*, the arbitral tribunal held that the requirements for the *force majeure* defence were not made out on the facts of the given case. The arbitral tribunals, in these cases, then went on to state, in what would appear to be *dicta,* that the State party had also failed to act in good faith.[1875]

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sold company had not suffered and would not suffer any material adverse changes in its financial position or assets or business and that it had conducted and would continue to conduct its business in the ordinary course, if this was a consequence of another company taking clients away from the sold company; Finally, in ICC Case No 15900 of 2012 and 2013, Arbitrator intelligence materials, §269 (German law), the sole arbitrator rejected the respondent's defence that it had an option to make, use or sell the licensed product based on an interpretation of the license agreement. The sole arbitrator added in *obiter dictum* that good faith would prevent the respondent from escaping the obligation to pay royalties by failing to identify products if it did in fact make, use and sell the licensed product.

1874 *Unger v Ding* (Final Award), ICDR Case No. 50-180 T 00871 11, Final Award of 29 July 2013, Arbitrator intelligence materials, 10.

1875 For example, in ICC Case Nos 3099/3100 (1982) 7 YB Comm Arb 87–95, 92 (Algerian law), the respondent State party invoked *force majeure* as an excuse for non-payment. It alleged that it had the money in its bank account but that it could not obtain an authorization for payment. The arbitral tribunal held that the conditions for the *force majeure* defence were not met. It went on to hold that the respondent acted contrary to the rules of good faith by obliging itself to pay for the products without having the certainty of being able to effectuate the payments in foreign currency on the dates that they became due. The arbitral tribunal pointed, in particular, to the fact that the respondent did not ask the Central Bank for this guarantee but only asked after having taken delivery of the larger part of the product. In addition, in the *ad hoc* arbitration of 9 September 1983 (1987) 12 YB Comm Arb 63–81, 66–67 (Swiss law), the issue of whether the State party could in good faith raise the *force majeure* defence was also superfluous as the majority of the arbitral tribunal held that the requirements for invoking the contractual *force majeure* provision were not made out. Finally, in ICC Case No 12112 (2009) 34 YB Comm Arb 77–110, §§18–32 (law of State Y), the sole arbitrator held that the non-performance of the State party was not excused on the grounds of *force majeure* as the State partner did not prove that it was impossible to avert the circumstances that led to non-performance by reasonable means, or that those circumstances were unforeseeable. Accordingly, the reference to the State party's duty imposed by the principle of good faith to check that performance would be possible at the promised time, taking also into consideration the social

3. Good faith as enforcing a more specific manifestation of the general principle of good faith

1126. In some cases, the reference to good faith was unnecessary as the arbitral tribunal was just enforcing the provisions of the contract, or in other words, the principle of *pacta sunt servanda*, a principle which itself is derived from the general principle of good faith.[1876]

1127. For example, in ICC Case No 15913 of 2011 (Algerian law), the respondent failed to pay the share transfer price to the claimant.[1877] The arbitral tribunal held that the respondent was obliged to pay its debt and that if it did not it would be a serious breach of the principle of the performance of contracts in good faith.[1878] However, merely relying on the principle of *pacta sunt servanda*, or more specifically the respondent's contractual obligation to pay the price, would have been sufficient in this case.[1879]

1128. In addition, in ICDR Case No 50 117 T 00199 13 (29 July 2014) (New York law), the sole arbitrator held that the respondent had breached the exclusive distributorship agreement by directly selling its Summation Products (and renewals thereof) into Canada after execution of the agreement and by unilaterally attempting to change the financial terms and conditions of the agreement.[1880] The sole arbitrator then went on to state that, as such, the respondent may have

climate that the foreign partner could not estimate properly and to bear all consequences, was mere *dicta.*

1876 See CHENG, 113; KOTUBY/SOBOTA, 138

1877 ICC Case No 15913 (2015) JDI 216–224.

1878 *Ibid*, §§69–72.

1879 See also CRCICA Cases Nos 32/1992 in M. E. I. Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I (Kluwer Law International 2000), 51–52 and 34/1992 in M. E. I. Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I (Kluwer Law International 2000), 53–56 (Egyptian law) in which the commentary refers to the fact that good faith provisions were applied in these cases. However, a review of the extracts of the awards shows that the arbitral tribunal only needed to enforce the principle of *pacta sunt servanda*. In CRCICA Case No 32/1992 (30 June 1993), the respondent claimed damages for impure grease due to an increase in humidity pressure. The arbitral tribunal applied the principle of good faith to the calculation of damages under the contract. However, the contract itself provided for the average of the analyses to be taken and the quantum of damages calculated thereon; In CRCICA Case No 34/1992 (30 June 1993), the respondent made a request for a second analysis of the shipped goods but the request was made after the lapse of the period allowed for such requests. The arbitral tribunal held that the claimant was right to object to the delayed demand for the second analysis of goods as the respondent had submitted a request after the expiry of the requisite period under the contract.

1880 *Privacy Assured, Inc. v Accessdata Corp*. (Final Award), ICDR Case No. 50 117 T 00199 13 of 29 July 2014, Arbitrator intelligence materials.

failed to fully abide by the standard of good faith and fair dealing established under New York law.[1881] The sole arbitrator thus appeared to be equating the breach of the terms of the exclusive distributorship agreement with the violation of the standard of good faith and fair dealing. However, merely relying on the violation of the principle of *pacta sunt servanda* would have been sufficient in this case.[1882]

1129. In another case, the reference to good faith was unnecessary as the arbitral tribunal was applying the doctrine of changed circumstances, which itself is derived from the general principle of good faith.[1883] Indeed, in ICC Case No 7365 of 1997, the arbitral tribunal held that "[…] from the covenant of good faith and fair dealing which is implied in each contract it follows that in a case in which the circumstances to a contract undergo said fundamental changes in an unforeseeable way, a party is precluded from invoking the binding effect of the contract."[1884] However, it would have been sufficient for the arbitral tribunal to rely, in this case, on the theory of changed circumstances or *clausula rebus sic stantibus*, which is arguably a general principle of law in its own right.[1885]

4. Reasons for superfluous references

1130. Such superfluous references to good faith may be explained by a certain desire of the arbitral tribunals to morally sanction or express disapproval of a party's conduct.

1131. It may also be explained by the arbitral tribunal's desire to show that their decision, which is primarily based on an application of the contract or other applicable legal provisions or rules, also accords with values of fairness and justice.

1132. Hence in ICC Case No 7639 of 1994 (Qatari law), the arbitral tribunal held that on the facts of the case, the award of the contracts was not due to the sponsor and that the sponsor was therefore not entitled to any commission.[1886] The arbitral tribunal thereafter explicitly stated that it would consider arguments in equity as directed by the applicable law "in its genuine and serious desire to be

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[1881] *Ibid*, 6.

[1882] See also, in this regard, SCC Case No 2017/164 (2020) 45 YB Comm Arb, 1–69, §132 in which the arbitral tribunal found that the supplier was in breach of the agreement as it failed to deliver the order and also breached its exclusivity obligations. The arbitral tribunal also held that by breaching its exclusivity obligations, it also breached the implied covenant of good faith and fair dealing.

[1883] See CHENG, 113; KOTUBY/SOBOTA, 145.

[1884] (2004) 15 ICC Bull 117, §8.10.

[1885] See para. 698 et seq.

[1886] (1998) 23 YB Comm Arb 66–79, §§1–11.

fair to both parties, […].”[1887] The arbitral tribunal then proceeded to find that there was no violation of the “*bona fide*” principles with respect to the issues raised in the arbitration.[1888]

D. Significant probability that good faith is not applied in accordance with the applicable law

1133. It appears that in the cases in which the arbitral tribunal applied good faith on the basis of a national law, arbitral tribunals may not have – in many cases – applied good faith in accordance with the applicable law.

1134. This submission is supported, first of all, by the noted lack of precision employed by arbitral tribunals when applying good faith to the parties' contract (1.). In addition, in some cases, arbitrators have explicitly or implicitly taken a more extensive approach when applying good faith (2.). Moreover, in some cases, there are indications that arbitrators may have been influenced by their own legal background when applying good faith (3.). Furthermore, the (impertinent) references to good faith under other national or non-national laws than the one applicable suggest that the arbitral tribunals may not have fully comprehended the nuances and specificities of good faith under the applicable law (4.). However, such an inaccurate application of good faith will rarely lead to the annulment of the arbitral award rendered (5.).

1. Lack of precision with respect to the reference to good faith

1135. The approaches taken by arbitral tribunals with respect to the reference to good faith can be divided into three main categories.

1136. In a first category of awards (forty-two cases), arbitral tribunals referred to the good faith provision under the applicable national law as well as case law and legal doctrine expanding on this notion under the applicable national law.[1889]

[1887] *Idem*, §31.

[1888] *Idem*, §37

[1889] The references of the following cases can be found in Appendix A. ICC Case No 2020-008 of 2016 (referring to legal doctrine on the concept of venire contra factum proprium, derived from good faith, under Romanian law); *FR Germany engineering company v Polish buyer*, *ad hoc* arbitration, 9 September 1983 (referring to Art 2 SwCC and case law); ICC Case No 12127 of 2003 (referring to Art 1134 FrCC and to “case law and doctrine” although no actual references to such case law and doctrine are included in the extract of the award); ICC Case No 5073 of 1986 (referring to Section 1-203 UCC, case law and Section 205 Restatement

(second) of contracts); ICC Case No 6490 of 1993 (referring to Art 248 Civil Code of the Netherlands and case law of the Supreme Court); ICC Case No 13730 of 2013 (referring to Art 1(2) Japanese Civil Code and numerous court decisions); ICC Case No 14637 of 2008 (referring to Art 1134(3) FrCC, case law and doctrine); ICC Case No 13646 of 2007 (referring to Art 18 SwCO, case law and doctrine); ICC Case No 11562 of 2003 (referring to Art 2 SwCC, case law and doctrine); ICC Case No 13954 of 2007 (referring to case law and doctrine for the proposition that good faith does not override authorization requirements under French company law); ICC Case No 10671 of 2006 (referring to Art 2(2) SwCC and case law); ICC Case No 12198 of 2004 (referring to case law and doctrine concerning the implied covenant of good faith and fair dealing under New Jersey law and the fact that it cannot override the express terms of the agreement); ICC Case No 7047 of 1994 (referring to the principle of good faith and relevant Swiss doctrine); ICC Case No 6197 of 1995 (referring to Art 2 SwCC, case law and doctrine); ICC Case No 9839 of 1999 (referring to case law concerning the implied covenant of good faith and fair dealing under New York law); CRCICA Case No 24/1995 (21 December 1995) (referring to Art 148 Egyptian Civil Code and French doctrine); NAI Arbitration dated 1 August 2003 (referring to the case law cited by the parties concerning the implied covenant of good faith and fair dealing under New York law); ICC Case No 10341 of 2001 (noting by reference to the legal doctrine that the applicable Belgian law recognizes the possibility of completing an agreement in light of good faith); ICC Case No 9593 of 1998 (referring to Art 1134 Ivorian Civil Code, Art 1134 FrCC, French case law and doctrine); ICC Case No 9613 of 1999 (referring to Art 1337 Italian Civil Code, case law and doctrine); ICC Case No 10188 of 1999 (referring to Section 242 BGB as well as commentaries); ICC Case No 10074 of 1999 (referring to Section 157 BGB, commentaries and case law); AIA Case No 76/98 (24 November 1999) (referring to Art 1375 Italian Civil Code and case law); SAA Case No 1569 (referring to case law on the good faith required when mitigating damages); ICC Case No 11539 of 2003 (Swiss law), referring to case law and doctrine with respect to good faith in connection with the allegations of error and willful deceit but only referring to good faith in connection with the allegations relating to the contractual warranties; ICC Case No 11961 of 2009 (Luxembourg Law), in which the arbitral tribunal referred to the parties' undisputed position that they owed a duty to negotiate in good faith whilst the partes' pleadings themselves refer to and detail the duty to negotiate in good faith under Luxembourg law; Costa Rica arbitration of 1 June 2003 (law of Costa Rica (based on German law)) referring to German doctrine on good faith; *Ad hoc* arbitration of 4 December 1996 (Italian law) referring to Art 1375 Italian Civil Code and case law as well as general doctrinal and case law developments with respect to the principle of good faith; ICC Case No 16982 of 2014 referring to case law on the implied covenant of good faith and fair dealing under New York law; ICC Case No 18701 of 2014 referring to case law on the implied covenant of good faith and fair dealing under the law of Massachusetts; ICC Case No 19134 of 2014 referring to case law on the implied covenant of good faith and fair dealing; ICC Case No 18807 of 2013 referring to case law on the implied covenant of good faith and fair dealing under New York law; JAMS Case No. 1425012160 (11 November 2013) referring to case law on the implied covenant of good faith and fair dealing under New York law; *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc* (23 January 2015) referring to case law on the implied covenant of good faith and fair dealing under New York law; ICC Case No 16257 of 2013 (French law) referring to French case law on estoppel derived from good faith; VIAC Case No. SCH-5196 of 16 July 2012 (Austrian law) referring to case law and doctrine; HFA Arbitration dated 21 March 1996

1137. In the second category of awards (sixty-seven cases), the arbitral tribunals limited themselves to referring to the good faith provision under the relevant national law.[1890] Within this category are included the awards where the arbitral

(*Chinese Goods case*) (German law) referring to case law and doctrine; ICC Case No 14500 of 2009 (French law) referring to case law; ICC Case No 20065 (Italian law) referring to case law and Art 1375 of the Italian Civil Code; ICC Case No 2020-007 of 2015 (Italian law) referring to case law according to which the doctrine of anticipatory breach is derived from the general duty of good faith in the performance of contracts; ICC Case No 16920 of 2016 (Dutch law) referring to Art 6.248 Dutch Civil Code and referring to case law on the application of good faith to exemption clauses; ICC Case No FA-2020-224 (Portuguese law) referring to Art 227 Portuguese Civil Code, legal doctrine and case law.

[1890] The references of the following cases can be found in Appendix A. ICC Case No 16958 of 2012 (referring to provision of State X law containing obligation to perform agreements in good faith); ICC Case No 11934 of 2004 (referring to Arts 1134 and 1135 French Civil Code); ICC Case No 1250 of 1964 (referring to Art 124 Lebanese Code of Obligations); ICC Case No 2114 of 1972 (referring to Art 2(1) SwCC and Art 18 SwCO); ICC Case No 6283 of 1990 (referring to Art 1135 Belgian Civil Code); ICC Case No 5946 of 1990 (referring to Art 1-203 NYUCC); *ad hoc* arbitration, 27 May 1991 (referring to Art 2 SwCC); ICC Case No 7006 of 1992 (referring to Arts 1134-1135 FrCC); ICC Case No 6955 of 1993 (referring to Section 2-103 UCC); CRCICA Case No 21/1990 (6 August 1993) (referring to Art 148 Egyptian Civil Code); CRCICA Case No 32/1992 (30 June 1993) (referring to Art 148 Egyptian Civil Code); ICC Case No 8908 of 1998 (referring to Arts 1362-1371 and 1337 Italian Civil Code); CRCICA Case No 730/2011 (18 December 2013) (referring to Art 148 Egyptian Civil Code); ICC Case No 16765 of 2013 (referring to the relevant provision in the civil code); ICC Case No 13615 of 2008 (citing the relevant provision of State X law); CRCICA Case No 34/1992 (30 June 1993) (referring to Art 148 Egyptian Civil Code); CCIR Case No 33 (30 September 1993) (referring to Art 970 Romanian Civil Code & Art 1 Law on Combatting Unfair Competition); ICC Case No 7639 of 1994 (referring to Art 49 Civil and Commercial Law of Qatar); ICC Case No 14841 of 2009 (German law) referring to good faith in the context of franchise contracts and referring to legal doctrine only; ICC Case No 13355 of 2005 (referring to Arts 113 and 422 Brazilian Civil Code); ICC Case No 12827 of 2005 (referring to Art 1134 FrCC); *Ad hoc* arbitration dated 4 March 2004 (referring to Arts 1134-1135 FrCC); ICC Case No 11789 of 2003 (referring to the rule of good faith under the "applicable law"); ICC Case No 8147 of 1996 (referring to Art 1134 FrCC and directive applicable to commercial agency contracts); ICC Case No 11976 of 2003 (referring to Arts 130 & 131 Brazilian Code of Commerce); ICC Case No 10351 of 2001 (law of State X) (citing in full the good faith provision under the 'applicable law'); ICAC at the RFCCI Case No 76/1997 (26 January 1998) (referring to Art 107 Algerian Civil Code); CRCICA Case No 154/2000 (8 March 2000) (referring to Art 148 Egyptian Civil Code); CRCICA Case No 173/2000 (14 December 2000) (referring to Art 148 Egyptian Civil Code); ICC Case No 10335 of 2000 (referring to Art 200 Greek Civil Code); CRCICA Case No 43/1995 (15 November 1995) (Egyptian law) (referring to Art 121 Egyptian Civil Code); ICC Case No 9029 of 1998 (Italian law) (referring to Art 1337 Italian Civil Code); China 7 December 2005 CIETAC Arbitration proceeding (Heaters case), (Chinese law) (referring to Article 60 Contract Law of the PRC); ICC Case No 11375 of 2002 (law of Country X) (referring to Article 219 Book II of the Civil Code); China 8 November

tribunals referred to the requirement or principle of good faith "under the law of State X" without however citing or referring to the relevant provision.[1891]

2002 CIETAC Arbitration proceeding (*Canned asparagus case*) (citing good faith provision of the Contract Law of the PRC); ICC Case No 4761 of 1987 (Libyan law/*lex mercatoria*) referring to Arts 148 ch 1, 5, 657(4) Libyan Civil Code (however only referring to international arbitration doctrine when referring to the obligation to cooperate in good faith); ICC Case No 7314 of 1995 (Greek law) referring to Arts 281 and 288 Greek Civil Code; ICC Case No 15913 of 2011 (Algerian law), referring to Arts 106 & 107 Algerian Civil Code; ICC Case No 10346 of 2000 (Columbian law) referring to Art 871 Columbian Commercial Code (duty to cooperate); CAM Case No 10915 (14 November 2016) (Italian law) referring to Art 1375 Italian Civil Code; ICC Case No 16240 of 2012 (Turkish law) referring to Art 5 Turkish Civil Code; ICC Case No 16550 of 2011 (Moroccan law) referring to Art 231 Moroccan Code of Obligations; ICC Case No 15900 (Second Partial Award) (German law) of 2013 referring to Section 242 BGB; ICC Case No 15900 (Third Partial Award) of 2012 (German law) referring to Section 242 BGB; CAM Case No 8803 of 2006 (Italian law) referring to Art 1337 Italian Civil Code; ICAC Case No 89/2015 (22 March 2016) (laws of the Russian Federation) referring to Arts 1, 6 and 10 Russian Civil Code; ICC Case No 19114 (French law) referring to Art 1134 FrCC; ICC Case No 16394 of 2013 (Greek law) referring to Arts 173, 200 and 288 Greek Civil Code; ICC Case No 19222 of 2016 (Swiss law) referring to Art 2 SwCC; ICC Case No 9753 of 1999 (Czech law) referring to Art 1.7 PICC indirectly referred to by Czech law which provides that trade usages should be taken into consideration in determining the parties' rights and duties; ICAC Case No 244/2014 (6 August 2015) (law of the Russian Federation) referring to the PICC obliging the parties to act in accordance with good faith and fair dealing; ICC Case No 15583 of 2010 (UAE law) referring to Art 247 UAE Civil Transactions Law; ICC Case No 2020-003 of 2011 (Romanian law) referring to Art 970(1) Romanian Civil Code; ICC Case No 2020-005 of 2013 (Moroccan law) referring to Art 231 of the Dahir; ICC Case No 11651 of 2002 (Egyptian law) referring to Art 966 Egyptian Civil Code.

1891 The references of the following cases can be found in Appendix A. ICC Case No 5477 of 1988 (New Hampshire Law) (reference to requirement of New Hampshire Law concerning good faith); ICC Case No 16198 of 2011 (law of state A) (referring to principle of good faith under State A law but without referring to the relevant provision); ICC Case No 15709 of 2009 (French law) (referring to good faith as the core principle of the French law on contracts); ICC Case No 8548 of 1996 (law of Holland) (referring to the principle of good faith under the law of Holland); *Company Z and Others v State Organization* ABC (April 1982) (Utopian law) (referring to the general principle of good faith in contractual relations (a principle recognized in Utopian law); ICC Case No 12112 of 2009 (law of State Y) referring to the principle of good faith which is central to State Y Contract law; ICC Case No 18489 of 2013 (law of Xanadu) referring to the good faith principle set forth in [Xanadu law]; ICC Case No 17768 of 2013 (law of Saudi Arabia) referring to the fact that the notion of good faith complies with the Koran verses that command people to be honest in their transactions and that prohibit fraudulent dealings and that according to the Sharia, good faith in commercial dealings is a primary obligation and all actions are judged by the underlying intents; JCAA Case No 13-03 (24 April 2014) referring to the good faith principle under the Japanese Civil Code; ICC Case No 2020-001 of 2008 referring to the fact that under Washington law, each contract bears the obligations of dealing in good faith in a fair way; SCC Case No 2017/164

1138. In a third category of awards (fifty-four cases), arbitral tribunals simply referred to good faith without referring to the relevant provision under national law.[1892]

referring to the implied covenant of good faith and fair dealing under New York law; ICC Case No FA-2020-226 referring to the duty of loyalty which is reflected in European Country X law.

[1892] The references of the following cases can be found in Appendix A. ICC Case No 15949 of 2012 (French law) referring to "principe de bonne foi" and "bonne foi"; ICC Case No 17521 of 2011 (New York law) referring to bad faith; ICC Case No 11045 of 2002 (French law) referring to the "*devoir/obligation de bonne foi*"; ICC Cases No 3099/3100 (Algerian law) referring to the rules of good faith; ICC Case No 3316 of 1979 (Belgian law) referring to the rules of good faith; ICC Case No 5080 of 1985 (Swiss law) referring to the principle of good faith; *Société d'Economie Mixte Guineo-Norvégienne de Transport Maritime-Guinomar v MMA*, *ad hoc* arbitration, 9 December 1986 (New York law) referring to good faith only; ICC Case No 5294 of 1988 (Swiss law) referring to the fact that the claimant was acting in good faith; CRCICA Case No 14/1989 (Egyptian law) referring to the implementation of the terms of the contract in good faith; ICC Case No 6673 of 1992 (French law) referring to the rule of good faith performance of obligations; CRCICA Case No 37/1992 (5 March 1993) (Egyptian law) referring to bad faith only; CRCICA Case No 27/1992 (15 May 1993) (Egyptian law) referring to the interpretation of contracts in accordance with the principle of good faith; ICDR Case No 367-04 (law of California) referring to the implied covenant of good faith and fair dealing; ICDR Case No 152-04 (New York law) referring to terms that may be implied by good faith; CAP Case No 3203 of 17 July 2013 (French law) referring to the duty to act in good faith and performance of contractual obligations in good faith; ICC Case No 14046 of 2010 (Italian law) referring to the principle of good faith prevailing in commercial relationships; ICC Case No 11462 of 2003 (Unknown law/French law?) referring to the performance of the agreement in good faith; NAI Case, 30 August 2005 (Dutch law) referring to the fact that parties to negotiations must negotiate in good faith; ICC Case No 7539 of 1995 (French law) referring to good faith; ICC Case No 8362 of 1995 (New York law) referring to principles of good faith and fair dealing; ICC Case No 8032 of 1995 (French law) referring to performance of the contract in good faith; CRCICA Case No 40/1992 (15 December 1995) (Egyptian law) referring to requirements of good faith and honourable dealing; ICC Case No 13504 of 2002 (unknown national law) referring to the duty of loyalty owed by parties in determining whether change in economic circumstances was beyond the control of the parties within the meaning of the price revision clause; ICC Case No 8423 of 1994 (law of Portugal) referring to generally accepted principle of contract law of good faith interpretation; ICC Case No 7365 of 1997 (Iranian law/general principles of law) referring to the covenant of good faith and fair dealing which is implied in every contract; CEPANI Case No 2106 of 1999 (Belgian law) referring to obligation to pursue negotiations in good faith; ICC Case No 7722 of 1999 (law of country X) referring to the good faith expected between parties in a commercial contract; CRCICA Case No 145/1999 (4 April 2000) (Egyptian law) referring to good faith in contractual matters; HFA Case dated 18 October 1977 (German law) referring to the principles of good faith; ICC Case No 12502 of 2009 (French law) referring to good faith only; ICC Case No 13790 of 2009 (Swiss law) referring to the principle to act in good faith; ICC Case No 6998 of 1994 (German law) referring to good faith requirement; CAM Case No 7813 (10 October 2014) (Italian law) referring to the standard of good faith; ICC Case No 8035 of 1995

1139. Hence in approximately three quarters of the awards reviewed, arbitral tribunals did not refer to case law or legal doctrine clarifying the role and scope of good faith under the applicable law.[1893]

1140. Even in those cases where the recourse to good faith was not superfluous (one hundred and thirty cases), only in approximately a quarter of these cases (thirty-

(Libyan law) referring to good faith only; ICC Case No 12456 of 2004 (Law of State B (close to French law) referring to the principle of good faith and the adage *non venire contra factum proprium*; LCIA Case No 101571 of 2012 (English law) referring only to the implied duty of good faith; ICDR Case No 50 517 T 00339 09 (April 2011) (law of Georgia) referring to the duty of good faith and fair dealing; ICDR Case No 50 148 T 00650 09 (14 October 2011) (New York law) referring to the implied covenant of good faith and fair dealing [However, it should be noted that a previous order rejecting the claim based on the breach of the implied covenant of good faith and fair dealing together with reasons had been previously issued]; ICDR Case No 50 110 T 00731 (28 February 2014) (New Jersey law) referring to the duty of good faith and fair dealing; ICDR Case No 50 122 T 00481 09 (12 October 2010) (New York law) referring to the duty of good faith and fair dealing; ICDR Case No 50 133 T 00751 13 (18 December 2014) (Connecticut law) referring to the implied duty on good faith; ICDR Case No 50-20-1300-1142 (29 July 2015) (law of California) referring to the implied covenant of good faith and fair dealing; ICDR Case No 50 1S4 TOOQ07 11 (6 February 2014) (New York law) referring to the implied covenant of good faith and fair dealing; ICDR Case No 50 421 T 00325 09 (2 June 2011) (Delaware law) referring to the duty of good faith and fair dealing; ICDR Case No 50 117 T 00884545 (New York law) referring to the implied duty of good faith and fair dealing; ICDR Case No 50 148 T 00299 11 (10 July 2013) (Nevada law) referring to the implied covenant of good faith and fair dealing [although in this case, the arbitral tribunal found that the claim based on this ground had been settled]; ICDR Case No 50 114 T 00267 12 (21 March 2014) (Minnesota law) referring to the implied covenant of good faith and fair dealing; ICDR Case No 50 155 T 00530 11 (4 April 2014) (law of California) referring to the implied covenant of good faith and fair dealing; ICDR Case No 50-180 T 00871 11 (29 July 2013) (Law of Iowa) referring to the obligation of good faith; ICDR Case No 50 117 T 00199 13 (29 July 2014) (New York law) referring to the standard of good faith and fair dealing established under New York law; SCC Case No 196/2011 (9 December 2013) (Swedish law) referring to the duty of loyalty or the contractual principle of loyalty; ICC Case No 10377 of 2002 (German law) referring to the principle of good faith; ICC Case No 18981 (Swiss law) referring to good faith and fair dealing; ICC Case No 2020-002 of 2009 (law of the State of Missouri) referring to the duty of fair dealing as well as good faith and fair dealing.

[1893] Indeed, in one hundred and twenty-one awards out of the one hundred and sixty-three relevant awards (four awards were not included as the reference to good faith by the arbitral tribunal could not be ascertained from the abstracts of the awards/court judgments available: ICAC at the RFCCI arbitration 119/2008 (7 June 2009); ICAC at the RFCCI arbitration 220/2009 (10 April 2010); ICAC at the RFCCI arbitration 100/2011 (30 December 2011) and *Baxter v Abbott*), there was no reference to case law or legal doctrine expanding on the notion of good faith.

five cases)[1894] did the arbitral tribunal refer to case law and doctrine when applying good faith.

1141. As a result of the lack of references to the legal doctrine and case law on good faith under the applicable national law, it is not clear whether the arbitral tribunal in question fully appreciated the nuances and specificities with respect to the role and scope of good faith under the relevant national law and, therefore, whether good faith was applied in accordance with such law.

2. More extensive approach taken in some cases

1142. It has been stated that arbitrators often apply the legal provisions and case law on good faith more extensively than under the applicable national law.[1895]

1143. In this respect, one arbitral tribunal explicitly stated that good faith could be applied more flexibly or extensively than under the applicable national law. Thus, in ICC Case No 9613 of 1999 (Italian law), the arbitral tribunal, which was applying the principle of good faith under Italian law, stated that it would follow the broader approach adopted by the Italian legal doctrine. The arbitrators noted that Italian case law tended to limit the scope of Article 1337 Italian Civil Code to cases of unjustified withdrawal from negotiations but that this restrictive interpretation was disputed by Italian doctrine which considered that a party who did not withdraw from the negotiations could nevertheless be liable under this article if it acted in violation of the principle of good faith. The arbitral tribunal followed this broader approach and considered whether the respondent had acted contrary to good faith during the negotiations even though

[1894] The references of the following cases can be found in Appendix A. ICC Case No 5073 of 1986; ICC Case No 6490 of 1993; ICC Case No 13730 of 2013; ICC Case No 14637 of 2008; ICC Case No 13646 of 2007; ICC Case No 11562 of 2003; ICC Case No 13954 of 2007: ICC Case No 12198 of 2004; ICC Case No 7047 of 1994; ICC Case No 6197 of 1995; ICC Case No 9839 of 1999; CRCICA Case No 24/1995 (21 December 1995); NAI Arbitration dated 1 August 2003; ICC Case No 9593 of 1998; ICC Case No 9613 of 1999; ICC Case No 10188 of 1999; ICC Case No 10074 of 1999; AIA Case No 76/98 (24 November 1999); AAA Case No 1569; ICC Case No 11961 of 2009; Costa Rica Arbitration of 1 June 2003; *Ad hoc* arbitration of 4 December 1996; ICC Case No 16892; ICC Case No 18701 of 2014; ICC Case No 19134 of 2014; ICC Case No 18807 of 2013; JAMS Case No 1425012160; NS *United Kaiun Kaisha Ltd v Cogent Fibre Inc*. (23 January 2015), VIAC Case No SCH-5196 of 16 July 2012; *Chinese Goods* case, ICC Case No 14500 of 2009; ICC Case No 20065; ICC Case No 2020-007 of 2015; ICC Case No 16920 of 2016; ICC Case No FA-2020-224.

[1895] MAYER, *bonne foi*, 543: "*On voit donc les arbitres interpréter de façon extensive les textes et la jurisprudence étatiques relatifs à la bonne foi*." ("One sees therefore arbitrators extensively interpreting the national provisions and case law on good faith.") (informal English translation of the French original).

it was not the party that ended the negotiations. The arbitral tribunal concluded, however, that the respondent had not made unreasonable requests during the negotiations and had therefore not acted contrary to good faith.[1896]

1144. Conversely, some arbitral tribunals have insisted on applying the notion of good faith in the same way as the relevant national courts. This approach is exemplified clearly in ICC Case No 13954 of 2007 (French law), where the arbitral tribunal insisted on a strict application of the applicable French law and refused to apply the principle of good faith in order to cure the lack of authorisation of the Board of Directors to sign a contract.[1897] This approach is also exemplified by ICC Case No 14500 of 2009 (French law) in which the arbitral tribunal strictly followed the case law of the French *Cour de cassation* when it held that the rule that contracts should be performed in good faith does not allow a judge to violate the very substance of the rights and obligations which the parties have legally agreed upon.[1898]

1145. In addition – recognizing the limits of the principle of good faith – the arbitral tribunal in ICC Case No 11789 of 2003 (unknown law), raised the issue of whether or not this principle could impose a duty on the parties to restructure the deal. The arbitral tribunal, however, went on to hold that this would "overstretch any possible application of the principles [*sic*] of good faith."[1899]

3. Possible influence of arbitrator's legal background

1146. The issue of whether arbitrators are influenced by their legal background when applying good faith is difficult to answer due to the lack of data. Indeed, most published awards do not identify the arbitrators or the nationality of the arbitrators. In addition, even in those published awards where the arbitrators or their nationalities were identified, in almost half of the cases (thirty-one awards), the arbitrator(s) had the same nationality as the law being applied.[1900]

1896 ICC Case No 9613 (2007) 32 YB Comm Arb 42–59, 45–46.

1897 ICC Case No 13954 (2010) 35 YB Comm Arb 218–240, §§35–38.

1898 ICC Case No 14500 (2016) ICC Disp Res Bull 95, §296.

1899 ICC Case No 11789 (2013) 24 ICC Bull 105, §481.

1900 SMA Case No 1569 of 1981 (Three US arbitrators applying New York law); CCIR Case No 33 (30 September 1993) (Romanian arbitrators applying Romanian law); CRCICA Case No 34/1992 (30 June 1993) (Egyptian arbitrators applying Egyptian law); CRCICA Case No 173/2000 (14 December 2000) (three Egyptian arbitrators applying Egyptian law); CRCICA Case No 154/2000 (8 March 2000) (three Egyptian arbitrators applying Egyptian law); CAP Case No 3203 of 17 July 2013 (French arbitrator applying French law); ICC Case No 5080 of 1985 (Swiss arbitrator applying Swiss law); *Société d'Economie Mixte Guineo-Norvégienne*

1147. In the remaining cases (thirty awards),[1901] there were some indications that an arbitrator's nationality or legal background had an influence on its recourse to, and its application of, good faith.

de Transport Maritime-Guinomar v MMA, *ad hoc* arbitration of 9 December 1986 (three US arbitrators applying New York law); ICC Case No 5294 of 1988 (Swiss arbitrator applying Swiss law); CRCICA Case No 37/1992 (5 March 1993) (three Egyptian arbitrators applying Egyptian law); CRCICA Case No 27/1992 (15 May 1993) (Egyptian arbitrator applying Egyptian law); CRCICA Case No 21/1990 (6 August 1993) (three Egyptian arbitrators applying Egyptian law); ICC Case No 16394 of 2013 (three Greek arbitrators applying Greek law); ICC Case No 18807 of 2013 (US arbitrator applying New York law); JAMS Case No 1425012160 (11 November 2013) (US arbitrator applying New York law); JCAA Case No 13-03 (24 April 2014) (Japanese arbitrator applying Japanese law); ICDR 50 517 T00339 09 (April 2011) (US arbitrators applying laws of Georgia); ICDR Case No 50 148 T 00650 09 (14 October 2011) (US arbitrators applying New York law); ICDR Case No 50 122 T00481 09 (12 October 2010) (US arbitrator applying New York law); ICDR Case No 50 133 T 00751 13 (18 December 2014) (US arbitrator applying Connecticut law); ICDR Case No 50-20-1300-142 (20 July 2015) (US arbitrators applying law of California); ICDR Case No 50 IS4 T00Q07 11 (6 February 2014) (US arbitrators applying New York law); ICDR Case No 01-15-002-9056 (US arbitrator applying law of Florida); ICDR Case No 50 421 T 00325 09 (2 June 2011) (US arbitrator applying Delaware law); ICDR Case No 50 181T 00107 09 (US arbitrators applying New York law): ICDR Case No 50 117 T 00845 13 (18 April 2014) (US arbitrator applying New York law); ICDR Case No 50 148 T 00299 11 (10 July 2013) (US arbitrators applying law of Nevada); ICDR Case No 50 114 T 00267 12 (21 March 2014) (US arbitrator applying law of Minnesota); ICDR Case No 50 155 T00530 11 (4 April 2014) (US arbitrator applying law of California); ICDR Case No 50-180 T 00871 11 (29 July 2013) (US arbitrator applying law of Iowa); *NS United Kaiun Kaisha Ltd v Cogent Fibre Inc* (23 January 2015) (US arbitrators applying New York law).

[1901] ICC Case No 1250 of 1964 (French arbitrator, Swedish arbitrator and Lebanese arbitrator applying Lebanese law); ICC Cases No 3099/3100 (Swiss arbitrator, Congolese arbitrator and Algerian arbitrator applying Algerian law); ICC Case No 3316 of 1979 (Swiss, Belgian and French arbitrators applying Belgian law); *FR Germany engineering company v Polish buyer*, *ad hoc* arbitration, 9 September 1983 (two Swiss arbitrators and one Polish arbitrator applying Swiss law); ICC Case No 5073 of 1986 (Mexican arbitrator, Argentinian arbitrator and US arbitrator applying law of California); CRCICA Case No 14/1989 (three Egyptian arbitrators applying Egyptian law); *Association of service industry firms v Service industry firm*, *ad hoc* arbitration, 27 May 1991 (Dutch, US and Swiss arbitrators applying Swiss law); CRCICA Case No 32/1992 (30 June 1993) (three Egyptian arbitrators applying Egyptian law); CRCICA Case No 43/1995 (15 November 1995) (one Swiss arbitrator and two Egyptian arbitrators applying Egyptian law); CRCICA Case No 40/1992 (15 December 1995) (one arbitrator from Jordan and two Egyptian arbitrators applying Egyptian law); CRCICA Case No 24/1995 (21 December 1995) (one Lebanese arbitrator, one French arbitrator & one Egyptian arbitrator applying Egyptian law); *Baxter v Abbott* (Spanish arbitrator, Japanese arbitrator, US arbitrator applying law of Illinois); ICC Case No 2114 of 1972 (French/Canadian arbitrator applying Swiss law); NAI Arbitration dated 1 August 2003 (Three Dutch arbitrators applying New York law); ICC Case No 14841 of 2009 (Swiss arbitrator applying German law); ICC Case

1148. For example, in an *ad hoc* arbitration of 27 May 1991 (Swiss law), the issue of whether the respondent had acted in good faith when it withdrew from the association and denied that any compensation was due was raised only by one of the Swiss co-arbitrators in his dissenting opinion.[1902] This issue had been raised by one of the legal experts during the proceedings but was not discussed by the majority of the panel composed of Dutch and US nationalities.[1903] The consideration of this argument by the Swiss co-arbitrator only in his dissenting opinion (and not by the other arbitrators) can perhaps be explained by the more extensive role that good faith plays under Swiss law.

1149. In addition, in ICC Case No 7365 of 1997 (Iranian law/general principles of law), the arbitral tribunal referred to "the covenant of good faith and fair dealing which is implied in every contract" in a case where the contract was governed by Iranian law and general principles of law (determined by reference to the PICC).[1904] By this reference, it can be surmised that at least some of the members of the arbitral tribunal were of US origin and were thus influenced by the notion of good faith under this law given the reference to the *implied covenant of good faith and fair dealing* which is employed in US law rather than a reference to the "duty of good faith and fair dealing" (which is employed in the PICC) or the notion of the principle of good faith employed in Civil law countries, such as Iran.[1905]

No 16982 of 2014 (Canadian arbitrator, Swiss? Arbitrator and US arbitrator applying New York law); ICC Case No 19222 of 2016 (Dutch arbitrator, Swiss arbitrator and Egyptian arbitrator applying Swiss law); ICC Case No 16240 of 2012 (two Swiss arbitrators and Belgian arbitrator applying Swiss law); ICC Case No 18701 of 2014 (Canadian arbitrator and two UK arbitrators applying the law of Massachusetts); ICC Case No 19134 of 2014 (New Zealand arbitrator, Argentinian arbitrator and Mexican arbitrator applying New York law); ICC Case No 17521 of 2011 (two US arbitrators and one French arbitrator applying New York law); ICC Case No 16550 of 2011 (two Swiss arbitrators and one French arbitrator applying Moroccan law); ICC Case No 15900 of 2012 and 2013 (Swiss arbitrator applying German law); ICC Case No 16257 of 2013 (two French arbitrators and one Belgian arbitrator applying French law); VIAC Case No SCH-5196 of 16 July 2012 (two Austrian arbitrators and one Spanish arbitrator applying Austrian law); LCIA Case No 101571 of 2012 (US arbitrator applying English law); ICDR Case No 50 110 T 00731 11 (28 February 2014) (US arbitrator, Canadian arbitrator and Mexican arbitrator applying law of New Jersey); ICDR Case No 50 117 T 00199 (French arbitrator applying New York law); ICAC Case No 89/2015 (22 March 2016) (arbitrator from the Czech Republic applying the laws of the Russian Federation; SCC Case No 196/2011 (9 December 2013) (Swedish arbitrator, US arbitrator and Russian arbitrator applying Swedish law).

1902 *Ad hoc* arbitration of 27 May 1991 (1992) 17 YB Comm Arb 11–41, §§71–73.

1903 *Ibid*.

1904 ICC Case No 7365 (2004) 15 ICC Bull 117, §8.10

1905 See, in general, Part III of the present thesis which discusses the role and scope of good faith under different national and non-national laws.

1150. Further, in ICDR Case No 50 117 T 00199, the sole arbitrator (of French nationality) held that the respondent had breached the exclusive distributorship agreement and that, as such, the respondent may have failed to fully abide by the standard of good faith and fair dealing established under New York law.[1906] The fact that the sole arbitrator used the term "standard of good faith and fair dealing" rather than the "implied covenant of good faith and fair dealing" may suggest that the sole arbitrator was influenced by his legal background when applying this notion. In addition, the fact that, under New York law, the same facts cannot constitute, at the same time, a breach of the contract and a breach of the implied covenant of good faith and fair dealing[1907] also supports this conclusion.

1151. Moreover, in an arbitration between *Abbott Laboratories and Baxter International* (Illinois law), the majority of the arbitral tribunal (KAZUO IWASAKI (Japan) and BERNARDO CREMADES (Spain)) held that the obligation of good faith under Illinois law established an independent cause of action and that it would be a breach of the duty of good faith for Baxter to deprive its own sublicensee of the fruits of its contract.[1908] However, the other arbitrator, who was a Texan attorney, dissented considering that good faith could not be a legal basis to decide the claim.[1909] The Common law background of the latter arbitrator and the Civil law background of the majority of the panel obviously influenced their application of good faith to this case.

4. Superfluous and impertinent references to good faith under other national and non-national laws

1152. Only two arbitral tribunals adopted a comparative approach when applying the notion of good faith on the basis of a national law.[1910]

1906 *Privacy Assured, Inc. v. Accessdata Corp*. (Final Award of 29 July 2014), ICDR Case No. 50 117 T 00199 13, Arbitrator intelligence materials, 6

1907 See above, para. 401.

1908 Case referred to in CREMADES, 764 and in (2003) 28 YB Comm Arb 1154, 1155.

1909 *Ibid*.

1910 One arbitral tribunal referred to the principle of good faith under different national laws in order to reinforce or comfort the conclusion reached by applying the principle of good faith under the relevant national law. Hence, in ICC Case No 7314 (1998) 23 YB Comm Arb 49–65, §33 (Greek law), the arbitral tribunal held that the claimant's conduct would amount to contradictory behaviour and would be a breach of good faith which is not permitted under the applicable Greek law or in other legal systems where this might fall under the estoppel principle. In addition, in one further case (ICC Case No 9593 (1999) 10 ICC Bull 110), a comparative approach was taken by an arbitral tribunal due to the fact that the relevant applicable law was based on another national law.

1153. In a higher proportion of awards (approximately 15%), the arbitral tribunals took a transnational approach and referred to good faith under international instruments such as the CISG, the PICC or under the *lex mercatoria* in order to reinforce the conclusion reached by applying the national law concept of good faith.[1911] Conversely, in one case, an arbitral tribunal explicitly rejected the

[1911] In twenty-four awards, arbitral tribunals took a transnational approach, ICAC at the RFCCI Case No 76/1997 (26 January 1998) (Algerian law) available at < https://iicl.law.pace.edu/cisg/cisg>, accessed 1 March 2023, referring to Art. 7.1 CISG and Art. 1.7 PICC; ICC Case No 10351 (2009) 20 ICC Bull 76 (law of State X), referring to Art. 1.7 PICC and noting that the obligation to perform a contact in good faith is a principle that is generally admitted in international contracts; ICC Case No 12112 (2009) 34 YB Comm Arb 77–110 (law of State Y), referring to Art. 6.14 PICC 1994 to support its conclusion that a foreign partner should be able to legitimately rely on the national public partner as to questions as the social climate and forces in the concerned region that the foreign partner cannot estimate properly; ICC Case No 8548 of 1996 (2001) Chronique de jurisprudence arbitrale de la CCI in Cahiers de l'arbitrage, Gazette du Palais no. 119, 6–44 (law of Holland), referring to the principle of good faith found in the PICC and in the *lex mercatoria* as well as to an arbitral award; ICC Case No 8908 of 1998 available at < http://www.unilex.info/case.cfm?id=663>, accessed 1 March 2023 (Italian law) referring to Art. 1.7 and Arts 4.1-4.8 PICC to reinforce its exposé of the rules of contractual interpretation under Italian law, in particular the rule that contracts should be interpreted in good faith; ICC Case No 10346 of 2000 available at < http://www.unilex.info/case.cfm?pid=2&do=case&id=700&step=FullText>, accessed 1 March 2023 (Columbian law), referring to Arts 5.3 and 1.7 PICC; Costa Rica arbitration of 1 June 2003 available at < http://www.unilex.info/case.cfm?pid=2&id=1101&do=case>, accessed 1 March 2023 (law of Costa Rica), referring to Article 1.7 PICC; CIETAC arbitration of 7 December 2005 (Chinese law) available at < https://iicl.law.pace.edu/cisg/cisg>, accessed 1 March 2023 referring to Article 7(1) CISG according to the summary of the decision; ICC Case No 9753 (2001) 12 ICC Bull 86 (Czech law) referring to Art. 1.7 PICC; *ad hoc* arbitration of 4 December 1996 available at http://www.unilex.info/case.cfm?id=631, accessed 1 March 2023 (Italian law), referring to Art. 1.7 PICC; ICC Case No 11375 of 2002 available at http://www.unilex.info/case.cfm?pid=2&do=case&id=1071&step=FullText, accessed 1 March 2023 (law of State X), referring to the implied obligation of good faith under the PICC; ICC Case No 9651 (Swiss law), referring to Art. 1.7 PICC available at < http://www.unilex.info/principles/case/692>, accessed 1 March 2023; ICAC at the RFCCI case (No 119/2008) available at < http://www.unilex.info/case.cfm?id=1804 >, accessed 1 March 2023 (Russian law), referring to Arts. 1.7 and 5.3 PICC; ICAC at the RFCCI case (No 220/2009) (10 April 2010) available at < http://www.unilex.info/case.cfm?id=1809>, accessed 1 March 2023 (English law), referring to Arts. 1.7 and 5.3 PICC; ICAC at the RFCCI Case No 100/2011 (30 December 2011) available at < http://www.unilex.info/case.cfm?id=1732>, accessed 1 March 2023 (Russian law), referring to Arts. 1.7 and 5.3 PICC; ICC Case No 9593 (1999) 10 ICC Bull 110 (law of the Republic of the Ivory Coast), referring to Art. 5.3 PICC; *ad hoc* arbitration of 4 March 2004 available at < http://www.unilex.info/case.cfm?id=973>, accessed 1 March 2023 (French law), referring to Art. 1.7 PICC; ICC Case No 15913 (2015) JDI 216–224 (Algerian law) where the arbitral tribunal referred firstly to the fundamental principle drawn from international

respondent's proposal to take into account the notion of good faith under the *lex mercatoria* and the PICC as well as under the applicable national law. Thus, in ICC Case No 9029 of 1998 (Italian law), the arbitral tribunal referred to its previous reasoning with respect to its refusal to take into account the *lex mercatoria* concerning the issue of hardship, namely that the respondent had failed to prove that the PICC were part of the *lex mercatoria*. The arbitral tribunal held that the parties had chosen a national law to apply and that the international commercial usages which were applicable by virtue of Article 834 Italian Code of Civil procedure could only be used to fill gaps in the national law.[1912]

1154. In six cases, the arbitral tribunals took both a comparative and transnational approach.[1913]

arbitration case law that contracts should be performed in good faith citing a well-known text book in the field. Only subsequently did the tribunal refer to this principle under the applicable Algerian law; ICC Case No 16257 of 2013, Arbitrator intelligence materials (French law) referring to the prohibition of inconsistent behaviour under Art. 1.8 PICC; ICAC Case No 244/2014 (6 August 2015) (2015) International Commercial Arbitration Review (laws of the Russian Federation) referring to Art. 1.7 PICC; ICC Case No 2020-003 of 2011 (2020) ICC Disp Res Bull 130 referring to Arts. 1.7 and 1.8 PICC; ICC Case No 2020-005 (2020) ICC Disp Res Bull 133 referring to Art. 1:201 PECL and Arts. 1.7 and 5.1.3 PICC; ICC Case No FA-2020-226 (2020) 45 YB Comm Arb 1–24, §38 referring to Art. 1.7 PICC.

1912 ICC Case No 9029 (1999) 10 ICC Bull 88.

1913 In ICC Case No 10335 (2001) 12 ICC Bull 107 (Greek law), the arbitral tribunal referred to the provision under Greek law that contracts shall be interpreted according to the requirements of good faith and then also referred to similar provisions under German, Austrian and Swiss law as well as the PICC (Arts 1.7, 1.8, 4.1-4.3); In *Company Z and others v State Organization ABC* (1983) 8 YB Comm Arb 94–117, 110 (Utopian law), the arbitral tribunal pointed out that the general principle of good faith in contractual relations was a principle recognized by both Utopian and Xanadu law and in international commercial law, and enshrined in innumerable arbitration awards; In ICC Case No 4761 (1987) JDI 1012–1018, 1015 (Libyan law/*lex mercatoria*), the arbitral tribunal held that the parties' agreement to enter into negotiations to agree on an increase in the contract price by a certain date was valid on the basis of the theory of change of circumstances which is recognized under the applicable Libyan national law, as well as under Swiss and German law. The arbitral tribunal also referred to this theory under the *lex mercatoria* as this was applicable to the parties' contract as well as Libyan law; In ICC Case No 2020-003 of 2011 (2020) ICC Disp Res Bull 130, §181 the arbitral tribunal referred to Articles 1.7 and 1.8 PICC and good faith under the Common law and Civil law legal traditions; In ICC Case No 2020-005 (2020) ICC Disp Res Bull 133, §§261–264, the arbitral tribunal referred to Article 1:201 PECL and Articles 1.7 and 5.1.3 PICC and to good faith under French law, from which Moroccan law (the applicable law) is derived; In ICC Case No 2020-008 (2020) ICC Disp Res Bull 139, §205 the arbitral tribunal referred to the fact that the principle of inconsistent behaviour (derived from good faith) is widely accepted in international arbitration and corresponds to what is acknowledged in Civil law systems under the concept of *venire contra factum proprium*.

1155. As shown above,[1914] the notion of good faith varies depending on the applicable law. Hence, in the author's view, it is not only superfluous, but also impertinent, to refer to good faith under another national or non-national law than the one applicable.

1156. The different role and scope played by good faith depending on the applicable law was well noted in ICC Case No 14108.[1915] In this case, in which the principles of law common to State W and the US were applicable, the arbitral tribunal noted that: "The doctrine of estoppel is not a principle of State W law. However, the broader concept of good faith, which in any case encompasses the doctrine of estoppel is a principle of law common to State W (State W Civil Code) and the United States and, thus, is applicable to this case."[1916] The arbitral tribunal went on to note that, "although both State W law and US law recognize the good faith principle, no evidence has been brought to the Arbitral Tribunal of an identity of the two laws in the application of the principle."[1917] The arbitral tribunal therefore went on to apply good faith, and the prohibition of inconsistent behaviour, on the basis of the PICC.[1918]

5. Consequences of an inaccurate application of good faith

1157. If an arbitral tribunal fails to apply good faith in accordance with the applicable law, it is highly unlikely that the arbitral award will be set aside as national courts will usually not review the application of the applicable national law by the arbitrators.[1919] An inaccurate application of good faith may only lead to an arbitral award being set aside in the rare case that the applicable national arbitration law contains a ground allowing for the annulment of an arbitral award for failure to accurately apply the applicable law.[1920]

1914 See above, Part III, Chapter one.

1915 ICC Case No 14108 (2011) 36 YB Comm Arb 135–201.

1916 *Idem*, §105

1917 *Idem,* §106.

1918 *Idem,* §108. Indeed, according to the applicable law clause, in the absence of principles common to State W and US, the principles of law normally recognized by nations in general would apply.

1919 See, for example, the decision of the Court of Appeal of Paris, Decision No. 19/08691 of 1 December 2020, holding that it is not for the judge in annulment proceedings to review the interpretation of the contractual provisions by the arbitral tribunal on the basis of the principle of good faith.

1920 According to BORN, 3633–3634: "Despite a trend away from any judicial review of the merits of awards, deriving in large part from the UNCITRAL Model Law's approach to the issue, a number of jurisdictions continue to provide for annulment of international arbitral awards

1158. Three cases were found in which arbitral awards were set aside for a failure to apply good faith accurately under the relevant applicable law:

– The first case was a Swiss domestic arbitration concerning an assignment and an agency agreement between two Swiss companies relating to the purchase of copper from a State-owned company in Georgia.[1921] The Swiss Federal Supreme Court set aside the award rendered by the arbitral tribunal as being arbitrary contrary to Article 393(e) SwCCP[1922].[1923] The arbitral tribunal had held that one of the parties had breached the agreements by extending its contract for direct delivery with the State-owned company without notifying the other party of the extension.[1924] The arbitral tribunal held that this party was estopped from terminating the agreements with sixty days prior notice and applied instead a fixed contractual term of five years which was provided for in the parties' previous contract.[1925] The Swiss Federal Supreme Court held that the arbitral tribunal had not applied the law and that its application was arbitrary as it had awarded the other party the fees under the agreements based on a very general reference to the principle of good faith and without addressing the case law and doctrine on the abuse of rights and good faith.[1926] The Supreme Court also held that the arbitral tribunal did not adequately explain why that party's previous breach of contract constituted an abuse of rights and why it was thereby estopped from terminating the contract.[1927] The Court further held that the general reference to the principle of good faith did not justify the application of the five year termination provision in the parties' prior contract.[1928] The case was remanded to the arbitral tribunal which provided some further reasoning for its argument that one of the parties had acted in bad faith. The Supreme Court held that the new award was also arbitrary as the arbitral tribunal merely

based upon such review. These jurisdictions include England, Ireland, China, Singapore, Abu Dhabi, Libya, Saudi Arabia, Argentina, Egypt and the United States (arguably)." See also BERGER, Precedents, 16.

1921 SFSCD 4A_190/2014 of 19 November 2014; NATHALIE VOSER/HANNAH BOEHM, Swiss Supreme Court once again considers meaning of arbitrariness in domestic arbitration, Practical law Case Report, 28 January 2015.

1922 According to Article 393(e) SwCCP, a domestic arbitral award may be set aside when the result of the award is arbitrary because it is grounded on findings which are manifestly contrary to the facts on file or because they constitute a manifest violation of law or equity.

1923 SFSCD 4A_190/2014 of 19 November 2014 c. 5.1.

1924 *Idem,* c. 4.2.

1925 *Idem,* c. 4.2.

1926 *Idem,* c. 4.3.

1927 *Idem,* c. 4.3.

1928 *Idem,* c. 4.3.

repeated and only slightly elaborated on the reasoning in its original award and had therefore disregarded the binding effect of the Supreme Court's previous ruling in manifest disregard of the law.[1929] The case was remanded for a second time to the arbitral tribunal. The Supreme Court thereafter held that the arbitral tribunal in its third award had substantiated its finding of an abuse of rights in light of the chronology of events surrounding the conclusion and termination of the Agreements. The Federal Supreme Court therefore considered that the award was no longer arbitrary.[1930]

– The second case was a Canadian domestic arbitration[1931] case where an appeal of an arbitral award was admitted due to the sole arbitrator's failure to apply good faith in accordance with Canadian law.[1932] The parties were involved in a twenty year contract for the disposal of waste from the Vancouver regional district.[1933] The contract set out rates to be paid by Metro to Wastech Inc. for the services provided and contained several mechanisms for rate adjustments.[1934] Metro's 2011 allocation resulted in a "material reduction" in the waste allocated to certain locations, which subsequently had significant financial implications for Wastech Inc., beyond the allocation mechanisms in the Agreement.[1935] As a result, Wastech Inc. did not achieve its target ratio.[1936] Relying, in particular, on the Supreme Court case of *Bhasin v. Hrynew,* the sole arbitrator found that Metro had disregarded Wastech Inc's legitimate contractual expectations that Metro would "not exercise its discretion under the [Agreement] to implement a material change in the volume of waste allocated […] that has the effect of depriving Wastech Inc. of the opportunity, if Wastech Inc. performs its own obligations, to achieve the [target ratio]."[1937] On this basis, the sole arbitrator found that Metro breached its duty of good faith as Metro's conduct lacked appropriate regard for

1929 SFSCD 4A_426/2015 of 11 April 2016 c. 3.3; NATHALIE VOSER/ANYA GEORGE, Swiss Supreme Court sets aside second award of same tribunal, Practical law Case Report, 25 May 2016.

1930 SFSCD 4A_348/2020 of 4 January 2021; ANYA GEORGE/ANASTASIIA DULSKA, Award finally upheld after case remanded twice to same arbitral tribunal, Practical law Case Report, 17 February 2021.

1931 Article 31 British Colombia Arbitration Act 1996 allows an appeal of domestic arbitral awards on questions of law.

1932 *Greater Vancouver Sewage and Drainage District v Wastech Services* 2018 BCSC 605 [51]–[64].

1933 *Idem*, [1], [8]–[9].

1934 *Idem*, [11]–[12].

1935 *Idem*, [13], [[16]–[17].

1936 *Idem*, [16]–[17].

1937 *Idem*, [23], [31].

Wastech Inc's interests and was effectively dishonest.[1938] The Supreme Court of British Columbia, however, admitted the appeal against the award holding that good faith had been applied incorrectly as one party's exercise of its contractual rights can deny the other party's contractual expectations but will not breach the duty of good faith if their contract contains no express or implied terms to safeguard those expectations;[1939] and

– The third case concerned the ICSID arbitration of *Klöckner v Cameroon*.[1940] The award rendered by the arbitral tribunal was annulled by the *ad hoc* Committee on the ground that the arbitral tribunal exceeded its powers by failing to apply Cameroonian law in violation of Articles 52(1)b) and 42(1) ICSID Convention[1941].[1942] The *ad hoc* committee criticized the arbitral tribunal for simply postulating the existence of a principle of full disclosure and presuming that it was a basic principle of French law before holding that Klöckner violated this principle and was not therefore entitled to the contract price.[1943] In particular, the *ad hoc* Committee stated: "Clearly, the principle of good faith lies 'at the root' of French civil law as of other legal systems, but this elementary observation does not in itself provide any answer to the question raised here. Does there exist, in Cameroonian law or in Franco-Cameroonian law, any such 'principle', as stated or postulated by the Award, of 'the obligation of full disclosure'? If it does exist, flowing no doubt from the general principle of good faith, and the obligation of frankness and loyalty, then how, by what rules and by what methods is it fulfilled, and within what limits? Can one have an obligation of 'full disclosure' and an unlimited one at that, even if it operates to one's own detriment? Does there

1938 *Idem*, [1].

1939 *Idem* [51]–[64]. The decision of the Supreme Court was confirmed by the Court of Appeal (*Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd*., 2019 BCCA 66). The Supreme Court of Canada (2021 SCC 7) upheld the lower courts' decision to set aside the arbitral award holding that although good faith does not allow a party to use its discretion unreasonably, on the facts of the case, Metro exercised its discretion for the right purpose and did not therefore violate its duty to act in good faith.

1940 *Klöckner Industrie-Anlagen GmbH v United Republic of Cameroon*, Annulment Decision, ICSID Case No ARB/81/2, 3 May 1985 (1986) 11 YB Comm Arb 162–184.

1941 Article 52(1)(b) ICSID Convention 1966 provides that "Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (b) that the Tribunal has manifestly exceeded its powers." Article 42(1) ICSID Convention provides in relevant part as follows: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties."

1942 *Klöckner Industrie-Anlagen GmbH v United Republic of Cameroon*, Annulment Decision, ICSID Case No ARB/81/2, 3 May 1985 (1986) 11 YB Comm Arb 166–174.

1943 *Idem,* 173.

exist a single legal system which recognizes such an extensive obligation?"[1944]

1159. As discussed above, an award in which an arbitral tribunal makes a general reference to good faith may also be challenged on the ground that, in doing so, the arbitral tribunal has in fact ruled in equity.[1945]

1160. However, it seems that in practice, such arguments have not met with success. In particular, in one case, a party's argument that the arbitral tribunal's reference to the principles of fairness, such as good faith and fair dealing, exceeded the terms of the submission to arbitrate as they were not indicated in the Terms of Reference as applicable law and thus violated Article V(1)(c) NYC, was rejected. The court held that the arbitral tribunal's reference to principles such as good faith and fair dealing did not violate Article V(1)(c) NYC as the tribunal applied these principles to disputes contemplated by and falling within the terms of the submission to arbitration.[1946] In another case, the Paris Court of Appeal held that the arbitral tribunal had relied on the principle of good faith recognized by Qatari law and that this could not be assimilated to an assessment of the claim in *amiable composition*. The Paris Court of Appeal thus rejected the argument that the arbitral tribunal had not complied with the terms of its mandate by deciding as *amiable compositeur*.[1947]

E. Good faith employed to address inequality between the parties in cases involving State parties

1161. Good faith often appears to be raised in cases involving State parties in order to address the inequality in the relationship between the commercial party and State party.

1162. Hence, good faith has been invoked to prevent a State party from raising the defence of *force majeure* when, because of its position as a State, it had (or should have had) knowledge of the circumstances leading to the *force majeure* event and/or was in a position to influence, and thus prevent such circumstances from occurring:

[1944] *Idem,* 171.

[1945] See para. 47.

[1946] *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems*, *Inc*, 7 December 1998, United States District Court, S.D. California available at < http://www.unilex.info/case.cfm?id=652>, §7, accessed 1 March 2023.

[1947] Decision of the Court of Appeal of Paris, Decision No. 19/08691 of 1 December 2020.

– For example, in ICC Case Nos 3099/3100 (Algerian law), the respondent State party invoked *force majeure* as an excuse for non-payment. It alleged that it had the money in its bank account but that it could not obtain an authorisation for payment.[1948] The arbitral tribunal held that according to the rules of good faith, the respondent could not oblige itself to pay for the products without having the certainty of being able to effectuate the payments in foreign currency on the dates that they became due. The arbitral tribunal pointed, in particular, to the fact that the respondent did not ask the Central Bank for this guarantee but only asked after having taken delivery of the larger part of the products.[1949] This is an example of where the State party should have known that its country was in a difficult monetary situation and that the bank would not be in a position to provide the necessary foreign exchange. Good faith, therefore, prevented the respondent State from relying on the *force majeure* defence in this case; and
– This can also be seen in ICC Case No 12112 of 2009 (law of State Y), where the sole arbitrator held that good faith required the State respondent party to check that performance under the contract would be possible at the promised time taking into consideration the social climate which the foreign partner, contrary to itself, would not be able to estimate properly.[1950] In this case, the State party was unable to make land available to its contracting party under the Joint Venture Agreement because it had made the land available to an international organization in order to accommodate refugees.[1951] The sole arbitrator considered that if the State party had not made the necessary verifications in this regard, then it would be liable towards its foreign partner.[1952] The State party was therefore again prevented from relying on a *force majeure* defence.[1953]

1163. Good faith has also been invoked to prevent a State party from relying on its own law in order to allege that a contract was not binding on it. Indeed, in ICC Case No 16257 of 2013 (French law), the State party argued that the contract was not binding on the State as it was not countersigned by the Minister of

[1948] ICC Case Nos 3099/3100 (1982) 7 YB Comm Arb 87–95, 87.
[1949] *Idem,* 92.
[1950] ICC Case No 12112 (2009) 34 YB Comm Arb 77–110, §63.
[1951] *Idem,* §§67, 70
[1952] *Idem,* §27.
[1953] *Idem,* §28. See also *ad hoc* arbitration of 9 September 1983 (Swiss law) (1987) 12 YB Comm Arb 63–81 in which the arbitral tribunal stated that it would have to be considered whether it would be an abuse of right/contrary to good faith for a State party to invoke a contractual *force majeure* clause but holding that the requirements in the contractual *force majeure* clause were not made out.

Finance.[1954] The arbitral tribunal found that such countersignature was not necessary but that, even if it was, it would be contrary to good faith for the State party to raise such an argument when it had led the other party to believe that they had validly entered into the contract.[1955]

1164. Good faith was further invoked in order to impose a duty to inform on a State party. Hence in *Company Z and others v State Organization ABC* (unknown national law), the arbitral tribunal referred to the notion of good faith to support its argument that the State party was under a duty to inform the other party that the contract was not valid due to a lack of authorisation.[1956] The State party's superior knowledge in this case appears to have justified the imposition of this duty to inform on the basis of good faith.

[1954] *Commissions Import Export S.A. v Republic of Congo* (Final Award), ICC Case No. 16257/EC/ND/MCP of 2013, Arbitrator intelligence materials, §254.

[1955] *Idem,* §271.

[1956] *Company Z and others v State Organization ABC* (1983) 8 YB Comm Arb 94–117, 110.

III. Proposed Guidelines

1165. In light of the above review, the following guidelines are proposed for the application of good faith by arbitral tribunals to the parties' contract on the basis of a national law. First, before applying good faith, the arbitral tribunal should invite the parties to discuss its application (A.). Second, when grounding its decision on good faith, an arbitral tribunal should include more exact reasoning in its decision (B.). Third, arbitral tribunals should, in general, follow the approach of the relevant national courts (C.). Finally, arbitral tribunals should not make reference to good faith under other laws than the one applicable (D.).

A. Invite parties to discuss the application of good faith

1166. Depending on the applicable law and given the fundamental nature of the principle of good faith, it may be possible for an arbitral tribunal to apply the principle of good faith *sua sponte*, namely without previously inviting the parties to discuss its application. However, given the uncertainty over whether such recourse would violate the right to be heard,[1957] caution warrants that arbitral tribunals should, wherever possible, invite the parties to comment on the application of good faith under the applicable law to the case in question, prior to applying such principle of its own accord.

B. Include more exact reasoning

1167. It is submitted that when an arbitral tribunal grounds its decision on good faith (rather than invoking good faith as an alternative or addition ground or as *obiter dicta*), it should include more exact reasoning in its decision.

1168. As stated by CREMADES in this regard:

> there is no doubt that arguments based on good faith are of a more precarious nature than others and thus, the need for a greater conviction at first and the need for a more exact reasoning by the arbitrator in his decision-making process afterwards.[1958]

[1957] See paras. 1110 et seq. above.

[1958] CREMADES, 786. See also, on a related note, JENNIE WILD, Duties of Good Faith – The Challenge of a Mixed Civil and Common Law Tribunal in Carlos González-Bueno (ed), 40 under 40 International Arbitration (2018) p. 72 who is of the view that, in the event of a mixed tribunal, a member from a Common law background will feel more comfortable with the application of good faith if the arbitral tribunal identifies precisely what the duty requires the

C. Follow the approach of the relevant national courts

1169. It is proposed that arbitrators should, in general, consider and follow the approach of the leading national case law and doctrine as applied by the relevant national courts when applying good faith to the parties' contract on the basis of a national law.[1959]

1170. This is in conformity with the parties' legitimate expectations and their interest in certainty and predictability.[1960]

1171. The application of the approach taken by the relevant national courts further allows the parties to assess their legal position under the applicable law.[1961]

1172. It is further in line with an arbitrator's mission if he or she applies good faith in light of the applicable national law rather than in line with his or her own social/ethical views. As stated by PIERRE MAYER:

> An arbitrator to whom the parties have prescribed the application of a certain State law would deviate from his mission if, faced with a reference made by that law to good morals or good faith, he determined their requirements in the light of his own ethical and social environment.[1962]

1173. In order to ensure that good faith is applied in accordance with the applicable national law, and to reduce the risk that the arbitral tribunal is influenced by its

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parties to do or not to do by reference to established principles and sets out how that duty applies to the given facts.

[1959] BERGER, Precedents, 10 stating that international arbitrators should construe and apply the law in accordance with the case law of the highest courts of the country concerned; MAYER, *règle morale*, 384, §9.

[1960] BERGER, Precedents, 10–11; REDFERN/HUNTER, §3.126: "[A] national system of law provides a known (or at least determinable) legal standard against which the rights and responsibilities of the parties can be measured. In the event of a dispute, the parties can be advised with reasonable confidence as to their legal position—or, at the very least, they can be given a broad indication of their chances of success or failure. If, for example, parties to a dispute that is to be heard in Switzerland agree that the arbitral tribunal shall apply the law of France, then all concerned (arbitrators, parties, and advisers alike) know where they stand. The arbitrators will know to what system of law they have to refer, if such reference becomes necessary. The parties and their advisers will be able to evaluate their prospects of success against the known content of French law. They will know, too, what sort of legal arguments they will have to present and what sort of legal arguments (as to fault, compensation, and so on) they may be required to address." ALAN RAU, Precedent in International Arbitration in Carl Baudenbacher/Simon Planzer, The Role of Precedent (2011 German Law Publishers) 57–58.

[1961] REDFERN/HUNTER, §3.126.

[1962] MAYER, *règle morale*, 384, §9: "*L'arbitre auquel les parties auraient préscrit d'appliquer un certain droit étatique s'écarterait de sa mission si devant une référence faite par ce droit aux bonnes moeurs ou à la bonne foi, il déterminait leurs exigences en function de son propre environnement éthico-social*."

own legal background when applying good faith, the arbitral tribunal should, before applying the notion of good faith, set out the role and scope of good faith as espoused by the relevant national legislation, case law and legal doctrine.[1963]

1174. However, it is proposed that arbitrators, after careful consideration, may choose not to follow the established and leading national case law and doctrine on good faith. This will not be contrary to the parties' legitimate expectations if the arbitral tribunal sets out its reasons for departing from the established case law on good faith.[1964] Indeed, there may be cases where the applicable national law does not take into account the specificity of an international commercial case before an arbitral tribunal and, in such cases, it is submitted that it is in line with the legitimate expectations of the parties not to strictly apply the relevant national law but to come to a solution which takes into account the international specificity of the case.[1965] In such an event, an arbitrator should be able to depart from the dominant case law in the relevant country but it should support its stance, wherever possible, by referring to legal doctrine or judgments of lower courts in the relevant country.[1966]

1175. Whilst such an approach is advocated in the name of the parties' legitimate expectations, it is recognized that if an arbitral tribunal fails to adhere to this approach, there is little possibility that its award will be set aside. Indeed, as we saw above,[1967] only few national arbitration laws allow for the application of the law by the arbitrators to be reviewed in international commercial arbitrations. In addition, it is unlikely that a national court will rule that an arbitral award should be set aside or not enforced because the arbitral tribunal in fact ruled in equity rather than applying the applicable national law.[1968]

1176. In order to address party concerns that an arbitral tribunal may resort to good faith and ignore the applicable law, the parties could request the arbitrator at the outset of the proceedings to state as follows: "In the absence of a clear agreement to the contrary between the parties I intend to do my best to render awards that are consistent with the evidence and applicable legal standards that are brought to my attention by the parties, and not to substitute my own notions of

[1963] In this regard, CREMADES advises parties to consider the legal culture and training of potential arbitrators before appointing them as this may have an impact on how they apply the principle of good faith, see CREMADES, 788.

[1964] DE BOISSÉSON, 124.

[1965] See in this regard, BERGER, Precedents, 11–12.

[1966] BERGER, Precedents, 15.

[1967] See paras. 1157 et seq.

[1968] See paras. 1159 et seq.

fairness and equity unless specifically requested to do so by the parties or their legal representatives."[1969]

D. No reference to good faith under other laws

1177. It is submitted that arbitral tribunals should not refer to good faith under other national or non-national laws than the one applicable.

1178. Whilst it is argued that a comparative approach may give an arbitral award increased comparative persuasiveness in the eyes of the parties,[1970] this is less likely to be the case with respect to the application of good faith given that, as we have seen above,[1971] its role and scope differs depending on the applicable law.

1179. At first blush, the taking of a transnational approach may appear attractive to the extent that it aims to bolster the conclusion reached in an international commercial dispute by the application of good faith under a given national law. Indeed, it has been argued that a reference to the PICC to confirm reasoning under the applicable national law may, in particular, reassure a party which was opposed to the application of a national law and will also promote the PICC as a body of rules which naturally apply to international contracts.[1972]

1180. However, in the author's view, not only is such a reference unnecessary, but in some cases, it is flawed as the role and scope of good faith under national law may be (and most likely is) very different from the role and scope of good faith under a transnational instrument. For example, a reference to a national law provision providing that contracts should be performed in good faith and a subsequent reference to Article 7(1) CISG and/or Article 1.7 PICC may not be at all pertinent given the different role and scope of good faith under these latter two provisions. Indeed, as we have seen, Article 7(1) CISG only directs good faith in international trade to be promoted when interpreting the provisions of the convention and does not impose a direct duty on the parties to act in good faith.[1973] Conversely, Article 1.7 PICC, imposes a general duty on the parties to act in accordance with good faith and fair dealing.[1974]

[1969] This was a suggestion made by THOMAS J. STIPANOWICH in Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals (2014) 25 Am Rev Intl Arb 297, 327–328.

[1970] MEIER, 124.

[1971] See above, Part III.

[1972] MAYER, Unidroit, 107.

[1973] See paras. 717 et seq.

[1974] See paras. 826 et seq.

Chapter 3: Application of Good Faith on the Basis of a Non-National Law

1181. This Chapter explores the application of good faith by arbitral tribunals to the parties' contract on the basis of a non-national law (II.). However, before analysing its application, we shall examine the popularity of the various potential sources of non-national law (I.). This Chapter concludes with proposed guidelines for the application of good faith by arbitral tribunals to the parties' contract on the basis of a non-national law (III.).

I. Popularity of Non-National Law

1182. The popularity of non-national law as the law applicable to the parties' contract will firstly be considered (A.). Thereafter, the popularity of the following sources of non-national law will be examined in turn, namely the general principles of law and trade usages (B.), the CISG (C.), the PICC (D.), the PECL (E.), and the DCFR (F.).

A. In general

1183. A non-national legal standard is rarely applied by arbitral tribunals[1975] and it is even more rarely chosen by parties as the law applicable to a contract.[1976] However, according to legal practitioners, 79% were definitely or possibly going to use transnational law in the future, 32% had already encountered transnational law in contracts or contract negotiations and 42% had already encountered transnational law in arbitration proceedings.[1977]

[1975] BORN, 2977 stating that "virtually no arbitral agreements select, and very few arbitral awards have been based on, lex mercatoria."; DASSER, Mouse or Monster? 144–145 noting that there were 34 awards over a period of 50 years where the arbitral tribunal applied a non-national legal standard either on its own or together with another national law and that 10 of these awards concerned State contracts; DASSER, Rare Bird, 155 noting that there were 18 awards where the arbitrators decided to apply a non-national legal standard in the absence of a choice of law of the parties and 4 awards where the arbitrators decided to apply a non-national legal standard where it had been endowed with the power to rule *ex aequo et bono*; DRAHOZAL, 542–543.

[1976] BORN, 2977 stating that "virtually no arbitral agreements select, and very few arbitral awards have been based on, lex mercatoria."; DASSER, Mouse or Monster? 139–144 observing that in only approximately 0.3% of ICC cases between 2000 and 2006 was a reference made by the parties to a non-national legal standard. He notes that there is a reference to a non-national legal standard by the parties only in one case every five years; DASSER, Rare Bird, 149, noting that only in 0.75% of ICC cases between 2000 and 2009 was a reference made by the parties to a non-national legal standard and 153 noting that the reference to a non-national legal standard is very rare and usually occurs in cases involving state parties; DRAHOZAL, 537–542.

[1977] KLAUS PETER BERGER/HOLGER DUBBERSTEIN/SASCHA LEHMANN/VIKTORIA PETZOLD, The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Practice in Klaus Peter Berger (ed) The Practice of Transnational Law (2001) 152, 212.

B. General principles of law/trade usages

1184. In some cases, usually in contracts involving States and State entities, either the parties or the arbitrators choose "general principles of law" as the law or rules applicable to the parties' contract.[1978]

1185. In nine ICC cases between 2000 and 2009, the parties chose general principles of law as the law applicable to their contract.[1979] Excluding the CISG, this was the most popular choice of a non-national legal standard.[1980] Between 2010 and 2017, there were eight references to general principles of (international) law and there were five references to the *lex mercatoria* (of which the general principles of law are deemed to form part[1981]).[1982]

1186. The rarity of choice of the general principles of law[1983] is said to be due to their vagueness. Indeed, parties want to know where they stand before they sign a

[1978] BORN, 2970.

[1979] DASSER, Rare Bird, 148.

[1980] *Idem*, 149.

[1981] See above para. 651.

[1982] 2010 Statistical Report (2011) 22 ICC Bull 14; 2011 Statistical Report (2012) 23 ICC Bull 14 (there was a reference to '*lex mercatoria'*); 2012 Statistical Report (2013) 24 ICC Bull 13; 2013 Statistical Report (2014) 25 ICC Bull 14; 2014 Statistical Report (2015) ICC Disp Res Bull 15 (there were five references to 'general principles of international law'); 2015 ICC Dispute Resolution Statistics (2016) ICC Disp Res Bull, 9; 2016 ICC Dispute Resolution Statistics (2017) ICC Disp Res Bull 98; 2017 ICC Dispute Resolution Statistics (2018) ICC Disp Res Bull, 61 (there was a reference to 'lex mercatoria'). The most recent statistics do not state how many cases referred to the general principles of law or the *lex mercatoria* but state in general that 1 or 2% of cases provided for the application a non-national law. According to the ICC Dispute Resolution, 2018 Statistics, p. 13: "Only 2% of contracts provided for the application of rules or instruments other than national laws in their arbitration agreement or choice-of-law clause. These included the UN Convention on Contracts for the International Sale of Goods, the UNIDROIT Principles of International Commercial Contracts, lex mercatoria, 'UNCITRAL Law' and the ICC Incoterms." According to the ICC Dispute Resolution, 2019 Statistics, p. 15: "Only 1% of contracts provided for the application of rules or instruments other than national laws in their arbitration agreement or choice-of-law clause. These included the UN Convention on Contracts for the International Sale of Goods, the UNIDROIT Principles of International Commercial Contracts, 'International commercial law', 'OHADA Law' and the ICC Incoterms® rules." According to the ICC Dispute Resolution, 2020 Statistics, p. 17: "Of the contracts, 2% included a reference to rules or instruments other than national laws, such as the United Nations Convention on Contracts for the International Sale of Goods, the UNIDROIT Principles of International Commercial Contracts, 'International commercial law', and the ICC Incoterms."

[1983] BERGER, General Principles, 97 stating that "there are relatively few published awards in which a tribunal has actually applied general principles of law, let alone decided a case solely on the basis of such principles."

contract and when a dispute arises. In addition, such principles do not provide answers to specific questions.[1984]

C. CISG

1187. Although the application of the CISG is often excluded by parties to an arbitration agreement,[1985] a significant proportion of the available CISG cases were decided by arbitral tribunals. Indeed, at the end of 2008, the available statistics indicated that approximately 25% of CISG cases were decided by arbitral tribunals.[1986] By mid-2012, this had increased to one third.[1987] However, given the lack of published arbitral awards, it is estimated that the actual number of arbitration cases involving the CISG is much higher.[1988] Based on the estimate that less than 5% of arbitral awards are published,[1989] it has been suggested that "almost four out of five CISG-related cases may therefore be arbitration cases."[1990]

1188. In addition, the ICC has also disclosed that in 155 out of 3000 cases randomly selected from a certain period of time, the CISG was applied.[1991]

1189. The ICC Statistics further indicate that it is the most frequently chosen non-national law.[1992]

1984 DASSER, Rare Bird, 156.

1985 See JAN M SMITS, Problems of Uniform Laws in Larry A. DiMatteo, International Sales Law: A Global Challenge (Cambridge University Press 2014) 609.

1986 MISTELIS, 387, referring to the fact that out of 2,000 decision, 512 were arbitral awards.

1987 JANSSEN/SPILKER, 133, stating that "[a]s of May 2012, 914 of the 2,766 documented cases in the PACE database were arbitral awards."

1988 JANSSEN/SPILKER, 134.

1989 MISTELIS, 387.

1990 JANSSEN/SPILKER, 134.

1991 NILS SCHMIDT-AHRENDTS, CISG and Arbitration (2011) Belgrade Law Review 211, 212.

1992 In 2003, it was chosen in 3 out of the 8 cases choosing a non-national law (Rapport statistique 2003 (2004) 15 ICC Bull 13); In 2004, it was chosen in 4 out of the 8 cases choosing a non-national law (Rapport statistique 2004 (2005) 16 ICC Bull 11); In 2005, in 5 out of the 9 cases choosing a non-national law, the parties had chosen the CISG (Rapport statistique 2005 (2006) 17 ICC Bull 12); In 2006, in half of the cases choosing a non-national law, the parties had chosen the CISG (Rapport statistique 2006 (2007) 18 ICC Bull 12); In 2007, it was chosen in 1 out of the 3 cases choosing a non-national law (Rapport statistique 2007 (2008) 19 ICC Bull 12); In 2008, it was the most popular non-national law chosen by the parties (Rapport statistique 2008 (2009) 20 ICC Bull 13); In 2009, the CISG was chosen as the law applicable although it is not stated in how many cases (Rapport statistique 2009 (2010) 21 ICC Bull 12); In 2010, the CISG was chosen in 7 out of 10 cases (2010 Statistical Report (2011) 22 ICC Bull 14); In 2011, the CISG was chosen in 5 out of 16 cases (2011 Statistical Report (2012) 23 ICC Bull 14); In 2012, 11 out of the 22 cases referred to the CISG (2012 Statistical Report

D. PICC

1190. Although it has been stated that the role of the PICC in international commercial arbitration is rather indeterminate,[1993] it has been argued that the PICC are nonetheless "particularly relevant in the context of international arbitration."[1994]

1191. A significant proportion of the available PICC cases were decided by arbitral tribunals. Indeed, to date, approximately 43% of cases referring to the PICC (230 out of 554) collected on the unilex database (a database of international case law and bibliography on the PICC and the CISG) are arbitral awards.[1995]

1192. There has been a constant, although small, number of parties who have referred to the PICC as the applicable law.[1996] Between 2002 and 2006, there was only one reference to the PICC in ICC arbitrations.[1997] Between 2007 and 2011, there

(2013) 24 ICC Bull 13); In 2013, in 14 out of 25 ICC cases in which the parties chose a non-national law, they expressly chose the CISG (2014 25 ICC Bull 14; In 2014, in 7 out of the 14 ICC cases in which parties chose a non-national law, they expressly chose the CISG (2014 ICC Dispute Resolution Statistics (2015) ICC Disp Res Bull 15); In 2015, in 4 out of the 7 ICC cases in which parties chose a non-national law, they expressly chose the CISG (2015 ICC Dispute Resolution Statistics (2016) ICC Disp Res Bull, 9); In 2016, in 6 out of the 18 ICC cases in which parties chose a non-national law, they expressly chose the CISG (2016 ICC Dispute Resolution Statistics (2017) ICC Disp Res Bull 98); and in 2017, in 5 out of the 15 ICC cases in which a non-national law was applicable, the parties provided for the application of the CISG (2017 ICC Dispute Resolution Statistics (2018) ICC Disp Res Bull, 61). The most recent statistics do not state how many cases referred to the CISG but state in general that 1 or 2% of cases provided for the application of a non-national law: see ICC Dispute Resolution, 2018 Statistics, p. 13; ICC Dispute Resolution, 2019 Statistics, p. 15; ICC Dispute Resolution, 2020 Statistics, p. 17.

1993 JAMES CRAWFORD/ANTHONY SINCLAIR, The Unidroit Principles and their Application to State Contracts (2002) Special Supplement: Unidroit Principles of International Commercial Contracts: Reflections on their Use in International Arbitration, 57.

1994 SCHERER, 113, §1.

1995 See < http://www.unilex.info/principles/cases/date/all >, and <http://www.unilex.info/principles/cases/arbitral_award >, accessed 1 March 2023.

1996 According to a survey carried out by LAKE, in 20% of arbitral cases in which the PICC were applied, the PICC were expressly chosen by the parties, see LAKE, 671; MAYER, Unidroit, 105 stating that parties never (or practically never) make their contracts subject to the Unidroit Principles.

1997 Between 2002 and 2006, there was only one reference to the PICC (Rapport statistique 2003 (2004) 15 ICC Bull 13; Rapport statistique 2005 (2006) 17 ICC Bull 12; Rapport statistique 2006 (2007) 18 ICC Bull 12).

were seven references to the PICC[1998] and between 2012 and 2017, there were also seven references to the PICC in ICC arbitrations.[1999]

1193. There has reportedly been a growing number of awards in which arbitrators have referred to the PICC. Indeed, whilst between 1996 and 1998, just under twenty ICC awards applied the PICC[2000] and between 1999 and 2000, fourteen ICC awards applied the PICC,[2001] this number grew significantly to fifty-four awards between 2002 and 2004.[2002]

E. PECL

1194. Four arbitral awards referring to the PECL were found in the Yearbook of Commercial Arbitration.[2003] In one of these awards, one of the parties referred to the parties' general duty to act in accordance with good faith and fair dealing found at Article 1:202 PECL in order to comfort the application of good faith and fair dealing on the basis of the applicable Swedish law.[2004]

1998 JASON FRY/SIMON GREENBERG/FRANCESCA MAZZA, The Secretariat's Guide to ICC Arbitration (2012) §3-761 identifying seven instances between 2007 and 2011 in an ICC arbitration where a contract referred to the PICC.

1999 In 2012, there were three references (2012 Statistical Report (2013) 24 ICC Bull 13); In 2013, there were two references (2014 25 ICC Bull 14); In 2014, there was one reference (2014 ICC Dispute Resolution Statistics (2015) ICC Disp Res Bull 15); In 2015, there were two references (2015 ICC Dispute Resolution Statistics (2016) ICC Disp Res Bull, 9); In 2016, there were six references (2016 Dispute Resolution Statistics (2017) ICC Disp Res Bull, 98); and in 2017, there was one reference to the PICC. The most recent statistics do not state how many cases referred to the PICC but state in general that 1 or 2% of cases provided for the application of a non-national law: see ICC Dispute Resolution, 2018 Statistics, p. 13; ICC Dispute Resolution, 2019 Statistics, p. 15; ICC Dispute Resolution, 2020 Statistics, p. 17.

2000 MAYER, Unidroit, 106.

2001 FABRIZIO MARRELLA, The Unidroit Principles of International Commercial Contracts in ICC Arbitration 1999-2001 (2001) 12 ICC Bull 49.

2002 EMMANUEL JOLIVET, *L'harmonisation du droit OHADA des contrats: l'influence des Principes d'Unidroit en matière de pratique contractuelle et d'arbitrage* (2008) Unif L Rev 127 *et seq*.

2003 NAI Arbitration Case of 10 February 2005 (2007) 32 YB Comm Arb 93–106; ICC Case No 12112 (2009) 34 YB Comm Arb 77–110; ICC Case No 14581 (2012) 37 YB Comm Arb 62–89; *First National Petroleum Corporation (FNP) v. OAO Tyumenneftegaz (TNGZ)* (Award), SCC Case No. 196/2011, 09 December 2013.

2004 *First National Petroleum Corporation (FNP) v. OAO Tyumenneftegaz (TNGZ)* (Award), SCC Case No. 196/2011, 09 December 2013.

F. DCFR

1195. No arbitral awards were found which rely on or refer to the DCFR. However, it was applied as the substantive law in the three editions of the moot court competition organized by the Warsaw Arbitral Tribunal attached to the Polish Chamber of Commerce.[2005]

[2005] See <https://www.sakig.pl/en/news/draft-common-frame-of-reference-warsaw-international-arbitration-moot/information-about-moot>, accessed 1 March 2023.

II. Application by Arbitral Tribunals

1196. Fifty-seven awards were found in which an arbitral tribunal applied good faith on the basis of a non-national law (A.). The review of the relevant awards showed that arbitral tribunals frequently apply good faith of their own accord (B.) but that in many cases, such recourse is superfluous (C.). This review also showed that there is a significant probability that good faith is not applied in accordance with the applicable non-national law (D.). A wide and varied role and content has been attributed to good faith by arbitral tribunals when applied on the basis of a non-national law (E.) In the cases involving State parties, good faith appears to be invoked, as in the national law cases, to redress the imbalance in such relationships (F.).

A. Awards reviewed

1197. A table listing the thirty-two awards examined below in which the arbitral tribunal applied good faith on the basis of the CISG ("**CISG awards**") along with their references and abbreviations can be found at Appendix B. These awards were found in the following sources:

- Pace CISG website[2006] and CISG online website[2007];
- Linn Bergman/Stephen Bond (eds), SCC Arbitral Awards 2004-2009 (Juris 2011);
- ICCA Yearbook of Commercial Arbitration;
- Arbitrator intelligence database;[2008]
- International Commercial Arbitration Law Review; and
- ICC Dispute Resolution Bulletin.

1198. A table listing the fourteen arbitral awards examined below in which the arbitral tribunal applied good faith primarily on the basis of the PICC ("**PICC awards**") along with their references can be found at Appendix C. Given the focus of the present thesis on the use of the general principle of good faith, only the awards referring to the general duty to act in accordance with good faith and fair dealing (found at Article 1.7 PICC) and not its specific applications are examined.[2009]

[2006] <https://iicl.law.pace.edu/cisg/cisg>, accessed 1 March 2023.

[2007] <https://cisg-online.org/home>, accessed 1 March 2023.

[2008] Available on Kluwer Arbitration.

[2009] An example of a case in which the arbitral tribunal applied a more specific application of the general principle of good faith found in the PICC is ICC Case No 10422, available at <

These awards were found on the unilex database,[2010] in the ICCA Yearbook of Commercial Arbitration, in an article on trade usages in ICC arbitration[2011] and in the International Commercial Arbitration Law Review.

1199. A table listing the eleven awards applying good faith as a general principle of law or trade usage ("**General Principles awards**") along with their references can be found at Appendix D. These awards were found in the ICCA Yearbook of Commercial Arbitration, the *Journal de droit international*, and in an article on trade usages in ICC arbitration.[2012]

1200. In four of these awards, the arbitral tribunal referred to good faith as a trade usage which it could apply as directed by the applicable institutional arbitration rules or national law.[2013] In doing so, these arbitral tribunals have followed the

http://www.unilex.info/case.cfm?pid=1&do=case&id=957&step=FullText>, accessed 1 March 2023 in which the arbitral tribunal held that: "The principle of good faith imposes on the party intending to terminate the contract on account of the other party's non-performance the duty to inform it of its intention within a reasonably short period of time from the moment when it came to know of the non-performance. This principle is contained also in the PICC. Indeed, Article 7.3.2(2) PICC states as follows: "If performance has been offered late or otherwise does not conform to the contract the aggrieved party will lose its right to terminate the contract unless it gives notice to the other party within a reasonable time after it has or ought to have become aware of the offer or of the non-conforming performance." See also ICC Case No 7365 of 1997 (Iranian law/general principles of law) (2004) 15 ICC Bull 117, in which the arbitral tribunal expressly referred to Article 6.2.3(4) PICC and held that as a result of the covenant of good faith and fair dealing which is implied in each contract, in a case in which the circumstances to a contract undergo fundamental changes in an unforeseeable way, a party is precluded from invoking the binding effect of the contract. The arbitral tribunal called this the doctrine of a change of circumstances or *clausula rebus sic stantibus* and noted that this doctrine has been incorporated into so many legal systems that it is widely regarded as a general principle of law. The arbitral tribunal however underlined that its application is only justified if the change in circumstances is fundamental and unforeseeable. The arbitral tribunal held that the parties were entitled on the basis of good faith to terminate the contract or insist on the modification of its terms as a result of the change of circumstances. See further ICC Case No 2020-004 (2020) ICC Disp Res Bull 131–132 referring to Article 5.1.2 PICC concerning obligations implied by good faith and fair dealing.

2010 <http://www.unilex.info/>, accessed 1 March 2023.

2011 See JOLIVET/MARCHISIO/GÉLINAS.

2012 *Ibid*.

2013 This was in ICC Case No 18009 in JOLIVET/MARCHISIO/GÉLINAS, 214–215, 223–224; ICC Case No 9593 (1999) 10 ICC Bull 110; ICC Case No 11976 (2012) 23 ICC Bull 51; and *ad hoc* award dated 4 December 1996, available at <http://www.unilex.info/case.cfm?id=631>, accessed 1 March 2023. See also ICC Case No 18728 (2018) 43 YB Comm Arb 108–152, a case in which the law of Cyprus was applicable but in which the arbitral tribunal considered that Article 1.7 PICC was a general principle of international commercial usages which it could take into consideration in accordance with (now) Article 21.2 ICC Rules of Arbitration 2021.

broad definition of trade usages[2014] and applied the general principle of good faith as a trade usage, thus confusing this notion with general principles of law. Only one award was found in which the arbitral tribunal rejected this broad conception of trade usages.[2015]

B. Frequent invocation of good faith by arbitral tribunals *sua sponte*

1201. It is noteworthy that it was only clear in five out of the thirty-two CISG awards that good faith was raised by the parties.[2016] In addition, it was only clear in less than half of the PICC awards that the parties had invoked the argument based on good faith.[2017] Furthermore, it was only clear in one case in which good faith was applied as a general principle of law or trade usage, that good faith was raised by the parties.[2018]

1202. In the majority of cases therefore, good faith seems to have been raised by the arbitral tribunal *sua sponte*. This is in line with the noted trend that arbitral tribunals frequently invoke the notion of good faith.[2019]

1203. However, caution should be exercised with respect to this conclusion given that only extracts of the awards were available and that the parties may have invoked good faith arguments in the unpublished part of the award.

[2014] See para. 708.

[2015] Hence in ICC Case No 13954 of 2007 (French law) (2010) 35 YB Comm Arb 218, 234, the sole arbitrator held that "the concept of trade usages in the ICC Rules and French Code of Civil Procedure does not include substantive law principles such as good faith, apparent authority and estoppel."

[2016] Russia 22 October 2003 Arbitration proceeding 134/2001 available at <https://iicl.law.pace.edu/cisg/search/cases>; CIETAC Arbitration 13 January 1999 available at < https://cisg-online.org/search-for-cases?caseId=7128>; ICC Case No 8786 of 1997, available at https://cisg-online.org/search-for-cases?caseId=6679; ICC Case No 14005 (2015) ICC Disp Res Bull 133–141; *Adamus HT Sp. Z.o.o v. International Inventory Management* (Final Award), 14 November 2012, Arbitrator intelligence materials, all accessed 1 March 2023.

[2017] In six of the fourteen awards examined, the argument based on good faith was raised by the parties: ICC Case No 14108 (2011) 36 YB Comm Arb 135–201; ICC Case No 14633, available at < http://www.unilex.info/case.cfm?pid=2&do=case&id=2114&step=Abstract>, accessed 1 March 2023; ICC Case No 16816 (2015) 40 YB Comm Arb 236–293; ICC Case No 7110 of April 1998 available at < http://www.unilex.info/case.cfm?id=650>, accessed 1 March 2023; ICC Case No 13009 (2011) 36 YB Comm Arb 70–95; Customer (Russian Federation) v contractor (USA) (Award), ICAC Case No. 173/2011, 23 August 2012 (2014) International Commercial Arbitration Law Review.

[2018] See ICC Case No 9593 (1999) 10 ICC Bull 110.

[2019] See paras. 33 et seq.

1204. As previously noted,[2020] one explanation for the frequent resort to good faith by arbitrators may lie in the discretion with which it endows the arbitrators allowing them to depart from the strict rigours of the applicable law/rules or contract and to do justice in a given case.

1205. As also explored above,[2021] the *sua sponte* recourse to good faith raises due process concerns which should be considered by arbitral tribunals prior to applying good faith of their own accord.

C. Superfluous reference to good faith in many cases

1206. In many of the CISG awards, the recourse to good faith was superfluous.[2022]

1207. In this regard, it is interesting to note that in Swiss court decisions applying the CISG, the references to good faith are also often very general and superfluous.[2023]

1208. First, the reference to good faith was superfluous in those cases in which it would have been sufficient to rely on the relevant party's contractual breach.[2024]

2020 *Ibid*.

2021 See paras. 1110 et seq.

2022 See, in this regard, SHEEHY, 46 stating that whilst good faith is mentioned in many cases, it is only really applied in a few; WALT, 21 stating that good faith has been employed in four different ways: as *dicta*, as an alternative ground for a result supported on another basis, as an additional consideration supporting the result supported by other considerations and as a basis for the result. He states that there are relatively few cases which employ it in the latter sense.

2023 WIDMER, 469.

2024 (1.) In the *Marble building materials case* (available at < https://iicl.law.pace.edu/cisg/search/cases >, accessed 1 March 2023, the Chinese buyer delayed part of the payment after receiving the marble stone citing quality concerns. The arbitral tribunal noted that the contract clearly stipulated that payment should be made by letter of credit 90 days after receiving the bill of lading and that the Singaporean seller had provided the original bill of lading to the buyer as the latter had requested it and had promised to bear the entire risk. Based on these facts and the principle of good faith, the arbitral tribunal held that the buyer had an obligation to pay for the goods after receiving the original bill of lading and taking delivery of the goods. The arbitral tribunal accordingly enforced the terms of the contract entitling the seller to payment 90 days after the buyer received the bill of lading and ordered the buyer to reimburse the seller the price of the goods plus interest; (2.) In an ICAC at the RFCCI arbitration (Case No 95/2004) (available at <https://iicl.law.pace.edu/cisg/search/cases> , accessed 1 March 2023), the arbitral tribunal held that the Russian seller's conduct did not comply with the principle of good faith. Indeed, the Russian seller had failed to deliver to the Turkish buyer the prepaid installment of goods, had thereby deprived the buyer of the expected profit by means of which it would have

1209. Second, in some cases, the arbitral tribunal could have relied on another provision in the CISG which is a more specific manifestation of the principle of good faith. Hence, the reliance on good faith in the *Fashion products* case was unnecessary as the sole arbitrator could have merely relied on Article 80 CISG ("A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission."), which is a specific manifestation of the principle of good faith, and its most general application in the form of *venire contra factum proprium*.[2025]

1210. Third, in some cases, the arbitral tribunal relied on good faith as an alternative or additional ground. For example, in the *Crude metal* case, the arbitral tribunal held that the buyer's notice of avoidance was timely in accordance with Article 49(2) CISG but that, even if this was not the case, the general rules on good faith prevented the seller from invoking the argument that the buyer's declaration of avoidance was late under Article 49(2) CISG since the delay would have been due to the seller.[2026] In addition, in the *Fashion products* case, the reliance on good faith in holding that the termination was wrongful was an additional ground for the decision reached. Indeed, the sole arbitrator held that pursuant to Article 64(2)(a) CISG, the seller had lost the right to terminate and that accordingly the contract was wrongfully terminated. The sole arbitrator went on

recovered its expenses and had unlawfully retained the buyer's prepayment sum. In this case, the arbitral tribunal was primarily merely sanctioning the seller's failure to comply with its obligation to deliver the goods; (3.) In a further ICAC at the RFCCI arbitration (Case No 134/2001) (available at <https://iicl.law.pace.edu/cisg/search/cases> , accessed 1 March 2023) between a Russian seller and an Italian buyer, the arbitral tribunal held that the seller violated the principle of good faith (and the impossibility of a unilateral refusal to perform one's obligation) by first declaring to the Italian authorities that the buyer was no longer an exclusive importer of the seller's goods to the Italian market, then concluding an agreement (Appendix 6) with the buyer concerning deliveries for 2000 and only thereafter sending a letter to the buyer terminating the exclusive distribution agreement. The buyer was accordingly entitled to be reimbursed for the lost profits incurred for the products not delivered under Appendix 6. In this case, the arbitral tribunal was simply sanctioning the breach of the obligations contained in Appendix 6; (4.) In *Adamus HT Sp. Z.o.o v. International Inventory Management* (Arbitrator Intelligence Materials), the sole arbitrator held that the respondent competed with the claimant by offering claimant's customers products competing with claimant which was a breach of the agreement, good business ethics and good faith and fair dealing. However, merely relying on the respondent's breach of its contractual obligation not to compete would have been sufficient; (5.) In the *White crystal sugar* case (available at < https://cisg-online.org/search-for-cases?caseId=7863>, accessed 1 March 2023), it would have been sufficient for the arbitral tribunal to rely on the seller's breach of its obligation to provide a certificate of origin.

2025 ICC Case No 11849 of 2003, available at < https://cisg-online.org/search-for-cases?caseId=7343>, accessed 1 March 2023.

2026 ICC Case No 7645 of 1995, available at < https://cisg-online.org/search-for-cases?caseId=6770>, accessed 1 March 2023.

to hold that this conclusion was reinforced by three other considerations, namely: (i) that the termination was also irregular under Article 64(1)(b) CISG; (ii) that the termination was not justified under Article 73(2) CISG and (iii) that the seller did not act in good faith when it terminated the agreement.[2027]

1211. Finally, in some cases, the holding in relation to good faith was *dicta*.[2028]

1212. Indeed, it appears that good faith was only really relied on in three CISG awards.[2029]

[2027] ICC Case No 11849 of 2003, available at < https://cisg-online.org/search-for-cases?caseId=7343>, accessed 1 March 2023.

[2028] (1.) In SCC Case No 71/2002 in LINN BERGMAN/STEPHEN BOND (eds), SCC Arbitral Awards 2004-2009 (Juris) 203–226, 212, the arbitral tribunal held in *dicta* that good faith would have obliged the respondent to examine discrepancies between the letter of credit and documents presented to the bank and give a waiver if the discrepancies were immaterial but the arbitral tribunal found on the facts that the respondent did not wrongfully withhold its consent to the waiver as the respondent did not possess sufficient information in order to be able to determine whether the discrepancies were material or not. (2.) In the *Steel wire case* (Milan Arbitration, 28 September 2001 available at <https://cisg-online.org/search-for-cases?caseId=7501>, accessed 1 March 2023), the arbitral tribunal considered what would happen if the seller had not acted in accordance with good faith and fair dealing ("But les us assume, only for the sake of truth and arguments' completeness, that [Seller], during the period under investigation (August - October 1999) did not comply with some of the broader obligations of good faith and fair dealing in international trade, namely by making its agreement to further deliveries conditional upon the arrival of the requested post-Settlement documents and/or an earlier payment of the second instalment. Was the bad faith actually proved and so serious as to constitute a fundamental breach? Was the procedure established in Section III of the Vienna Convention adhered to by the Buyer? Did [Buyer] observe the general duty (Unidroit Principles of International Commercial Contracts, Art. 5.3) of cooperation with [Seller], in a situation in which such cooperation could be reasonably expected for the performance of the latter's obligations? The Tribunal can only answer negatively to these questions. Furthermore, even if [Seller]'s bad faith were proved and constituted a fundamental breach on the part of the Seller, the causal nexus between the breach and the alleged damages is far from being proved…"). (3.) In the *Clothing case*, (ICC Case No 8786 of 1997, available at <https://cisg-online.org/search-for-cases?caseId=6679>, accessed 1 March 2023) the arbitral tribunal held in *dicta* that good faith would prevent a respondent from terminating if it had acted in a contradictory fashion or if it had abused its rights but held that on the facts, there was no breach of good faith. (4.) In the *Siemens Telephone Booths case* (available at < https://cisg-online.org/search-for-cases?caseId=8148>, accessed 1 March 2023) the arbitral tribunal held in *dicta* that the buyer would have been deemed to have acted in accordance with good faith if it had considered that there was no delivery or acted indifferently in the case where the delivery of the goods to a different stipulated place. However this reasoning did not apply to the case in question as the buyer knew that the goods had been delivered to a different place than the one stipulated.

[2029] For example in an ICAC at the RFCCI arbitration (Case No 131/2004) (available at < https://iicl.law.pace.edu/cisg/search/cases>, accessed 1 March 2023), good faith was the

1213. With respect to the PICC awards, it is noteworthy that many of the references to Article 1.7 PICC were also superfluous because the case concerned a more specific manifestation of the general duty to act in accordance with good faith and fair dealing. This confirms that, despite the frequent references to Article 1.7 PICC found in arbitral awards applying the PICC,[2030] the general duty to act in accordance with good faith and fair dealing under Article 1.7 PICC has, in fact, a limited role due to the numerous and more specific manifestations of the duty to act in accordance with good faith and fair dealing found in the PICC.[2031]

ground on which the buyer's statute of limitations objection was rejected. In addition, in Vienna arbitration Case No SCH-4318 (available at < https://cisg-online.org/search-for-cases?caseId=6099>, accessed 1 March 2023), the principle of estoppel (derived from good faith) was the ground for holding that the seller had waived the defence of late notice by the buyer. Finally, in the *second pork case* (CIETAC Arbitration, 24 February 2005, available at < https://cisg-online.org/search-for-cases?caseId=7742>, accessed 30 1 March 2023), good faith was the basis for rejecting the buyer's defence that a customs form was required for payment.

2030 See above para. 835.

2031 See above para. 836.

1214. Indeed, three cases concerned the duty to cooperate found at Article 5.1.3 PICC[2032] and four further cases concerned the prohibition of contradictory behaviour (Article 1.8 PICC) or one of its more specific applications.[2033]

[2032] (1.) In ICC Case No 14633 (available at http://www.unilex.info/case.cfm?pid=2&do=case&id=2114&step=Abstract, accessed 1 March 2023), the arbitral tribunal found that both the contract and Article 1.7 PICC obliged the buyer to amend the letter of credit upon the seller's reasonable request. In the author's view, the arbitral tribunal could have relied on the more specific manifestation of the duty to act in accordance with good faith and fair dealing, namely the duty to cooperate found at Article 5.1.3 PICC. The author also notes that Article 1.7 PICC was an additional ground for the decision reached; (2.) In an *ad hoc* arbitration of 30 April 2001 (available at < http://www.unilex.info/principles/case/1100>, accessed 1 March 2023), the parties had agreed to participate in a public bidding procedure for the construction and operation of centres for technical revision of vehicles in Costa Rica but the contract was awarded to a third party. The arbitral tribunal, referring *inter alia* to Articles 1.7 and 5.3 (now Article 5.1.3) PICC, held that the French party had violated its obligations under the joint venture agreement with the Costa Rican company by refusing to join the latter in its appeal against the decision of the adjudicating authority (the Costa Rican company not being able to conclude the proceedings without the French company). This case was therefore just a specific application of the principle of good faith and fair dealing, and more specifically the duty to cooperate found at Article 5.1.3 PICC; (3.) In ICC Case No 9797 (available at < www.unilex.info/case.cfm?id=668>, accessed 1 March 2023), Andersen Consulting Business Unit (ACBU) brought an arbitration against Arthur Andersen Business Unit (AABU) and Andersen Worldwide Société Coopérative (AWSC). All parties were members of Andersen Worldwide Organization (AWO). As a result of restructuring in 1989, AABU became responsible for audit/attest, tax and other financial advisory services, and ACBU for strategic services, systems integration and other consulting services. The relationship between AABU and ACBU deteriorated as AABU began to develop its own consulting practices and ACBU complained that such behaviour constituted undue interference with their own professional practices. Referring to Article 1.7 PICC, the arbitral tribunal held that the AABU member firms had violated their implicit duty to cooperate and to pursue their professional practice in accordance with the principle of good faith and fair dealing inherent in international contracts by engaging in uncooperative acts to benefit themselves at the expense of other members. Again, this case involved the duty to cooperate found at Article 5.1.3 PICC which is a specific application of the duty to act in accordance with good faith and fair dealing.

[2033] (1.) In ICC Case No 14108 (2011) 36 YB Comm Arb 135–201, the arbitral tribunal, referring to Articles 1.7 and 1.8 PICC, found that the Ministry adopted an ambiguous and contradictory behaviour by letting the Joint Venture believe that the extension was granted by approval of the Council of Ministers irrespective of the Parliament's approval of the contract terms and then subsequently affirming that no extension was ever granted on the old terms as Parliament ratification of certain terms was necessary to have a binding contract. State W was therefore held liable for the costs of exploration work performed by the joint venture; (2.) In ICC Case No 16816 (2015) 40 YB Comm Arb 236–293, referring to Articles 1.7 and 1.8 PICC, the sole arbitrator made a non-essential finding that the claimant project manager did not act in good faith when it terminated the contract as it induced a belief that time for payment was not of

1215. With respect to the General Principles awards, in at least three cases, the reference to good faith was superfluous as good faith was an additional ground for the decision reached.[2034]

1216. As previously noted,[2035] such superfluous references to good faith may be explained by a certain desire of the arbitral tribunals to morally sanction or express disapproval of a party's conduct.

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the essence, did not complain of delays with respect to the eighth invoice, indicated its intention to proceed with the performance of the contract by participating in events after the eighth payment became due and proposed to replace the designer team in the same month. This case did nothing more than confirm one of the specific applications of the general principle of good faith and fair dealing, namely the prohibition of contradictory behaviour found at Article 1.8 PICC; (3.) In Lausanne CCI arbitration 25 January 2002 (available at < http://www.unilex.info/principles/case/861>, accessed 1 March 2023), in connection with a consulting contract for the manufacture of new products between two Belgian individuals and a Spanish company, the arbitral tribunal held referring to Articles 1.7 and 7.1.2 PICC that the Spanish company failed to act in good faith and could not therefore invoke the allegedly improper performance by the claimants since it caused such acts by its own behaviour. This case is just a specific application of the principle of good faith and fair dealing, and more specifically its most general application, the principle of non-contradictory behaviour and the specific application of the latter contained at Article 7.1.2 PICC; (4.) In ICAC at the RFCCI arbitration (Case No 173/2011) (2014) International Commercial Arbitration Law Review, the arbitral tribunal found, referring to Articles 1.7 and 1.8 PICC that the claimant had acted in an incompatible manner when it proposed negotiations to modify the contract but then subsequently refused to perform the contract.

2034 (1.) In ICC Case No 3267 in SIGVARD JARVIN/YVES DERAINS (eds), Collection of ICC Awards 1974-1985 (Kluwer Law International 1990) 76–87, 81, the arbitral tribunal decided that the respondent was not permitted under the contract to make deductions due to delays in the works and that, in addition, the abrupt deduction of fees without advance warning was contrary to good faith. Accordingly, it would have been sufficient for the arbitral tribunal to rely on the fact that the respondent was not contractually entitled to make deductions due to delays in the works; (2.) In ICC Case No 6219 in SIGVARD JARVIN/YVES DERAINS/DOMINIQUE HASCHER (eds), Collection of ICC Awards 1986-1990 (Kluwer Law International 1994) 428–437, 431–432, the arbitral tribunal held that the obligation to re-negotiate imposed by the general principle of good faith in international commerce was also imposed by the contractual provision obliging the parties to attempt to come to an amicable solution in case of dispute. The argument based on the general principle of good faith was therefore an additional argument for the decision reached; (3.) In ICC Case No 6317 in JEAN-JACQUES ARNALDEZ/YVES DERAINS/ DOMINIQUE HASCHER (eds), Collection of ICC Awards 2001-2007 (Kluwer Law International 2009) 623–629, 625–626, the arbitral tribunal found that the content of the fax was clear in suspending the guarantee even though it was not in the typical codified language of the group and that, in addition, as a result of the parties' fundamental obligations to perform their obligations in good faith, it was normal to expect, from the recipient of the fax, conduct in accordance with the message of the fax to suspend the guarantee.

2035 See para. 1130.

1217. It may also be explained by the arbitral tribunal's desire to show that their decision, which is primarily based on an application of the contract or other legal provisions, also accords with values of fairness and justice.[2036]

D. Significant probability that good faith was not applied in accordance with applicable law/rules

1218. In the awards in which arbitral tribunals applied good faith on the basis of a non-national law, there is a significant probability – as with respect to the awards in which good faith was applied on the basis of a national law – that good faith was not applied in accordance with the applicable law or rules.

1219. Indeed, there was a noted lack of precision with respect to the reference to good faith (1.) as well as a lack of references to relevant legal doctrine or case law (2.). In addition, impertinent references were made to good faith under other national or non-national laws (3.) and there were indications that arbitrators may have been influenced by their legal background when applying good faith (4.).

1. Lack of precision

1220. In the CISG awards, many arbitral tribunals did not even refer to the provision of Article 7 CISG when applying good faith to the parties' contract.[2037]

[2036] See para. 1131.

[2037] CIETAC Arbitration 13 January 1999 available at < https://cisg-online.org/search-for-cases?caseId=7128> (referring to the *bona fide* principle). It should be noted that the seller referred to the *bona fide* principle under Chinese law and that accordingly the arbitral tribunal may also have been applying it on this basis too; ICC Case No 7645 of 1995 available at < https://cisg-online.org/search-for-cases?caseId=6770> (referring to general rules of good faith); ICAC at the RFCCI arbitration (Case No 105/2005) available at < https://cisg-online.org/search-for-cases?caseId=7861> (referring to the principle of good faith in international trade on which the CISG is based although referring in a later part of the award to this principle as one of the principles under Article 7(2) CISG), ICAC at the RFCCI arbitration (Case No 134/2001) available at < https://iicl.law.pace.edu/cisg/search/cases> (referring to the principle of good faith); ICAC at the RFCCI arbitration (Case No 131/2004) available at < https://cisg-online.org/search-for-cases?caseId=7421> (referring to the good faith principle of international trade); Milan Arbitration, 28 September 2001 available at < https://cisg-online.org/search-for-cases?caseId=7501> (referring to good faith and fair dealing in international trade); CIETAC Arbitration, 6 November 2000 available at < https://cisg-online.org/search-for-cases?caseId=7361> (referring to the principle of good faith); ICAC at the RFCCI arbitration (Case No 55/1998) available at < https://iicl.law.pace.edu/cisg/search/cases> (referring to good faith in commercial relations);

1221. If a reference was made to Article 7 CISG, some arbitral tribunals did not specify whether they were applying good faith on the basis of Article 7(1) or Article 7(2) CISG.[2038] However, it is assumed – in the absence of a reference to a gap in the CISG in these cases and other support for the conclusion that the principle of good faith is one underlying the CISG – that the arbitral tribunals were

ICAC at the RFCCI arbitration (Case No 288/1997) available at < https://iicl.law.pace.edu/cisg/search/cases>; CIETAC Arbitration, 24 February 2005 available at < https://cisg-online.org/search-for-cases?caseId=7742> (referring to the obligation to perform the contract in good faith); CIETAC Arbitration 4 June 1999 available at < https://cisg-online.org/search-for-cases?caseId=7724> (referring to the duty to act in good faith); ICC Case No 7645 of 1995 available at < https://cisg-online.org/search-for-cases?caseId=6770 > (referring to the notion of good faith underlying Article 8 CISG); Serbia 28 January 2008 Foreign Trade Court attached to the Serbian Chamber of Commerce available at < https://cisg-online.org/search-for-cases?caseId=8148> (referring to bona fide and good faith); *Adamus HT Sp. Z.o.o v International Inventory Management* (Final Award), 14 November 2012 available at Arbitrator intelligence materials (referring to good faith and fair dealing only); Serbia 23 January 2008 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce available at < https://cisg-online.org/search-for-cases?caseId=7863> referring to "the principle of good faith and fair dealing on which all of the modern legislation is based." Cf CIETAC Arbitration 11 February 2000 available at < https://cisg-online.org/search-for-cases?caseId=7449> (referring to Article 7(1) CISG); ICC Case No 8786 of 1997 available at < https://cisg-online.org/search-for-cases?caseId=6679> (referring to Article 7(1)); NAI arbitration of 10 February 2005 available at <https://cisg-online.org/search-for-cases?caseId=7540> (referring to Article 7(1) CISG); SCC Case No 71/2002 in Linn Bergman/Stephen Bond (eds), SCC Arbitral Awards 2004-2009 (Juris) 203–226 (referring to Article 7(1) CISG); Austria 15 June 1994 Vienna Arbitration proceeding SCH-4318 available at < https://cisg-online.org/search-for-cases?caseId=6099> (referring to Articles 7(1) and 7(2) CISG); ICAC at the RFCCI arbitration (Case No 95/2004) available at < https://cisg-online.org/search-for-cases?caseId=7376> (referring to Article 7(1) CISG).

2038 Russia 24 November 1998 Arbitration proceeding 96/1998 available at < https://cisg-online.org/search-for-cases?caseId=7445>; Russia 27 July 1999 Arbitration proceeding 302/1996, available at < https://cisg-online.org/search-for-cases?caseId=6707>; Russia 18 December 1998 Arbitration proceeding 288/1997, available at < https://iicl.law.pace.edu/cisg/search/cases>; ICC Case No 11849 of 2003 available at < https://cisg-online.org/search-for-cases?caseId=7343>; *Dulces Luisi SA de CV v Seoul International Co Ltd & Seoul Confectionary Co, Mexico Commission for the Protection of Foreign Trade M/115/97* of 30 November 1998 available at < https://cisg-online.org/search-for-cases?caseId=6472>, all accessed 1 March 2023. See also in this regard BELL, 22; WALT, 19 noting that tribunals, when applying good faith to the interpretation of the CISG or to the obligations of the parties, often do not specify whether they are applying Article 7(1) or 7(2) CISG.

applying good faith on the basis of Article 7(1) CISG given the explicit reference to good faith in the latter.[2039]

1222. The lack of precision with respect to the reference to good faith supports the conclusion that, in many cases, good faith may not have been applied accurately under the CISG (or, at least, not in an arguably accurate manner given the debated role of good faith under the CISG[2040]).

2. Lack of doctrinal or case law references

1223. In all bar one of the reviewed CISG awards, the arbitral tribunals did not refer to other case law, whether judicial or arbitral, applying the notion of good faith under the CISG.[2041] Only in three awards did the arbitral tribunals refer to legal doctrine on the notion of good faith under the CISG.[2042]

1224. In two cases, arbitral tribunals did refer to international arbitration practice or arbitral awards and doctrine to comfort their conclusions with respect to good faith.[2043] However, the pertinence of such references is debatable given that the

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2039 See, in this vein, DJAKHONGIR SAIDOV, Cases on CISG Decided in the Russian Federation (2003) 7 Vindobona Journal of International Commercial Law and Arbitration, 13–14: "statements declaring good faith as a general principle and an obligation imposed on the parties, not supported by any argumentation and accompanied by direct references to Article 7 seem to indicate that it was paragraph (1) (in which good faith is expressly mentioned), rather than paragraph (2), that was relied upon."

2040 See paras. 717 et seq.

2041 In ICC Case No 2020-006 (2020) ICC Disp Res Bull 135–136, the arbitral tribunal referred to another decision of an arbitral tribunal concerning good faith under the CISG.

2042 Only in the *ICC Case No 8786 of 1997, available at* < https://cisg-online.org/search-for-cases?caseId=6679>; Austria 15 June 1994 Vienna Arbitration proceeding SCH-4318, available at < https://cisg-online.org/search-for-cases?caseId=6099>; and ICC Case No 2020-006 (2020) ICC Disp Res Bull 135–136 did the arbitral tribunal refer to legal doctrine on the notion of good faith under the CISG (all accessed 1 March 2023).

2043 For example, in ICAC at the RFCCI arbitration Case No 302/1996 (available at <https://cisg-online.org/search-for-cases?caseId=6707>, accessed 1 March 2023), the arbitral tribunal referred to "international arbitration practice" in conjunction with Article 7 CISG to conclude that the principle of estoppel applies to international sales contracts: "*Inter alia*, in accordance with Article 7 CISG and the requirement of "observance of good faith in international trade", the international arbitration practice has concluded to apply to contracts for international sales the Anglo-American principle of estoppel or the German *Verwirkung*." In the *Clothing* case (available at <https://cisg-online.org/search-for-cases?caseId=6679>, accessed 1 March 2023), the arbitral tribunal referred to arbitral awards and doctrine in international arbitration to support its proposition that the principle of good faith includes the prohibition of abuse of right, in particular the general concept of *non concedit venire contra factum proprium* (references were made to the Collection of ICC Arbitral Awards 1986-1990, Deventer/Boston 1994,

practice referred to was general international arbitration practice and the awards referred to were not rendered in the specific context of the CISG.

1225. The vast majority of the PICC awards did not refer to any doctrine or case law on the general duty of good faith and fair dealing found at Article 1.7 PICC.[2044]

1226. Conversely, with respect to the General Principles awards, in the majority of cases,[2045] the arbitral tribunals referred to legal doctrine and case law to support their findings that good faith was a general principle of law or trade usage.[2046]

1227. The lack of doctrinal or case law references (most notably with respect to the CISG and PICC awards), supports the conclusion that, in the majority of cases,

Case no. 4381 and Case No. 5103 and Klaus Peter Berger, International Economic Arbitration, Deventer/Boston 1993). ICC Cases Nos 4381 and 5103 did not involve the application of the CISG.

2044 In fact, only in ICC Case No 16818 (2015) 40 YB Comm Arb 236–293, §§149–151 did the arbitral tribunal refer to the official commentaries to Articles 1.7 and 1.8 PICC without, however, referring to any other commentaries or case law with respect to these articles.

2045 In ICC Case No 3267 in SIGVARD JARVIN/YVES DERAINS (eds), Collection of ICC Awards 1974-1985 (Kluwer Law International 1990) 76–87, 81, the arbitral tribunal applied good faith as a general principle of law but did not discuss the basis for considering good faith as a general principle of law referring only to "good faith spirit". It should be noted that it is unclear whether the arbitral tribunal was applying good faith as a general principle of international commercial law given that it was also endowed with the power to rule as *amiable compositeur*. ICC Case No 18009 was merely referred to in JOLIVET/MARCHISIO/GÉLINAS, 223–224. We therefore do not know whether the arbitral tribunal referred to case law and doctrine relating to good faith. In the *ad hoc* arbitration of 4 December 1996 (available at <http://www.unilex.info/case.cfm?id=631>, accessed 1 March 2023) the arbitral tribunal merely referred to Article 1.7 PICC.

2046 For example, in ICC Case No 5953 in SIGVARD JARVIN/YVES DERAINS/DOMINIQUE HASCHER (eds), Collection of ICC Awards 1986-1990 (Kluwer Law International 1994) 437–444, 441, the arbitral tribunal referred to both arbitral awards and international arbitration doctrine when discussing good faith as a general principle of international commercial law. In addition, in ICC Case No 6219 in SIGVARD JARVIN/YVES DERAINS/DOMINIQUE HASCHER (eds), Collection of ICC Awards 1986-1990 (Kluwer Law International 1994), 428–437, 432 the arbitral tribunal also referred to legal doctrine supporting the view that the obligation to negotiate in good faith is one of the general principles of international commercial law. In ICC Case No 3131 (1984) 9 YB Comm Arb 109–111, the arbitral tribunal referred to French legal doctrine when noting that the emphasis on contractual good faith is one of the dominating tendencies which reveals the convergence of national legislations in this area. In ICC Case No 9593 (1999) 10 ICC Bull 110, the arbitral tribunal referred to several ICC awards to support its statement that the obligation to cooperate in good faith was a trade usage. In ICC Case 11976 (2012) 23 ICC Bull 51, the arbitral tribunal referred to one ICC award when holding that it was allowed to decide on the basis of the general notion of good faith in business and the usages of international trade.

good faith may not have been applied accurately under these instruments, yet alone in a uniform manner.

3. Impertinent references to good faith under other national or non-national laws

1228. In the CISG awards, some arbitral tribunals made impertinent references to good faith under other non-national or national laws. Hence in two cases, the arbitral tribunal also referred to the concept of good faith under non-national law[2047] and, in two other cases, the arbitral tribunal referred to good faith provisions under other national laws.[2048]

1229. Indeed, in one arbitration (ICAC at the RFCCI arbitration (Case No 96/1998)), the arbitral tribunal referred to the "analogous provisions of German law (§ 242 of the German Civil Code)" thus implicitly arguing that Article 7 CISG is the same as Section 242 BGB. As shown above,[2049] such an analogy is not pertinent given the limited role of good faith under the CISG, as mainly a tool of interpretation of the CISG, which is different in many respects to the notion and breadth of the notion of good faith under German law.[2050]

1230. Conversely, the vast majority of PICC awards did not take a comparative approach. Indeed, it was only in one arbitral award (Lausanne CCI 17 May 2002) that the arbitral tribunal took a comparative approach and noted that good faith

[2047] For example, in an ICAC at the RFCCI arbitration (Case No 302/1996) (available at <https://cisg-online.org/search-for-cases?caseId=6707>, accessed 1 March 2023), the arbitral tribunal referred to the principle of *venire contra factum proprium* in the *lex mercatoria* as a specific manifestation of the general principle of good faith. In addition, in the *White crystal sugar* case (available at < https://cisg-online.org/search-for-cases?caseId=7863>, accessed 1 March 2023) the arbitral tribunal stated that "this principle [of good faith and fair dealing] is also accepted by the acts that the arbitral tribunal invokes as the legal sources of substantive law on the basis of which it decided this dispute [which included the PECL and PICC as examples of the lex mercatoria]."

[2048] ICAC at the RFCCI arbitration (Case No 302/1996) (available at < https://cisg-online.org/search-for-cases?caseId=6707>, accessed 1 March 2023), the arbitral tribunal, when discussing the concept of estoppel as a specific manifestation of the principle of good faith, referred to the Anglo-American principle of estoppel and the German *Verwirkung*. The arbitral tribunal also referred to the concept of good faith under Russian law (which was of subsidiary application); ICAC at the RFCCI arbitration (Case No 96/1998) (available at < https://cisg-online.org/search-for-cases?caseId=7445>, accessed 1 March 2023).

[2049] See paras. 717 et seq.

[2050] See paras. 545 et seq.

was a principle that was found in many codifications including in France, Quebec, the Netherlands, Poland, Portugal, Argentina, Brazil and Turkey.[2051]

4. Possible influence of the arbitrator's legal background

1231. With respect to the national court case law applying the CISG, it has been noted that those national courts that have attributed a broad role to good faith under the CISG are biased by their own national law. Indeed, it has been asserted that good faith has been applied to the parties' conduct by Egyptian, Swiss, Italian and German courts as a result of "homeward trend" influences.[2052]

1232. In addition, as noted by ANDERSEN, all of the national courts that have applied good faith as a general principle under the CISG have general duties of good faith under their own national laws.[2053]

1233. With respect to the CISG awards, the identity, and therefore nationality, of the arbitrators was only known in four cases.[2054] One should only warily draw conclusions from such a small sample.

2051 www.unilex.info/case.cfm?id=863, accessed 1 March 2023.

2052 HOSSAM A. EL-SAGHIR, Islamic legal systems and the CISG: the case of Egypt in Larry A DiMatteo (ed), International Sales law: a global challenge (New York, Cambridge University Press 2014) 515–516: "Influenced by their national legal systems, Egyptian scholars tend to adopt a broad interpretation of Article 7(1). […] The broad scope that good faith has in both the civil law and Islamic law induces Egyptian commentators to attach a broad interpretation to CISG Article 7(1)."; EDOARDO FERRANTE, Italy, in Larry A DiMatteo (ed), International Sales law: a global challenge (New York, Cambridge University Press 2014) 407–408: "The modification of good faith from a rule of interpretation to a rule of party conduct appears to be due to the strong role of good faith in many legal systems in continental Europe, including Germany and Italy, but finds only a weak basis in the Convention itself. The insertion of the principle of good faith by the Tribunal of Padova was the result of "homeward trend" influences."; WIDMER, 469: "Nonetheless, courts whose domestic legal systems recognize a general duty of good faith in contracting have interpreted the good faith principle as an independent source of rules for contract interpretation or as a source of ancillary duties between the parties when deciding CISG cases."; see also MAZZOTTA, 131 noting that "German courts give good faith a large role when evaluating parties' rights and obligations under the CISG."

2053 ANDERSEN, 30–31.

2054 In ICAC at the RFCCI arbitration (Case No 302/1996) (available at <https://cisg-online.org/search-for-cases?caseId=6707>, accessed 1 March 2023), the arbitral tribunal was composed of Prof. CRESPIREGHIZZICRE of Italy, A. KOSTIN of Russia and K. HOBER of Sweden; In Vienna Arbitration Case No SCH-431 (available at < https://cisg-online.org/search-for-cases?caseId=6099>, accessed 1 March 2023), the sole arbitrator was MICHAEL BONELL of Italian nationality; In the *Industrial Equipment case* (available at <https://cisg-online.org/search-for-cases?caseId=6210>, accessed 1 March 2023), the sole arbitrator was

1234. Significantly, in this respect, it should be noted that the sole arbitrators in two of these arbitrations were involved in the drafting of the CISG.[2055] In the author's view, this background meant that these sole arbitrators most probably applied the notion of good faith correctly under the CISG and that they were also not influenced by their own legal backgrounds when applying this notion.

1235. The nationality of the arbitrators applying good faith on the basis of the PICC was not known. Given the noted lack of reference to relevant doctrine and case law when applying good faith on the basis of the PICC,[2056] it is conceivable that the arbitrators could have been influenced by their legal background when applying good faith on this basis.

1236. With respect to the application of good faith as a general principle of law, it is highly likely, in the author's view, that arbitrators will be influenced by their legal background when applying good faith given the elastic and uncertain contours of good faith as a general principle of law.[2057]

1237. The nationality of the arbitrators was known in two of the General Principles awards.[2058] Again, one should only warily draw conclusions from such a small sample. In one of these cases, the arbitral tribunal appears to have been influenced by their (French) legal background when elaborating on the concept of good faith as a general principle of law. Thus in ICC Case No 3131 the arbitral tribunal composed of BERNARDO CREMADES (Spain), PROFESSOR GHESTIN (France) and DR STEINER (unknown nationality) referred to French legal doctrine to support their statements that the emphasis placed on good faith reflects "dominant tendencies revealed by the convergence of national laws on the matter" and that "good faith expresses not only a state of mind, the knowledge or ignorance of a fact, but also reference to customs, and to an ethical rule of conduct."[2059]

ROLAND LOEWE of Austrian nationality; and in *Adamus HT Sp. Z.o.o v. International Inventory Management* (Arbitrator intelligence materials), the sole arbitrator was of Swedish nationality.

2055 In Vienna Arbitration Case No SCH-4318 (available at < https://cisg-online.org/search-for-cases?caseId=6099>, accessed 1 March 2023), the sole arbitrator was MICHAEL BONELL who was a member of the Italian delegation and in the *Industrial Equipment case,* (available at <https://cisg-online.org/search-for-cases?caseId=6210>, accessed 1 March 2023), ROLAND LOEWE chaired the CISG drafting committee.

2056 See para. 1225.

2057 See paras. 652 et seq.

2058 In ICC Case No 3131 (1984) 9 YB Comm Arb 109–110, the arbitral tribunal was composed of BERNARDO CREMADES (Spanish), PROFESSOR GHESTIN (French) and DR STEINER (unknown nationality) and in ICC Case No 3267 (1980) 107 JDI 962–970, the arbitral tribunal was composed of C. REYMOND (Swiss), F. DUHOT and P. CHATENET.

2059 ICC Case No 3131 (1984) 9 YB Comm Arb 109–110.

E. Role, content and remedies

1238. The role and content attributed by arbitral tribunals to good faith when applied on the basis of the CISG (1.), the PICC (2.) and as a general principle of law/trade usage (3.) as well as the remedies awarded for a failure to act in accordance with good faith will be discussed in turn.

1. CISG

1239. The reviewed arbitral awards provide little clarification with respect to the role of good faith under the CISG (a.). In line with the approach taken by national courts, most arbitral tribunals have not followed the view that the notion of good faith contained in Article 7(1) CISG may only be used as a tool for the interpretation of the CISG (b.) but have applied good faith directly to the parties' conduct (c.).

1240. Some awards hold, or appear to suggest, that the principle of good faith is one of the general principles on which the CISG is based and that it could therefore be used to fill gaps in the CISG pursuant to Article 7(2) CISG (d.).

a. No clarification with respect to the role of good faith

1241. The reviewed arbitral awards do not help to clarify the role of good faith under the CISG.[2060] Indeed, save for a few exceptions,[2061] arbitrators do not explicitly

[2060] See also in this regard, SIM, 69: "judicial and arbitral determinations have only exacerbated the confusion over the proper role of good faith in the Convention. It is possible to find a decision that supports almost every possible interpretation of the role of good faith in the CISG. At times, these courts or tribunals issue their decisions without any recognition of the debate surrounding the concept of good faith in the Convention and without an examination of the ramifications of its findings on the role of good faith in the CISG."

[2061] In the following cases, the arbitral tribunals elaborated on the role and content of good faith under the CISG: Hungary 17 November 1995 Budapest Arbitration proceeding Vb 94124, available at <https://cisg-online.org/search-for-cases?caseId=6224>, accessed 1 March 2023; ICC Case No 8611 of 1997, available at <https://cisg-online.org/search-for-cases?caseId=6210>, accessed 1 March 2023; Russia 13 April 2006 Arbitration proceeding 105/2005, available at <https://cisg-online.org/search-for-cases?caseId=7861>, accessed 1 March 2023; ICC Case No 2020-006 (2020) ICC Disp Res Bull 135–136.

elaborate on the role of good faith in the CISG.[2062] Indeed, surprisingly few address the controversy with respect to the role of good faith under the CISG.[2063]

b. Minority application of good faith as a sole tool for interpreting the CISG

1242. Most arbitral tribunals appear to have not followed the view that good faith (as referred to in Article 7(1) CISG) can only be used as a tool for the interpretation of the CISG.

1243. Indeed, the author is only aware of two cases in which the arbitral tribunal explicitly took such an approach.

1244. This was firstly in the *Industrial equipment* case, in which the sole arbitrator, in a dispute between a German seller and a Spanish buyer, held that good faith was only a principle to be applied to the interpretation of the CISG and did not directly apply to the parties' conduct. The sole arbitrator noted that whilst under German law the mass producer of technical equipment would have been expected to provide spare parts according to the principle of good faith, no implied secondary obligations could be derived from good faith when the CISG was applicable.[2064]

1245. This award is significant because the sole arbitrator (ROLAND LOEWE of Austrian nationality) who rendered this award chaired the committee drafting the CISG and was thus aware of the negotiating history surrounding this provision.

1246. In addition, in ICC Case No 2020-006, the arbitral tribunal held as follows:

> It is the Arbitral Tribunal's conclusion that no duty of good faith directed to the parties of a commercial contract can be derived from Article 7(1) CISG since it concerns only the interpretation of the convention. This view is supported by the decision in the ICC Case No. 8611 of 23 January 1997. The Arbitral Tribunal considers that there is a benefit, to those engaged in international trade who may well come from different legal and business cultures, in arriving at an interpretation of the CISG which gives effect to its clear words.[2065]

[2062] See BRIDGE, good faith, 115 stating that there is a "lack of rigour in judicial reasoning that resorts to such a concept and a certain intellectual laziness in such reasoning" and that the "standard of discussion of good faith in the case law is profoundly disappointing."; MAZZOTTA, 128 stating that "decisions and awards dealing with "good faith" rarely, if ever, examine the concept in a meaningful way."

[2063] Cf ICC Case No 8611 of 1997, available at <https://cisg-online.org/search-for-cases?caseId=6210>, accessed 1 March 2023 and ICC Case No 13184 (2011) 36 YB Comm Arb 96–118, §45 which do elaborate on the role of good faith under the CISG.

[2064] ICC Case No 8611 of 1997, available at <https://cisg-online.org/search-for-cases?caseId=6210>, accessed 1 March 2023.

[2065] ICC Case No 2020-006 (2020) ICC Disp Res Bull 135–136.

1247. Furthermore, in ICC Case No 18643, the arbitral tribunal also implicitly took this approach when it referred to Article 7 CISG and held that Article 54 CISG would not be interpreted in good faith if it were interpreted to mean that the buyer had a performance obligation (*obligation de résultat*) to procure the confirmation of the letter of credit by a bank.[2066]

c. Majority application of good faith as a standard directly applicable to the parties

1248. In the majority of cases, good faith was directly applied as a standard to be observed by the parties.[2067]

1249. In most cases, arbitral tribunals applied good faith directly to the parties' conduct without discussing the debated role of good faith under Article 7(1) CISG.

1250. Only two arbitral tribunals touched on the role of good faith under the CISG.

[2066] Buyer SA v Seller Co Ltd, ICC Case No 18643 (2019) YB Comm Arb 145–180, §§176–178.

[2067] CIETAC Arbitration 11 February 2000 available at < https://cisg-online.org/search-for-cases?caseId=7449>; Russia 24 November 1998 Arbitration proceeding 96/1998 available at < https://cisg-online.org/search-for-cases?caseId=7445>; Russia 18 December 1998 Arbitration proceeding 288/1997 available at < https://iicl.law.pace.edu/cisg/search/cases>; Russia 10 June 1999 Arbitration proceeding 55/1998 available at < https://iicl.law.pace.edu/cisg/search/cases>; Russia 27 May 2005 Arbitration proceeding 95/2004, available at < https://cisg-online.org/search-for-cases?caseId=7376>; ICAC at the RFCCI arbitration (Case No 131/2004) available at < https://cisg-online.org/search-for-cases?caseId=7421>; Hungary 17 November 1995 Budapest Arbitration proceeding Vb 94124 available at <https://cisg-online.org/search-for-cases?caseId=6224>; ICC Case No 13184 (2011) 36 YB Comm Arb 96–118; ICC Case No 8786 of 1997 available at < https://cisg-online.org/search-for-cases?caseId=6679>; ICC Case No 11849 of 2003 available at < https://cisg-online.org/search-for-cases?caseId=7343>; Milan Arbitration, 28 September 2001 available at <https://cisg-online.org/search-for-cases?caseId=7501>; NAI arbitration of 10 February 2005 available at < https://cisg-online.org/search-for-cases?caseId=7540>; CIETAC Arbitration, 24 February 2005 available at < https://cisg-online.org/search-for-cases?caseId=7742>; CIETAC Arbitration, 6 November 2000 available at < https://cisg-online.org/search-for-cases?caseId=7361>; CIETAC Arbitration 13 January 1999 available at < https://cisg-online.org/search-for-cases?caseId=7128>; CIETAC Arbitration 4 June 1999 available at <https://cisg-online.org/search-for-cases?caseId=7724>; SCC Case No 71/2002 in Linn Bergman/Stephen Bond (eds), SCC Arbitral Awards 2004-2009 (Juris) 203–226; *Dulces Luisi SA de CV v Seoul International Co Ltd & Seoul Confectionary Co, Mexico Commission for the Protection of Foreign Trade M/115/97* of 30 November 1998 available at < https://cisg-online.org/search-for-cases?caseId=6472>; Serbia 23 January 2008 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce available at < https://cisg-online.org/search-for-cases?caseId=7863> (all accessed 1 March 2023).

1251. Hence the arbitral tribunal in the *Mushrooms* case, explicitly held that the observance of good faith was both a principle for interpreting the CISG and a standard to be observed by the parties when performing their contract.[2068]

1252. In SCC Case No 71/2002, the arbitral tribunal's reference to the role of good faith under Article 7(1) CISG was more tentative. Most probably aware of the controversy surrounding Article 7(1) CISG, it stated that this Article "renders some support for the principle of good faith in determining the buyer's obligation."[2069]

d. Support for good faith as a gap filler

1253. There were two awards in which the arbitral tribunal explicitly held that the principle of good faith is a general principle on which the CISG is based pursuant to Article 7(2) CISG.

1254. This was firstly in an ICAC at the RFCCI arbitration (Case No 105/2005), concerning a dispute between a seller from the Bahamas and an Italian buyer. The arbitral tribunal confirmed that the principle of good faith was one on which the CISG is based pursuant to Article 7(2) CISG and that this principle (along with the principles of reasonableness of the parties' conduct and cooperation whilst performing mutual obligations) was taken into account when considering the buyer's claim for loss of profit as a result of the seller's failure to perform.[2070]

1255. This was secondly in ICC Case No 14005 in which the sole arbitrator referred to Article 7(2) CISG and held that "the basic principles of good faith and preservation of contract in the Convention" are principles on which the CISG is based.[2071]

1256. Other awards appear to implicitly hold that the principle of good faith is one on which the CISG is based.[2072]

[2068] Hungary 17 November 1995 Budapest Arbitration proceeding Vb 94124, available at <https://cisg-online.org/search-for-cases?caseId=6224>, accessed 1 March 2023.

[2069] SCC Case 71/2002 in LINN BERGMAN/STEPHEN BOND (eds), SCC Arbitral Awards 2004-2009 (Juris) 203–226, 212. For a critique of the application of the principle of good faith to the parties' conduct in this case, see the observations by PING LIU in Case 71/2002 in Linn Bergman/Stephen Bond (eds) SCC Arbitral Awards 2004-2009 (Juris) 222–226.

[2070] Available at <https://cisg-online.org/search-for-cases?caseId=7861>, accessed 1 March 2023.

[2071] ICC Case No 14005 (2015) ICC Disp Res Bull 133, 139 and 141.

[2072] In the *Cowhides* case (available at <https://cisg-online.org/search-for-cases?caseId=6086>, accessed 1 March 2023), for example, the arbitral tribunal in a dispute between a Yugoslav seller and an Italian buyer, had to determine the applicable law to the dispute. The arbitral

1257. In one case, an arbitral tribunal held that the principle of estoppel or *venire contra factum proprium* (as a specific manifestation of the general principle of good faith) was a general principle on which the CISG was based and employed it under Article 7(2) CISG in order to fill a gap in the CISG. Indeed, in the Vienna arbitration (Case No SCH-4318), the sole arbitrator held that the principle of estoppel or *venire contra factum proprium* was a specific application of the general principle of good faith and was a principle on which the CISG was based. This allowed the arbitrator to rely on this principle pursuant to Article 7(2) CISG to resolve the issue (not expressly settled in the CISG) of whether the buyer had waived its right to claim non-conformity of the goods by giving late notice to the seller. Interestingly, in this case, the sole arbitrator stated that the exact significance to be attached to good faith in Article 7(1) CISG within the scope of the Convention is disputed. This was one of the reasons that led the sole arbitrator to apply the principle of estoppel, a specific manifestation of the general principle of good faith, as a general principle on which the CISG is based pursuant to Article 7(2) CISG rather than relying on Article 7(1) CISG. In the sole arbitrator's view, the principle of estoppel was undoubtedly a general principle on which the CISG was based pursuant to Article 7(2) CISG and therefore his legal reasoning would be much less open to debate.[2073] This case is significant given that the sole arbitrator was MICHAEL BONELL who was a member of the Italian delegation during the drafting of the CISG.

e. Content of good faith and remedies awarded for breach

1258. In most cases, an autonomous meaning was attributed to good faith under the CISG.[2074] However, in ICC Case No 13184, the arbitral tribunal held that "the

tribunal followed the buyer's proposition and held that "general principles of international commercial practice, including the principle of good faith should govern the dispute […] [F]or the present dispute, such principles and accepted usages are most aptly contained in the [CISG]." This case accordingly appears to confirm that the principle of good faith is a general principle on which the CISG is based. For an author who is of this view, see GODERRE, 278. In addition, in an ICAC at the RFCCI arbitration (Case No 288/1997) (available at < https://iicl.law.pace.edu/cisg/search/cases>, accessed 1 March 2023) concerning a dispute between a Russian seller and a buyer from Uzbekistan, the arbitral tribunal held that the general principle of good faith in international trade, on which the CISG was based, was taken into account when rejecting the buyer's defence that a contract fine was no longer due under the contract as shown by accounting records made by the seller for the buyer.

2073 Austria 15 June 1994 Vienna Arbitration proceeding SCH-4318, available at < https://cisg-online.org/search-for-cases?caseId=6099>, accessed 1 March 2023.

2074 See in this regard the *Candies and Sweets* case (available at < https://cisg-online.org/search-for-cases?caseId=6472>, accessed 1 March 2023) in which the arbitral tribunal held that good faith should be given an international and not a national meaning.

CISG imposes a general duty of good faith [but] does not expressly settle the content or limit of this duty of good faith".[2075] Accordingly, in that case – and contrary to the goal of uniformity – the arbitral tribunal looked to Mexican law when determining the content of good faith.[2076]

1259. The content attributed to good faith under the CISG by arbitral tribunals is similar to that attributed to good faith under the CISG by national courts.[2077]

1260. In five CISG awards, good faith was equated with the principle of *pacta sunt servanda* as conduct which constituted a breach of the parties' contract was deemed to be contrary to good faith.[2078]

[2075] ICC Case No 13184 (2011) 36 YB Comm Arb 96–118, §59.

[2076] *Ibid*. See also ICC Case No FA-2020-226 (2020) 45 YB Comm Arb 1–24, §38 in which the arbitral tribunal held that the duty of loyalty, reflected in the European Country X law and in Article 1.7 Unidroit Principles 2010, supplements the CISG on matters not directly governed by provisions of the CISG.

[2077] See above paras. 797 et seq.

[2078] (1.) In the *Marble building materials* case (available at < https://cisg-online.org/search-for-cases?caseId=7361>, accessed 1 March 2023) the Chinese buyer delayed part of the payment after receiving the marble stone citing quality concerns. The arbitral tribunal noted that the contract clearly stipulated that payment should be made by letter of credit 90 days after receiving the bill of lading and that the Singaporean seller had provided the original bill of lading to the buyer as the latter had requested it and had promised to bear the entire risk. Based on these facts and the principle of good faith, the arbitral tribunal held that the buyer had an obligation to pay for the goods after receiving the original bill of lading and taking delivery of the goods. The arbitral tribunal accordingly enforced the terms of the contract entitling the seller to payment 90 days after the buyer received the bill of lading and ordered the buyer to reimburse the seller the price of the goods plus interest; (2.) In an ICAC at the RFCCI arbitration (Case No 95/2004) (available at <https://cisg-online.org/search-for-cases?caseId=7376>, accessed 1 March 2023), the arbitral tribunal held that the Russian seller's conduct did not comply with the principle of good faith. Indeed, the Russian seller had failed to deliver to the Turkish buyer the prepaid installment of goods, had thereby deprived the buyer of the expected profit by means of which it would have recovered its expenses and had unlawfully retained the buyer's prepayment sum. In this case, the arbitral tribunal was primarily merely sanctioning the seller's failure to deliver the goods; (3.) In a further ICAC at the RFCCI arbitration (Case No 134/2001) (available at < https://iicl.law.pace.edu/cisg/search/cases>, accessed 1 March 2023) between a Russian seller and an Italian buyer, the arbitral tribunal held that the seller violated the principle of good faith (and the impossibility of a unilateral refusal to perform one's obligation) by first declaring to the Italian authorities that the buyer was no longer an exclusive importer of the seller's goods to the Italian market, then concluding an agreement (Appendix 6) with the buyer concerning deliveries for 2000 and only thereafter sending a letter to the buyer terminating the exclusive distribution agreement. The buyer was accordingly entitled to be reimbursed for the lost profits incurred for the products not delivered under Appendix 6. In this case, the arbitral tribunal was simply sanctioning the breach of Appendix 6; (4.) In *Adamus HT Sp. Z.o.o v*

1261. In three CISG awards, good faith was referred to in conjunction with Article 8 CISG on contractual interpretation. It was thus employed in deciding whether the seller's general terms and conditions should apply,[2079] whether a seller had an obligation to deliver under an allegedly falsified supplement to the

International Inventory Management (Arbitrator intelligence materials) the sole arbitrator held that the respondent competed with the claimant by offering claimant's customers products competing with claimant which was a breach of the agreement, good business ethics and good faith and fair dealing. In this case, the arbitral tribunal was sanctioning the respondent's breach of the non-competition clause contained in the parties' contract; (5.) In the *White crystal sugar* case (available at <https://cisg-online.org/search-for-cases?caseId=7863>, accessed 1 March 2023), the seller had delivered goods of non-Yugoslav origin, contrary to the terms of the contract, and had submitted a flawed EUR 1 certificate of origin also in contravention of the terms of the contract. The arbitral tribunal held that the seller had not acted in accordance with the principle of good faith and fair dealing by doing so.

[2079] In the NAI arbitration of 10 February 2005 (available at <https://cisg-online.org/search-for-cases?caseId=7540>, accessed 1 March 2023), an issue arose in a dispute between a Dutch seller and an Italian buyer, concerning the applicability of the seller's General Conditions. The sole arbitrator held that in determining this issue it must look at the intent of the buyer to agree to these General Conditions and that this was a matter of interpretation and regard was therefore to be had to good faith. The sole arbitrator first noted that the proposal of the seller to apply its General Conditions was clear from its confirmations and the buyer knew, or could not be unaware, of this intent. The sole arbitrator secondly noted that the buyer was aware of the content of the general conditions as it had eventually received a hard copy of the same by regular mail. A standard confirmation of order sent to the buyer contained on the front page a reference to the seller's general conditions of contract printed on the reverse. By failing to express disagreement with the General Conditions or to deviate from its practice of returning a signed copy of the faxed confirmation, the buyer created the expectation that it agreed to the application of the General Conditions and the seller was allowed under the principle of good faith to rely on the signature of the buyer on the confirmations to include acceptance of the General Conditions. Good faith was thus employed in this case in order to determine whether the buyer consented, or should be deemed to have consented, to the seller's general terms and conditions.

contract[2080] and whether a contract fine, which was not indicated in the accounting records, was in fact still due.[2081]

1262. In five CISG awards, the arbitral tribunals held that good faith would have imposed a positive obligation to cooperate on the parties. In particular, it would have imposed: (i.) a duty to respond to the inquiries of the other party and an attempt to find out where the goods were;[2082] (ii.) a duty to communicate in order to resolve difficulties with respect to the performance of the contract;[2083]

[2080] In an ICAC at the RFCCI arbitration (Case No 105/2005) (available at <https://cisg-online.org/search-for-cases?caseId=7861>, accessed 1 March 2023), concerning a dispute between a seller from the Bahamas and an Italian buyer, the arbitral tribunal held that, even though the seller argued that a supplement to the contract was falsified, the seller's subsequent conduct proved the existence of its obligation to deliver goods as performance under this supplement and that this reasoning corresponded to the provisions of Article 8 CISG and the principle of good faith in international trade. Hence, the application of good faith in this case meant that the subsequent conduct of the parties was taken into account when objectively interpreting the supplement to the contract.

[2081] In an ICAC at the RFCCI arbitration (Case No 288/1997) (available at <https://iicl.law.pace.edu/cisg/search/cases>, accessed 1 March 2023), concerning a dispute between a Russian seller and a buyer from Uzbekistan, the buyer argued that a contract fine was no longer due under the contract as shown by accounting records executed by the seller for the buyer. Referring to Article 8 CISG and the general principle of good faith in international trade on which the CISG was based (Article 7), the arbitral tribunal rejected the buyer's argument holding that the parties knew that the fine was still outstanding and that the accounting records did not accurately reflect the situation. This was thus a case where the application of good faith led to the parties' actual intent prevailing over the wording of a clear written document.

[2082] In a first ICAC at the RFCCI arbitration (Case No 55/1998) (available at <https://iicl.law.pace.edu/cisg/search/cases>, accessed 1 March 2023), the Cypriot buyer failed to pay for goods that had been shipped. Whilst acknowledging that the Russian seller had acted negligently, the tribunal held that this negligence did not justify the buyer's non-payment given that the seller had shipped the goods in the manner instructed by the buyer and that the buyer did not attempt to find out where the goods were or respond to the seller's inquiries contrary to the principle of good faith in commercial relations. According to this award, good faith would therefore have required the buyer to cooperate with the seller by responding to the seller's inquiries and also by attempting to find out where the goods were.

[2083] In a second ICAC at the RFCCI arbitration (Case No 96/1998) (available at <https://cisg-online.org/search-for-cases?caseId=7445>, accessed 1 March 2023), a dispute arose between a German seller and a Russian buyer when the latter failed to pay. The buyer invoked *force majeure* and alleged that it was prevented from paying as it had not received permission from the Russian Central Bank to make foreign currency payments. The arbitral tribunal held that the buyer's argument that its representatives did not have the authority either to correspond or to declare the contract avoided on the ground of *force majeure* did not excuse its failure to pay. Indeed, the principle of good faith required that the competent organ of the buyer should have complied with the contractual provisions or should have contacted the seller in case of

(iii.) a duty to waive discrepancies between letters of credit and other documents when such discrepancies were immaterial;[2084] (iv.) a duty to request documents from the other party that it was required to hand over under the contract;[2085] and (v.) a duty to amend a letter of credit or waive the discrepancy between the invoice and letter of credit.[2086]

1263. In four CISG awards, good faith was invoked in order to sanction dishonest and unreasonable conduct, namely: (i.) issuing an already expired bank guarantee;[2087] (ii.) conditioning further deliveries on the arrival of settlement documents or earlier payment;[2088] (iii.) promising delivery and requesting extension of times whilst never having the intention to perform;[2089] and (iv.) obtaining the seller's trust through small operations and thereafter placing a large order

difficulties. Good faith therefore would have required the buyer to ensure that competent representatives either fulfilled the contract or communicated with the seller when difficulties arose in the performance of their contract.

2084 In SCC Case No 71/2002 SCC Case 71/2002 in LINN BERGMAN/STEPHEN BOND (eds), SCC Arbitral Awards 2004-2009 (Juris) 203–226, 212, the arbitral tribunal held that if an issuing bank of a guarantee asks for a waiver from the buyer, then good faith obliges the latter to examine the discrepancies between the letter of credit and documents submitted to the bank in so far as it is possible within the validity period and to give a waiver in the event that the discrepancies are clearly immaterial.

2085 In the *Second pork* case (available at <https://cisg-online.org/search-for-cases?caseId=7742>, accessed 1 March 2023), the Russian buyer had failed to pay part of the contract price on the basis that the Chinese seller had not provided the customs declaration form in accordance with the contract. The arbitral tribunal held that both parties were obliged to perform the contract in good faith and that even if the seller had failed to provide the necessary customs form as provided by the contract, the buyer was obliged to demand and urge the seller to deliver the form in order to avoid increasing damages.

2086 ICC Case No 14005 (2015) ICC Disp Res Bull 133, 141.

2087 Indeed, in the *Mushrooms* case (available at <https://cisg-online.org/search-for-cases?caseId=6224>, accessed 1 March 2023) which concerned a dispute between a Hungarian seller and an Austrian buyer, the issuance of a bank guarantee by the buyer which had already expired was deemed to be contrary to the principle of good faith (as well as to a reasonable interpretation under Article 8(3) CISG).

2088 In the *Steel wire case* (available at <https://cisg-online.org/search-for-cases?caseId=7501>, accessed 1 March 2023), it was suggested that the seller's conditioning of further deliveries on the arrival of settlement documents and/or earlier payment could potentially violate its obligations of good faith and fair dealing.

2089 In the *Mobile Sheer Baler case* (available at <https://cisg-online.org/search-for-cases?caseId=8178>, accessed 1 March 2023) the seller's failure to deliver the machine to the buyer whilst at the same time continuously promising the buyer that delivery would occur and requesting further extensions of time for delivery was considered to be contrary to good faith as it never had any true and honest intentions to perform its part of the bargain.

without any intention of paying and deceitfully obtaining the shipment of the goods prior to payment.[2090]

1264. Good faith has been invoked in many CISG awards in order to sanction contradictory conduct. Hence it was held that the following conduct was contrary to good faith: (i.) only invoking the invalidity of a contract three years after the conclusion of the contract;[2091] (ii.) invoking the defence of late notice when it had led the other party to believe that it would not invoke such a defence;[2092] (iii.) arguing that a notice of avoidance was late when it was responsible for the delay in the notice being issued;[2093] (iv.) the seller relying on the fact that the additional time allowed for performance had lapsed when the buyer was

[2090] In the *Candies and sweets* case (available at < https://cisg-online.org/search-for-cases?caseId=6472>, accessed 1 March 2023) the arbitral tribunal held that the buyer had acted contrary to good faith by organizing the whole operation with the sole intention of obtaining the goods without paying for them, first by gaining the seller's trust and respect through two significantly smaller operations which were conducted correctly, and secondly, by placing a large order without any intention of paying the purchase price, and deceiving the seller in order to have the goods shipped without performing its obligation to pay the price.

[2091] In the ICAC at the RFCCI arbitration (Case No 302/1996) (available at <https://cisg-online.org/search-for-cases?caseId=6707>, accessed 1 March 2023), a Swiss seller in a dispute with a Russian buyer attempted to declare a contract void on the ground that it failed to comply with certain legal requirements. The arbitral tribunal held that the seller acted contrary to good faith under Russian law (Articles 10 and 302(1) Russian Civil Code) by concealing this non-compliance at the time of the conclusion of the contract and by not raising it at any time during the three-year performance of the contract. The arbitral tribunal further held that the seller's conduct was also contrary to the principle of *nemo potest venire contra factum proprium*.

[2092] In the Vienna arbitration Case No SCH-4318 (available at < https://cisg-online.org/search-for-cases?caseId=6099>, accessed 1 March 2023), the sole arbitrator held that the principle of estoppel or *venire contra factum proprium* was a specific application of the general principle of good faith and was a principle on which the CISG was based. This allowed the arbitrator to rely on this principle pursuant to Article 7(2) CISG to resolve the issue (not expressly settled in the CISG) of whether the buyer had waived its right to claim non-conformity of the goods by giving late notice to the seller. The sole arbitrator held that the seller had repeatedly made statements to the buyer from which the latter could reasonably infer that the seller would not invoke the defense of late notice and that, in reliance upon this, the buyer refrained from taking legal action not only against its own customer, but also against the seller.

[2093] In the *Crude metal* case (available at <https://cisg-online.org/search-for-cases?caseId=6770>, accessed 1 March 2023) the arbitral tribunal referred, in a dispute between a Korean seller and Czech buyer, to the principle of good faith as a principle preventing a party from relying on its own contradictory conduct. The arbitral tribunal held that the notice of avoidance was timely in accordance with Article 49(2) CISG but that even if this was not the case, the general rules on good faith prevented the seller from invoking the argument that the buyer's declaration of avoidance was late under Article 49(2) CISG since the delay would have been due to the seller.

prevented from performing by the seller;[2094] (v.) arguing that another company of the group should be considered as the buyer because it paid for the goods even though the signatory company was the consignee of the goods, received the goods and cleared them from customs and never denied that it was the buyer;[2095] and (vi.) a buyer arguing that an agreement fixing new terms for the set off of indebtedness was signed by an unauthorized person when it had knowingly misled the seller in this regard.[2096] Conversely, it was held that it was not contradictory conduct for a buyer to refuse late delivery even though it had accepted late delivery in the past.[2097]

2094 In the *Fashion products* case (available at < https://cisg-online.org/search-for-cases?caseId=7343>, accessed 1 March 2023) which concerned an exclusive distributorship agreement whereby the US buyer was granted exclusive distributorship rights to a brand of the Italian seller's fashion products, the sole arbitrator held that it would be contrary to the principle of good faith and to Article 80 CISG ("A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.") to allow the seller to take advantage of the elapsing of the additional time granted to the buyer to perform in the situation where the buyer was prevented from performing because of the seller's late response to a request for information enabling it to open the letter of credit. The sole arbitrator accordingly held that the 20 days period of additional time should therefore only run from when the seller responded to the request for information sent by the buyer.

2095 In the *Latex gloves* case (available at < https://cisg-online.org/search-for-cases?caseId=7128>, accessed 1 March 2023) which concerned a dispute between a Chinese seller and a US buyer, the arbitral tribunal held that the buyer's allegation that American B company rather than American A company should be considered as the buyer under the contract because it paid for the goods would violate the *bona fide* principle. This was because the contracts had been titled with American A Company and the representative of both companies could have put American B Company's title on the contracts if she had so wished. In addition, the American A company was the consignee of the goods, received the goods and cleared them from customs. Furthermore, American A Company had never denied that it was the buyer in the two years since the receipt of the goods until the initiation of the arbitration.

2096 In an ICAC at the RFCCI arbitration (Case No 131/2004) (available at < https://iicl.law.pace.edu/cisg/search/cases >, accessed 1 March 2023), in a dispute between a Bulgarian seller and a Russian buyer concerning non-payment by the buyer, the arbitral tribunal held that the buyer's argument that the Agreement which fixed new terms for the set-off of the indebtedness had been signed by an unauthorized person was contrary to the principle of good faith as the buyer had knowingly misled the seller. In rejecting the buyer's argument, the arbitral tribunal pointed to the fact that this agreement was signed by the person who was the Director General of the buyer's firm when the parties concluded the contract for sale and the Agreement was signed in the presence and with the consent of the person who at that time was the Director General of the Buyer's company.

2097 In the *Clothing* case (available at < https://cisg-online.org/search-for-cases?caseId=6679 >, accessed 1 March 2023) the arbitral tribunal held that the principle of good faith under Article 7(1) CISG includes the prohibition of an abuse of rights and contradictory conduct although there was no estoppel on the facts of the case. Indeed, in this case, the seller argued that the

1265. In one CISG award, good faith was employed to sanction an abusive invocation of the right to terminate.[2098]

1266. In two CISG awards, good faith was employed to justify the non-application of a rule in the particular circumstances of the case, namely, to prevent reliance on the usual rule that a bill of lading must strictly comply with the letter of credit[2099] and to avoid the application of the custom and general rule that if a contract provides for a letter of credit, then the latter must be opened before the seller prepares the goods. [2100]

buyer had acted in bad faith by not allowing late delivery as it had accepted late delivery in the past. The sole arbitrator held that the fact that the buyer had not previously insisted on delivery dates did not mean that it could not insist on them in the future, especially given that the buyer when extending time limits for delivery had always explicitly mentioned the urgency of delivery.

2098 This occurred in the *Fashion products* case (available at < https://cisg-online.org/search-for-cases?caseId=7343>, accessed 1 March 2023) which concerned an exclusive distributorship agreement whereby the US buyer was granted exclusive distributorship rights to a brand of the Italian seller's fashion products. The sole arbitrator held that a general principle of good faith prevented a party from taking undue advantage of the remedies provided in case of breach of the other parties' obligations. In this case, the seller had acted in bad faith by pretending not to be aware that the buyer had opened the letter of credit, not responding to the request for information and already deciding to terminate the agreement before the expiration of the additional time period so that it could renegotiate new contract terms. Hence the Agreement had been wrongfully terminated by the seller and the buyer was entitled to loss of profit damages.

2099 In the *Industrial raw material* case (available at < https://cisg-online.org/search-for-cases?caseId=7724>, accessed 1 March 2023), the arbitral tribunal employed the principle of good faith to prevent one of the parties from invoking the usual rule that the bill of lading must strictly comply with the letter of credit. On the facts of the case, the Chinese seller submitted documents that were not in compliance with the letter of credit, namely the date of the bill of lading was typed as 1999 instead of 1998. The US buyer argued that this disparity constituted a fundamental breach entitling it to avoid the contract and to refuse to take delivery of the goods. The arbitral tribunal noted that in usual circumstances, the documents must strictly comply with the letter of credit. However, in the present case, the mistake was obviously a typing error and the goods were in compliance with the contract and were not defective. The arbitral tribunal held that the buyer should act in good faith and therefore accept the goods and pay for them.

2100 In the *Silicon metal* case (available at < https://cisg-online.org/search-for-cases?caseId=7449>, accessed 1 March 2023), in a dispute between a Chinese seller and a Hong Kong buyer, the arbitral tribunal applied the principle of good faith to avoid a strict application of the custom and general rule that if a contract provides for payment by letter of credit, then the latter should be opened before the seller prepares the goods. The arbitral tribunal held that on the facts of the case, the contract was not a big deal which would make it difficult to open the letter of credit and accordingly the buyer's plan to extend the letter of credit after the seller's

1267. With respect to the requirement of causation and the burden of proof in case of a violation of good faith, the arbitral tribunal held in the *Steel wire* case that not only will a party have to prove that the other party acted in bad faith and that this constituted a fundamental breach, but also that it acted in good faith by co-operating and that the bad faith conduct caused the loss that it has suffered.[2101]

1268. With respect to the remedies awarded for violation of the good faith standard, in most cases, good faith was invoked in order to defeat a party's argument.[2102]

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arrangement for shipment would not harm the seller's interest. In addition, the arbitral tribunal noted that the seller delayed delivery of the goods and never informed the buyer of the time of shipment and inspection. The buyer thus had reason to question whether the seller had the ability to deliver the goods on the date agreed by the parties. Hence, the buyer's decision to defer amending the letter of credit until it received an assured arrangement from the seller was reasonable. The arbitral tribunal further noted that the ultimate reason for the failure to perform the contract was that the seller had no goods to deliver or no intent to deliver.

2101 Milan Arbitration, 28 September 2001, available at < https://cisg-online.org/search-for-cases?caseId=7501>, accessed 1 March 2023.

2102 Thus in the *Crude metal* case (available at < https://cisg-online.org/search-for-cases?caseId=6770>, accessed 1 March 2023), good faith was invoked to prevent the seller from raising the argument that the buyer's declaration of avoidance was late; In ICAC at the RFCCI arbitration (Case No 288/1997) (available at < https://iicl.law.pace.edu/cisg/search/cases >, accessed 1 March 2023), good faith was invoked in order to reject the buyer's argument that the fine was no longer due; In ICAC at the RFCCI arbitration (Case No 105/2005) (available at < https://cisg-online.org/search-for-cases?caseId=7861>, accessed 1 March 2023), good faith was employed to prevent the seller from alleging that the contractual supplement was not sent, was not in the correct form and contained a distorted stamp; In the *Second pork* case (available at < https://cisg-online.org/search-for-cases?caseId=7742>, accessed 1 March 2023), good faith prevented the buyer from arguing that it was exempted from paying the remaining contract price; In the *Silicon metal* case (available at < https://cisg-online.org/search-for-cases?caseId=7449>, accessed 1 March 2023), good faith prevented the seller from arguing that it was not liable for its failure to deliver as the buyer did not amend the letter of credit; In the *Industrial raw material* case (available at < https://cisg-online.org/search-for-cases?caseId=7724>, accessed 1 March 2023), good faith prevented the buyer from arguing that it was not obliged to pay or was entitled to a reduction in price; In ICAC at the RFCCI arbitration (Case No 131/2004) (available at < https://cisg-online.org/search-for-cases?caseId=7421 >, accessed 1 March 2023), good faith prevented the buyer from raising a statute of limitations objection; In the *Latex gloves* case (available at < https://cisg-online.org/search-for-cases?caseId=7128>, accessed 1 March 2023), good faith was employed to prevent the buyer from alleging that another party was in fact the buyer; In ICAC at the RFCCI arbitration (Case No 96/1998) (available at < https://cisg-online.org/search-for-cases?caseId=7445>, accessed 1 March 2023), good faith prevented the buyer from arguing that its representatives did not have the power to make a declaration of avoidance and therefore that it was not liable; In ICAC at the RFCCI arbitration (Case No 55/1998) (available at < https://iicl.law.pace.edu/cisg/search/cases >, accessed 1 March 2023), good faith prevented the buyer from arguing that it was the seller's fault that it had not

1269. In some cases, good faith was considered as a factor in determining whether a party had breached its obligations or was employed to comfort a conclusion of breach leading to the normal remedies for breach of contract being available.[2103] This is consistent with the findings made in relation to national court decisions applying good faith under the CISG in Southeastern Europe. Indeed, it has been noted that in these decisions, the failure to comply with good faith did not entitle a party to a particular remedy. Rather, any remedies awarded were prescribed by other specific provisions found in the CISG.[2104]

fulfilled its obligation to pay; In Vienna arbitration Case No SCH-4318 (available at < https://cisg-online.org/search-for-cases?caseId=6099>, accessed 1 March 2023), good faith prevented the seller from relying on the defense of late notice; In ICAC at the RFCCI arbitration (Case No 302/1996) (available at < https://cisg-online.org/search-for-cases?caseId=6707>, accessed 1 March 2023), good faith prevented the seller from alleging that the contract was not valid; In the *Marble building* case (available at < https://cisg-online.org/search-for-cases?caseId=7361>, accessed 1 March 2023), good faith also prevented the buyer from raising the defence that it was not obliged to pay for the goods.

2103 (1.) In the *Mushrooms* case (available at < https://cisg-online.org/search-for-cases?caseId=6224>, accessed 1 March 2023), good faith was considered as a factor in deciding that the buyer had breached its obligation to pay. (2.) In the *Fashion products* case (available at < https://cisg-online.org/search-for-cases?caseId=7343>, accessed 1 March 2023), the arbitral tribunal found that the seller had unjustifiably terminated the contract contrary to good faith and also that the termination was irregularly notified pursuant to Article 64(1)(a) and 64(1)(b) CISG and was not justified under Article 73(2) CISG. The buyer was entitled to loss of profits as a result of the wrongful termination. (3.) In ICAC at the RFCCI arbitration (Case No 95/2004) (available at < https://cisg-online.org/search-for-cases?caseId=7376>, accessed 1 March 2023), the arbitral tribunal held that the Russian seller's failure to deliver was contrary to the principle of good faith and entitled the buyer to avoid the contract on the basis of Article 26 CISG, to recover the prepayment made on the basis of Article 81(2) CISG, to recover the contractual penalty foreseen under the contract for failure to perform as well as loss of profits under Articles 45(1)(b) and 74 CISG. (4.) In a further ICAC at the RFCCI arbitration (Case No 134/2001) (available at < https://iicl.law.pace.edu/cisg/search/cases >, accessed 1 March 2023), the arbitral tribunal held that the seller had violated the principle of good faith (and the impossibility of a unilateral refusal to perform one's obligation) and thus that the buyer was accordingly entitled to be reimbursed for the lost profits pursuant to Articles 45 and 74 CISG. (5.) In the *White crystal sugar* case (available at < https://cisg-online.org/search-for-cases?caseId=7863>, accessed 1 March 2023), the arbitral tribunal held that the seller had breached its contractual obligations to provide a valid certificate of origin and had consequently acted contrary to good faith and fair dealing and was therefore liable for the damages incurred by the buyer.

2104 MILENA DJORDJEVIĆ/VLADIMIR PAVIĆ, CISG in Southeastern Europe in Larry A DiMatteo (ed), International Sales law: a global challenge (New York, Cambridge University Press 2014) 425: "It has to be stressed that despite the occasional references to the good faith principle that "obliges" the parties to act in a certain way, in no case examined was the nonobservance of the general principle of good faith sufficient in itself to trigger a remedy for breach

1270. Thus, in most cases, the arbitral tribunals awarded remedies pursuant to provisions found in the CISG. However, in ICC Case No 13184, the arbitral tribunal held that "the CISG imposes a general duty of good faith [but] does not […] provide any remedy for its breach". Accordingly, the arbitral tribunal went on to apply Mexican law to the alleged violations of good faith.[2105] Thus the fear of the delegates drafting the CISG came true in this case.[2106] The arbitral tribunal resorted to domestic notions of good faith as it held that Article 7(1) CISG does not specifically elaborate on the remedies (if any) for the violation of good faith.[2107]

2. PICC

1271. In three of the PICC awards reviewed, there was no information on the context in which good faith was applied.[2108]

1272. There were only three awards where the arbitral tribunal applied the general duty to act in accordance with good faith and fair dealing (and not one of its specific manifestations) under the PICC.

– ICC Case No 7110 concerned a dispute between an English company and a government agency of the Middle East arising from nine related contracts for the supply of equipment.[2109] Article 1.7 PICC was impliedly sanctioned by the arbitral tribunal as the justification for the creation of

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of contract. Rather, remedies for not adhering to this "general principle" were available only if prescribed by specific rule contained elsewhere in the CISG."

2105 ICC Case No 13184 (2011) 36 YB Comm Arb 96–118, §59.

2106 See para. 731.

2107 ICC Case No 13184 (2011) 36 YB Comm Arb 96–118, §§59–60.

2108 In ICAC at the RFCCI arbitration (Case No 100) (available at < http://www.unilex.info/principles/case/1550>, accessed 1 March 2023), reference was made to Article 1.7 PICC. However, no further information is given explaining the context in which Article 1.7 PICC was applied. Similarly, in a further case conducted under the auspices of the Lausanne Chambers of Commerce and Industry, no information is given concerning the context in which Article 1.7 PICC was applied other than it was referred to in the finding that one of the parties had not properly performed its obligations under the contract (Lausanne CCI 17 May 2002, available at < http://www.unilex.info/case.cfm?id=861>, accessed 1 March 2023) and in ICC Case No 14988 (JOLIVET/MARCHISIO/GÉLINAS, 217–218), the sole arbitrator decided to apply the PICC to the parties' dispute and in reliance on the principle of good faith and fair dealing, rejected the claimant's request that it was entitled to post-termination commission under the representative agreement. No further information on how the sole arbitrator applied the principle of good faith and fair dealing under the PICC is given. Nothing can therefore be drawn from these three cases with respect to the content of good faith and they will not be discussed any further.

2109 ICC Case No 7110, available at < www.unilex.info/case.cfm?id=650>, accessed 1 March 2023.

the general principle that a claim is time-barred if it is pursued with unreasonable delay.[2110] Indeed, the version of the PICC that was in force at the time (1994 edition) did not address the issue of limitation periods.[2111] The respondent, referring to Article 1.7 PICC, argued that as a matter of general principle, the arbitral tribunal should reject claimant's claims because of the unreasonable delay in initiating them. The arbitral tribunal went on to hold that eleven years did not constitute an unreasonable delay, thus implicitly sanctioning the argument that good faith could prevent a party bringing a claim if it significantly and unreasonably delayed in bringing them[2112];

– In ICC Case No 9875, a dispute arose between a French claimant and a Japanese respondent under an exclusive license agreement to manufacture, sell and distribute the latter's products in Europe. The respondent subsequently entered into an agreement with a US company granting it an exclusive license for the US market. Thereafter, the respondent entered into a new contract with the US company and submitted a new draft contract to the claimant which was never signed. In the claimant's new draft contract, there was a prohibition of indirect sales to the American and Asian markets whereas in the new contract with the US company, there was a prohibition of indirect sales to the Asian market but not the European market. The arbitral tribunal held that Article 1.7 PICC (as part of the applicable *lex mercatoria*) prevented indirect sales i.e., the licensee selling to a company which one knows or should reasonably know intends to resell in another licensee's territory. The arbitral tribunal held that by entering into a contract that allowed the US company to make indirect sales in Europe, respondent breached the exclusive license it had granted to claimant[2113]; and
– In ICC Case No 13009, a dispute arose between a Liechtenstein seller and a Spanish buyer in connection with a settlement agreement that they had entered into.[2114] The seller claimed that it had been forced to enter

2110 *Ibid*. This is confirmed by PIERRE MAYER (MAYER, Unidroit, 107), who states that in this case, the arbitral tribunal held that the principle of good faith and fair dealing "prevents a claimant from acting so late that the respondent is likely no longer to have the evidence necessary for its defence and to have let the harm for which compensation is claimed get worse."

2111 Note that the issue of limitation periods was addressed in Chapters 10 of the 2004, 2010 and 2016 editions of the PICC.

2112 ICC Case No 7110, available at < www.unilex.info/case.cfm?id=650>, accessed 1 March 2023.

2113 ICC Case No 9875 (2001) 12 ICC Bull 97. This case is also available at <www.unilex.info/case.cfm?id=697>, accessed 1 March 2023.

2114 ICC Case No 13009 (2011) 36 YB Comm Arb 70–95, also available at <www.unilex.info/case.cfm?id=1661>, accessed 1 March 2023.

> into the settlement agreement under economic duress. The arbitral tribunal, however, rejected the seller's claim that the buyer had acted contrary to good faith (Article 1.7 PICC). Indeed, the buyer had pointed to the defects in the goods from the beginning; its decision to stop payment was logical given that the end buyer had also applied for an order to stop payment; its decision to join its own seller to the proceedings was logical given that it was also sued as a seller; and nothing showed that there was fraudulent collusion between the port authority, the end buyer and the buyer to have the contract declared void in a plunging market.[2115]

1273. In ICC Case No 7110, good faith was the basis for the rule that a claimant's claims will be time barred if it fails to initiate them within a reasonable period of time.[2116] It is not clear whether good faith was employed as a general principle in order to settle an issue falling within the scope of the PICC but not expressly settled by it pursuant to Article 1.6(2) PICC or whether it was employed pursuant to Article 1.7 PICC to address new circumstances not foreseen by the drafters of the PICC. This rule, however, is now expressly contained in Chapter 10 of the 2016 version of the PICC.

1274. From ICC Case No 9875, we can conclude that good faith also prevents a party from doing indirectly what the contract prevents it from doing directly.[2117] Finally from ICC Case No 13009, we can conclude that good faith requires a party to act transparently, honestly and in accordance with fair practices.[2118]

1275. Concerning the remedies attributed for a violation of Article 1.7 PICC, there was only one case in which the arbitral tribunal held that there was a violation of this Article. This was in ICC Case No 9875 where the violation of good faith contributed to the arbitral tribunal's holding that there had been a breach of the contract.[2119] Accordingly, the violation of good faith had no specific remedy of its own and the usual remedies applied as a result of the finding of a contractual breach.

2115 *Idem,* §§46–49.

2116 ICC Case No 7110, available at < www.unilex.info/case.cfm?id=650>, accessed 1 March 2023.

2117 ICC Case No 9875 (2001) 12 ICC Bull 97. This case is also available at <www.unilex.info/case.cfm?id=697>, accessed 1 March 2023.

2118 ICC Case No 13009 (2011) 36 YB Comm Arb 70–95, §§46–49 also available at <www.unilex.info/case.cfm?id=1661>, accessed 1 March 2023.

2119 ICC Case No 9875 (2001) 12 ICC Bull 97. This case is also available at <www.unilex.info/case.cfm?id=697>, accessed 1 March 2023.

3. General Principles of Law and Trade Usages

1276. As a general principle of law, good faith has imposed a duty on the parties to act reasonably (a.). Good faith has also been employed in order to impose ancillary duties on the parties (b.) and to prohibit an abuse of rights (c.). It has most controversially been linked to the general principle of liability (d.).

a. Good faith as imposing a duty to act reasonably

1277. The general principle of good faith was employed in order to express disapproval of a party's failure to act reasonably during the course of the performance of the parties' contract without drawing any legal consequences therefrom.

1278. Hence in ICC Case No 3267, the arbitral tribunal held that the abruptness of the deductions made by the respondent in response to the delayed works without advance warning was not in keeping with the good faith spirit which should have prevailed in the performance of the contract. The arbitral tribunal noted that there was no unilateral right under the contract to make a reduction of payment and that the respondent should have sought instead an amendment to the contract or a request for the suspension of works. The arbitral tribunal further held that such a deduction was also incompatible with the lump sum amount and automatic payment provisions found in the parties' contract.[2120]

1279. In ICC Case No 14427, the arbitral tribunal held that the general obligation to act in good faith imposed a duty on the parties to act diligently and efficiently. This meant that in the absence of a contractual deadline for the claimant to pay the advance on costs and to put into place the documentary credit, the claimant should have paid these within a reasonable timeframe (and not seven months after the signature of the contract). No damages were, however, awarded in this case as the respondent had not included this claim in its summary of claims.[2121]

b. Good faith as imposing ancillary duties on the parties

1280. In two cases, the general principle of good faith was employed in order to impose a duty to negotiate on the contracting parties.

1281. Hence in ICC Case No 6219, the general principle of good faith imposed an obligation on the parties to negotiate the method of repayment when the State party faced difficulties in reimbursing a loan. The sole arbitrator held that the

[2120] ICC Case No 3267 in SIGVARD JARVIN/YVES DERAINS (eds), Collection of ICC Awards 1974-1985 (Kluwer Law International 1990) 76–87, 81.

[2121] ICC Case No 14427 (2013) JDI 217–227, 219–220.

other party was under an obligation to negotiate the method of repayment in good faith and that this was an obligation which flowed from the general principles of international commercial law. On the facts, the sole arbitrator, however, held that this party had fulfilled its obligation to negotiate the repayment in good faith.[2122]

1282. In addition in ICC Case No 2291, the sole arbitrator held that the general principle of good faith imposed on the parties a duty to renegotiate in good faith in order to overcome difficulties.[2123] Indeed, in this case, the French transporter claimed that it was entitled to be paid a higher price for the transport of the goods because there were more items and the items that it had transported were bulkier than foreseen. The opposing English party admitted that the parties had agreed on a hardship clause but argued that this clause only applied in the event of the modification of the maritime freight tariffs. The sole arbitrator set out the principle that contracts should be interpreted in good faith with each party having the duty not to act so as to harm the other with reasonable renegotiation being customary in international economic contracts. Applying this principle, the sole arbitrator went on to hold that the transporter was entitled to an increase in price for the items not listed but not for the difference in weight in the items listed.[2124]

1283. Good faith has also been invoked to impose a duty to cooperate. Hence, it was held that a company should have acted on the fax sent to it by another company in the same group informing it of the suspension of a guarantee even though it was not in the typical codified language.[2125]

c. Good faith as prohibiting an abuse of rights

1284. Good faith (through the bias of trade usages) was also employed to prevent a party from invoking strict compliance with formality requirements for terminating the contract.

1285. Hence in ICC Case No 18009 of 2002 (unknown applicable law), the arbitral tribunal held that the principle of good faith (applicable via Article 21(2), then 17(2) ICC Rules) was an international trade usage which prevented a strict application of the formality requirements set out in the contract with respect to the

[2122] ICC Case No 6219 in SIGVARD JARVIN/YVES DERAINS/DOMINIQUE HASCHER (eds), Collection of ICC Awards 1986-1990 (Kluwer Law International 1994), 428–437, 431–432.

[2123] ICC Case No 2291 (1978) JDI 989–992.

[2124] *Idem,* 989–990.

[2125] ICC Case No 6317 in JEAN-JACQUES ARNALDEZ/YVES DERAINS/DOMINIQUE HASCHER (eds), Collection of ICC Awards 2001-2007 (Kluwer Law International 2009) 623–629, 625–626.

termination of the contract. More specifically, the subsequent conduct of the respondent constituted contradictory behaviour (a corollary of the principle of good faith) which prevented it from relying on this formal requirement. The arbitral tribunal went on to hold that the contract had been validly terminated and that the claimant was entitled to damages.[2126]

d. Good faith as underlying the general principle of liability

1286. The general principle of good faith has most controversially been linked to the general principle of liability leading to damages being awarded for violation of this principle.

1287. Indeed in ICC Case No 3131, the arbitral tribunal, relying on the principle of good faith sought to determine whether the breach of the agency agreement was attributable to the conduct of one of the parties and whether it had caused damage to the other which would thus be without justification and which equity would hence require to be remedied. The arbitral tribunal awarded damages for violation of this duty.[2127]

F. Good faith invoked to redress the imbalance in relationships with State parties

1288. In two of the twelve PICC awards examined (ICC Case No 7110 and ICC Case No 14108), a State party was involved.[2128]

1289. Good faith appears to have been raised in ICC Case No 14108 in order to sanction the contradictory conduct of the State party, in particular, in light of its superior knowledge.[2129]

1290. Indeed, in this case, good faith – and its more specific manifestation in the form of the prohibition of contradictory behaviour – was employed to prevent the State party from relying on the Parliament's refusal to extend the Production Sharing Agreement when it had led its contracting party to believe that

[2126] ICC Case No 18009 of 2002 (unknown applicable law) described in JOLIVET/MARCHISIO/GÉLINAS, 223–224.

[2127] ICC Case No 3131 (1984) 9 YB Comm Arb 109–110.

[2128] See ICC Case No 14108 (2011) 36 YB Comm Arb 135–201 and ICC Case No 7110, available at < www.unilex.info/case.cfm?id=650>, accessed 1 March 2023. In the latter case, it was the good faith of the non-State party that was at issue.

[2129] ICC Case No 14108 (2011) 36 YB Comm Arb 135–201, §§101–131.

Parliamentary approval was not required for the renewal of the Agreement even though it must have known that such approval was required.[2130]

[2130] *Ibid*.

III. Proposed Guidelines

1291. When applying good faith on the basis of a non-national law, it is advocated – as with the cases where an arbitral tribunal is applying good faith on the basis of a national law – that arbitral tribunals should: (i.) invite the parties to discuss the application of good faith prior to applying this notion;[2131] and, (ii.) include more exact reasoning in its decision when grounding its decision on good faith.[2132]

1292. In this section, further guidelines for the application of good faith on the basis of a non-national law are made, distinguishing between the cases where good faith is applied on the basis of the CISG (A.), the PICC (B.) or on the basis of a non-codified source such as the general principles of law (C.). It is also argued that good faith should not be applied as a trade usage (D.).

A. Good faith applied on the basis of the CISG

1293. Despite the fact that most arbitral tribunals have attributed a broad role to good faith and applied it directly to the parties' conduct, good faith in fact plays a restricted role under the CISG and should solely be invoked when interpreting the provisions of the CISG or filling an internal gap within the CISG (1.).

1294. When invoking good faith under the CISG, arbitral tribunals should first specify the basis on which they are applying good faith (2.). If an arbitral tribunal is invoking good faith in relation to the interpretation of a provision of the CISG, it should aim to promote a minimum standard of good faith in international trade which takes into account the goals of the CISG (3.). If an arbitral tribunal is applying the general principle of good faith in order to fill a gap in the CISG, the arbitral tribunal should identify the specific manifestation of good faith that it is applying to fill the gap (4.). In both cases, no reference should be made to good faith under other national or non-national laws given the different role and scope of good faith under such laws (5.). However, reference should be made to case law and doctrine relating to good faith under the CISG in order to enhance predictability and uniformity with respect to the application of this notion under the CISG (6.).

[2131] See paras. 1167 et seq.

[2132] See para. 1166.

1. Recourse to good faith when interpreting the CISG or filling an internal gap

1295. As explored above,[2133] under the CISG, the promotion of good faith in international trade is a goal to be aimed towards when interpreting its provisions. Admittedly, this may have an indirect impact on the parties' conduct.[2134] However, there is no explicit duty of good faith which is directly imposed on the parties.[2135] As an interpretation tool, its role is further restricted by the fact that many of the provisions of the CISG already embody the notion of good faith and by the fact that a decision maker will automatically, in the normal course of interpreting, take into account good faith.[2136]

1296. As discussed above,[2137] good faith is also a general principle on which the CISG is based and it may therefore be employed to fill any identified internal gaps in the CISG.

2. Specification of the basis on which good faith is applied

1297. If resorting to good faith on the basis of Article 7(1) CISG, an arbitral tribunal should specify that it is applying good faith on this basis[2138] and identify the provision it is interpreting with the aim of promoting the observance of good faith in international trade.

1298. If resorting to good faith on the basis of Article 7(2) CISG, then the arbitral tribunal should specify that it is applying good faith on this basis[2139] and identify the relevant internal gap in the CISG.

3. Promotion of a minimum standard of good faith in international trade taking into account the goals of the CISG (Article 7(1) CISG)

1299. When interpreting a provision in line with the goal of promoting good faith in international trade pursuant to Article 7(1) CISG, arbitral tribunals should bear in mind the following:

2133 See paras. 740–741.
2134 See paras. 749 et seq.
2135 See, in this regard, paras. 757 et seq.
2136 See para. 755.
2137 See paras. 761 et seq.
2138 JANSSEN/CLAAS KIENE, 273.
2139 *Ibid*.

– First, arbitral tribunals should only strive to promote a minimum standard of good faith given the varying backgrounds of the parties and their different understandings of this notion;[2140]
– Second, arbitral tribunals should take into account the specificities of international trade, namely that the latter entails intense competition and arm's length dealings.[2141] The fact that international trade entails intense competition means that an arbitral tribunal should respect the party's bargain (which will usually be extensively negotiated and minutely drafted) and not attempt to rewrite their contract by interpreting a provision of the CISG in accordance with good faith. Conversely, the fact that international trade involves arm's length dealings may mean that good faith should play a greater role in certain cases in order to protect the parties, who – because of the fact that they concluded their contract *à distance* – have placed greater trust in the other contracting party; and
– Third, arbitral tribunals should take into account the aim in the preamble of the CISG of promoting equality and mutual benefit in international trade.[2142] Thus the interpretation of a provision in line with the goal of promoting good faith should lead to the promotion of equality as well as mutual benefit between the parties.

1300. When employed as an interpretative tool of the CISG, the application of good faith may lead to the usual remedies set out in the relevant provision, or those found in the general provisions, of the CISG being awarded. It may even lead to the non-application of the relevant provision in cases where its application would be contrary to the goal of promoting good faith in international trade.

4. Identification of the specific manifestation of the general principle of good faith employed to fill gap (Article 7(2) CISG)

1301. If the arbitral tribunal is applying the general principle of good faith in order to fill a gap in the CISG, the arbitral tribunal should be required to identify the specific manifestation of the principle of good faith which it is using to fill the gap.

2140 See para. 789. This also takes into account the preamble which provides, in relevant part, as follows: "the adoption of uniform rules which […] take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade."

2141 See para. 786.

2142 See para. 795.

1302. Such specific manifestations include, *inter alia*, the prohibition of contradictory conduct (Articles 16(2)(b), 29(2) CISG), the prohibition of an abuse of right (Articles 21(2), 40 CISG), the prohibition of unfair conduct which would cause economic harm to the other party (Articles 49(2), 64(2), 82 CISG), the duty to mitigate one's loss (Articles 85–88 CISG) as well as a duty to be tolerant (i.e., allowing the seller to remedy non-conformity before the date for delivery as long as the buyer is not unreasonably burdened thereby) (Article 37 CISG).

1303. Employed in this restrictive way, the general principle of good faith would not be making an entrance via the back door.[2143]

5. No reference to good faith under other national or non-national laws due to different role and scope

1304. In general, references to good faith under other transnational instruments such as the PICC or under other national laws is not only unnecessary but also lacking in pertinence due to the difference in the role and scope of good faith under each of these instruments.[2144]

6. Reference to case law and doctrine to enhance predictability and uniformity

1305. It has been advocated that "when arbitrators apply a body of rules that is less developed and is still in the process of being formed, their role with respect to the establishment of predictable rules is much more important."[2145]

1306. As the role of good faith under the CISG is less developed than under national law, arbitrators should therefore look to other arbitral awards and decisions of national courts in order to establish a predictable approach.[2146] This should be even more the case given the important goal of applying a uniform interpretation

2143 See para. 780.

2144 See Part III of the present thesis.

2145 KAUFMANN-KOHLER, Precedent, 375.

2146 The author is of the view that good faith should only be employed when interpreting the provisions of the CISG or when filling an internal gap (see paras. 1295 et seq.). However, the author notes that most national courts and arbitral tribunals have applied good faith directly to the Parties' conduct (see para. 758 and paras. 1248 et seq.). Although it is advocated that arbitral tribunals should adopt this former approach, it is recognized that an approach which refers to and follows the majority of the judicial and arbitral case law applying good faith directly to the parties' conduct would at least have the merits of predictability.

of the CISG.[2147] In addition, by referring to doctrine and case law relating to the notion of good faith under the CISG, it is less likely that arbitrators will be influenced by their own legal background when applying good faith under the CISG.

B. Good faith applied on the basis of the PICC

1307. Due to the limited scope of the general duty to act in accordance with good faith and fair dealing under the PICC, arbitral tribunals should first verify whether there is a specific manifestation of the general duty to act in accordance with good faith and fair dealing which may apply before having recourse to Article 1.7 PICC (1.). Indeed, recourse should only be had to Article 1.7 PICC in exceptional circumstances (2.). In such a case, no reference should be made to good faith under other national or non-national laws given their different roles and scopes (3.). Reference, however, should be made to case law and legal doctrine relating to Article 1.7 PICC in order to enhance predictability and uniformity with respect to the application of good faith under the PICC (4.).

1. Application of a specific manifestation of the duty to act in accordance with good faith and fair dealing

1308. Article 1.7 PICC has a limited scope due to the numerous specific manifestations of the general duty to act in accordance with good faith and fair dealing found in the PICC.[2148] Accordingly, an arbitral tribunal should first determine whether a more specific manifestation of the general duty to act in accordance with good faith and fair dealing (in particular, the duty to cooperate (Article 5.1.3 PICC) or the prohibition of contradictory behaviour (Article 1.8 PICC), or one of the many specific manifestations of this prohibition, should apply instead.

2. Exceptional recourse to Article 1.7 PICC

1309. Article 1.7 PICC should only be applied in exceptional cases requiring the non-application of a contractual provision or the PICC on the grounds of fairness, justice or equity[2149] or in cases requiring a more flexible and less technical

[2147] Article 7(1) CISG provides in relevant part as follows: "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 […]."

[2148] See para. 836.

[2149] VOGENAUER, Article 1.7, 220, §§28–29.

application of the contract or the PICC (*de minimis non curat lex*).[2150] It may also be invoked to deal with new circumstances which were not foreseen by the drafters of the PICC or parties to future contracts.[2151]

1310. Given the limited role of the general duty to act in accordance with good faith and fair dealing found under Article 1.7 PICC, its application may usually only lead to a more flexible or restrictive application, or the non-application, of the parties' contract or the PICC.

3. No reference to good faith under other national or non-national laws due to different role and scope

1311. In general, references to good faith under other non-national laws, such as the CISG or the PECL, or under other national laws, is not only unnecessary but lacking in pertinence due to the difference in the role and scope of good faith under each of these instruments.[2152]

4. Reference to case law and doctrine to enhance predictability and uniformity

1312. In order to enhance uniformity and predictability in the application of the general duty to act in accordance with good faith and fair dealing under Article 1.7 PICC, arbitrators should look to other arbitral awards and decisions of national courts as well as to the legal doctrine when applying Article 1.7 PICC. By referring to legal doctrine and case law, it is more likely that arbitrators will not be influenced by their own legal background when applying the general duty of good faith and fair dealing under Article 1.7 PICC.

C. Good faith applied as a general principle of law

1313. It is advocated that arbitral tribunals should, wherever possible, apply good faith on the basis of a codified non-national law text, such as the PICC. This is because the PICC are a codified instrument which have been specifically developed for international commercial contracts and on which a body of case law

2150 *Idem*, 222–223, §§36–37.

2151 *Idem*, 221, §32. See also ICC Case No 7110, available at < www.unilex.info/case.cfm?id=650>, accessed 1 March 2023 described above at para. 1272.

2152 See Part III of the present thesis.

and doctrine can be built. The application of good faith will therefore be much less uncertain than when applying it as a general principle of law.

1314. However, if an arbitral tribunal decides, or is bound, to apply good faith as a general principle of law, it should give priority to the application of the specific manifestations of the general principle of good faith (1.). If there is no specific manifestation of the general principle of good faith, then an arbitral tribunal may formulate a new specific rule on the basis of the general principle of good faith (2.). When applying the specific manifestations of the general principle of good faith, arbitral tribunals should refer to case law and doctrine to enhance certainty and predictability with respect to the application of the general principle of good faith (3.). References may be made to the role, scope and content of good faith under other national and non-national laws in order to establish the role, scope and content of good faith as a general principle of law (4.).

1. Application of specific manifestations of the principle of good faith

1315. MAYER'S main critique with respect to the application of good faith as a general principle of law centers on the use of this principle as the source of already existing rules under contract law. He laments that every equitable solution could be imposed on the basis of the principle of good faith thereby solely accentuating the moral element when in fact there is an existing specific rule that has been violated which could be invoked instead.[2153]

1316. If general principles of law are deemed applicable to the parties' contract, international arbitrators should first look for a more specific application of the principle of good faith, i.e., one that has been deduced from the principle of good faith in a large number of legal systems (for example, the duty to mitigate damages) and then apply it to the facts of the case.[2154]

[2153] MAYER, bonne foi, 554: "*Il n'y a en fait guère de règles de la théorie générale des obligations qu'on ne puisse justifier par un recours similaire à la notion de bonne foi.* […] *Toute solution équitable - et le droit, le plus souvent, n'est pas contraire à l'équité - serait imposée au nom de la bonne foi*."; see also JARROSSON, *bonne foi*, §35, 204 : "*La bonne foi ne doit pas venir la seule règle dont dépend la solution*." ("good faith should not become the only rule on which the solution depends. ") (informal English translation of the French original).

[2154] See HEIN KÖTZ, Towards a European Civil Code: The Duty of Good Faith in Peter Cane/Jane Stapleton (eds) The Law of Obligations: Essays in Celebration of John Fleming (Clarendon Press 1998), 243, 250 with respect to Section 242 BGB: "Most cases, however, can be assigned to one of a number of well-defined rules which have all been developed by the courts under the umbrella of §242, but which now lead a separate and independent existence so that,

1317. To paraphrase WIGHTMAN, arbitrators should not "jump to the very high level of generality of good faith […] [and] leave behind 'middle range' arguments which capture better the reason for intervention."[2155] In other words, good faith should not be used "as a cloak with which to envelop other doctrines" and should not be employed to subsume "many contract doctrines […] under a single amorphous doctrine of good faith."[2156] Indeed, as argued by BRIDGE, "[t]he problem with a concept that explains everything is that it explains nothing."[2157]

1318. As stated by FOUCHARD/GAILLARD/GOLDMAN, "the principle of good faith is particularly useful when understood as providing the basis for more specific rules, which may in turn become general principles. This is the case, for example, of the principle that a party cannot contradict itself to the detriment of another." [2158]

2. Specific and precise creation of new rule

1319. If there is no suitable existing specific manifestation of the general principle of good faith, an arbitrator may create a new specific rule on the basis of the general principle of good faith but, in doing so, should formulate such rule as specifically and precisely as possible.[2159]

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figuratively speaking, the statutory foundation of §242 could be withdrawn without any risk of having the judge-made edifice collapse. It would be a poor advocate who would simply cite §242 to the judge and invite him to dispense justice to his client according to the principles of good faith and fair dealing. What would be expected of him would be a reference to the more specific doctrines of, say, laches, or frustration, or forfeiture including the judgments applying these doctrines to individual cases." POUDRET/BESSON, 601, §700 stating that uncertainty and laxity result when arbitrators do not specify the general principles which are in fact applicable and that it also blurs the line between arbitration in law and amiable composition.

2155 JOHN WIGHTMAN, Good Faith and Pluralism in the Law of Contract in Good Faith in Roger Brownsword/Norma Hird/Geraint Howells (eds), Good Faith in Contract, Concept and Context (Dartmouth 1999), 41, 60 at fn 56.

2156 FARNSWORTH, Good Faith, 60–61 lamenting that "[c]ivil lawyers demonstrate an unsettling tendency to use the doctrine of good faith as a cloak with which to envelop other doctrines."

2157 BRIDGE, good faith, 114.

2158 FOUCHARD/GAILLARD/GOLDMAN, 820, §1462.

2159 See in this regard, HESSELINK, Good Faith, 641, arguing that "if the general good faith clause is not a rule, it does not make sense to say that a decision is based on it. In reality such a decision is based on the new rule. Therefore the court should mention the new rule and formulate it as explicitly as possible."

3. Reference to doctrine and case law

1320. The role of good faith as a general principle of law is less developed and lacking in certainty due to its uncodified nature. Arbitrators should thus look to other awards of arbitral tribunals and legal doctrine in order to establish a predictable approach.

1321. In addition, by referring to doctrine and case law relating to good faith as a general principle of law, it is more likely that arbitrators will not be influenced by their own legal background when applying the notion of good faith.

4. Possible reference to good faith under other laws

1322. In order to establish the role, scope and content of good faith as a general principle of law, it may be necessary to examine its role, scope and content under other national laws or non-national laws.

1323. Indeed, the examination of the role and scope of good faith under other national and non-national laws may be helpful in order to ascertain the role, scope and content of good faith as a general principle of law given that general principles of law are principles of law common to leading national legal systems and that the solutions adopted in some non-national laws may represent the approach taken by a majority of States.[2160]

D. No application of the general principle of good faith as a trade usage

1324. If an arbitral tribunal is directed to consider trade usages by the applicable substantive law, *lex arbitri* or institutional arbitration rules, it should not – in the author's view – apply the general principle of good faith on this basis.

1325. It is submitted that a strict conception of trade usages should be followed, according to which only repeated, industry specific practices – and not general principles – can constitute trade usages.[2161] As previously stated with respect to trade usages under the CISG, whilst there may be a trade usage which is derived from the principle of good faith, the general principle of good faith is too vague and imprecise to constitute a trade usage itself.[2162] The strict view adopted in ICC Case No 13954 of 2007, namely that the general principle of good faith

[2160] See para. 647.
[2161] See para. 708.
[2162] See para. 784.

should not be applied as a trade usage, is accordingly the preferable approach to take.[2163]

[2163] See para. 1200.

Chapter 4: Application of Good Faith when Arbitrators are Endowed with the Power to Rule *ex aequo et bono* or as an *amiable compositeur*

1326. This Chapter explores the application of good faith by arbitral tribunals to the parties' contract when they are endowed with the power to rule *ex aequo et bono* or as an *amiable compositeur* (II.). However, before examining its application, we shall examine the popularity of the mandate given to arbitrators to rule *ex aequo et bono* or as an *amiable compositeur* (I.). This Chapter ends with a conclusion concerning the application of good faith by arbitral tribunals to the parties' contract when they are ruling *ex aequo et bono* or as an *amiable compositeur* (III.).

I. Popularity of the Mandate to Rule *ex aequo et bono* or as an *amiable compositeur*

1327. Parties may provide in their arbitration agreement for the arbitrators to rule *ex aequo et bono* or as an *amiable compositeur* in relation to their dispute. However, such cases are rare.[2164]

1328. In eleven of the awards reviewed, good faith was applied in cases where the arbitral tribunal was endowed with the power to rule *ex aequo et bono* or as an *amiable compositeur.*

[2164] It is estimated that around 2–3% of all arbitration agreements provide for the arbitrators to rule *ex aequo et bono* in relation to the dispute, see BORN, 2987.

II. Application by Arbitral Tribunals

1329. When invested with the mandate to rule *ex aequo et bono* or as an *amiable compositeur*, arbitrators are permitted to have recourse to the legal principle of good faith and may arguably be obliged to ensure that such principle is respected (A.). When endowed with such a mandate, it has been noted that arbitrators frequently have recourse to good faith even though such recourse is, in many cases, superfluous (B.). In this respect, the legal background of the arbitrators may possibly have an effect on their recourse to, and eventual application of, good faith (C.). As we shall see, when employed by arbitrators ruling *ex aequo et bono* or as *amiable compositeur*, good faith has played a wide and varied role (D.).

A. Power to apply, or duty to ensure respect of, the principle of good faith

1330. The definitions of the terms "*ex aequo et bono*" and "*amiable compositeur*" vary.[2165] Some authors are of the view that when arbitrators are *amiable compositeurs,* they are obliged to apply the applicable law but are allowed to mitigate the effects of such law if it proves to be unfair in the circumstances of the case.[2166] Conversely, these authors are of the view that when the arbitrators are endowed with the mandate to rule *ex æquo et bono*, they are relieved from any duty to apply the law.[2167] Despite the differences in the definitions of these two terms, the common thread underlying both of these concepts is that the arbitrators are allowed to decide a dispute without being bound by any system of law or rules of law.[2168] Such a power, however, does not prevent an arbitral tribunal from applying legal rules to the dispute as long as it takes equitable considerations into account.[2169]

1331. Undoubtedly therefore, an arbitral tribunal may apply the legal principle of good faith in such cases.

[2165] BORN, 2987–2988.

[2166] BERGER/KELLERHALS, 535–536, §1448; POUDRET/BESSON, 617–618, §709 and 622, §714. See also in this regard, FOUCHARD/GAILLARD/GOLDMAN 836, §1502.

[2167] BERGER/KELLERHALS, 532, §1441; POUDRET/BESSON, 625–626, §717. See also in this regard, FOUCHARD/GAILLARD/GOLDMAN 836, §1502.

[2168] BORN, 2988.

[2169] BORN, 2992; see also in this regard FOUCHARD/GAILLARD/GOLDMAN 839, §1506 stating that arbitrators cannot be criticized for applying general principles of law or even a national law if they consider that to be appropriate.

1332. Indeed, in ICC Case No 16117, the sole arbitrator applied the principle of good faith as recognized by Ecuadorian law and as a general principle of law.[2170] In this regard, the sole arbitrator explicitly justified his recourse to Ecuadorian law stating that:

> [although the contract] does not stipulate the application of any national law and the Sole Arbitrator does not consider himself obligated, for this reason and his attributions as such, to pronounce about the application of a certain body of law to the Agreement or to the controversies that have been submitted to him. However, in virtue of the contacts of the Agreement with Ecuador in relation to the location of the assets to be sold or transferred according to its provisions and the fact that Exporklore – original owner of said assets – was an entity incorporated and organized under the laws of Ecuador with commercial and economic activity in that country, the Sole Arbitrator is free to take into consideration Ecuadorian Law as one of the guidelines to which to reference at his discretion in the task of defining the principles of equity or fairness that according to his conscience and to the best of his knowledge can help him in the resolution of the controversies that have been submitted to him.[2171]

1333. Notwithstanding the above, mandatory rules of public policy apply to arbitrators endowed with the power to rule ex *aequo et bono* or as an *amiable compositeur*.[2172] Indeed, it has been submitted that arbitrators must ensure that their awards will be enforceable at the seat of the arbitration and at foreseeable places of enforcement.[2173] Therefore, to the extent that good faith is considered to form part of public policy at the seat of the arbitration or at foreseeable places of enforcement,[2174] it is arguable that arbitrators may have a duty to ensure that it is respected in their award. In this regard, one arbitral tribunal has held that principles of good faith must be respected even in proceedings in equity.[2175]

2170 *IIG Capital LLC v Republic Federal Bank, N.A.* (Final Award), ICC Case No 16117/JRF (HORACIO A. GRIGERA NAON (Argentina)), 2 September 2010, Arbitrator intelligence materials, §82. The relevant arbitration clause provided as follows: "In case of a conflict or controversy arising between them with respect to this agreement and to the obligations here contracted and promised, the Parties will try to resolve them amicably and if this is not possible they will submit them to the resolution of a sole arbitrator named according to the Arbitration Rules of the International Chamber of Commerce, who will arbitrate in equity, in other words, ex aequo et bono […]"

2171 *Idem,* fn 49.

2172 BORN, 2993.

2173 See above, para. 1333.

2174 See para. 427 (Swiss law); para. 471 (French law), para. 556 (German law) and para. 610 (law of the PRC).

2175 *Company X v Consultant A*, AIA Case No 66/96, 16 February 1998, (1999) 24 YB Comm Arb 182–186, §8 holding that: "Company X acted against the principles of good faith which must be respected even in a proceeding in equity."

B. Frequent but often superfluous resort to good faith

1334. It has been submitted that arbitrators endowed with the power to rule *ex aequo et bono* or as an *amiable compositeur* attach a significant importance to the notion of good faith in their awards.[2176]

1335. Indeed, despite the infrequency with which arbitrators are endowed with the power to rule *ex aequo et bono* or as an *amiable compositeur*, comparatively many awards were found where the arbitrators referred to the notion of good faith when ruling on this basis.[2177]

1336. The frequent resort to good faith in such cases is not surprising. As a legal concept which embraces the ideas of morality and equity,[2178] good faith is a convenient concept to apply in cases where the arbitrator is endowed with the power to rule *ex aequo et bono* or as an *amiable compositeur*. Arbitrators have the security of a legally defined standard to apply which also takes into account the terms of their mandate.

1337. Notwithstanding this frequent recourse to good faith, in at least a quarter of the cases,[2179] the recourse to good faith was superfluous. Indeed, in two cases, the recourse to good faith was an additional reason for the decision reached[2180] whereas in one case, the arbitral tribunal's reference to good faith and its application was *obiter dicta*.[2181]

1338. The fact that in some cases the reference to good faith was superfluous may be prompted by the arbitral tribunal's desire to show that the solution reached is just, fair and equitable which – contrary to the cases where the arbitral tribunal

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2176 LOQUIN, *amiable composition*, 358, §616.

2177 According to BORN, 2987, 2–3% of all arbitration agreements provide for the arbitrators to rule *ex aequo et bono* in relation to the dispute whereas in over 5% (eleven out of approximately two hundred and thirty) of the awards reviewed in which good faith was applied to the parties' contract, good faith was applied by the arbitrators endowed with the power to rule *ex aequo et bono*.

2178 See in this regard, LOQUIN, *amiable composition*, 358, §616 who notes that equity and good faith are neighbouring concepts, and that it is through the notion of good faith that equity manifests itself and allows equity to be done.

2179 As some of the awards referred to are only references made in LOQUIN, *amiable composition*, it is not possible to ascertain whether the recourse to good faith in such cases was superfluous.

2180 ICC Case No 3267, SIGVARD JARVIN/YVES DERAINS (eds), Collection of ICC Awards 1974-1985 (Kluwer Law International 1990) 76–87and *ad hoc* award of 2 July 1956 (*Société Européenne d'Etudes et d'Entreprises v. République fédérale de Yougoslavie*, Award of MM Ripert and Panchaud, 2 July 1956 (1959) JDI 1074, 1080–1081).

2181 ICC Case No 11409 (2007) 18 ICC Bull 104, cc.

is not endowed with the power to rule *ex aequo et bono* or as an *amiable compositeur* – it is obliged to do by the terms of its mandate.

C. Possible influence of arbitrator's legal background

1339. It is noteworthy that the arbitrators (where identified) in the awards surveyed[2182] were all from Civil law systems and were mostly of Swiss nationality and that these systems (in particular, the Swiss legal system) attribute an extensive role to good faith.[2183] It can therefore be expected that arbitrators trained in Civil law systems, in particular those which attribute an extensive role to good faith, will be more likely to have recourse to good faith when endowed with the power to rule *ex aequo et bono* or as an *amiable compositeur*.

1340. Given the arbitrator's power to rule *ex aequo et bono* or as an *amiable compositeur* and the fact that the arbitrator is therefore not even obliged to apply legal rules, the arbitrator is not bound, for example, to apply good faith as interpreted and applied by the courts in a given national legal system. It may apply its own notions of the concept of good faith, even though such notions may inevitably be influenced by the arbitrator's legal background.[2184]

D. Wide and varied role of good faith

1341. In the awards (extracts or references) reviewed, good faith was firstly employed in order to elaborate on the standard of conduct expected from the contracting

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[2182] In *Société Européenne d'Etudes et d'Entreprises v République fédérale de Yougoslavie*, Award of MM Ripert and Panchaud, 2 July 1956 (1959) JDI 1074, the arbitral tribunal was composed of DEAN RIPERT (France) and M ANDRÉ PANCHAUD (Switzerland); In ICC Case No 3267 in SIGVARD JARVIN/YVES DERAINS (eds), Collection of ICC Awards 1974-1985 (Kluwer Law International 1990) 76–87, the arbitral tribunal was composed of C. REYMOND (Switzerland), F. DUHOT and P. CHANENET; In AIA Case No 66/96 (1999) 24 YB Comm Arb 182–186, the sole arbitrator was PIERRE FORTIN (Canada); In *IIG Capital LLC v Republic Federal Bank, N.A.* (Final Award), ICC Case No. 16117/JRF, 2 September 2010, Arbitrator intelligence materials, the sole arbitrator was HORACIO A GRIGERA NAON (Argentina).

[2183] See paras. 422 et seq.

[2184] See in this regard, MAYER, *règle morale*, 397, §28: "*Lorsque l'arbitre est amiable compositeur, il n'est pas là invité à faire primer le sentiment du juste sur l'application stricte du droit. Ce sentiment du juste, qui possède une composante morale, est nécessairement le sien: il ne peut l'emprunter à un autre système que celui dans lequel il s'est formé*." ("When the arbitrator is an amiable compositeur, he or she is not asked to give precedence to the idea of justice over the strict application of the law. This sense of justice, which has a moral component, is necessarily his own: he cannot borrow it from any system other than the one in which he was formed.") (informal English translation of the French original).

parties when performing their contractual obligations and therefore to determine whether the parties had acted in compliance with such obligations.

1342. For example, in AIA Case No 66/96 which concerned a dispute arising under a management consultancy contract, the parties were contractually obliged to cooperate in the finding of mutually acceptable measurement indices for the reporting of improvements by Consultant A. The sole arbitrator held that Company X had the duty to evaluate in good faith, and therefore not in a capricious or unmotivated manner, the measurement indices proposed by Consultant A. On the facts, however, it was held that Company X had not acted contrary to its duty to evaluate the proposed indices in good faith. [2185]

1343. In addition, in AIA Case No 57/94, the sole arbitrator held that Article 27 of the exclusive distributorship contract which provided for the manufacturer to assign the manufacturing license and know-how by a separate contract reflected the mutual undertaking by the parties to behave diligently and in good faith toward the conclusion of a further agreement, which would establish the subject matter and manner of the assignment, the price and manner of payment having already been agreed upon. The sole arbitrator held that neither party had complied with this obligation. Indeed, Y had drafted a contract which included provisions severely limiting X's autonomy. X had also acted contrary to this duty as it insisted that the contractual agreement be performed without taking charge of the further agreements, which were necessary in order to effect the assignment, and even without indicating which provisions in Y's draft were, in its opinion, at odds with the agreement, and which different provisions corresponded thereto. Given that both parties did not comply with Article 27 of the exclusive distributorship contract, the arbitral tribunal went on to hold that the assignment did not take place and that the agreement on a future assignment was terminated.[2186]

1344. Good faith was also employed (or appears to have been in the arbitrators' minds) when expressing disapproval of, or sanctioning, a party's (unreasonable or contradictory) conduct during the performance of the contract.

1345. Thus, in ICC Case No 3267, the arbitral tribunal held that the abruptness of the deductions made by the respondent without advance warning to sums owed to the claimant on account of delays in the works was not in keeping with the good faith spirit which should have prevailed in the performance of the contract.[2187]

[2185] AIA Case No 66/96 (1999) 24 YB Comm Arb 182–186, §§7–8.

[2186] AIA Case No 57/94 (1997) 22 YB Comm Arb 182–190, §§8–12

[2187] ICC Case No 3267 in SIGVARD JARVIN/YVES DERAINS (eds), Collection of ICC Awards 1974-1985 (Kluwer Law International 1990) 76–87, 81. It should be noted that in this case, general principles of international commercial law also applied to the contract and that for this reason, this award is also discussed in Chapter three.

No consequences seem, however, to have been drawn by the arbitral tribunal as a result of this bad faith conduct.[2188]

1346. In addition, in CAIP Case No 9963, the arbitral tribunal held that the franchisee violated its duty of good faith, at a meeting of sponsors and franchisees, by underlining defects in the franchisee network and thereafter resigning as sponsor. According to the arbitral tribunal, this justified the termination by the franchisor and exonerated the franchisor from indemnifying the franchisee in question.[2189]

1347. Good faith was most extensively employed in order to mitigate the strict rigours of the principle of *pacta sunt servanda*. It was thus employed to modify the amount due under a contract to reflect the devaluation of a currency,[2190] to award payment of an equitable compensation when a party had suffered a loss as a result of a harsh contractual clause,[2191] to prevent reliance on compliance with a contractual notice requirement,[2192] to award damages as a result of

[2188] *Ibid*.

[2189] CAIP Case No 9963 (although the summary of this case was previously available on the CAIP's website (https://www.arbitrage.org/), it is no longer available online).

[2190] In an *ad hoc* award of 2 July 1956 (*Société Européenne d'Etudes et d'Entreprises v. République fédérale de Yougoslavie*, Award of MM Ripert and Panchaud, 2 July 1956 (1959) JDI 1074, 1079–1081, 1080–1081), the arbitral tribunal invoked good faith, as an additional ground (the main reason for the arbitral tribunal's conclusion that the State was obliged to pay the real value of the benefits received appears to be that it deemed that a guarantee against devaluation was intended in the absence of an express provision to the contrary) in order to prevent a State from relying on the price foreseen under the contract for the construction of a railway when the currency of payment had suffered a significant devaluation. The arbitral tribunal held that it would be contrary to good faith for a State which had ordered and received benefits under the contract to refuse to pay the real value and take advantage of the devaluation of the currency of payment. The arbitral tribunal then went on to order that the balance which remained due must be paid by a money payment of equivalent economic value to the services performed by the plaintiff company

[2191] Arbitral award, *Dame Krebs v. Milton Stern* referred to in Cass civ 1e, 28 April 1987, (1991) Rev Arb 345. In this case, good faith was invoked in order to attenuate the effects of a rather harsh clause (only allowing the distributor to pass on in absolute terms the increase in the prices of the products sold) in a distribution contract. The tribunal ordered the respondent to pay equitable compensation to the claimant to compensate for the loss it had suffered as a result of this clause.

[2192] In ICC Case No 11409 (2007) 18 ICC Bull 104, cc., the arbitral tribunal held that one could object that a notice of termination did not comply with the formal contractual notice requirements, however such an objection would be contrary to good faith when the claimant received and was aware of the respondent's notification of intent to terminate and did not contest that it was so aware. It appears that in this case the claimant did not raise the argument that the notice of termination did not comply with the formal contractual notice requirements but that it was the arbitral tribunal who raised this as a possible objection. However, if the claimant

reliance on an automatic termination provision which was abusive in the circumstances of the case,[2193] to award damages for the arbitrary, unfounded and abusive exercise of a party's contractual right to veto,[2194] and even to oblige the parties to maintain the contract in force despite the legal termination thereof in accordance with the terms of the contract.[2195]

1348. Finally good faith was also employed to reduce or eliminate a breaching party's liability when the latter had acted in good faith.[2196]

had invoked this argument, then it is reasonable to presume that the arbitral tribunal would have rejected it on the grounds of good faith.

2193 In ICC Case No 4972 (1989) JDI 1100–1107, 1105, the arbitral tribunal held that it would be contrary to the good faith performance of contracts for the respondent to invoke the automatic termination provision in the exclusive distribution agreement when it had been lax regarding previous contractual breaches in the previous three years. Indeed the respondent invoked the automatic termination clause in the agreement even though it had tolerated the behaviour in question previously and the claimant could not therefore have foreseen that it would invoke this provision. The arbitral tribunal held that the termination letter should have informed the other party of the breach and given a time period for the other party to comply. The arbitral tribunal therefore awarded damages for the abusive termination.

2194 *IIG Capital LLC v Republic Federal Bank, N.A*. (Final Award), ICC Case No 16117/JRF, 2 September 2010, Arbitrator intelligence materials, §82 in which the Parties had entered into an Agreement to reorganize Exporklore's business, sell its assets (while they were their property) as an economic unit, and proceed with its orderly liquidation. The sole arbitrator found that Capital had exercised its right to veto (and thus to reject an offer made) under the Agreement in a manner incompatible with the general principle of good faith.

2195 In an unpublished ICC Case No 2012 rendered in 1973, the arbitrators sanctioned the bad faith but nonetheless legal conduct of a licensor which had terminated the distribution contract after five years. The arbitral tribunal held that given that the licensor had led the licensee to incur significant investment costs, it should be obliged to maintain the contract in force until the licensee had recuperated its costs. Referred to in LOQUIN, *amiable composition*, 359, §619. Although there appears to be no express mention of good faith in the award in question, LOQUIN refers to this case in the section on equity and the taking into consideration of good faith by *amiable compositeurs* as an example of a case where an arbitral tribunal sanctioned the disloyal conduct of the licensor.

2196 Thus, in the unpublished ICC Case No 1494 of 12 May 1970 (referred to in LOQUIN, *amiable composition*, 360, §620), the arbitral tribunal noted that the buyer had suffered a loss due to the fact that the machine sold did not conform to the contractual specifications. However, the seller had incurred significant costs to repair the machine and to build a new machine. Accordingly, the arbitral tribunal decided that it would be inequitable to impose any further costs on the seller. In an award 7/70 rendered under the auspices of the Strasbourg arbitral chamber, the arbitral tribunal took into account the good faith of the buyer in order to reduce by half the amount of compensation due by the latter. Again, although there appears to be no express mention of good faith in the awards in question, LOQUIN refers to this case in the section on equity and the taking into consideration of good faith by *amiable compositeurs*.

III. Conclusion

1349. If an arbitral tribunal is endowed with the power to rule *ex aequo et bono* or as an *amiable compositeur*, it may have recourse to good faith in deciding the parties' dispute. Indeed, the principle of good faith offers the security of a legally defined standard to arbitrators who are ruling *ex aequo et bono* or as an *amiable compositeur* whilst at the same time being a standard embracing ideals of morality and justice which takes into account the terms of their mandate.

1350. If an arbitral tribunal decides to apply good faith, it is not bound to apply this principle as interpreted or applied under any national or non-national law. Accordingly, it may apply its own notions of the concept of good faith, even though such notions may inevitably be influenced by the arbitrator's nationality or legal background.

Part V:

Good Faith and the Arbitration Agreement

1351. Part V explores good faith and issues related to the arbitration agreement. Chapter 1 considers the role of good faith with respect to the validity and interpretation of the arbitration agreement whilst Chapter 2 considers the role of good faith with respect to the various issues which arise concerning the parties to the arbitration agreement. Chapter 3 examines the obligation to negotiate and/or mediate in good faith prior to resorting to arbitration. Finally, Chapter 4 examines the role of good faith with respect to the performance of the arbitration agreement and, more specifically, the parties' obligation to arbitrate in good faith.

1352. Given the popular use of London, Paris, Hong Kong, Singapore, Geneva, New York and Stockholm as seats of the arbitration,[2197] this Part V, will, in particular, make reference to the approach taken by the following jurisdictions with respect to the various issues surrounding the arbitration agreement: namely, England, France, Hong Kong, Singapore, Switzerland and Sweden.

[2197] According to the 2015 Queen Mary Survey, Improvements and Innovations, 12, the most widely used and preferred seats are London, Paris, Hong Kong, Singapore, Geneva, New York and Stockholm.

Chapter 1: Good Faith and the Validity and Interpretation of the Arbitration Agreement

1353. In certain cases, good faith has been invoked when addressing the validity of the arbitration agreement and, in particular, when ruling on the formal validity of the arbitration agreement (I.) and when deciding whether an arbitration agreement has been validly incorporated by reference (II.). Good faith has also been invoked, in certain cases, when interpreting the arbitration agreement (III.).

I. Good Faith and the Formal Validity of the Arbitration Agreement

1354. This section firstly examines the issue of the formal validity of the arbitration agreement (A.), before proceeding to examine the application of good faith to this issue (B.).

1355. Following a conclusion on the application of good faith to the formal validity of the arbitration agreement (C.), guidelines for its application by arbitral tribunals is proposed (D.).

A. Formal validity of the arbitration agreement

1356. This subsection discusses the formal requirements that may be applicable to some arbitration agreements (1.), and the consequences due to a lack of compliance with such requirements (2.).

1. Formal requirements

1357. The arbitration agreement, like any other contract, may be subject to rules concerning its form.[2198]

1358. The most common formal requirement is the requirement that the arbitration agreement should be in writing (a.).The specific formal requirements which are applicable to arbitration agreements can be found in both international conventions (b.) and in national arbitration laws (c.).

a. Writing requirement as the most common formal requirement

1359. The most common formal requirement, which is set out in international conventions as well as the majority of national arbitration laws, is the requirement that the arbitration agreement be recorded in writing,[2199] together with the related requirements for a signature or an exchange of documents.[2200]

1360. The justification for the most common form requirement – the writing requirement – is firstly to prove that the parties consented to resolve their dispute by

[2198] BORN, 697.
[2199] BORN, 697–698; STEINGRUBER, 105, §6.23.
[2200] BORN, 698.

arbitration rather than through the national courts and, secondly, to evidence the terms of the agreement.[2201]

b. Formal requirements under international conventions

1361. The formal requirement which crops up most often in the sphere of international commercial arbitration is the requirement set out at Article II NYC.[2202] This is due to the significant number of contracting parties to the NYC[2203] whose national courts are obliged to impose this 'maximum' form requirement when recognizing and enforcing foreign arbitral awards.[2204] Importantly, for our purposes, it is submitted that arbitral tribunals are also bound to give effect to the provisions of the NYC, and thus its formal validity requirements.[2205]

1362. Article II(1) NYC provides that only an "agreement in writing" under which the parties have submitted disputes to arbitration is covered by the NYC.[2206] Article II(2) NYC specifies that this agreement in writing "shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."[2207] Article I(2) of the European Convention on International Commercial Arbitration 1961 and Article 1 of the Inter-American Convention on International Commercial Arbitration 1975 both contain similar provisions.[2208]

2201 BORN, 701–702; LEW/MISTELIS/KRÖLL, 131, §7-7; STEINGRUBER, 105, §6.24.

2202 BORN, 704.

2203 As of 1 March 2023, there are 172 Contracting States. See <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2>, accessed 1 March 2023.

2204 BORN, 708–715. Many national courts have held that Article II(2) NYC also sets out a 'minimum' form requirement and therefore overrides national laws that have less stringent form requirements for international arbitration agreements. This approach, whilst supported by some commentators, is criticized by GARY BORN, see BORN, 670–674.

2205 BORN, 708.

2206 The text of the NYC can be found here: <http://www.newyorkconvention.org/new+york+convention+texts>, accessed 1 March 2023.

2207 *Ibid*.

2208 Article I(2) European Convention on International Commercial Arbitration, 21 April 1961 (available at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en>, accessed 1 March 2023) provides that it applies to "either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being signed by the parties or contained in an exchange of letters, telegrams, or in a communication by teleprinter." Article I Inter-American Convention on International Commercial Arbitration 1975 (available at < http://www.oas.org/juridico/english/Sigs/b-35.html >, accessed 1 March 2023) provides as follows with respect to the arbitration agreement: "The agreement shall be

c. Formal requirements under national arbitration laws

1363. A written form requirement is also found in many national arbitration laws.

1364. Indeed Article 178(1) PILA provides that "[t]he arbitration agreement is valid if it is in writing or in any other means which permits it to be evidenced by a text."[2209]

set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications."

[2209] Article 178(1) PILA provides in the French, German and Italian original as follows: "*La convention d'arbitrage est valable si elle est passée en la forme écrite ou par tout autre moyen permettant d'en établir la preuve par un texte*." "*Die Schiedsvereinbarung hat schriftlich oder in einer anderen Form zu erfolgen, die den Nachweis durch Text ermöglicht*." "*Il patto di arbitrato dev'essere fatto per scritto o in un'altra forma che consenta la prova per testo*." Cf Articles 12–15 SwCO which require that a contract must be made in writing and also be signed by all persons on whom it imposes obligations.

1365. Section 5 EAA,[2210] Section 2 FAA,[2211] Section 19 HKAO,[2212] Section 2A(3) SIAA[2213] as well as Article 7(2) (Option I) UNCITRAL Model Law on

[2210] Section 5 EAA provides as follows: "(1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing. The expressions "agreement", "agree" and "agreed" shall be construed accordingly. (2) There is an agreement in writing—(a) if the agreement is made in writing (whether or not it is signed by the parties), (b) if the agreement is made by exchange of communications in writing, or (c) if the agreement is evidenced in writing. (3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing. (4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement. (5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged. (6) References in this Part to anything being written or in writing include its being recorded by any means."

[2211] Section 2 FAA provides as follows: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an *agreement in writing* to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." (emphasis added).

[2212] Section 19 HKAO provides in relevant part as follows: "(1) […] (2) The arbitration agreement shall be in writing. (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy. (5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. (6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract. (2) Without affecting subsection (1), an arbitration agreement is in writing if—(a) the agreement is in a document, whether or not the document is signed by the parties to the agreement; or (b) the agreement, although made otherwise than in writing, is recorded by one of the parties to the agreement, or by a third party, with the authority of each of the parties to the agreement. (3) A reference in an agreement to a written form of arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement."

[2213] Section 2A SIAA provides in relevant part as follows: "(3) An arbitration agreement shall be in writing. (4) An arbitration agreement is in writing if its content is recorded in any form,

International Commercial Arbitration 1985, as amended in 2006,[2214] also require that arbitration agreements should be in writing.

1366. The writing requirement under the EAA and the HKAO is construed broadly. Hence, under these instruments, an arbitration agreement is in writing if: (i.) it is recorded by one of the parties or by a third party with the authority of the parties; (ii.) it is in some medium other than writing which refers to terms which are in writing; or (iii.) it is in an exchange of written submissions in which the existence of an arbitration agreement in some medium other than writing is alleged and not denied. In addition, writing includes being recorded by any means.[2215] The writing requirement under the FAA has also been interpreted liberally by the US courts.[2216]

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whether or not the arbitration agreement or contract has been concluded orally, by conduct or by other means. (5) The requirement that an arbitration agreement shall be in writing is satisfied by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference. (6) Where in any arbitral or legal proceedings, a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances in which the assertion calls for a reply and the assertion is not denied, there shall be deemed to be an effective arbitration agreement as between the parties to the proceedings. (7) A reference in a contract to any document containing an arbitration clause shall constitute an arbitration agreement in writing if the reference is such as to make that clause part of the contract. (8) A reference in a bill of lading to a charterparty or other document containing an arbitration clause shall constitute an arbitration agreement in writing if the reference is such as to make that clause part of the bill of lading."

2214 See also Article 7(2)-(4) (Option I) UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006, which provides as follows: "(2) The arbitration agreement shall be in writing. (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means. (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy. (5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. (6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract."

2215 With respect to the EAA see Section 5 (3)-(5) EAA and SUTTON/GILL/GEARING, §2-040; with respect to the HKAO, see Sections 19(1)(5) and 19(2)(b) and 19(3) HKAO.

2216 See, in this regard, BORN, 742–745; see also ALI, Restatement of the Law, The US Law of International Commercial and Investor-State Arbitration, Proposed Final Draft, 24 April 2019, 175, lines 13–14.

1367. In contrast to English, US, Singapore and Hong Kong arbitration law, French arbitration law does not impose any formal requirements on the arbitration agreement. Article 1507 FrCCP provides that an international arbitration agreement shall not be subject to any requirements as to its form.[2217] Similarly, the Swedish Arbitration Act 2019 does not subject the arbitration agreement to any formal requirements.[2218]

1368. Some national laws impose additional formal requirements to the writing requirement, for example, the requirement that the arbitration clause be in a certain font[2219] or that it include certain information, such as the choice of an arbitration institution.[2220]

2. Consequences of a lack of compliance with applicable formal requirements

1369. Depending on the national law or international convention in question, the non-compliance of an arbitration agreement with the formal requirements contained therein may either lead to the inapplicability of the relevant national law or

[2217] The FrCCP is available in English at < www.iaiparis.com/lois_en.asp>, accessed 1 March 2023. Article 1507 FrCCP provides in the French original as follows: "*La convention d'arbitrage n'est soumise à aucune condition de forme*."

[2218] Section 1, SAA 2019 provides as follows: "Disputes concerning matters in respect of which the parties may reach a settlement may, by agreement, be referred to one or several arbitrators for resolution. Such an agreement may relate to future disputes pertaining to a legal relationship specified in the agreement. The dispute may concern the existence of a particular fact." The SAA is available in English at < https://sccarbitrationinstitute.se/en/resource-library/legislation > accessed 1 March 2023; BORN, 751; see also POUDRET/BESSON, 162, §201.

[2219] Article 4(2) Brazilian Arbitration Law 1996 (available in English at https://cbar.org.br/site/en/brazilian-legislation/law-no-9-307-96-english/>, accessed 1 March 2023) used to provide that "[i]n adhesion contracts, the arbitration clause will only be valid if the adhering party initiates arbitral proceedings or if it expressly agrees to arbitration by means of an attached written document, or if it signs or initials the corresponding contractual clause, *inserted in boldface type.*" (emphasis added).

[2220] Article 16 PRC Arbitration Law 1994 (available in English at < http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383756.htm>, accessed 1 March 2023) provides that the arbitration clause must designate an arbitration commission. For further examples, see BORN, 764–765.

international convention[2221], or may lead to the nullity[2222] of the arbitration agreement.[2223]

1370. The issue of the formal validity of an arbitration agreement is, accordingly, an important one as it may potentially lead – in the case that the arbitration agreement is held to be invalid – to a national court refusing to refer a dispute to arbitration, to an arbitral tribunal denying jurisdiction over a dispute, to the annulment of the arbitral award or to the recognition and enforcement of an arbitral award being denied.[2224]

B. Application of good faith to the formal validity of the arbitration agreement

1371. Good faith may override the formal validity requirements found in the applicable law (1.) in the presence of certain contradictory conduct (2.).

1. Good faith overriding formal requirements in the applicable law

1372. Good faith may override the formal requirements found in the NYC (a.) as well as the formal requirements found in some national arbitration laws (b.).

2221 BORN, 698–699; with respect to the position under the NYC, see VAN DEN BERG, NYC, 182 stating that an arbitration agreement cannot be enforced under the NYC if it does not satisfy the formal validity requirements of Article II(2) NYC; with respect to the position under the FAA, see ALI, Restatement of the Law, The US Law of International Commercial and Investor-State Arbitration, Proposed Final Draft, 24 April 2019, 177, lines 15–18 stating that an arbitration agreement must be in writing in order to be enforced under the Federal Arbitration Act; with respect to the position under English arbitration law, see Section 5 EAA which provides that "(1) The provisions of this Part apply only where the arbitration agreement is in writing […]."

2222 BORN, 698–699; With respect to the position under Swiss arbitration law, see Article 178(1) PILA ("The arbitration agreement shall be valid if […]") and GIRSBERGER/VOSER, 94, §337.

2223 ADAM SAMUEL, Jurisdictional Problems in International Commercial Arbitration (1989) 75: "[t]here are essentially two types of laws concerning the formal validity of arbitral agreements. Failure to comply with rules of the first type result in the nullity of the agreement, while non-compliance with the second merely precludes the application of legislation designed to assist arbitration." Note, however, that under some national laws, writing is required for evidentiary purposes rather than a condition for the validity of the arbitration agreement, see STEINGRUBER, 107, §6.32.

2224 STEINGRUBER, 105, §6.23.

a. NYC

1373. According to VAN DEN BERG, the principle of good faith, or its more specific manifestation in the form of estoppel or the prohibition of contradictory behavior (*venire contra factum proprium*), overrides the formal requirements contained in Article II(2) NYC.[2225]

1374. According to VAN DEN BERG, the principle of good faith is enshrined in the NYC and its application is permitted by the terms of the NYC, notably Article V(1) NYC which provides that a court *may* refuse enforcement if the respondent proves one of the grounds for refusal of enforcement.[2226]

1375. This view has been endorsed by the arbitral tribunal in VIAC Case No SCH-4366[2227] as well as by some national courts.[2228] Some national courts have,

[2225] VAN DEN BERG, 185: "The third [preferred] solution is to regard the question of estoppel as a fundamental principle of good faith, which principle overrides the formalities required by Article II(2)."; see also BORRIS/HENNECKE, 266, §48: "That a party may, under certain circumstances, be precluded from relying on grounds for refusal of recognition and enforcement follows directly from the Convention itself, namely the principle of *venire contra factum proprium*."; PAULSSON, NYC, 78: "An overly formalistic approach to the requirements of Article II would violate a good faith understanding of it."; SCHRAMM/GEISINGER/PINSOLLE, 86–87: "certain authorities state that an arbitration agreement that does not fulfill the written form requirement of Article II(2) can still be considered to be valid in exceptional cases where the party contesting the validity of the arbitration agreement violates the principle of good faith."

[2226] VAN DEN BERG, 185; see also PAULSSON, NYC, 158 et seq (concerning the discretion that a decision-making authority applying the NYC has as a result of the term 'may') and WOLFF, 107–108, §53: "The prohibition of contradictory behavior (*venire contra factum proprium*) as a generally recognized subcategory of good faith is directly enshrined in the Convention (Art. V para. 48)."

[2227] Award in VIAC Case No SCH-4366, 15 June 1994, available at <http://www.unilex.info/cisg/case/55>, accessed 1 March 2023 stating that "to rely on one occasion on the arbitration clause signed only by the opposing party in order to assert one's own claims and, on a second occasion, when the opposing party goes to law, to dispute the validity of an arbitration clause agreed upon in exactly the same form, would not be compatible with the requirement of the observance of good faith and fair business dealings, which is also fully valid within the scope of the New York Convention (referring to VAN DEN BERG, 182 et seq)."

[2228] *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd*. [1994] 3 HKC 375; HCMP 2411/1992 (13 July 1994) (approving Van den Berg's third solution regarding the question of estoppel as a fundamental principle of good faith, which overrides the formalities required by Article II(2) NYC. See with respect to this case, SIMON GREENBERG, Chapter 16: Waiver, Good Faith and the Exercise of Discretion in Award Enforcement Proceedings: Kaplan J's Decisions in China Nanhai, in Hong Kong International Arbitration Centre (ed), International Arbitration: Issues, Perspectives and Practice: Liber Amicorum Neil Kaplan (Kluwer Law International 2018) 305–314; *Not indicated v Not*

however, refused to apply good faith in order to cure the lack of compliance with Article II(2) NYC.[2229]

b. National arbitration law

1376. Whether good faith overrides formal requirements contained in national arbitration laws is less clear. As noted by BORN, "[t]here has […] been little attention to the effect of principles of good faith on a party's right to challenge the formal validity of an arbitration agreement […]."[2230]

1377. Austrian courts have refused to apply good faith to cure the violation of a written form requirement imposed by Article 577(3) Austrian Code of Civil

indicated, Schleswig Court of Appeal, 85, 30 March 2000, (2006) 31 YB Comm Arb 652, 657: "the opinion that allows for a cure if arguments [on the merits] are entered into without reservation is based on the fact that also the prohibition of contradictory behavior is a legal principle included in the Convention that must be taken into account in the context of Art. II Convention […]."; *K Trading Company (Syria) v Bayerischen Motoren Werje AG (Germany)*, Higher Court of Appeal of Bavaria, 4Z Sch 005-04, 23 September 2004 (2005) 30 YB Comm Arb 568–573, 572: "It appears from the interpretation of Art. II Convention that the prohibition of contradictory behavior is a legal principle implied in the Convention […]."; SFSCD of 16 January 1995, 121 III 38 [45], (1996) 21 YB Comm Arb 690 (a case concerning the application of Article II NYC): "We must add that, in particular situations, a certain behaviour can replace compliance with a formal requirement according to the rules of good faith."; SFSCD 5A_441/2015 of 4 February 2016, c. 4.2 holding that the formal validity of the arbitration agreement could not be contested for the first time at the enforcement proceedings: "The duty to act in good faith and the prohibition of an abuse of rights are principles which are also valid in international relations, in particular with respect to the recognition and enforcement of foreign judgments and arbitral awards; this is a case of application of the rule that a party may not, when the outcome of the dispute is unfavourable to it, rely on a formal defect that it could have raised at an earlier stage in the proceedings […]. In international arbitration, case law has consistently held that, depending on the circumstances, "a given conduct may, under the rules of good faith, supplement the observance of a formal validity requirement" […]; this principle applies, in particular, to the grounds under the NYC to oppose the enforcement of the arbitral award." (informal English translation of the French original).

2229 *Robobar Limited v Finncold sas*, Italian Supreme Court of Cassation Decision, 28 October 1993, (1995) 20 YB Comm Arb 739, 741 concerning a preliminary ruling on jurisdiction and holding with respect to Article II NYC that "the formal requirement cannot be derogated from."; *Manufacturer (Netherlands) v. Buyer (Germany)*, Oberlandesgericht [Court of Appeal], Frankfurt am Main, 26 Sch 28/05, 26 June 2006 (2007) 32 YB Comm Arb 351–357, 353 holding that "preclusion (*Präklusion*) does not apply to issues concerning the written form under Art. II Convention […]."

2230 BORN, 752.

Procedure.[2231] Similarly, commentators are of the view that good faith cannot override a lack of compliance with the formal requirements set out in Section 1031 German Code of Civil Procedure.[2232]

1378. Conversely, with respect to Swiss arbitration law, commentators are of the view that a party may be prevented from invoking a lack of compliance with the formal requirements set out in Article 178(1) PILA when to do so would contravene the principle of good faith.[2233]

2. Contradictory conduct justifying the application of good faith

1379. Good faith may only override the applicable formal requirements in the presence of certain party conduct. This may include a party's contradictory conduct during a prior commercial relationship (a.), and, arguably, a party's performance of the contract (b.). This may also include a party's invocation of the arbitration agreement in prior court or arbitral proceedings (c.) and a party's participation in the arbitral proceedings without raising an objection (d.).

2231 FRANZ T. SCHWARZ/CHRISTIAN W. KONRAD, Article 15: Multi-Party Arbitration in FRANZ T. SCHWARZ/CHRISTIAN W. KONRAD, The Vienna Rules: A Commentary on International Arbitration in Austria, (Kluwer Law International 2009) 346, §15-097; OGH, 21 June 2005, 5 Ob 127/05w: "*Das Vertrauen des Vertragspartners auf einen äußeren Tatbestand oder die Berufung auf Treu und Glauben vermag über die Verletzung dieser Formvorschrift nicht hinwegzuhelfen*." ("Reliance by the contractual partner on an external fact or an argument based on good faith cannot [be used to justify] the violation of such a written form requirement.") (informal English translation of the German original).

2232 ROLF TRITTMANN/ INKA HANEFELD, Part II: Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Chapter II: Arbitration Agreement, § 1031 – Form of Arbitration Agreement, in Patricia Nacimiento/Stefan Michael Kröll, et al. (eds), Arbitration in Germany: The Model Law in Practice (2nd edn Kluwer Law International 2014) 107: "The form requirements for the arbitration agreement stipulated in § 1031 ZPO are mandatory and cannot be derogated from by general principles (for example, good faith considerations)."

2233 SFSCD 121 III 38 [45] of 16 January 1995 (although this case concerned the formal requirement of Article II NYC, it has been submitted that the same reasoning would apply to the formal requirement found in Article 178(1) PILA); BERGER/KELLERHALS, 148, §440; GIRSBERGER/VOSER, 99, §348; KAUFMANN-KOHLER/RIGOZZI, 109, §3.59; MÜLLER/RISKE, 80–81, §32.

a. Certain conduct during prior commercial relationships

1380. In certain cases, the prior conduct of the parties in their commercial relationship has justified the invocation of good faith in order to override the applicable formal validity requirements.

1381. For example, in a VIAC arbitration case, the relevant arbitration clause was contained in the acknowledgement of order sent by the seller to the buyer, which the latter never countersigned. The sole arbitrator held that this complied with the formal requirement of Article II(2) NYC but went on to hold that, in any event, "on the basis of the general legal principle of good faith", the buyer would be precluded from relying on the lack of compliance with this provision. This was because the buyer had concluded three similar contracts with the seller within three months and had relied on the arbitration agreement (which it had also not countersigned) in a dispute concerning the second of the three contracts. According to the tribunal, to allow the buyer to rely on the lack of compliance with formal requirements "would not be compatible with the requirement of the observance of good faith and fair business dealings, which is also fully valid within the scope of the New York Convention."[2234]

1382. In addition, in ICC Case No 3779, the parties had entered into three contracts concerning the same type of merchandise and all containing an ICC arbitration clause. However, whilst the first two contracts had been signed by the parties, the third contract was not signed by either party. The sole arbitrator noted that the third contract was not objected to within a reasonable timeframe, that the three contracts formed part of a group of contracts, economically speaking, and that there was a tacit acceptance of the arbitration clause in the third contract given the previous business relationship of the parties. The sole Belgian arbitrator thus held that it did not lack jurisdiction given the context of the parties' legal relationship and "their obligations of good faith". [2235]

1383. Finally, in the *Compagnie de Navigation* case, it was argued before the Swiss Federal Supreme Court that the arbitration clause was not formally valid pursuant to Article II(2) NYC as the shipper had not signed the bill of lading containing general conditions including an arbitration clause. The Swiss Federal

[2234] Award in VIAC Case No SCH-4366, 15 June 1994, available at < http://www.unilex.info/cisg/case/55>, §3.3 accessed 1 March 2023.

[2235] *Swiss seller v Dutch buyer*, Award, ICC Case No 3779, 13 August 1981, (1984) 9 YB Comm Arb 124–130: "If, in principle, silence does not mean acceptance, this meaning is, however, attributed to it in view of the circumstances, in particular, the previous business relations of the parties. Consequently, within the context of their juridical relation and according to their obligations of good faith, the exception of incompetence does not apply." In this case, it was not clear, however, which formal validity requirements the sole arbitrator was applying or, on which basis, good faith was applied.

Supreme Court held that "[…] in particular situations, a certain behaviour can replace compliance with a formal requirement according to the rules of good faith." The Supreme Court went on to hold that good faith could be relied on in this case as the parties had a long-standing business relationship during which they had frequently applied the general conditions containing the arbitration clause and the shipper had also filled in the bill of lading and returned it to the carrier. According to the Supreme Court: "[…] the carrier had the right to believe in good faith that the shipper, its business partner since several years, approved of the contractual documents which it had filled in itself."[2236]

b. Performance of the contract

1384. It has been argued by one Swiss commentator that good faith prevents a party from relying on the formal invalidity of an arbitration agreement when that party has performed the contract without raising an objection to the arbitration agreement.[2237]

1385. According to this commentator, such behaviour by the buyer constitutes acceptance not only of all substantive aspects of the contract but also the arbitration agreement contained therein. He submits that "the requirement to act in good faith would be violated if the buyer invoked the invalidity of the arbitration clause based on the argument that there has been no exchange of documents in respect of the arbitration clause."[2238]

1386. He adds that:

> [g]ood faith would be violated because no one can or should avail himself of his own shortcomings (the lack of a notification from buyer to seller that buyer does not agree

[2236] *Compagnie de Navigation et Transports SA v MSC-Mediterranean Shipping Company SA*, SFSCD 121 III 38 of 16 January 1995 c. 3. It has been argued that the arbitration agreement was in fact formally valid pursuant to Article II(2) NYC as there was an exchange of writings, see RICHARD HILL, Note – 16 January 1995 – Supreme Court (1996) 14 ASA Bull 488–495.

[2237] BLESSING, 173, who refers to the following scenario: "The seller transmits by fax a sales confirmation to the buyer which reflects the terms of the transaction and which contains a typical shortform of an arbitration clause such as "Disputes: ICC Arbitration in Zurich". The buyer, without any further correspondence, opens the letter of credit as required by the terms of the sales confirmation and undertakes further steps to implement his contractual obligation […]." See also NEIL KAPLAN, Is the Need for Writing Out of Step with Commercial Practice? (1996) 12 Arb Intl 27, 29 : "I have difficulty in seeing […] why if one party is sent a contract which includes an arbitration clause and that party acts on that contract and thus adopts it without any qualification, that party should be allowed to wash his hands of the arbitration clause but at the same time maintain an action for the price of the goods delivered or conversely sue for breach."

[2238] BLESSING, 173.

with the arbitration clause suggested in the sales confirmation). Moreover, a party should be estopped from taking an inconsistent standpoint (venire contra factum proprium), specifically where the acting party had inspired the other party's confidence i.e., the seller's confidence that the buyer, by proceeding with his performance under the sales confirmation, had fully accepted its terms including the arbitration clause.[2239]

1387. Notwithstanding the above advocated approach, in a case where purchase confirmations containing an arbitration clause were not objected to by the other party who performed the contract over a period of two years, the Italian Supreme Court of Cassation refused to apply good faith in order to cure the formal defects of the arbitration agreement pursuant to Article II NYC holding that "the formal requirement cannot be derogated from."[2240]

c. Invocation of the arbitration agreement in prior court/arbitral proceedings

1388. Commentators of the NYC have argued that in the event that a party invokes an arbitration agreement in prior court proceedings in support of its argument that a dispute should be referred to arbitration, good faith prevents such party from thereafter raising the formal invalidity of the arbitration agreement in the subsequent arbitral proceedings.[2241]

1389. Similarly, it has been submitted that it would be contrary to good faith for a party who has already relied on an arbitration agreement in a past arbitration to later challenge the formal validity of such agreement in a subsequent arbitration.[2242]

1390. Finally, it has also been argued that a party should not be able, on the basis of *venire contra factum proprium,* to rely on the invalidity of an arbitration agreement when that party has previously assured the other party that it would not invoke the invalidity of the arbitration agreement.[2243]

2239 *Ibid*.

2240 *Robobar Limited v Finncold sas*, Italian Supreme Court of Cassation Decision, 28 October 1993, (1995) 20 YB Comm Arb 739, 741.

2241 VAN DEN BERG, 182; WOLFF, 108, §53 (with respect to the validity of the arbitration agreement in general): "A party acts in a contradictory manner for example if it had previously relied on the arbitration agreement's validity and later contests this very validity."

2242 KAUFMANN-KOHLER/RIGOZZI, 113, §3.73.

2243 WOLFF, 108–109, §53 (with respect to the validity of the arbitration agreement in general): "A party acts in a contradictory manner for example if it had previously relied on the arbitration agreement's validity and later contests this very validity. Another example is that the party now contesting the arbitration agreement had previously assured the other party that it would not do so."

d. Participation in the arbitral proceedings without raising an objection

1391. Some national courts have relied on the concept of estoppel/*venire contra factum proprium* in order to prevent a party from relying on a formal defect with respect to the arbitration agreement under the NYC in setting aside or enforcement proceedings when that party has participated in the arbitral proceedings without raising an objection.[2244]

1392. Consistent with this approach, other national courts have confirmed that the principle of estoppel or *venire contra factum proprium* cannot be relied on to cure a formal defect with respect to the arbitration agreement under the NYC in the event that the party did not participate in the arbitration proceedings.[2245]

[2244] *K Trading Company (Syria) v Bayerischen Motoren Werje AG* (Germany), Higher Court of Appeal of Bavaria, 4Z Sch 005-04, 23 September 2004 (2005) 30 YB Comm Arb 568–573, 571–572: "It can be left open whether the parties validly concluded an arbitration agreement in writing, as required by Art. II(1) and (2) Convention, since the defendant participated in the arbitration without raising any objection and is therefore estopped from relying on a formal defect. It is no obstacle [to this conclusion] that Art. II Convention, other than Art. V(2) [1961 European Convention] or national legal systems, such as for instance Sect. 1031(6) ZPO, (5) does not explicitly provide that the lack of written form of the arbitration agreement may be thus cured. It appears from the interpretation of Art. II Convention that the prohibition of contradictory behavior is a legal principle implied in the Convention […]. Where, in violation of good faith, the formal invalidity of the arbitration agreement is raised [by a party who has] participated in the arbitration without raising any objection, this objection is not to be examined […]."; *Not indicated v Not indicated*, Schleswig Court of Appeal, 85, 30 March 2000, (2006) 31 YB Comm Arb 652, 657: "the opinion that allows for a cure if arguments [on the merits] are entered into without reservation is based on the fact that also the prohibition of contradictory behavior is a legal principle included in the Convention that must be taken into account in the context of Art. II Convention […]. "The court agrees with this opinion. The requirement of the written form in Art. II New York Convention was also met by entering into arguments [on the merits] by written statement without any reservation […]."; SFSCD 5A_441/2015 of 4 February 2016 (concerning the application of Article II NYC), c. 4.2 holding that it was contrary to good faith and constituted an abuse of right for the party to invoke the formal invalidity of the arbitration agreement for the first time during the enforcement proceedings.

[2245] *Seller v Buyer*, Celle Court of Appeal, 8 Sch 12/02, 18 September 2003, (2005) 30 YB Comm Arb 536, 539–540 (case in which the formal requirements under the NYC were applicable): "The defendant is not estopped from raising the objection of the lack of an arbitration agreement in writing because it did not raise it before the arbitral tribunal (according to the decision of the Commercial Court, which allegedly was not notified to the defendant). The defendant cannot be deemed to have submitted to arbitration (pursuant to Sect. 295 and Sect. 1027 ZPO), because it did not participate in the arbitration proceedings."; *Exporter (Yugoslavia) v Importer (Germany)*, Higher Court of Bavaria Decision, 4Z Sch 16/02, 12 December 2002, (2004) 29 YB Comm Arb 761, 766 (enforcement proceedings) (holding that there was no waiver of the objection of the lack of arbitration agreement when the party did not make any statement on the merits at all before the arbitral tribunal).

1393. The above approach is supported by commentators of the NYC.[2246]

1394. In this regard, some national arbitration laws provide that when a party fails to raise an objection with respect to the validity of the arbitration agreement during the arbitral proceedings, it has waived its right to do so. Thus, under Swiss law, a party is deemed to have waived its right to invoke the lack of compliance of the arbitration agreement with formal validity requirements pursuant to Article 186(2) PILA when it fails to raise it during the arbitral proceedings.[2247] Section 1031(6) German ZPO also explicitly provides that submitting to the proceedings on the merits remedies formal deficiencies.[2248] Section 31(1) EAA provides that objections with respect to the substantive jurisdiction of the arbitral tribunal must be made no later than when a party makes a first step in the proceedings.[2249] Other national arbitration laws contain general waiver provisions according to which a party who knows that any requirement under the arbitration agreement has not been complied with and proceeds with the arbitration without objecting, waives the right to object.[2250]

2246 BORRIS/HENNECKE, 267–268, §51 and 271, §62 (submitting that a party that has not participated in the arbitral proceedings is not prevented from later raising grounds for refusal of enforcement of the award); VAN DEN BERG, 182, who suggests that cooperation in the appointment of the arbitrators is sufficient to estop a party from arguing that the arbitration agreement is formally invalid.

2247 Article 186(2) PILA provides that any objection as to jurisdiction must be raised before any defence on the merits. This provision is, according to the Swiss Federal Supreme Court, an application of the principle of good faith (see e.g., SFSCD 143 III 578 [585], SFSCD 143 III 462 [465], SFSCD 128 III 50 [57], SFSCD 119 II 386 [388]); see also BERGER/KELLERHALS, 148–149, §441 (submitting that if a party enters an unconditional appearance by filing a defense on the merits, it has irrevocably waived its right to object to the arbitral tribunal's jurisdiction); GIRSBERGER/VOSER, 99, §348; KAUFMANN-KOHLER/RIGOZZI, 113, §3.73; MÜLLER/RISKE, 80, §32.

2248 Section 1036(1) German ZPO provides in the German original as follows: "*Der Mangel der Form wird durch die Einlassung auf die schiedsgerichtliche Verhandlung zur Hauptsache geheilt*." An informal English translation of this section provides as follows: "The deficiency of form shall be remedied by the submission to the arbitral tribunal's hearing of the principal proceedings."

2249 Section 31(1) EAA provides as follows: "An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction."

2250 Article 4 UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006, provides as follows: "A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object." Section 11 HKAO and Section 4 SIAA contain the same provision.

1395. Similarly, some institutional arbitration rules contain general provisions according to which, when a party proceeds with the arbitration and fails to raise an objection during the arbitral proceedings, it has waived its right to do so.[2251]

1396. In some instances, national courts have found that a new formally valid arbitration agreement in accordance with the NYC has been formed by the parties' participation in the arbitral proceedings.[2252]

1397. This is in line with the approach taken by some national arbitration laws. In this regard, Section 5(5) EAA provides that "[a]n exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged." Article 7(5) UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006, also provides that: "[…] an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other." Section 2A(6) SIAA,[2253]

[2251] See e.g., Article 40 ICC Rules of Arbitration 2021 which provides as follows: "A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object." Article 32(1) LCIA Arbitration Rules 2020 provides as follows: "A party who knows that any provision of the Arbitration Agreement has not been complied with and yet proceeds with the arbitration without promptly stating its objection as to such non-compliance to the Registrar (before the formation of the Arbitral Tribunal) or the Arbitral Tribunal (after its formation), shall be treated as having irrevocably waived its right to object for all purposes."

[2252] *Shipowner v Time charterer*, Hamburg Court of Appeal, 30 July 1998, (2000) 25 YB Comm Arb 641: "[…] [a]fter the claimant appointed an arbitrator, the defendant also appointed an arbitrator […] It clearly appears from the exchange of communications [between the parties] that both parties wished the dispute to be settled by the arbitral tribunal. This is an arbitration agreement based on an exchange of letters in the sense of Art. II(2)."

[2253] Section 2A(6) SIAA provides as follows: "Where in any arbitral or legal proceedings, a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances in which the assertion calls for a reply and the assertion is not denied, there shall be deemed to be an effective arbitration agreement as between the parties to the proceedings."

Article 19 HKAO[2254] and Article 9(5) Spanish Arbitration Act 2003, as amended in 2011, contain similar provisions.[2255]

C. Conclusion

1398. As we have seen, formal validity requirements, (most notably the "in writing" requirement and the related requirement for a signature or an exchange of documents), applicable to the arbitration agreement can be found in the NYC and in some national arbitration laws.[2256]

1399. It is submitted that the issue of the formal validity of the arbitration agreement – and thus the potential application of good faith to this issue – will not arise frequently. This is mainly because many of the most popular applicable national arbitration laws either do not contain any formal validity requirements (e.g., SAA, Articles 1504 et seq. FrCCP) or have adopted an expansive view of the 'in writing' requirement (e.g., EAA, HKAO, FAA).[2257]

1400. Notwithstanding the infrequency with which this issue may arise, the consequences of a lack of compliance with the applicable formal requirements are potentially significant. Indeed, in the event of non-compliance with the relevant formal requirements, an arbitration agreement may be declared invalid or may simply be unenforceable under the relevant instrument.[2258]

1401. According to the majority of the legal doctrine and case law, good faith underlies the NYC and can override the formal validity requirements contained

[2254] Section 19(5) HKAO provides as follows: "Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other."

[2255] Article 9(5) Spanish Arbitration Act 2003, as amended in 2011, provides as follows: "There is an arbitration agreement when in an exchange of statements of claim and defence the existence of an arbitration agreement is alleged by one party and not denied by the other. See, in this regard, LAURA LOZANO CORREA, Spanish Arbitration Act, Article 9 [Form and content of the arbitral agreement], in Carlos González-Bueno (ed), The Spanish Arbitration Act: A Commentary, (Dykinson, S.L. 2016) 59 stating that "Such provision is based on the principle *"venire contra factum proprium"*. Therefore, if a party has not previously denied the existence of the arbitration agreement, it cannot do so at a later stage. Similarly, if a party has claimed the existence of the arbitration agreement, it cannot afterwards deny the arbitration agreement without contravening the good faith principles."

[2256] See above, para. 1357 et seq.

[2257] See paras. 1366–1367.

[2258] See para. 1369 et seq.

therein[2259] According to commentators and case law, good faith may also override the formal validity requirements found in Article 178(1) PILA.[2260]

1402. Conversely, good faith may not override the formal validity requirements found in Austrian and German arbitration law.[2261]

1403. Even if good faith may, in principle, override the formal requirements under the applicable law, it may only do so, in a particular case, in the presence of certain contradictory conduct.[2262] In this context, good faith thus serves to prohibit contradictory behaviour.

1404. Indeed, in the cases where good faith may override the applicable formal requirements, it will prevent the party who has acted in a contradictory manner from relying on the lack of compliance of the arbitration agreement with the applicable formal validity requirements. In this respect, good faith is used as a corrective tool.

1405. In the cases where the non-compliance with the relevant formal requirements leads to the invalidity of the arbitration agreement, good faith – when applied to override the applicable formal requirements – also has a validation function. Indeed, the recourse to good faith leads to the arbitration agreement being declared valid when it would otherwise be declared invalid.

1406. It is noteworthy that, in some cases, the recourse to good faith was superfluous. Indeed, in a VIAC arbitration case, the sole arbitrator held that the arbitration clause contained in the acknowledgement of order sent by the seller to the buyer, which the latter never countersigned did in fact comply with the formal requirement of Article II(2) NYC.[2263] The sole arbitrator, however, went on to hold that, in any event, "on the basis of the general legal principle of good faith", the buyer would be precluded from relying on the lack of compliance with this provision.[2264] This superfluous recourse to good faith may be explained by a certain desire of the sole arbitrator to highlight the bad faith conduct of the seller in raising the lack of compliance of the arbitration agreement with the relevant formal validity requirements and to thereby show the arbitrator's disapproval of the same.[2265]

2259 See para. 1373 et seq.

2260 See para. 1378.

2261 See para. 1377.

2262 See para. 1379 et seq.

2263 Award in VIAC Case No SCH-4366, 15 June 1994, available at < http://www.unilex.info/cisg/case/55>, §3.3 accessed 1 March 2023.

2264 *Ibid*.

2265 See, in this regard, para. 1130

D. Proposed Guidelines

1407. Before applying good faith to the issue of the formal validity of the arbitration agreement, an arbitral tribunal should first set out the relevant formal requirements of the national arbitration law at the seat of the arbitration.

1408. In the event that the arbitration agreement does not comply with the applicable formal requirements, an arbitral tribunal should then determine whether or not good faith can override such formal requirements under the applicable law.[2266]

1409. If good faith may, in principle, override the relevant formal requirements under the applicable law, it is submitted that in the presence of certain contradictory conduct (as set out in more detail below), the relevant formal requirements can be disregarded. It should, however, be borne in mind that whether certain conduct is contrary to good faith will always ultimately depend on the facts of the case in question.

1410. First, if a party acts in a manner during the parties' prior commercial relationship which shows that it approved of the arbitration agreement, good faith may prevent this party from thereafter invoking the formal invalidity of the same. This may be the case, for example, where there were similar or related prior contracts containing arbitration agreements between the parties which did not suffer from any formal defects or which the party invoking the formal defect had previous relied on.

1411. Second, in the author's view, good faith should not be applied to override formal validity requirements when a party has not objected to the arbitration agreement and has merely performed the contract (in spite of the legal doctrine to the contrary[2267]). In the author's view, this would be going too far as it would be equivalent to eliminating the formal requirements for the validity of an arbitration agreement and instead imposing a positive obligation on the parties to object immediately to a formally invalid arbitration clause included in a contract.

1412. Third, if a party, prior to the arbitral proceedings, relies on the arbitration agreement either before a national court or another arbitral tribunal or assures the other party that it will not rely on the agreement's lack of compliance with formal requirements, good faith or the prohibition of contradictory behaviour can be applied to prevent that party from thereafter invoking the formal invalidity of the arbitration agreement.

1413. Fourth, if a party participates in the arbitral proceedings without objection, good faith may prevent that party from invoking thereafter a lack of compliance of

[2266] See para. 1372 et seq.

[2267] See para. 1384 et seq.

the arbitration agreement with formal requirements. Good faith, however, has a limited role to play in this context. This is because many national arbitration laws and institutional arbitration rules expressly provide that in such a case: (i.) a party is deemed to have waived its right to invoke the lack of compliance with formal validity requirements; or that (ii.) a new formally valid arbitration agreement has been concluded. In this case, an arbitral tribunal should give preference to the relevant specific provisions on waiver or formation of a new arbitration agreement rather than the general principle of good faith.

II. Good Faith and the Incorporation of an Arbitration Agreement by Reference

1414. This section explores the issue of the incorporation of an arbitration agreement by reference (A.) and the application of good faith to this issue (B.).

1415. Following a conclusion on the application of good faith to the issue of the incorporation of an arbitration agreement by reference (C.), guidelines for its application by arbitral tribunals will be proposed (D.).

A. Incorporation of an arbitration agreement by reference

1416. In an international contract, it is common to find a clause seeking to incorporate the terms, including the arbitration agreement, from another contract, the rules of a trade association, one of the party's general terms and conditions or another non-contractual source.[2268]

1417. Such arbitration agreements by reference give rise to two issues, namely: (i.) whether a party has consented to the arbitration agreement; and (ii.) whether the arbitration agreement is formally valid.[2269]

1418. There is no provision in the NYC explicitly dealing with the issue of the incorporation of an arbitration agreement by reference.[2270]

1419. Such arbitration agreements by reference raise two issues under the NYC, namely whether the arbitration agreement: (i.) fulfills the "in writing" requirement of Article II(2) NYC; and (ii.) is substantively valid under the applicable national law.[2271]

[2268] BERGER/KELLERHALS, 153, §451; BORN, 877–878; FOUCHARD/GAILLARD/GOLDMAN, 272, §491; GIRSBERGER/VOSER, 82, §290; POUDRET/BESSON, 170, §213.

[2269] POUDRET/BESSON, 170, §213 stating in general that the incorporation of an arbitration agreement by reference gives rise to both a substantive issue (namely whether the addressee of an offer referring to a document containing an arbitration clause effectively consented to such clause which is a matter of interpretation of that party's consent) and a formal issue (whether the intent was expressed in the form required). See also BERGER/KELLERHALS, 153, §452; GIRSBERGER/VOSER, 82, §290.

[2270] BORN, 878; TOBY LANDAU, The Requirement of A Written Form for An Arbitration Agreement: When "Written" Means "Oral", in Albert van den Berg (ed), International Commercial Arbitration: Important Contemporary Questions 19, 30 (ICCA Congress Series No. 11 2003): "Unlike the Model Law, the New York Convention contains no provision dealing specifically with arbitration clauses incorporated by reference."

[2271] SCHRAMM/GEISINGER/PINSOLLE, 62 (with respect to the issue of the substantive validity of the arbitration agreement) 88.

1420. In order to comply with the "in writing" requirement of Article II(2) NYC, the arbitration agreement referred to must be in writing and the reference itself must also be in writing.[2272]

1421. It is debated by commentators, and unclear in the case law, whether the issue of the specificity of the reference should be resolved under the national law governing the substantive validity of the arbitration agreement or under Article II(2) NYC.[2273]

1422. Putting aside this debate, it has been held that a specific reference to the arbitration agreement in a secondary document will be sufficient to incorporate that arbitration agreement.[2274]

1423. In some circumstances, a general reference to the secondary document was held not to be sufficient to validly incorporate the arbitration agreement found therein.[2275] Conversely, in other circumstances, such a general reference was

[2272] SCHRAMM/GEISINGER/PINSOLLE, 88.

[2273] *Idem*, 88–89.

[2274] *Tradax Export S.A. v. Amoco Iran Oil Company* (formerly Amoco Overseas Oil Company), SFSCD of 7 February 1984, (1986) 11 YB Comm Arb 532–535, 534: "Generally speaking, when one is dealing with an agreement which refers to a separate contract in which the requirement for arbitration is set out, usually in the general conditions, foreign case law and opinion seem to accept the validity of the latter, when there is a specific reference to the arbitration clause."; *Granitalia v. Agenzia Marittima Sorrentini*, Corte di Cassazione, Sezioni Unite [Supreme Court, Plenary Session], SU 1328, 22 December 2000 (2002) 27 YB Comm Arb 506–509 (case holding that an arbitration agreement in a charter party was not incorporated where a bill of lading made a general reference to the charter party without any specific reference to the arbitration agreement); *Louis Dreyfus Commodities v. Cereal Mangimi s.r.l.* (Italy), Corte di Cassazione, Plenary Session, 11529, 19 May 2009, (2009) 34 YB Comm Arb 649–652 (holding that only an express and specific reference to an arbitration clause in a separate document (*per relationem perfectam* reference) meets the 1958 New York Convention's requirement of an arbitration agreement in writing).; *DIETF Ltd. v. RF AG*, Obergericht [Court of Appeal], Basel-Land, 5 July 1994 (1996) 21 YB Comm Arb 685, 687: "It is generally acknowledged that the requirements of Art. II(2) are met when the contract signed by the parties contains a specific reference to general conditions including an arbitration clause. In this case it is not necessary that these conditions have been communicated to the other party, as that party has been warned of the existence of the arbitration clause contained in the general conditions and can thus request to see it." See also SCHRAMM/GEISINGER/PINSOLLE, 90.

[2275] OLG Oldenburg, unreported decision of 1 February 2005 (9 SchH 03/04), available at <www.dis-arb.de>, accessed 1 March 2023 (Oldenburg Court of Appeal, Germany) (holding that a general reference to terms and conditions in the invoice was insufficient and that a specific reference to the arbitration agreement would have been required in a case where the recipient party did not receive the terms and conditions); *Bothell v. Hitachi Zosen Corp*., 97 F. Supp. 2d 1048, 1053 (2001) 26 YB Comm Arb 939 (at 943–945) (US District Court for the Western District of Washington, US) holding that the vague references to "General Terms

deemed to be sufficient where: (i.) the party had previously received a copy of the secondary document and was therefore aware of its contents;[2276] (ii.) the secondary document was printed on the back of the contract;[2277] and (iii.) both parties were experienced business people and thus deemed to know the terms contained in the secondary documents used regularly in their line of business.[2278]

1424. Some national arbitration laws contain provisions recognizing the possibility for parties to incorporate an arbitration agreement by reference. Hence, Article 7(2) UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006, provides that an arbitration agreement is formed through incorporation by reference where "the reference is such as to make that clause part of the contract."[2279] Section 6(2) EAA, Section 2A(7) SIAA[2280] and Section 19(1)(6) HKAO[2281] contain similar provisions. These provisions, however, do not elaborate on the specific conditions required in order for an arbitration agreement to be validly incorporated by reference. Accordingly, case law has

and Conditions for Purchasing" was not sufficient to incorporate the arbitration agreement contained therein.

2276 *Bomar Oil NV v. ETAP – l'Entreprise Tunisienne d'Activités Pétrolières*, French Cour de Cassation Decision of 9 November 1993 (1995) 20 YB Comm Arb 660–662. See also *Tyco Valves & Controls Distribution GmbH v. Tippins*, *Inc.*, (2007) 32 YB Comm Arb 890 (at 894 et seq.) (US District Court for the Western District of Pennsylvania, US) (Party A had sent its standard conditions including an arbitration clause to party B, who initialed each page and sent them back. A issued a purchase order some time afterwards that made reference to these standard conditions and explicitly stated that they prevailed over the terms and conditions printed on the back of the purchase order. The Court confirmed the validity of the arbitration clause in the initialed standard conditions).

2277 Bayerisches Oberstes Landesgericht [Court of Appeal of Bavaria], 17 September 1998 (1999) 24 YB Comm Arb 645–647.

2278 *Tradax Export S.A. v. Amoco Iran Oil Company* (formerly Amoco Overseas Oil Company), SFSCD of 7 February 1984, (1986) 11 YB Comm Arb 532, 535.

2279 See BORN 880–883 for a discussion of the case law rendered by national courts under Article 7(2) UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006. See also UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, 30–31.

2280 Section 2A(7) SIAA provides as follows: "A reference in a contract to any document containing an arbitration clause shall constitute an arbitration agreement in writing if the reference is such as to make that clause part of the contract."

2281 Section 19(1)(6) HKAO provides as follows: "The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract."

elaborated on the specific conditions required for the valid incorporation of an arbitration agreement by reference.[2282]

1425. The FrCCP, the SAA, the PILA, and the FAA do not expressly address the issue of the incorporation of an arbitration agreement by reference. Case law, however, has explicitly recognized this possibility and has addressed the conditions under which an incorporation of an arbitration agreement by reference will be valid under such laws.[2283]

[2282] With respect to England, see *Aughton Limited v. MF Kent Services Limited* [1991] 57 BLR 6, in which the Court of Appeal held that an arbitration clause "must be expressly referred to in the document which is relied on as the incorporating writing. It is not incorporated by a mere reference to the terms and conditions of contract to which the arbitration clause constitutes a collateral contract." In this case, a reference in a subcontract to another contract's terms and conditions did not suffice to incorporate the arbitration agreement from that contract. However, more recent decisions have distinguished this case as a two-contract case and have taken a more lenient approach, holding that, in principle, even a general reference is sufficient, at least in the case where the terms are readily available and the transaction is between experienced business users (see *Sea Trade Maritime Corp v Hellenic Mutual War Risks Association* (Bermuda) Ltd [2006] EWHC 2530 (Comm) holding that "General words of incorporation may serve to incorporate an arbitration clause save in the exceptional two-contract cases to which I have referred in which some express reference to arbitration or perhaps provision of the relevant clause is also required."; *Habas sinai Ve Tibbi Gazlar Isthisal Endustri AS v. Sometal SAL* [2010] EWHC 29 (Comm) holding that general words of incorporation are capable of incorporating terms which include an arbitration clause without specifically referring to it. This was a case where the parties had used the words "all the rest will be the same as our previous contracts."). With respect to Singapore, see *Concordia Agritrading Pte Ltd v. Cornelder Hoogewerff* [1999] SGHC 269 (Singapore High Ct.) holding that there must be an intention to incorporate an arbitration agreement and that if the words of incorporation are specific, then this intention may have been clearly expressed. With respect to Hong Kong, see *Fai Tak Eng'g Co. Ltd v. Sui Chong Constr. & Eng'g Co. Ltd*, [2009] HKDC 141 (Hong Kong District Court) holding that a general reference to a standard form of contract commonly used in Hong Kong in the parties' letter of intent was sufficient to incorporate the arbitration agreement in the standard form of contract; *Ho Fat Sing v. Hop Tai Constr. Co. Ltd*, [2008] HKDC 339 (Hong Kong District Court) holding that a general reference to the Main Contract in the parties' Subject Contract was sufficient to incorporate the arbitration agreement from the Main Contract.

[2283] With respect to US law, see e.g. BORN, 883–886; with respect to Swedish law, see ANDERS RELDEN/OLA JACOB FRANK, Chapter 4 The Arbitration Agreement, in Ulf Franke/Annette Magnusson, et al. (eds), International Arbitration in Sweden: A Practitioner's Guide, (2nd edn Kluwer Law International 2021) 106, §§24–26; with respect to Swiss law, see e.g. MÜLLER/RISKE, §27 & §§63–68; with respect to French law, see FOUCHARD/GAILLARD/GOLDMAN, §§491 et seq and SERAGLINI/ORTSCHEIDT, 199–201, §153.

B. Application of good faith

1426. Good faith is a tool employed by some national laws in order to determine whether a party has consented, or should be deemed to have consented, to the arbitration agreement by reference.

1427. In such cases, good faith is presumably applied on the basis of the law deemed applicable to the issue of the incorporation of the arbitration agreement i.e., the law applicable to the formal or substantive validity of the arbitration agreement.[2284]

1428. In one case before the Efeteio Court of Appeal, the Court was faced with the issue of whether an arbitration agreement contained in the seller's general conditions which were referred to in the order confirmation and also attached to the same had been validly incorporated. The Court noted that arbitration was a usual and familiar way of resolving disputes in the trade sector concerned and that the parties had not expressed any objection thereto. The Court went on to hold that "it is reasonable to assume, based on the principles of good faith and on trade usages, that an arbitration clause may be included in [the seller's general conditions] with respect to the settlement of the disputes arising out of that specific contract and that in this way the prerequisite of the written form is satisfied."[2285]

1429. In another case, the Higher Regional Court of Cologne held that an arbitration agreement contained in the seller's terms and conditions which were referred to in the order confirmation was also validly incorporated. The Court held that

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[2284] This was the case in *N. v Fédération Equestre Internationale*, Federal Tribunal, 1st Civil division, 31 October 1996, in Mathieu Reeb (ed), Digest of CAS Awards I 1986-1998, Digest of CAS Awards Series Set, Vol 1 (Kluwer Law International 1998) 585–592, where the Swiss Federal Supreme Court applied the principle of trust, derived from the general principle of good faith, on the basis of Swiss law (the law applicable to the formal and substantive validity of the arbitration agreement). Cf *Company A (Greece) v Company B (Germany)*, Efeteio Court of Appeal Athens, Decision no. 7195 of 2007 (2009) 34 YB Comm Arb 545–547, in which there was no mention of the source of the principle of good faith although this decision concerned the issue of whether or not the arbitration agreement was in writing in accordance with Article II NYC. Good faith may accordingly have been applied due to its status as a principle underlying the NYC. In *Seller v Buyer*, Higher Regional Court of Cologne, 16 December 1992 (1996) 21 YB Comm Arb 535–541, the source of good faith was presumably German law although it is not expressly stated. In this case, the arbitration agreement did not comply with the form requirement of Article II(2) NYC. Accordingly, the Court applied, by virtue of Article VII(1) NYC, a more favourable provision of German law according to which an arbitration agreement does not need to satisfy any requirement of form when it is concluded between merchants (Article 1027(2) German ZPO). The court went on to hold that an arbitration agreement had been tacitly included.

[2285] *Company A (Greece) v Company B (Germany)*, Efeteio Court of Appeal Athens, Decision no. 7195 of 2007 (2009) 34 YB Comm Arb 545–547.

good faith would have required the buyer to expressly object to the arbitration agreement given that the buyer had accepted performance under the contract and had contested other points in the order confirmation. [2286]

1430. Under Swiss law, in accordance with the principle of good faith, an arbitration agreement will be deemed to be incorporated by reference when a specific reference is made to this agreement in the other document and the document referred to is either attached to the contract, or is known to the other party, for example, through previous commercial dealings between the same parties.[2287]

1431. In addition – in a case involving experienced business people – even if a party does not have access to, or knowledge of the arbitration agreement, this party is deemed nevertheless to have consented to the arbitration agreement when it has been explicitly alerted to this agreement unless the content of the arbitration agreement is different to the usages prevailing in the parties' business.[2288]

1432. The application of the principle of good faith further means that a global reference to a document containing an arbitration agreement will not suffice to incorporate the latter where the party relying on the arbitration agreement knows or should have known that the other party was not ready to submit to arbitration or only under different conditions.[2289]

1433. On the other hand, if the party agrees to the global reference without objecting and is aware of the arbitration agreement, then the arbitration agreement is deemed to be incorporated.[2290]

1434. Indeed, in a case before the Swiss Federal Supreme Court, the claimant had signed a model agreement referring to the regulations of the *Fédération Equestre Internationale* ("FEI") which contained an arbitration agreement.[2291] The Swiss Federal Supreme Court held that this was a case of a global reference

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2286 *Seller v Buyer*, Higher Regional Court of Cologne, 16 December 1992 (1996) 21 YB Comm Arb 535–541, 546: "Those who, like defendant, discuss certain points of a contractual offer, but do not discuss other points similarly therein contained and apparently considered essential by the contractual partner, show that they have no objection against these contractual points […] An explicit objection would have otherwise been expected of them, in good faith, which would have made it possible to the other party to further negotiate the incorporation question."

2287 BÄRTSCH/SCHRAMM, 17; MÜLLER/RISKE, 90, §64.

2288 BÄRTSCH/SCHRAMM, 17.

2289 BÄRTSCH/SCHRAMM, 17; BERGER/KELLERHALS, 155, §459; MÜLLER/RISKE, 90, §66.

2290 MÜLLER/RISKE, 90, §66. See also BERGER/KELLERHALS, 154–155, §457 who are of the view that a global reference should be sufficient where the transaction is between business partners who are familiar with the relevant trade sector.

2291 *N v Fédération Equestre Internationale*, Swiss Federal Supreme Court, 1st Civil division, 31 October 1996, in Mathieu Reeb (ed), Digest of CAS Awards I 1986-1998, Digest of CAS Awards Series Set, Vol 1 (Kluwer Law International 1998) 585–592, 590.

which had been accepted in writing and, as a result, the issue to be resolved was one of consent rather than form and that the principle of trust (derived from the principle of good faith) would therefore come into play.[2292] The Supreme Court held that the arbitration agreement had been validly incorporated, in accordance with the principle of trust, as the claimant was aware of the arbitration clause in the FEI regulations at the time that the claimant signed the model agreement and had even made use of the arbitration clause in a prior dispute.[2293]

C. Conclusion

1435. As we have seen, good faith has been applied on the basis of the law deemed applicable to the issue of the incorporation of the arbitration agreement in order to ascertain whether a party has consented, or is deemed to have consented, on the facts of that case, to the arbitration agreement by reference.[2294]

1436. In this context, the interpretative function of good faith has thus been employed.

1437. Good faith, however, has a limited role to play in this context. This is because case law has been developed by many national courts on the issue of the incorporation of an arbitration agreement by reference without recourse to good faith. Indeed, it appears to have only been invoked in cases where the relevant applicable national law utilizes the interpretative function of good faith when ascertaining whether the parties have consented to, or should be deemed to have consented to, terms or clauses incorporated by reference into their contract.[2295]

D. Proposed Guidelines

1438. With respect to the incorporation of an arbitration agreement by reference, good faith should only be applied by an arbitral tribunal to this issue if the applicable law to this issue directs that good faith may be applied in order to determine whether terms or clauses (and, in particular, arbitration agreements) from other documents may be incorporated into a contract.

1439. If the applicable law directs that good faith may be employed in determining whether an arbitration agreement is incorporated by reference, the following examples may aid in determining whether, on the facts of that particular case, good faith may support, or mitigate against, the incorporation of the arbitration

2292 *Ibid*.
2293 *Ibid*.
2294 See above, para. 1392 et seq.
2295 With respect to Swiss law, see above para. 446.

agreement by reference. It should, however, be borne in mind that whether good faith supports the incorporation of the arbitration agreement by reference or not will always ultimately depend on the facts of the case in question.

1440. In accordance with good faith, an arbitration agreement may be deemed to be validly incorporated in the following circumstances: (i.) where an arbitration agreement is contained in general conditions which are referred to and are attached to an order confirmation; (ii.) where an arbitration agreement is contained in general terms and conditions referred to in the order confirmation in circumstances where the party has accepted performance under the contract, has contested other points in the order confirmation and did not object to the arbitration agreement therein; (iii.) where a specific reference is made to the arbitration agreement in the other document and the document referred to is either attached to the contract, or is known to the other party, for example, through previous commercial dealings between the same parties; (iv.) where a specific reference is made in a contract between experienced business users to the arbitration agreement in the other document even though such document is not attached and is not known to the parties (unless the arbitration agreement contains unusual terms for that trade sector); and (v.) where there is a global reference to a document containing an arbitration agreement if the party agrees to the global reference without objecting and is aware of the arbitration agreement.

1441. In accordance with good faith, an arbitration agreement may not be deemed to be validly incorporated in a case where there is a global reference to a document containing an arbitration agreement and the party relying on the arbitration agreement knows or should have known that the other party was not ready to submit to arbitration or only under different conditions.

III. Good Faith and the Interpretation of the Arbitration Agreement

1442. This section explores the rules generally applicable to the interpretation of the arbitration agreement (A.) before turning specifically to the application of good faith to the interpretation of the arbitration agreement (B.).

1443. Following a conclusion on the application of good faith to the interpretation of the arbitration agreement (C.), guidelines for the application of good faith by arbitral tribunals to the interpretation of the arbitration agreement will be proposed (D.).

A. Rules generally applicable to the interpretation of the arbitration agreement

1444. International conventions do not expressly address the issue of the interpretation of the arbitration agreement and the majority of national arbitration laws do not prescribe any specific rules of construction.[2296]

1445. Most arbitral tribunals and national courts have applied the law applicable to the arbitration agreement,[2297] and, more specifically, the general principles of contract interpretation found in this law, to the interpretation of the arbitration agreement.[2298]

[2296] BORN, 1424–1425.

[2297] POUDRET/BESSON, 264, §304 stating that the interpretation of arbitration agreement is governed, in principle, by the law applicable to such agreements; See however, BORN, 1505–1508 stating that some courts, notably US courts, have applied the law of the judicial enforcement forum.

[2298] BORN, 1426; With respect to Swedish law, see ANDERS RELDEN/JACOB FRANK, Chapter 4 The Arbitration Agreement, in Ulf Franke/Annette Magnusson et al. (eds), International Arbitration in Sweden: A Practitioner's Guide, (2nd edn Kluwer Law International 2021) 111, §44; With respect to Swiss law, see SFSCD 142 III 296 [305], SFSCD 140 III 367 [370], SFSCD 140 III 134 [138–139], SFSCD 138 III 29 [35–36] holding that the general rules of contract interpretation apply to the interpretation of arbitration agreements; BERGER/KELLERHALS, 163, §477 et seq.; KAUFMANN-KOHLER/ RIGOZZI, 127, §3.120 et seq. With respect to New York law, see e.g. *Haviland v. Goldman, Sachs & Co*., 736 F.Supp. 507, 509 (SDNY 1990) ("Arbitration agreements are contractual obligations which are governed by general principles of contract interpretation."); With respect to Singaporean law, see *Insigma Tech. Co. Ltd v. Alstom Tech. Ltd*, [2009] 3 SLR(R) 936, §30 (Singapore Court of Appeal.): "An arbitration agreement […] should be construed like any other commercial agreement […]." With respect to French law, see J-L. DELVOLVÉ/G-H. POINTON/J. ROUCHE, French

1446. Some arbitral tribunals, however, have applied general canons of contract interpretation to the interpretation of the arbitration agreement.[2299]

1447. This is in line with the stance of the French courts, who have not taken a conflict-of-law approach and who have directly applied general canons of contractual interpretation to the interpretation of the arbitration agreement.

1448. The Paris Court of Appeal has thus held that the intention of the parties must be ascertained by applying the following general rules: (i.) the principle of interpretation in good faith according to which the actual intent of the parties should prevail over the literal meaning of the terms employed and one party should not be allowed to avoid commitments freely made but expressed in a clumsy manner; (ii.) the principle of effectiveness according to which, when the parties insert an arbitration clause in their contract, it must be presumed that their intention was to establish an effective mechanism for settling the disputes covered by the arbitration clause; and (iii.) the principle of interpretation against the person who drafted the obscure or ambiguous clause.[2300]

Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration (2nd edn 2009), 73, §111: "In seeking to ascertain the true intentions of the parties, the arbitral tribunal (and later the court controlling the award) will be guided by the rule whereby contracts must be interpreted on the basis that the parties gave their mutual undertakings in good faith, with the result that the real will of the parties must prevail over any apparent expression thereof, and, in the presence of an ambiguous clause, preference is to be given to the interpretation which will render it effective. These rules are of general application in French contract law, and are to be found in Articles 1156 et seq. of the Code Civil." and SERAGLINI/ORTSCHEIDT, 236, §191.

2299 See BORN, 1426; *S. v State X*, Award, ICC Case No. 10623, 7 December 2001 (2003) 21 ASA Bull 82–111, 106 (relying on "generally accepted principle of contract interpretation […] that contracts should be interpreted as a whole, so that their provisions make sense together"); *Distributor v Manufacturer*, Partial Award, ICC Case No. 7920, 1993 (1998) 23 YB Comm Arb 80–85 (applying "general principles of contract interpretation" to "reach […] the same result" as other methods of analysis); *A v B and C*, Interim Award on Jurisdiction, VIAC Case No. SCH-5024 A, 5 August 2008, (2010) 2 International Journal of Arab Arbitration, 341–354, 344 (applying general principles of interpretation of contracts under civil law).

2300 *SA Alfac v. Société Irmac Importacão, comércia e industria LTDa*, Court of Appeal, 7 February 2002, (2002) Rev Arb 413–417, 416: "*Considérant qu'en l'état du principe d'autonomie de la clause d'arbitrage international, sous réserve de l'ordre public international, la volonté réelle des parties doit être recherchée notamment au regard des règles générales suivantes: principe d'interprétation de bonne foi qui implique de rechercher la volonté réelle des parties au-delà du sens littéral des termes et de ne pas permettre à l'une d'elles de se soustraire à des engagements librement consentis mais exprimés de manière maladroit; principe d'effet utile selon lequel, lorsque les parties insèrent une clause d'arbitrage dans leur contrat, on doit présumer que leur intention a été d'établir un mécanisme efficace pour le règlement des litiges visés par la clause compromissoire; principe d'interprétation contre*

B. Application of good faith

1449. Good faith has been applied to the interpretation of the arbitration agreement due to its inclusion in the general rules of contractual interpretation of the applicable law (1.). Good faith has also been directly applied to the interpretation of the arbitration agreement as a general canon of contract interpretation (2.).

1. Indirect application of good faith as a general rule of contractual interpretation found in the applicable law

1450. Many national laws include, in their general rules on contractual interpretation, the rule that contracts should be interpreted in good faith.[2301] Some non-national laws similarly include the general rule that contracts should be interpreted in good faith.[2302] This rule of good faith interpretation may thus be applied to the interpretation of the arbitration agreement due to its inclusion in the general rules on contractual interpretation of the applicable national or non-national law.

1451. The content of the rule of good faith interpretation under national and non-national law has been previously discussed[2303] and is well-established by the relevant case law and legal doctrine.

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celui qui a rédigé la clause obscure ou ambiguë." ("Considering that, in view of the principle of autonomy of the international arbitration clause, subject to international public policy, the real intention of the parties must be sought, in particular with regard to the following general rules : the principle of interpretation in good faith, which implies seeking the real intent of the parties beyond the literal meaning of the terms and not allowing one of them to evade commitments freely given but awkwardly expressed; the principle of effectiveness, according to which, when the parties include an arbitration clause in their contract, it must be presumed that their intention was to establish an effective mechanism for the settlement of the disputes covered by the arbitration clause; the principle of interpretation against the party who has drafted the obscure or ambiguous clause.") (informal English translation of the French original).

2301 See the description with respect to Swiss law (para. 443 et seq.), French law (para. 484 et seq.), German law (para. 565 et seq.), and law of the PRC (para. 619) which all apply good faith to the interpretation of contracts.

2302 See the description with respect to the PECL (para. 911), the DCFR (para. 954) and the PLACL (para. 993) which all apply good faith to the interpretation of contracts.

2303 See the description with respect to Swiss law (para. 443 et seq.), French law (para. 484 et seq.), German law (para. 565 et seq.), the law of the PRC (para. 619), the PECL (para. 911), the DCFR (para. 954) and the PLACL (para. 993).

1452. Arbitral tribunals have often applied the rule of good faith interpretation, derived from the general contract rules of the applicable national law, to the interpretation of the arbitration agreement.

1453. For example, in ICC Case No 19127 (unknown applicable law, Geneva (Switzerland)), the arbitral tribunal applied the rule of good faith interpretation on the basis of Swiss law to the interpretation of the arbitration agreement.[2304] Similarly, the arbitral tribunal in ICC Case No 7929 (law of Delaware, Zurich (Switzerland)) applied Swiss law to the interpretation of the arbitration agreement.[2305] Referring to the case law of the Swiss Federal Supreme Court, it held that:

> […] an arbitral tribunal should construe the validity and scope of an arbitration clause in accordance with the general principles of the interpretation of contracts i.e., seeking the real and common intent of parties, based on the wording of the clause, and the principle of *confiance* or good faith.[2306]

1454. Similarly, the Swiss Federal Supreme Court has applied the general rules of contractual interpretation under Swiss law (Article 18 SwCO) to arbitration agreements and has repeatedly held that when the parties' true and common intention cannot be ascertained (the so-called "subjective interpretation"), the parties' declarations should be interpreted objectively in accordance with the principle of good faith i.e., as a reasonable person would have understood the parties' declarations in light of all the circumstances at the time of conclusion of the contract.[2307]

2. Direct application of good faith as a general canon of contract interpretation

1455. Good faith has been directly applied to the interpretation of the arbitration agreement as a general canon of contract interpretation.

1456. According to LEW/MISTELIS/KRÖLL, "[a]rbitration agreements are in general submitted to the same type of rules of interpretation as all other contracts. […] Declarations should be interpreted in good faith."[2308] Indeed, the principle of

[2304] ICC Case No 19127 (2017) 42 YB Comm Arb 251–279, 270.
[2305] ICC Case No 7929 (2000) 25 YB Comm Arb 312, 317.
[2306] *Ibid*.
[2307] SFSCD 142 III 296 [305], 142 III 239 [253], 140 III 134 [138–139], 138 III 29 [35–36]. See also KAUFMANN-KOHLER/RIGOZZI, 127, §3.121; MÜLLER/RISKE, 88, §59.
[2308] LEW/MISTELIS/KRÖLL, 150, §7-60; RUBINO-SAMMARTANO, 343.

interpretation in good faith is considered to be "[t]he first and most widely accepted principle of interpretation applied to arbitration agreements."[2309]

1457. According to (mainly French) commentators, the application of good faith means that the parties' true and common intention, as distinct from their declared intention, should be ascertained without being limited to a literal interpretation of the arbitration agreement.[2310]

1458. Various specific rules of interpretation can be derived from the general rule of interpretation in good faith. These rules all aim to ascertain the parties' true and common intention.

1459. The first specific rule looks at the context in which the arbitration agreement was concluded in order to ascertain the consequences that the parties reasonably and legitimately envisaged.[2311]

[2309] FOUCHARD/GAILLARD/GOLDMAN, 257, §477; STEINGRUBER, 126, §7.29; see also BORN, 1428.

[2310] FOUCHARD/GAILLARD/GOLDMAN, 257, §477; GIRSBERGER/VOSER, 80–81, §284; ROBIN, 723. See further J-L DELVOLVÉ/G-H POINTON/J ROUCHE, French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration, (2nd ed 2009) 73, §111: "In seeking to ascertain the true intentions of the parties, the arbitral tribunal (and later the court controlling the award) will be guided by the rule whereby contracts must be interpreted on the basis that the parties gave their mutual undertakings *in good faith*, with the result that the real will of the parties must prevail over any apparent expression thereof […]. (emphasis added)".

[2311] FOUCHARD/GAILLARD/GOLDMAN, 257, §477; GIRSBERGER/VOSER, 80–81, §284; ICSID Case No ARB/03/28, *Duke Energy International Peru Investments No 1 Ltd v Republic of Peru* (L. Yves Fortier, C.C., Q.C. (President, Canada), Dr. Guido Santiago Tawil (Argentina) and Dr. Pedro Nikken (Venezuela)), Decision on Jurisdiction, 1 February 2006, §76; *Société Ouest-Africaine des Bétons Industriels (SOABI) v The Republic of Senegal*, Jurisdictional Decision, ICSID Case No. ARB/82/1, 1 August 1984 (1992) 17 YB Comm Arb 42, 52, §4-10: "In the opinion of the Tribunal an arbitration agreement, like any agreement, must be interpreted with due respect for the principle of good faith, that is to say, taking account of the consequences of their commitments which the parties must be considered to have reasonably and legitimately contemplated." *Amco Asia Corp. et al v Republic of Indonesia*, ICSID Case No ARB/81/8 (Prof. Berthold Goldman (France), Chairman; Prof. Dr.jur. Isi Foighel (Denmark); Edward W. Rubin (Canada)), Decision on Jurisdiction, 25 September 1983, 1 ICSID Rep. 394, §14: "Moreover – and this is again a general principle of law – any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged."

1460. The second specific rule looks at the conduct of the parties following the signature of the arbitration agreement as a reflection of how the parties actually perceived the agreement.[2312]

1461. The third specific rule invites the interpreter to interpret the arbitration agreement as a whole.[2313]

1462. A concrete example of a bad faith interpretation would be where a party relies on an interpretation which is based on the ambiguous wording of the arbitration clause in order to escape its obligations which is contrary to the context in which the contract was concluded or contrary to the very purpose of the contract.[2314] In particular, it has been held that a party should not be allowed to escape from an obligation which it freely agreed to but which was not adequately expressed in the contract.[2315]

1463. Some arbitral tribunals have directly applied good faith to the interpretation of the arbitration agreement due to its nature as a general canon of contractual interpretation.

1464. For example, in ICC case No 17146 (law of the employer's company, Paris), the arbitral tribunal adopted the approach of the French courts in directly applying the principles of good faith, effective interpretation and interpretation *contra proferentem* to the interpretation of the arbitration agreement whilst also confirming that the interpretation principles under the governing law were similar and included the principle of good faith and fair dealing.[2316]

2312 FOUCHARD/GAILLARD/GOLDMAN, 257, §477; see ICC Case No 5065 of 1986 (1987) 4 JDI 1039–1045 in which the arbitral tribunal held that, *inter alia*, the principle of good faith interpretation required the taking into account of the common intent of all parties concerned as revealed by the negotiations and the subsequent performance of the agreement ("*Ces principes* [les principes généraux du droit et les usages et en particulier, le principe de la bonne foi] *exigent, au nom de la justice, que toutes les parties prennent en consideration l'intention commune de chacune d'entres elles, telle que révélée par les circonstances de la négociation et l'exécution ultérieure de tout accord apparent*."). This differs from the position under Swiss law whereby one is not permitted to look at the parties' conduct following the signature of the contract when interpreting a contract in accordance with good faith, see para. 445.

2313 FOUCHARD/GAILLARD/GOLDMAN, 257, §477; ROBIN, 723–724; STEINGRUBER, 127, §7.30.

2314 FOUCHARD/GAILLARD/GOLDMAN, 257, §477; see also ROBIN, 723.

2315 *SA Alfac v Société Irmac Importacão, comércia e industria LTDa*, Paris Court of Appeal, 7 February 2002 (2002) Rev Arb 413.

2316 ICC Case 17146 of March 2013 (2015) 1 ICC Bull 114, §§399–402.

C. Conclusion

1465. In the majority of cases, the rule of good faith interpretation is applied to the arbitration agreement on the basis of its inclusion in the general rules of contract interpretation found in the applicable national or non-national law.

1466. The application of this rule gives rise to few difficulties given that its content is well established by legal doctrine and case law under the relevant applicable law.

1467. In some cases, the rule of good faith interpretation is directly applied to the arbitration agreement as a general canon of contract interpretation.

1468. The content of the rule of good faith interpretation, as a general canon of contractual interpretation applicable to the interpretation of the arbitration agreement, has been largely influenced by French law on contractual interpretation. This may be due to the fact that the French courts have taken the unique approach of not applying a national law to the issue of the interpretation of the arbitration agreement but directly applying general rules, including the general principle of interpretation in good faith, to the arbitration agreement.

D. Proposed Guidelines

1469. In cases where an arbitral tribunal is directed to apply the general contractual interpretation rules of a certain national law to the interpretation of the arbitration agreement, then such arbitral tribunal may apply the rule of good faith interpretation if such rule forms part of these general contractual rules.

1470. When applying the rule of good faith interpretation under the applicable law to the arbitration agreement, the arbitral tribunal should, in general, determine the content of the rule of good faith interpretation in accordance with the case law and legal doctrine of the applicable law.

1471. In cases where an arbitral tribunal is directed to apply non-national rules to the interpretation of the arbitration agreement (in line, for example, with the approach taken by the French courts), then this arbitral tribunal may directly apply the rule of good faith interpretation to the arbitration agreement. As set out above,[2317] the general canon of contractual interpretation in good faith has the following content: the parties' true and common intention, as distinct from their declared intention, should be ascertained without being limited to a literal interpretation of the arbitration agreement. Accordingly, one should look at the context in which the arbitration agreement was concluded in order to ascertain the

[2317] See para. 1457 et seq.

consequences that the parties reasonably and legitimately envisaged. One should also look at the conduct of the parties following the signature of the arbitration agreement as a reflection of how the parties actually perceived the agreement. Finally, the arbitration agreement should be interpreted as a whole.

Chapter 2: Good Faith and the Parties to the Arbitration Agreement

1472. Good faith has been employed in many contexts concerning the parties to the arbitration agreement. Good faith has been invoked in connection with the capacity of a party to enter into an arbitration agreement (I.) as well as a party's power or authority to enter into an arbitration agreement (II.).[2318] Good faith has further been invoked in relation to the extension of an arbitration agreement to a non-signatory (III.).

[2318] It is important to distinguish between a party's capacity to enter into an arbitration agreement and a party's power or authority to enter into the same. The issue of capacity arises when a party enters into an arbitration agreement in its own name and on its own account whereas the issue of power or authority arises when a party enters into an arbitration agreement on behalf of another person or entity that has the capacity to arbitrate, see FOUCHARD/GAILLARD/GOLDMAN, 242, §453; RAZUMOV, 260; STEINGRUBER, 32, §3.04.

I. Good Faith and the Capacity of a Party to Enter into an Arbitration Agreement

1473. This section examines the requirement of the capacity to arbitrate (A.), before proceeding to examine the application of good faith to the issue of a party's capacity to arbitrate (B.).

1474. Following a conclusion on the application of good faith by arbitral tribunals to the issue of the capacity to arbitrate (C.), guidelines for its application is proposed (D.).

A. Requirement of the capacity to arbitrate

1475. As is the rule with respect to contracts in general, contracting parties must have the legal capacity to conclude an arbitration agreement.[2319] The general rule is that any natural or legal person who has the capacity to enter into a valid contract also has the capacity to conclude a valid arbitration agreement.[2320]

1476. The issue of a lack of a party's capacity to arbitrate has arisen infrequently in "pure" international commercial arbitration cases i.e., in cases between two or more individuals or commercial entities.[2321] In such cases, the issue of whether the parties have the capacity to arbitrate is usually governed by the law of the natural person's domicile or the law of the place of incorporation of the relevant company.[2322]

1477. Conversely, in international commercial arbitrations involving a State party, the issue of the State party's lack of capacity to arbitrate has arisen frequently.[2323] This is due to State laws forbidding the State party from referring disputes to arbitration or imposing restrictions on a State party's ability to agree to arbitration, such as the necessity for authorizations to be obtained in advance.[2324]

1478. For example, Article 4 of the Venezuela Commercial Arbitration Act 1998 provides that when one of the parties to the arbitration agreement is a State party,

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2319 REDFERN/HUNTER, §2.33; STEINGRUBER, 32, §3.05; SUTTON/GILL/GEARING, 104, §3-004.

2320 LEW/MISTELIS/KRÖLL, 140, §7.33; REDFERN/HUNTER, §2.33; STEINGRUBER, 32, §3.06.

2321 RAZUMOV, 260; STEINGRUBER, 33, §3.08.

2322 REDFERN/HUNTER, §2.36 & §2.37; According to BORN, most arbitral tribunals and national courts take a conflict of laws approach and have applied either the law of the State where a party is organized or domiciled or the law governing the arbitration agreement to the issue of a party's capacity to conclude an arbitration agreement (BORN, 769–770).

2323 BORN, 772; RAZUMOV, 264; STEINGRUBER, 35, §3.17.

2324 BORN, 772; POUDRET/BESSON, 182, §228; REDFERN/HUNTER, §2.40.

the arbitration agreement must be specifically approved by the relevant minister.[2325]

1479. A party's lack of capacity to arbitrate has significant consequences. Indeed, as it entails the invalidity of the arbitration agreement, it may lead to an arbitral tribunal declaring that it has no jurisdiction,[2326] to a national court refusing to refer the parties to arbitration,[2327] and to a national court setting aside,[2328] or

[2325] Article 4 of the Venezuela Commercial Arbitration Act 1998 provides as follows: "Should one of the parties of an arbitration agreement be a corporation in which the Republic, the States, the Municipalities and the Autonomous Agencies hold a participation equal to or higher than fifty percent (50%) of its equity or a corporation in which the aforesaid persons hold a participation equal to or higher than fifty percent (50%) of its equity, the agreement requires approval from the appropriate corporate entity and the written authorization from the directive Minister to be valid. The arbitration agreement shall specify the type of arbitration and the number of Arbitrators, in no case to be lower than three (3)." An English translation of the Venezuela Commercial Arbitration Act 1998 can be found here <https://arbitrationlaw.com/sites/default/files/free_pdfs/Venezula%20Commercial%20Arbitration%20Act.pdf>, accessed 1 March 2023.

[2326] For example, in *Vivendi SA et al. vs. Deutsche Telekom AG et al. and Elektrim SA et al.,* SFSCD of 31 March 2009, 4A_428/2008, the Swiss Federal Supreme Court upheld an interim award issued by an ICC arbitral tribunal seated in Switzerland in which the arbitral tribunal had discontinued the arbitration proceedings against the Polish entity Elektrim SA due to a lack of jurisdiction caused by the latter's lack of capacity following a declaration of its bankruptcy after the initiation of the arbitration.

[2327] Article II(3) New York Convention provides as follows: "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, *unless it finds that the said agreement is null and void*, inoperative or incapable of being performed" (emphasis added). According to BORN, 766: "Although Article II of the Convention does not refer to capacity, it is clear that the contracting parties' capacity is a requirement for valid arbitration agreements at all stages of the arbitral process, including in actions to enforce arbitration agreements under Article II (as well as arbitral awards under Articles III, IV and V). Thus, Article II must be read to incorporate "incapacity" in its reference to arbitration "agreements," or alternatively to agreements that are "null and void," and therefore not to require giving effect to an arbitration agreement where one of the parties lacked legal capacity." Article 8.1 UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006, similarly provides as follows: "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration *unless it finds that the agreement is null and void*, inoperative or incapable of being performed." (emphasis added). See also REDFERN/HUNTER, §2.34.

[2328] Article 34(2) UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006, provides as follows: "(2) An arbitral award may be set aside by the court specified in article 6 only if: (a) the party making the application furnishes proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the

rejecting the recognition or enforcement[2329] of any arbitral award potentially rendered.

B. Application of good faith

1480. Good faith has been applied to the issue of whether a State party has the capacity to enter into an arbitration agreement either on the basis of its inclusion in the law deemed applicable to the issue of the capacity of the State party to arbitrate or directly as part of transnational public policy (1.). Good faith has been invoked in order to override the requirement of the capacity to arbitrate in the presence of certain contradictory conduct (2.).

1481. Notwithstanding, it is not clear whether good faith is the (most) appropriate tool to prevent a State party from invoking an alleged lack of capacity to arbitrate (3.).

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said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State […]". Section 81 HKAO and Section 34(2)(a)(i) SIAA contain similar provisions. Article 190(2)(b) PILA, Section 67 EAA, Article 1520(1) FrCCP and Article 34(1) SAA provide that an award may be set aside if the arbitral tribunal did not have jurisdiction or the arbitration agreement was not valid and thus encompass the situation where the arbitration agreement was invalid due to one party's lack of capacity to arbitrate.

2329 Indeed Article V(1)(a) NYC provides that recognition and enforcement of the award may be refused when the parties "were, under the law applicable to them, under some incapacity." Article 36 UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006, also provides as follows: "(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made […]". Article 54(1) SAA similarly provides that "A foreign award shall not be recognised and enforced in Sweden where the party against whom the award is invoked proves that the parties to the arbitration agreement, pursuant to the law applicable to them, lacked capacity to enter into the agreement or were not properly represented, […]." Section 86(1) HKAO and Section 36(1)(a)(i) SIAA contain similar provisions. According to §4-10 of Proposed Final Draft dated 24 April 2019 of the ALI Restatement of the Law, The US Law of International Commercial and Investor-State Arbitration, 170: "(a) Upon request, a court may deny recognition or enforcement of a foreign Convention award to the extent that no arbitration agreement exists or the arbitration agreement is invalid. (b) A court determines the existence of the arbitration agreement referred to in subsection (a), or the capacity of a party to enter into the agreement, pursuant to the law indicated by the choice-of-law rules of the forum." See also in this regard REDFERN/HUNTER, §2.34.

1. Good faith applied on the basis of the law applicable to the issue of capacity or as part of transnational public policy

1482. Good faith has been applied to the issue of a State party's capacity to arbitrate on the basis of its inclusion in the law applicable to the party's capacity to arbitrate or directly as a principle of international/transnational public policy.

1483. Thus, in ICC Case No 5103, the arbitral tribunal applied Tunisian law to the issue of the Tunisian State party's capacity to arbitrate and also applied good faith to this issue on the basis of the Tunisian legal doctrine and case law.[2330]

1484. Conversely, in ICC Case 6474 (Swiss law, Zurich (Switzerland)), the arbitral tribunal, in connection with the issue of a State party's capacity to arbitrate, directly applied the general principle of good faith as a principle of international/transnational public policy[2331].[2332] In this regard, PAULSSON has noted that good faith has often been applied by international arbitrators in such cases as an imperative norm without reference to any specific national law.[2333]

2. Good faith overriding the requirement of the capacity to arbitrate in the presence of contradictory conduct

1485. Good faith has been applied in order to override the requirement of a State party's capacity to arbitrate in the presence of certain contradictory conduct, namely the contradictory conduct of the State party who, at the outset, fails to disclose the relevant provisions of its national law preventing, or restricting, it from entering into an arbitration agreement and thereafter invokes such provisions in order to attempt to escape from the arbitration.[2334]

2330 ICC Case No 5103, (1988) JDI 1206, 1209.

2331 According to BORN, 2926 et seq.: "This term is usually employed to refer to certain fundamental principles of law that are considered to be common among developed legal systems, and to have mandatory application, regardless of what the parties have agreed."

2332 ICC Case No 6474 of 1992 (2000) 25 YB Comm Arb 279 at §12 and §36.

2333 PAULSSON, Internal Law, 90; see also ANDREAS BUCHER, *Le nouvel arbitrage international en Suisse* (Helbing & Lichtenhahn 1989) 105–106, §303. This also appears to be the approach taken in *Benteler et al. v Belgian State*, Award, 18 November 1983 (1984) 1 J Intl Arb 190 in which the arbitral tribunal reached its decision on the basis of Article II Geneva Convention that the Belgian State had the power to validly enter into the arbitration agreement and in which the arbitral tribunal stated *obiter* that "one can also conceive that the international arbitrator dismiss the argument based on this prohibition when the circumstances of the case are such that the State would go *contra factum proprium* in raising it."

2334 WEBSTER/BÜHLER, 147, §6-142: "In essence, by entering into and participating in the performance of a contract with an arbitration clause, the government entity is implicitly representing

1486. As put by one leading commentator:

> The prevailing view is that it would be contrary to fundamental principles of good faith for a State party to an international contract, having freely accepted an arbitration clause, later to invoke its own legislation as grounds for contesting the validity of its agreement to arbitrate.[2335]

1487. For example, in ICC Case No 5103 (rules common to French and Tunisian law and *ex aequo et bono* powers if necessary, Paris (France)), the arbitral tribunal held that the provisions of Tunisian law which allegedly led to the incapacity of the Tunisian State party to arbitrate were not applicable and that, even if they were, it would be – according to Tunisian doctrine and case law – contrary to good faith for the Tunisian State party to invoke such provisions when it had previously failed to disclose such provisions.[2336]

1488. In addition, in ICC Case No 6474 (Swiss law, Zurich (Switzerland)), the arbitral tribunal held that by application of Article 177 PILA[2337], the State party could not argue that its officials lacked the capacity to bind the State party to arbitration. The arbitral tribunal subsequently added that, even if the respondent was not a State party within the meaning of Article 177 PILA, general principles of

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that it has the capacity to agree to the clause. Therefore, to argue the contrary in arbitral proceedings, may well be contrary to basic principles of good faith." See also KOTUBY/SOBOTA, 159.

2335 PAULSSON, Internal Law, 90; see also BORN, 777; POUDRET/BESSON, 192, §235: "Numerous authors submit that a state which disputes its own undertaking to submit to arbitration acts contrary to good faith […]"; WEBSTER/BÜHLER, 147, §6-142. See further the comments of Judge KEBA MBAYE of the International Court of Justice and former First President of the Supreme Court of Senegal, in International Arbitration: 60 Years On - A Look at the Future 293, at 296 (collection of papers from the 60th Anniversary of the International Chamber of Commerce Court of Arbitration, ICC Publication No. 412, 1984): "For a long time the French-speaking countries of Africa, following the French example, had thought that they could avoid arbitration, by citing procedural rules forbidding them to agree to internal arbitration […] This situation […] was sapping the confidence of the economic partners of these countries. It was a question of pure good faith. A state must not be allowed to cite the provisions of its law in order to escape from an arbitration that it has already accepted."

2336 ICC Case No 5103 (1988) JDI 1206, 1209: "*jurisprudence et doctrine tunisiennes estiment* […] *qu'il serait contraire à la bonne foi qu'une entreprise publique, qui a dissimulé dans un premier temps l'existence de telles règles de droit interne, les invoque ultérieurement, si tel est son intérêt dans un litige déterminé, pour denier la validité d'un engagement qu'elle a souscrit pourtant en parfait connaissance de cause*." ("Tunisian case law and legal doctrine is of the view that it would be contrary to good faith for a public company, which initially concealed the existence of such rules of national law, to invoke them subsequently, if that is its interest in a particular dispute, to deny the validity of an undertaking which it has nevertheless entered into with full knowledge of the facts.") (informal English translation of the French original).

2337 See below, para. 1492.

good faith, estoppel, or appearance of authority would prevent the State party from relying on its lack of capacity in order to annul its previous undertaking to arbitrate.[2338]

3. Good faith as an appropriate tool to prevent a State party from relying on a lack of capacity to arbitrate?

1489. It is debatable whether good faith is the (most) appropriate tool to employ in order to prevent a State party from relying on a lack of capacity to arbitrate. Indeed, some international and national provisions now expressly prevent a State party from invoking its own national law in order to avoid arbitration (a.) and many other techniques have been employed by national courts and arbitral tribunals in order to prevent a State party from invoking a lack of capacity to arbitrate (b.). Moreover, the rule that a State party acts contrary to good faith by firstly entering into an arbitration agreement and thereafter invoking a prohibition or restriction under its own internal law in order to avoid arbitration has been criticized due to its failure to take into account the other party's awareness of such prohibition or restriction (c.).

a. International/national provisions preventing a State party from invoking its own internal law to avoid arbitration

1490. Provisions can be found at both the national and international level which prohibit a State party from invoking its lack of capacity to arbitrate.

1491. Hence, at the international level, Article II(1) ECICA[2339] provides that "legal persons considered by the law which is applicable to them as 'legal persons of

[2338] ICC Case No 6474 of 1992 (2000) 25 YB Comm Arb 279 at §12: "the general principle of good faith – or what may be considered as one of its possible forms, the international concept of 'estoppel' ('*non venire contra factum proprium*') – would seem to suffice to prohibit, under the above-mentioned assumption, the defendant from relying on its own non-recognition by the international community in order to avoid or annul its previous undertaking to arbitrate under the contracts." See also *Benteler et al. v Belgian State*, Award, 18 November 1983 (1984) 1 J Intl Arb 184, 190 stating that "one can also conceive that the international arbitrator dismiss the argument based on this prohibition when the circumstances of the case are such that the State would go *contra factum proprium* in raising it."

[2339] In comparison to the NYC, the ECICA has not won widespread international acceptance. As of 1 March 2023, the ECICA has only 31 parties, see < https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en>, accessed 1 March 2023.

public law' have the right to conclude valid arbitration agreements."[2340] A resolution of the Institute of International Law of 1989 also provides that "a State, a state enterprise or a state entity cannot invoke incapacity to arbitrate in order to resist arbitration to which it has agreed."[2341]

1492. At the national level, Article 177(2) PILA, provides that "[i]f a party to the arbitration agreement is a state or enterprise or organization controlled by it, it cannot rely on its own law in order to contest its capacity to be a party to an arbitration or the arbitrability of a dispute covered by the arbitration agreement."[2342] This Article is said to be based on the principle of good faith, and more specifically, the prohibition of contradictory conduct.[2343] Article 2(2) of the Spanish Arbitration Act of 2003 also contains a similar provision.[2344]

b. Other techniques employed in order to prevent a State party from invoking a lack of capacity to arbitrate

1493. National courts and arbitral tribunals have also resorted to many different techniques in order to prevent a State party from invoking a lack of capacity under its own internal law to enter into an arbitration agreement.[2345]

2340 The text of the ECICA can be found here: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en>, accessed 1 March 2023.

2341 Article 5, Resolution on Arbitration Between States, State Enterprises or State Entities and Foreign Enterprises, Institute of International Law, 12 September 1989, (1991) 16 YB Comm Arb 233.

2342 The provisions of Chapter 12 PILA can be found in English here <https://swissarbitration.org/swiss-arbitration/swiss-arbitration-laws/>, accessed 1 March 2023. This provision was applied in ICC Case No 6474 (2000) 25 YB Comm Arb 279 to prevent the State party from alleging that its ministers did not have the capacity to bind the State party, see para. 1488.

2343 KAUFMANN-KOHLER/RIGOZZI, 126, §3.116. See also *Republic of Transkei vs/ F.J. Berger, Steyr-Daimler-Puch AG*, SFSCD 4P.126/1992 and 4P.128/1992, (1993) ASA Bull 68, 74. See further, in this regard, CHRISTOPH MÜLLER/SABRINA PEARSON, Swiss Case Law in International Arbitration (3rd edn Schulthess 2019) 43.

2344 "Where the arbitration is international and one of the parties is a State or company, organization or enterprise controlled by a State, that party shall not invoke the prerogatives of its own law to avoid the obligations arising from the arbitration agreement." This provision is cited in CARLOS GONZÁLEZ-BUENO, Spanish Arbitration Act, Article 2 [Matters subject to arbitration], in Carlos González-Bueno (ed), The Spanish Arbitration Act: A Commentary, Dykinson, S.L. 2016) 17.

2345 See in this regard, PAULSSON, Internal Law, 96.

1494. First, some national courts have considered the national law of the State party to be irrelevant and have applied instead either the law of the contract or the law of the arbitration agreement in order to get around this issue.[2346]

1495. Second, some national courts and arbitral tribunals have construed the national law of the State party as applying to domestic cases only.[2347]

1496. Third, some arbitral tribunals and national courts, whilst considering the national law of the State party to be relevant, have prevented a State party from invoking this law on the ground that this would be contrary to international public policy.[2348]

1497. Finally, it has been considered that this issue is one of subjective arbitrability rather than capacity and is therefore not governed by the national law of the State party but by a substantive rule of international arbitration arising from international arbitration practice which prevents a State party from relying on its own internal law in order to avoid arbitration.[2349]

2346 LEW/MISTELIS/KROLL, 737, §27-13; STEINGRUBER, 40, §3.33; *Benteler et al. v Belgian State*, Award, 18 November 1983 (1984) 1 J Intl Arb 190; see also *Dutch private company (seller) v Iranian private company (buyer)*, 5 September 1977 (1979) YB Comm Arb 218 in which the arbitral tribunal applied Dutch law (the law applicable to the contract) rather than Iranian law to the issue of the validity of the arbitration agreement. Indeed, under Iranian law, an arbitral clause under which an Iranian party and a non-Iranian party submitted in advance their disputes to arbitration by arbitrators or arbitral tribunals of the same nationality of the non-Iranian party would be invalid.

2347 LEW/MISTELIS/KROLL, 737, §27-13; STEINGRUBER, 39, §3.32; *Benteler et al. v Belgian State*, Award, 18 November 1983 (1984) 1 J Intl Arb 190; Paris Court of Appeal decision of 24 February 1994, *Ministry of Public Works (Tunisia) v Société Bec Frères* (1997) 22 YB Comm Arb 682 at §9 and (1995) Rev Arb 275 holding that the prohibition for the State to conclude an arbitration agreement is limited to domestic contracts.

2348 LEW/MISTELIS/KROLL, 737, §27-13; STEINGRUBER, 39, §3.32; *Benteler et al. v Belgian State*, Award, 18 November 1983 (1984) 1 J Intl Arb 190; ICC Case No 4381 of 1986, (1986) JDI 1102, 1106; ICC Case No 1939 of 1973 (1973) Rev Arb 122: "International public policy would strongly reject the idea that a State organ, having contracted with foreign persons, could openly and intentionally agree to an arbitration clause which attracts the confidence of the contracting party and could later, whether during the arbitral proceedings or at the stage of enforcement, invoke the nullity of its own word" as cited in ICC Case No 6474 (2000) 25 YB Comm Arb 299 at §105; See also, relying on the ground of international public policy, *Société Gatoil v National Iranian Oil Company*, Paris Court of Appeal, 17 December 1991 (1993) Rev Arb 281; *Société KFTCIC v Société Icori Estero et autres*, Paris Court of Appeal, 13 June 1996 (1997) Rev Arb 251.

2349 LEW/MISTELIS/KROLL, 737–738, §27-15; STEINGRUBER, 40, §3.34; *Benteler et al. v Belgian State*, Award, 18 November 1983 (1984) 1 J Int'l Arb 189; Company Z and Others v State Organization ABC, Award, April 1982 (1983) 8 YB Comm Arb 108–109 ("[…] a general

c. Failure to take into account the other party's awareness of prohibition or restrictions on the State party's capacity to arbitrate

1498. SILVA ROMERO has argued that the rule that a State party would act contrary to good faith if it firstly enters into an international arbitration agreement and then afterwards argues that it is not bound by the arbitration agreement by invoking a provision of its internal law, presupposes that only the State party is capable of acting in bad faith. According to SILVA ROMERO, the other contracting party may be aware of, or should have been aware of, the domestic law prohibiting or restricting the State party from entering into an arbitration agreement and such contracting parties have an obligation of diligence to inform themselves about potential restrictions.[2350]

1499. POUDRET and BESSON have similarly argued that good faith cannot be employed in all cases to prevent a State party from invoking its lack of capacity to arbitrate under national law, in particular, in the case where both parties were aware of the restriction under national law as, in such a case, both parties have acted in bad faith. They further argue, in more general terms, that the application of good faith is always linked to the conduct of a party and that, accordingly, the mere

principle, universally recognized nowadays in both inter-State relations and international private relations (whether this principle is considered as international public policy, as appertaining to international commercial usages or to recognized principles of public international law and the law of international arbitration or lex mercatoria) would in any case prohibit the Utopian State […] to repudiate the undertaking to arbitrate which it made itself."); *Elf Aquitaine Iran v National Iranian Oil Company*, Preliminary Award, 14 January 1982 (1986) Rev Arb 104, §24 holding that "It is a recognized principle of international law that a State is bound by an arbitration clause contained in an agreement entered into by the State itself or by a company owned by the State and cannot thereafter unilaterally set aside the access of the other party to the system envisaged by the parties in their agreement for the settlement of disputes." See further, Article IV.2.3 TransLex Principles 'No repudiation of contractual consent by state party' which provides as follows: "A state or state controlled entity may not invoke its sovereignty or internal law to repudiate contractual consent", available at < https://www.trans-lex.org/922000/_/no-repudiation-of-contractual-consent-by-state-party/>, accessed 1 March 2023; KOTUBY/SOBOTA, 179 et seq; MUSTILL, 112 citing as one of the rules of the *lex mercatoria*: "A State entity cannot be permitted to evade the enforcement of its obligations by denying its own capacity to make a binding agreement to arbitrate, or by asserting that the agreement is unenforceable for want of procedural formalities to which the entity is subject."

2350 Commentary by EDUARDO SILVA ROMERO to ICC Case No 14470 of 2008, Collection of ICC Arbitral Awards 2008–2011, 945, 955; see also LALIVE, *bonne foi*, 428 at fn 7 arguing that the principle of good faith obliges the private party to inform itself during the negotiations on the capacity and authority of the State party.

invocation of a "prohibited" legal provision is not by itself sufficient to justify the application of good faith.[2351]

1500. In this respect, and in the context of the application of Article 177 PILA[2352], BERGER and KELLERHALS are of the view that, in order to invoke this provision, the private party must be acting in good faith. They submit that the principle of legitimate expectations[2353] should be employed. If the State party, by its conduct, gives rise to a legitimate expectation that it has the capacity to arbitrate and the other party justifiably relies on this conduct, then the State party cannot rely on its lack of capacity. The reliance is not justified if objectively a party knew or could not have been unaware of the fact that the State party lacked the capacity to arbitrate and, in such a case, a party should not be allowed to rely on Article 177 PILA.[2354]

C. Conclusion

1501. As we have seen, the issue of a party's capacity to arbitrate arises seldomly in cases between individuals or commercial parties and arises most frequently in cases involving State parties.

1502. Good faith has been applied, either on the basis of the law deemed applicable to the issue of the State party's capacity to arbitrate or directly as a principle of transnational public policy, in order to override the requirement of a State party's capacity to arbitrate.

1503. Good faith has been essentially invoked in the scenario where a State party acts in a contradictory manner by failing to disclose the relevant provisions of its national law preventing, or restricting, it from entering into an arbitration agreement and thereafter invoking such prohibition or restriction in order to attempt to escape from the arbitration. In this context, good faith thus prohibits contradictory conduct.

1504. It is interesting to note that in many cases, the recourse to good faith was superfluous. Hence in ICC Case No 5103, the arbitral tribunal firstly held that the provisions of Tunisian law which allegedly led to the incapacity of the Tunisian

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2351 POUDRET/BESSON, 193, §236.

2352 See para. 1492.

2353 For a discussion of the recourse to the principle of the protection of legitimate expectations, developed most notably with respect to the fair and equitable treatment standard in international investment arbitration, see KOTUBY/SOBOTA, 160–163 and MICHELE POTESTÀ, Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept (2013) 28 ICSID Review 88–122, in particular, 93 et seq.

2354 BERGER/KELLERHALS, 127–129, §§374–377.

State party to arbitrate were not applicable before holding that, in any event, it would be contrary to good faith for the Tunisian State party to invoke such provisions when it had previously failed to disclose them.[2355] In addition, in ICC Case No 6474, the arbitral tribunal first held that, by application of Article 177 PILA, the State party could not argue that its officials lacked the capacity to bind the State party to arbitration, before going on to hold that even if the State party could have raised this argument, general principles of good faith, estoppel, or appearance of authority would lead to an identical result.[2356] This superfluous recourse to good faith may again be explained by a certain desire of the arbitrators to show that their decision is not only in accordance with the law but also accords with values of fairness and justice as well as a desire to highlight and express their disapproval of the bad faith conduct of one of the parties.

1505. In the cases where good faith may override the requirement of the capacity to arbitrate, it will prevent a party from relying on a lack of capacity to arbitrate. In this respect, good faith is used as a corrective tool leading to the non-application of the relevant capacity requirement and preventing a party from relying on the lack of capacity to arbitrate.

1506. Not only therefore is good faith a corrective tool but it is also a validation tool, as the recourse to good faith leads to the arbitration agreement being declared valid when it would otherwise be declared invalid due to a party's lack of capacity to arbitrate.

1507. As discussed above, good faith may not be the most appropriate tool to employ in order to prevent a State party from relying on its lack of capacity to arbitrate under its own law. This is because some international and national provisions now expressly prevent a State party from invoking its own national law in order to avoid arbitration. In addition, there are other techniques that have been employed in order to prevent a State party from invoking a lack of capacity to arbitrate. These include: (i.) holding that another law applies to the issue of the State party's capacity; (ii.) construing the prohibition or restrictions as applying to domestic cases only; (iii.) directly invoking international public policy to prevent a State party from relying on such a prohibition or restrictions; and (iv.) holding that this issue is one of subjective arbitrability governed by a substantive rule derived from international arbitration practice which provides that a State party cannot invoke its own law in order to avoid arbitration. Moreover, the rule that a State party acts contrary to good faith by firstly entering into an arbitration agreement and thereafter invoking a prohibition or restriction under its own internal law in order to avoid arbitration has been criticized due to its

[2355] ICC Case No 5103 (1988) JDI 1206.
[2356] ICC Case No 6474 of 1992 (2000) 25 YB Comm Arb 279.

failure to take into account the other party's awareness of such prohibition or restriction. In this regard, it has been submitted that the principle of legitimate expectations should be applied in order to determine whether a State party may invoke its lack of capacity to arbitrate depending on the knowledge or awareness of the other party.

1508. Interestingly, we see again the rebalancing role played by good faith in cases involving State parties. Indeed, the State party is in a position of superior knowledge with respect to the restrictions imposed by its own internal law on its capacity to arbitrate. Good faith is thus employed to redress the imbalance and prevent a State party from relying on the restrictions imposed by its own internal law with respect to its capacity to arbitrate.

D. Proposed Guidelines

1509. In the event that a State party alleges that it lacks capacity to arbitrate under its internal law, arbitral tribunals should first verify whether the prohibition or restriction is in fact applicable and – if so – whether there is an international or national legal provision which prevents this State party from relying on its own national law to contest that it has the capacity to arbitrate.

1510. In the absence of such a provision, arbitral tribunals should give preference to the doctrine of legitimate expectations (if available under the applicable law), rather than good faith, to potentially override the requirement of the capacity to arbitrate, given that this doctrine takes into account that the other party may be aware, or should have been aware, of the prohibition or restrictions on the State party's ability to enter into arbitration agreements.

1511. If the doctrine of legitimate expectations is not available under the applicable law, the arbitral tribunal may potentially have recourse to good faith (or its specific manifestation in the form of the prohibition of contradictory behaviour) in order to prevent a State party from alleging a lack of capacity to arbitrate if: (i.) good faith and the prohibition of contradictory behaviour derived therefrom forms part of the applicable law; and (ii.) there is contradictory conduct, namely, the State party who is alleging a lack of capacity to arbitrate has previously held itself out as having the capacity to arbitrate.

II Good Faith and the Power or Authority to Enter into an Arbitration Agreement

1512. This section examines the requirement of the power or authority to arbitrate (A.), before proceeding to examine the application of good faith to the issue of a party's power or authority to arbitrate (B.).

1513. Following a conclusion on the application of good faith by arbitral tribunals to the issue of the power or authority to enter into an arbitration agreement (C.), guidelines for its application is proposed (D.).

A. Requirement of the power or authority to enter into an arbitration agreement

1514. The issue of a party's power or authority to enter into an arbitration agreement arises frequently in practice.[2357] Typical examples include the power of a corporate officer or director to enter into an agreement on behalf of the company that it manages, the power of an agent to enter into an agreement on behalf of its principal, or the power of a company to enter into an agreement on behalf of an affiliate.[2358]

1515. National courts and arbitral tribunals have generally adopted a conflict of laws approach and have applied either the law governing the agency agreement or power of attorney, the law of the place where the agent acted or the law governing the substantive validity of the arbitration agreement to the issue of the power or authority of a party to enter into an arbitration agreement.[2359]

1516. French courts, however, have directly applied a substantive rule derived from the principle of the validity of the arbitration agreement based on the principle of good faith, the common intention of the parties and the legitimate belief in the power of the clause's signatory to carry out an act of ordinary administration binding the company.[2360]

2357 LEW/MISTELIS/KRÖLL, 141, §7-33; STEINGRUBER, 33, §3.08.

2358 BORN, 777–778.

2359 BORN, 672–673.

2360 *Société d'études et représentations navales et industrielles v Société Air Sea Broker Ltd*, French Cour de Cassation, 8 July 2009, (2010) 35 YB Comm Arb 356–358: "However, the issue whether a company is bound to arbitration is not examined by reference to a national law but through the application of a substantive rule derived from the principle of the validity of the arbitration agreement based on the common intention of the parties, on good faith and

1517. The lack of power or authority of a party to enter into an arbitration agreement leads to the invalidity of the arbitration agreement and thus has the same significant consequences as the lack of capacity to enter into an arbitration agreement.[2361]

1518. Accordingly, if an arbitration agreement is invalid due to a lack of power or authority of a party to enter into an arbitration agreement, an arbitral tribunal may deny jurisdiction, and a national court may deny a motion to compel arbitration as well as set aside or reject the recognition or enforcement of any award potentially rendered.[2362]

1519. Notwithstanding, subject to a few exceptions,[2363] national courts and arbitral tribunals have consistently rejected a party's argument that it lacked the power or authority to enter into an arbitration agreement.[2364]

B. Application of good faith

1520. Good faith has been applied to the issue of whether a party has the power or authority to enter into an arbitration agreement either on the basis of its inclusion in the national or non-national law deemed applicable to the issue of the power or authority of the agent (1.). Good faith has been invoked in order to override the requirement of a power or authority to enter into an arbitration agreement in the presence of certain contradictory conduct (2.). Notwithstanding, it is not clear whether good faith is the (most) appropriate tool to employ in

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on the legitimate belief in the power of the clause's signatory to carry out an act of ordinary administration binding the company." See also *Bargues Agro Industrie SA (France) v Young Pecan Company (US)*, Paris Court of Appeal, 2003/09894, 10 June 2004, (2005) 30 YB Comm Arb 499, 502: "Since arbitration clauses are thus independent of national provisions, the lack of capacity of the representative of one of the parties to conclude an arbitration agreement is not evaluated pursuant to a national law, but rather directly by the court when examining the facts of the case, (in order to ascertain) whether the other party could legitimately and in good faith believe that this power was not lacking."

2361 DEVAUD, 2.

2362 See *Buyer v Seller*, Celle Court of Appeal, 8 Sch 11-02, 4 September 2003 (2005) YB Comm Arb 528–535 holding that the arbitral award could not be enforced as the arbitration agreement was invalid due to the fact that Mr U did not have a valid power of attorney; *Shipyard RS v Ship Management TS*, Award, 8 November 2005 (2006) 31 YB Comm Arb 66, §§9–15 holding that the arbitral tribunal lacked jurisdiction as a result of the fact that Mr K did not have the authority to bind the defendant; *Herlofson Management A/S v Ministry of Supply, Kingdom of Jordan* (1991) 765 F Supp 78 denying petitions to compel arbitration as Ward did not have actual or apparent authority to make a binding contract on behalf of the Ministry.

2363 *Ibid*.

2364 STEINGRUBER, 33, §3.08.

order to prevent a party from invoking such a lack of power or authority to arbitrate (3.).

1. Good faith applied on the basis of the applicable national or non-national law

1521. Good faith has been logically applied by both national courts and arbitral tribunals to the issue of whether an agent has the power or authority to enter into an arbitration agreement on the basis of its inclusion in the national law deemed applicable to the issue of the power or authority of the agent.[2365]

1522. In addition, in a case involving a State party, the arbitral tribunal was apparently of the view that general principles of law applied to the issue of the power of the State party's officials to enter into the arbitration agreement and accordingly applied the general principle of good faith to prevent the State party from alleging a lack of power to arbitrate.[2366]

[2365] See ICC Case No 5832 of 1988, (1988) 115 JDI 1198, 1202; ICC Case No 5832, Collection of ICC Arbitral Awards 1986-1990, 352–358. In this case, the arbitral tribunal considered the application of the principle of good faith on the basis of Austrian law, the law applicable to the issue of the power of the agent. See also ICC Case No 14861 of 2008, (2014) JDI 201–210, where the arbitral tribunal appeared to apply French law to the issue of the power/authority to arbitrate. In addition, when applying good faith to this issue, the arbitral tribunal referred to the frequent recourse by French courts to the principle of good faith when determining an arbitrator's jurisdiction and, in particular, when determining whether a contracting party could legitimately believe in light of the other party's conduct that the latter had the capacity to enter into the arbitration agreement. The arbitral tribunal, however, also made a general reference in this context to Article 1.7 PICC to support its statement that the principle of good faith applies to international contracts. See further Beirut Civil Court of Appeals, First Chamber, 28 October 2009 (2010) 2 International Journal of Arab Arbitration 151–166 in which good faith was applied on the basis of Lebanese law, the law applicable to the issue of the power of the Chairman of the company to enter into the arbitration agreement.

[2366] *Framatome, Alsthom-Atlantique et APIE-Batignoles v Atomic Energy Organization of Iran*, ICC Case No 3896, 30 April 1982 (1989) 111 JDI 37; *Company Z and Others v State Organization ABC*, Award, April 1982 (1983) 8 YB Comm Arb 94–117, 101 (PIERRE LALIVE (Switzerland); BERTHOLD GOLDMAN (France); JACQUES ROBERT (France)): "The general principles of law and particularly that of good faith, applicable in international relations, both inter-State and between "private" persons, necessarily lead to the exclusion of the argument drawn by ABC from the infringements and irregularities committed which, by the very nature of things, the parties of the Republic of Xanadu could hardly oppose or criticize." The fact that the parties had chosen Iranian law to apply to their contract would seem to preclude the application of general principles of law. However, it has been argued that general principles may be applied in contracts with State parties where the contract is binding because of international law rather than a national law, see in this regard, BRUNO OPPETIT, *Arbitrage et contrats*

2. Good faith overriding the requirement of the power or authority to arbitrate in the presence of certain contradictory conduct

1523. Good faith has been invoked in order to override the requirement of a valid power or authority to arbitrate in the presence of certain contradictory conduct.

1524. This is the case, for example, where a company representative holds itself out as having the power or authority to enter into an arbitration agreement but does not in fact have the special power of attorney required in order to do so.

1525. Hence, in a case brought before the Beirut Civil Court of Appeal, the Court held that a company could not invoke the lack of power of its chairman to enter into the arbitration agreement. The Court of Appeal held that according to case law, the chairman did not in fact require a special power of attorney in order to enter into the arbitration agreement and that, in addition, the principle of estoppel and good faith prevented the company from relying on such an alleged lack of authority.[2367]

1526. In another case before the Dubai Court of Cassation, the respondent alleged that the arbitration agreement was invalid as it was not signed by the then manager of the company. The Dubai Court of Cassation held that due to the fact that contracts must be concluded in good faith, where the preamble and the body of the contract mention the name of the corporate entity only without the name and capacity of its legal representative and the contract is signed with an illegible signature and contains an arbitration clause, a conclusive presumption shall arise that such signature belongs to the legal representative of the corporate entity who has the authority to make dispositions and agree to arbitration. Accordingly, in such a case, the Court held that no argument could be made that the

d'Etat: l'arbitrage Framatome et autres c/ Atomic Energy Organization of Iran (1984) JDI 37, 46.

[2367] Beirut Civil Court of Appeals, First Chamber, 28 October 2009 (2010) 2 International Journal of Arab Arbitration 151–166, 156: referring to and applying the precedent in a decision of the third chamber of the Beirut Court of Appeals of 6 February 2007 (Al-Adl 2008/3) 1177: "Further, the company cannot avoid the signature of the arbitration submission agreement by the chairman of its board of directors under the pretext that he does not have the authority to do so pursuant to the principle of estoppel which is in conformity with the principle stating that once a party has taken a position, he is bound to that position. The bona fide in dealing does not allow the company to allege that the chairman of its board of directors does not have the authority to carry out some acts since this is an internal issue limited to the relation of the board of directors with its chairman that does not have an effect on the dealings third parties have with the company. As a matter of fact, the third party does not have the right to closely examine the scope of authority the chairman of the board of directors has to sign contracts, especially that the said agreement was enforced for years, which means that the company is a party to the arbitration."

signature was not that of the person legally authorized by the corporate entity to make dispositions and agree to arbitration.[2368]

1527. In one case, however, an ICC arbitral tribunal refused to apply good faith to cure the lack of power of an agent to enter into an arbitration agreement due to the lack of writing which was required under the applicable Austrian law. The arbitral tribunal supported its decision by reference to the strictness of the formality provisions under Austrian law whose aim was to ensure a clear and simple method of proof and to protect parties against the relinquishment of procedural guarantees.[2369] Subsequently, however, the Austrian courts have held that the principle of the prohibition of contradictory behaviour (derived from the general principle of good faith) could be invoked to cure this lack of authority.[2370]

1528. Good faith has also been invoked in order to override the requirement of a State party's power to arbitrate in the presence of certain contradictory conduct.

1529. Thus, in the *Framatome vs AEOI* case, the arbitral tribunal held that the general principle of good faith prevented the State party from raising the argument that its president did not have the power to conclude the arbitration agreement.[2371]

3. Good faith as the (most) appropriate tool to prevent reliance on a lack of power or authority?

1530. Some arbitral tribunals have invoked the doctrine of apparent authority (which is considered to be a specific application of the general principle of good faith

[2368] Decision of the Dubai Court of Cassation Petition No. 442 of 2015, dated 24 February 2016; see also Decision of the Dubai Court of Cassation, Petition 310 of 2015, dated 27 April 2016. Summaries of both decisions can be found in Arab Hassan/Lara Hammoud/Graham Lovett (eds), Summaries of UAE Courts' Decisions on Arbitration 2012-2016 (2nd edn ICC Publishing 2018) 153–154 and 155–156.

[2369] ICC Case No 5832 of 1988, (1988) 115 JDI 1198; ICC Award No 5832, Collection of ICC Arbitral Awards 1986-1990, 352–358.

[2370] FRANZ T. SCHWARZ/CHRISTIAN W. KONRAD, The Vienna Rules: A Commentary on International Arbitration in Austria, (Kluwer Law International 2009) 22, §1-059 referring to Austrian Supreme Court, 7 Ob 236/051, 26 April 2006. Although this commentary states that this case concerned a formal defect, it concerned a lack of authority, see Austria No. 17, *M GmbH v. M Inc. USA* (US), Oberster Gerichtshof [Supreme Court], 7 0b 236/05i, 26 April 2006 in (2007) 32 YB Comm Arb 266–270.

[2371] *Framatome, Alsthom-Atlantique et APIE-Batignoles v Atomic Energy Organization of Iran*, ICC Case No 3896, 30 April 1982 (1989) 111 JDI 37; *Company Z and Others v State Organization ABC*, Award, April 1982 (1983) 8 YB Comm Arb 94–117, 101.

and the prohibition of contradictory conduct[2372]), in order to prevent a party from invoking a lack of power or authority to enter into an arbitration agreement.

1531. For example, in a case conducted under the auspices of the Arbitral Chamber of Paris, the president of the board of directors of a company lacked the authority to agree to an arbitration agreement as it had not received the necessary special power of attorney required by law. The arbitral tribunal held that the opposing company could invoke the doctrine of apparent authority given that the president acted in the name of the company and that it contracted in good faith with the president and that the president led this company to believe that it had the authority to enter into an arbitration agreement.[2373]

1532. In addition, some national courts and arbitral tribunals have resorted to other consent-based concepts, which are not derived from good faith, in order to prevent a party from relying on a lack of power or authority. These include the concepts of implicit authorisation[2374] or ratification[2375].

1533. In this regard, it was held by one arbitral tribunal, that the practice in international arbitration is to interpret questions of authority of representatives liberally: "[i]nternational trade usages demand that one overlooks formal flaws in corporate action if, as a matter of fact, corporate consent is evident."[2376]

2372 See TransLex Principle No. II.4, available at <https://www.trans-lex.org/914000/_/agency-by-estoppel-apparent-authority/>, accessed 1 March 2023.

2373 CMAP Case No 9246 of 1996 (1997) 22 YB Comm Arb 28 (applying the theory of apparent authority under French law even though company Y had not received the power to arbitrate as it did not have a special power of attorney as foreseen by Article 702 FrCC). See also ICC Case No 14861 of 2008, (2014) JDI 201–210, 202–203 in which the arbitral tribunal referred to the doctrine of apparent authority under French law, derived from the general principle of good faith. In this case, the defendant company did not exist and thus lacked the capacity to arbitrate. Applying the doctrine of apparent authority to the facts, the arbitral tribunal held that the claimant legitimately believed that the purported representative of this company had the power to enter into an arbitration agreement.

2374 ICC Case No 7047 of 1994 (1995) ASA Bull 301, 320; see also *SIDOR v Linea Naviera de Cabotaje* 1999 WL 632870 (SDNY) in which the United States District Court held that "Sidor agreed to be bound by the arbitration provision contained in the COA as a result of the personal supervision and approval of the contract by its duly authorized agent, Vice President of Services Navas."

2375 ICC Case No 7047 of 1994 (1995) ASA Bull 301, 320; *Société d'études et représentations navales et industrielles v Société Air Sea Broker Ltd*, French Cour de Cassation, 8 July 2009, (2010) 35 YB Comm Arb 356, §4; *Bin Saud Bin Abdel Aziz v Crédit industriel et commercial de Paris*, Paris Court of Appeal, 24 March 1995 (1996) Rev Arb 259, 261; *Company Z and Others v State Organization ABC*, Award, April 1982 (1983) YB Comm Arb 94–117, 110.

2376 ICC Case No 7047 of 1994 (1995) ASA Bull 301, 320.

C. Conclusion

1534. As we have seen, good faith has been invoked on the basis of the law deemed applicable to the issue of the party's power or authority to arbitrate in order to override the requirement of the power or authority to arbitrate.

1535. Good faith has been invoked in the presence of contradictory conduct, namely where a party invokes its lack of power or authority to arbitrate when it has previously led the other party to believe that it had the power or authority to enter into the arbitration agreement. Hence, in this context, good faith prohibits contradictory behaviour.

1536. It is interesting to note that, again, in many cases, the recourse to good faith was superfluous. For example, in the case brought before the Beirut Civil Court of Appeal, the Court held that the chairman did not in fact require a special power of attorney in order to enter into the arbitration agreement and that, in any event, the principle of estoppel and good faith prevented the company from relying on such an alleged lack of authority.[2377] In addition, in the *Framatome vs AEOI* case, the arbitral tribunal held that the general principle of good faith prevented the State party from raising the argument that its president did not have the power to conclude the arbitration agreement.[2378] The arbitral tribunal also added that the State party had ratified the arbitration agreement by performing the contract.[2379] Again, this approach may be explained by a certain desire of the arbitral tribunal to show that their decision, reached on the basis of the application of the law, also accords with values of fairness and justice as well as a desire to underline and express their disapproval of the bad faith conduct of one of the parties.

1537. In the cases where good faith (or the prohibition of contradictory behaviour derived therefrom) may override the requirement of the power or authority to arbitrate, it will prevent a party from relying on a lack of power or authority to arbitrate. In this respect, good faith is used as a corrective tool leading to the non-application of the relevant power or authority requirements and preventing a party from relying on the lack of power or authority to arbitrate.

1538. Not only therefore is good faith a corrective tool but it is also a validation tool, as the recourse to good faith leads to the arbitration agreement being declared

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2377 Beirut Civil Court of Appeals, First Chamber, 28 October 2009 (2010) 2 International Journal of Arab Arbitration 151–166, 156.

2378 *Framatome, Alsthom-Atlantique et APIE-Batignoles v Atomic Energy Organization of Iran*, ICC Case No 3896, 30 April 1982 (1989) 111 JDI 37; *Company Z and Others v State Organization ABC*, Award, April 1982 (1983) 8 YB Comm Arb 94–117, 101–103.

2379 *Ibid*.

valid when it would otherwise be declared invalid due to a party's lack of power or authority to arbitrate.

1539. It has been pointed out that, contrary to the case where a party lacked the power or authority to enter into a contract, there is a "strong consensus that the principles of good faith and apparent authority provide a legal basis for upholding the validity of arbitration clauses."[2380] This is most probably because the lack of validity of the arbitration agreement, as a result of a lack of power or authority to arbitrate, would lead to the parties being denied the opportunity to resort to arbitration to resolve their dispute.

1540. As we have seen, it is not clear whether good faith is the most appropriate tool to employ in order to prevent a party from relying on a lack of power or authority to arbitrate. Indeed, some arbitral tribunals have invoked the doctrine of apparent authority (which is considered to be a specific application of the principle of good faith and the prohibition of contradictory conduct) or other consent-based concepts, which are not derived from good faith (such as implicit authorisation or ratification), in order to prevent a party from relying on a lack of power or authority to arbitrate.

D. Proposed Guidelines

1541. In the event that a party lacks the power or authority to arbitrate under the applicable law, arbitral tribunals should first give preference to legal theories based on consent (if available under the applicable law) before giving preference to the specific legal doctrine of apparent authority (if available under the applicable law), which is deemed to be derived from the principle of good faith, in order to potentially override the lack of power or authority to arbitrate. Indeed, as it has been stated, doctrines based on equity and good faith should only be employed in extraordinary circumstances as their objective is to correct the strict application of the law.[2381]

1542. In the absence of a doctrine of apparent authority under the applicable law, good faith (or the prohibition of contradictory conduct derived therefrom) may potentially be applied to cure a lack of power or authority to arbitrate if: (i.) good faith and the prohibition of contradictory behaviour derived therefrom form part of the applicable law; and (ii.) there is contradictory conduct, namely, the party

[2380] ICC Case No 13954 (2010) 35 YB Comm Arb 218–240.

[2381] See BREKOULAKIS, 624. Although this statement is made in the context of the extension of the arbitration agreement to a non-signatory, in the author's view, it can be applied by analogy to the issue of the power or authority to arbitrate.

who is alleging a lack of power or authority to arbitrate has previously held itself out as having the power or authority to arbitrate.

III Good Faith and the Extension of the Arbitration Agreement to a Non-Signatory

1543. This section examines the law and rules applicable to the issue of the extension of the arbitration agreement to a non-signatory (A.), before analyzing the application of good faith to this issue (B.).

1544. Following a conclusion on the application of good faith to the issue of the extension of the arbitration agreement to a non-signatory (C.), guidelines for its application by arbitral tribunals is proposed (D.).

A. Law/rules applicable to the extension of the arbitration agreement to a non-signatory

1545. With respect to the law or rules applicable to the extension of the arbitration agreement to a non-signatory, two approaches have been taken by arbitral tribunals.

1546. The first approach is to take a conflict of law approach and apply the law deemed applicable to the arbitration agreement.[2382]

1547. The second approach is to directly apply transnational principles of law to this issue.[2383]

1548. This is the approach advocated by BORN with respect to nonconsensual contexts who advocates that: "the better approach in these circumstances is to apply international principles of estoppel and good faith, together with a validation principle, rather than engaging in an unpredictable, potentially arbitrary choice-of-law analysis."[2384] Conversely, LANDBRECHT and WEHOWSKY reject the direct application of non-national rules except in the case where a national legal system so directs.[2385]

[2382] BORN, 1611 et seq; LANDBRECHT and WEHOWSKY submit that in the case of alleged actual consent, the law applicable to the substantive validity of the arbitration agreement should be applied to the issue of the personal scope of the arbitration agreement. However in the case where a non-party respondent is sought to be joined, they submit that a separate conflict of law rule should be created which points to a law closer to the non-party than to the arbitration agreement (LANDBRECHT/WEHOWSKY, 848, 852).

[2383] BORN, 1607 et seq.

[2384] BORN, 1613.

[2385] LANDRECHT/WEHOWSKY, 849 who are of the view that anational rules should only apply where a national legal system so directs, such as the French legal system which applies anational rules to the personal scope of the arbitration agreement.

1549. International arbitration conventions and national arbitration laws, for the most part, do not contain any explicit provisions on the issue of the extension of an arbitration agreement to a non-signatory.[2386]

1550. However, one provision of national arbitration law was found which directly addresses the issue of the extension of an arbitration agreement to a non-signatory. This was Article 14 of the Peruvian Arbitration Act 2008 which provides that an arbitral agreement can be extended to those whose consent to arbitration can *in good faith* be inferred from their active and decisive participation in the negotiation, performance or termination of the contract to which the arbitration agreement is connected.[2387]

1551. Given the lack of explicit legislative provisions governing the extension of an arbitration agreement to a non-signatory, arbitral tribunals and national courts have applied generally applicable rules of contract law to this issue.[2388]

B. Application of good faith

1552. Good faith has been applied to the issue of the extension of an arbitration agreement to a non-signatory on the basis of the law deemed applicable to this issue and has also been applied directly to this issue as a transnational or general principle of law (1.). Good faith has been employed in order to determine whether an arbitration agreement should be extended to a non-signatory in light of the circumstances of the case in question (2.). Notwithstanding, it is not clear whether good faith is the (most) appropriate tool to employ in order to extend an arbitration agreement to a non-signatory (3.).

1. Good faith applied as part of the applicable law or directly as a general or transnational principle of law

1553. Good faith has been applied to the issue of the extension of the arbitration agreement due to its inclusion in the law deemed applicable to this issue.

2386 BORN, 1523.

2387 Emphasis added. Article 14 Peruvian Arbitration Act 2008 provides as follows in the Spanish original: "*El convenio arbitral se extiende a aquellos cuyo consentimiento de someterse a arbitraje, según la buena fe, se determina por su participación activa y de manera determinante en la negociación, celebración, ejecución o terminación del contrato que comprende el convenio arbitral o al que el convenio está relacionado. Se extiende también a quienes pretendan derivar derechos o beneficios del contrato, según sus términos*."

2388 BORN, 1525.

1554. For example, in an *ad hoc* arbitration seated in Geneva (Switzerland), the arbitral tribunal applied good faith on the basis of Swiss law and held that it would be contrary to the rules of good faith (Article 2 SwCC) for the chairman to hide behind its company (signatory of the contract) and dispute being a party to the contract and the arbitration clause.[2389]

1555. Good faith has also been applied directly to the issue of the extension of the arbitration agreement to a non-signatory as a transnational principle.

1556. Indeed, in ICC Case No 5721 (Egyptian law, Switzerland), the arbitral tribunal – citing the autonomy of the arbitration agreement – decided to apply the *lex mercatoria,* and in particular the general notion of good faith in business and usages in international commerce, to the issue of whether the arbitration agreement should be extended to Mr. Z. The arbitral tribunal, however, noted that all the other relevant national laws would lead to a similar result. The arbitral tribunal referred to the fact that under Swiss law (the law of the seat of the arbitration), the corporate veil is only pierced when the independence of the company is fraudulently invoked contrary to good faith and noted that Egyptian law (the law applicable to the contract) also accords a decisive importance to the principle of good faith and sanctions abuses of rights.[2390]

1557. In addition, in ICC Case No 5065, the arbitral tribunal decided to apply general principles of law and usages accepted in international commerce, and, in particular, the principle of good faith, to the arbitration agreement when holding that the arbitration agreement should be extended to the existing entity contracting on behalf of a future entity.[2391] However, in this case, general principles of law and usages accepted in international commerce were applicable to the parties' contract and the arbitration was seated in Paris, France.[2392]

2389 *E Holding v Z Ltd, Mr G and others*, Final Award, 24 August 2011 (2011) 29 ASA Bull 884, 894. See also *M1 v Y1 and Y2* (Final Award), CRICA Case No. WWW/2017, 8 April 2020, (2021) 46 YB Comm Arb 58–65 in which the arbitral tribunal considered the application of good faith to the issue of the extension of the arbitration agreement to a non-signatory on the basis of Egyptian law (the law held applicable to the arbitration agreement).

2390 ICC Case No 5721 (1990) JDI 1020, 1023–1024.

2391 ICC Case No 5065 of 1986 (1987) JDI 1039, 1041.

2392 In addition, in an ICC arbitration referred to in *ABC International (UK) v Diverseylever Limited (UK)*, Paris Court of Appeal, 11 April 2002, 2001/10769 (2003) YB Comm Arb 209, 215, the arbitral tribunal directly applied good faith as a general principle. Similarly, general principles of law and trade usages were applicable to the parties' contract and the arbitration was seated in France.

2. Good faith employed to determine whether an arbitration agreement should be extended to non-signatory

1558. Good faith has been employed in order to determine whether an arbitration agreement should be extended to another company or companies related to the signatory company (a.), to an individual owner or chairperson of the signatory company (b.) and to the relevant State of the signatory State-owned company (c.).

a. Extension to another company/companies related to the signatory company

1559. Good faith has been employed in order to extend the arbitration agreement to another company or companies related to the signatory company when such company or companies were involved in the performance of the contract in question.

1560. Hence, in ICC Case No 1434 (French law, Geneva (Switzerland)), the arbitral tribunal was faced with the question whether the arbitration agreement could be extended to the entire group of companies that was involved in the performance of the contract. The arbitral tribunal noted that the designation of the parties in the contract was flexible, lacked coherence and formalism and that it was clear that the State party wished to deal with the entire group responsible for the construction of a factory in its country. The arbitral tribunal accordingly held that the arbitration agreement should not be interpreted literally but should be interpreted in good faith, in light of the context of all of the contracts and in line with the real intention of the parties and the spirit of the operation. On this basis, the arbitration agreement was accordingly extended to all the companies of the group.[2393]

1561. In addition, in ICC Case No 5065 (Paris (France)), the arbitral tribunal held that, in accordance with the principle of good faith, an existing entity contracting on behalf of a future entity was personally bound by the arbitration agreement. Indeed, the arbitral tribunal was of the view that it would be contrary to the principle of good faith for an entity to initial the contract, benefit from its performance for a long period and then assert that it has no obligations under the contract as it was concluded with a future entity which it was responsible for creating.[2394]

[2393] ICC Case No 1434 (1976) JDI 978, 980.
[2394] ICC Case No 5065 of 1986 (1987) 4 JDI 1039, 1043.

1562. In a further ICC arbitration (general principles of international law and trade usages, Paris (France)), the arbitral tribunal relied on the principle of good faith and loyalty (and in particular, the duty to inform) in order to prevent the respondent from arguing that it could not be a party to the arbitration as it was not the party that signed the arbitration agreement. In this case, the claimant had signed a contract containing an arbitration agreement with Diversey Limited which subsequently became part of the Diversey Lever Group and was thereafter called Diverseylever Limited. In preventing Diverseylever Limited from arguing that it could not be a party to the arbitration, the arbitral tribunal, in particular, laid emphasis on the fact that the claimant had dealt with the same people and could not imagine that it would be affected by internal re-structurings of the company of which it was not aware.[2395]

1563. Finally, the Swiss Federal Supreme Court refused to set aside an award which extended an arbitration agreement to a non-signatory parent company on the basis of the principle of good faith holding that the parent company had acted in such a way as to lead the other party to believe in good faith that there was a legal relationship between them. In particular, the Swiss Federal Supreme Court took into account the fact that the claimant had concluded a contract with one company of the group but that the claimant had later accepted the proposition of its co-contracting party and its parent company to transfer the liability for the performance of the rest of the works to another company of the group.[2396]

1564. Conversely, in another case, the Swiss Federal Supreme Court refused to set aside an award which applied the principle of trust (derived from the general principle of good faith) and denied the extension of the arbitration agreement to the parent company. The Court held that the claimants knew that they had a contractual relationship with the subcontracting party only and not with the parent company.[2397]

[2395] ICC arbitration (before an arbitral tribunal composed of PAUL A GELINAS (President) (Canada), MICHAEL TUGENDHAT (United Kingdom), HABIB MALOUCHE (Tunisia)) referred to in *ABC International (UK) v Diverseylever Limited (UK)*, Paris Court of Appeal, 11 April 2002, 2001/10769 (2003) YB Comm Arb 209, 215.

[2396] SFSCD 4A_450/2013 of 7 April 2014, c. 3.5.5. In this case, Swiss law was applicable to the parties' contract and the arbitration was seated in Geneva, Switzerland.

[2397] *Saudi Butec Ltd et Al Fouzan Trading v. Saudi Arabian Saipem Ltd*, unpublished ICC interim awards of 25 October 1994, confirmed by SFSCD of 29 January 1996 (1996) ASA Bull 496–507. See also SFSCD 4A_124/2020 of 13 November 2020 c. 3.3.2 in which the Swiss Federal Supreme Court set aside the arbitral award in which the arbitral tribunal had held that the arbitration agreement could be extended to a subcontractor of one of the parties. The Supreme Court held that whilst the subcontractor was mentioned in the contract between the parties and had performed work important to the contract, it was in its role as a sub-contractor and in good faith this could not be seen as a valid consent to arbitration.

b. Extension to an individual owner or chairman of signatory company

1565. Good faith has also been employed in order to extend the arbitration agreement to an individual owner or chairperson of the signatory company when such individual was involved in the performance of the contract in question.

1566. For example, in an *ad hoc* arbitration (Geneva (Switzerland)), the arbitral tribunal held that the active and critical role of the chairman at the time of the negotiation and performance of the contract constituted acceptance by the chairman of the contract and the arbitration agreement contained therein. The arbitral tribunal further supported its conclusion by applying good faith holding that it would be contrary to the rules of good faith (Article 2 SwCC) for the chairman to hide behind its company (signatory of the contract) and dispute being a party to the contract and the arbitration clause.[2398]

1567. The Swiss Federal Supreme Court has also refused to set aside an award in which the arbitral tribunal extended the arbitration agreement to the owner of the companies that signed the contract due to the owner's active involvement in the management of the companies and in the performance of the contract. The Supreme Court held that it would be contrary to the rules of good faith which govern international commercial relations for an individual that has repeatedly and constantly performed the contract to hide behind the legal entities signing the contract and deny being bound by the arbitration agreement contained therein.[2399]

2398 *E Holding v Z Ltd, Mr G and others*, Final Award, 24 August 2011 (2011) 29 ASA Bull 884, 894.

2399 SFSCD 129 III 727 [730], 4P.115/2003 of 16 October 2003: "*il ressort des pièces du dossier que A. s'est manifestement et volontairement immiscé, non seulement dans la direction des sociétés défenderesses en ce qui concerne la gestion du projet immobilier, mais encore dans l'exécution du contrat d'entreprise litigieux, dont il n'a pu, de ce fait, ignorer les termes et conditions, en particulier la clause compromissoire qui y figure. Aussi bien, il est clairement établi que les sociétés Y. et X. n'ont été, à l'évidence, que les instruments de l'activité personnelle de A., ce dernier ayant ainsi manifesté son intention d'être personnellement partie à la convention d'arbitrage. Il serait du reste contraire aux règles de la bonne foi, qui gouvernent les relations commerciales internationales, qu'une personne physique qui est intervenue, de façon constante et répétée, dans l'exécution d'un contrat, puisse, le moment venu, s'abriter derrière la ou les personnes morales signataires de celui-ci, en contestant être liée par les clauses qu'il contient, et notamment la clause compromissoire. Dans ces conditions, la clause arbitrale incluse dans le contrat doit être étendue à A. personnellement, lequel a dès lors été attrait à bon droit dans la procédure d'arbitrage*." ("it is apparent from the documents on file that A. manifestly and deliberately interfered, not only in the management of the defendant companies as regards the supervision of the real estate project, but also in the performance of the disputed works contract, the terms and conditions of which, in particular the arbitration

1568. Good faith has usually been invoked to justify the extension of an arbitration agreement to a non-signatory individual. However, in some cases, arbitral tribunals have applied good faith and decided not to extend the arbitration agreement to the non-signatory individual.

1569. Hence, in ICC Case No 5721 of 1990 (Egyptian law, Switzerland), an arbitral tribunal was faced with the issue of whether the arbitration agreement should be extended to Mr. Z who had signed the two contracts on behalf of the contracting company. Applying the general notion of good faith in business, the arbitral tribunal examined the facts and held that it was not certain that the claimant intended to contract with Mr. Z through the company or that Mr. Z intended to be party to the arbitration agreement.[2400]

1570. In addition, in a case before the Second Circuit of the US Court of Appeals, the Court found, applying Swiss law, that the plaintiffs had not acted contrary to good faith and thus rejected the attempt of the non-signatory defendants to invoke the arbitration agreement. The issue in this case was whether the arbitration agreement in a contract between Motorola and Nokia, on the one hand, and Telsim and Rumeli, on the other hand, could be invoked by the Uzans who controlled Telsim and Rumeli. The Court held that there was no evidence that Nokia and Motorola acted in bad faith or manifested an intent to enter into a contract with the Uzans as individuals and that, in fact, there was evidence that the defendants repeatedly acted in bad faith. Accordingly, the Court refused to allow the defendants to invoke the arbitration agreement.[2401]

c. Extension to a non-signatory State

1571. Good faith has further been invoked to justify the extension of an arbitration agreement to a non-signatory State.

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clause contained therein, he could not, therefore, have been unaware of. It is also clear that Y. and X. were clearly merely instruments of A.'s personal activity, the latter having thus manifested his intention to be personally a party to the arbitration agreement. Moreover, it would be contrary to the rules of good faith, which govern international commercial relations, for a natural person who has been constantly and repeatedly involved in the performance of a contract to be able, when the time comes, to hide behind the legal person or persons who have signed the contract, contesting that he is bound by the clauses contained therein, in particular the arbitration clause. In these circumstances, the arbitration clause included in the contract must be extended to A. personally, who has therefore been rightly drawn into the arbitral proceedings.") (informal English translation of the French original).

2400 ICC Case No 5721 of 1990 (1990) 117 JDI 1019, 1024.

2401 *Motorola Credit Corporation and Nokia Corporation v Kemal Uzan (Turkey) and others*, US Court of Appeals, 2nd circuit, 22 October 2004, (2005) 30 YB Comm Arb 951, 959–960, §17.

1572. For example, in the *Dallah v Pakistan* case, the arbitral tribunal held, on the basis of the facts, that the behaviour of the respondent State showed and proved that it had always been, and considered itself to be, a true party to the arbitration agreement. One of the arbitrators, Dr MAHMASSANI (Lebanon) held that this conclusion was further supported by the general principle of good faith. According to Dr MAHMASSANI, this principle prevented a State party which is party to an agreement through a State-owned entity from avoiding its obligations by making such entity insolvent or by ending its existence. Interestingly, the other arbitrators, Dr SHAH (Pakistan) and Lord MUSTILL (UK), were not convinced that the principle of good faith could be employed to "make someone a party to an arbitration who on other grounds could not be regarded as such." However, they were "reassured by the fact [that] the conclusion […] conforms to the general justice of the case." The legal background of these latter two arbitrators obviously explains their reluctance to sanction the recourse to the principle of good faith in order to extend the arbitration agreement to the non-signatory State.[2402]

3. Good faith as the (most) appropriate tool to extend an arbitration agreement to a non-signatory?

1573. Arbitral tribunals have relied on a multitude of doctrines and theories in order to extend the arbitration agreement to non-signatories such as agency, apparent authority, implied consent, veil piercing, alter ego, group of companies, third party beneficiaries, guarantors, succession, assignment and other transfers of contractual rights, subrogation, estoppel and related doctrines and ratification.[2403]

[2402] *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs*, Government of Pakistan, ICC Case No 9987, 26 June 2001 (2010) 2 International Journal of Arab Arbitration 337, 366–367.

[2403] See BORN, 1531 et seq. See also BERGER/KELLERHALS, 191–208, §540–§576 referring to the doctrines of succession (universal and singular), assignment of claim, assumption of debt, assignment of contract, arbitration agreement in favour of a third party, third party interference, extension from a general partnership to its partners, piercing the corporate veil and group of companies; BREKOULAKIS, 612 referring to agency, apparent authority, assignment, estoppel, alter ego/piercing of the corporate veil, third party beneficiary, incorporation by reference and group of companies; KAUFMANN-KOHLER/RIGOZZI, 137–145, §3.155–§3.179 referring to the doctrines of assignment, succession, subrogation, transfer in case of insolvency proceedings, third party beneficiary, guarantors, piercing the corporate veil/alter ego, group of companies, implied consent; REDFERN/HUNTER, §2.46–§2.64 referring to the doctrines of group of companies, assignment, agency, succession, piercing the corporate veil/alter ego, beneficiaries under a trust, and third party beneficiaries; RUBINO-SAMMARTANO, 238–243

1574. Out of these various doctrines and theories, there are those that are deemed to be based on constructive consent to the underlying substantive contract such as the doctrines of assignment, third party beneficiary, implied consent and group of companies.[2404] The other doctrines and theories are deemed to be based on equity, such as the doctrines of apparent authority, alter ego/piercing the corporate veil and estoppel.[2405] Indeed, good faith lies at the heart of the doctrines of apparent authority,[2406] estoppel,[2407] and piercing the corporate veil.[2408]

1575. US courts have resorted to the following theories in contract and agency law to extend the arbitration agreement to third parties: (i.) estoppel; (ii.) incorporation by reference; (iii.) assumption (based on the notion of consent inferred by the parties' conduct); (iv.) agency; and (v.) alter ego.[2409]

1576. Under English law, the theories of agency (including undisclosed principal, apparent authority), lifting the corporate veil, assignment and succession have been employed to extend an arbitration agreement to non-signatories.[2410]

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referring to the doctrines of succession, incorporation by reference, assumption, assignment, agency, group of companies, alter ego, piercing the corporate veil, estoppel, third party beneficiary, subrogation, apparent authority, subrogation, apparent authority, and implied consent.

2404 BREKOULAKIS, 620. See also BORN, 1531 who is of the view that the theories of implied assent, guarantee, incorporation, assumption, subrogation, agency, group of companies and ratification are all consent or intent based theories.

2405 BREKOULAKIS, 618. See also BORN, 1531 who is of the view that the theories of succession, veil-piercing and estoppel are all theories which operate by virtue of the law and do not concern questions of intent or consent.

2406 The theory of apparent authority is often deemed to be derived from good faith. See for example, BORN, 1538–1539.

2407 BORN, 1585 stating that estoppel "generally means that a party is barred by considerations of good faith and equity from acting inconsistently with its own statements or conduct."

2408 See *Alpha SA v Beta & Co*, Award, 1991, (1992) 10 ASA Bull 202, 218 in which the theory of piercing the corporate veil was employed to extend the arbitration agreement to the parent company of the signatory company. The theory of piercing the corporate veil is derived from the prohibition of an abuse of right, itself derived from the principle of good faith. Thus, the arbitral tribunal referred to the theory of piercing the corporate veil and held that the legal independence of a company could be ignored in the present case. Indeed, the principle of good faith required that it be ignored because it would be an abuse of right for the signatory company to rely on its legal independence and it would manifestly violate the legitimate interests of the other contracting party.

2409 *Thomson-CSF SA v AAA and Evans & Sutherland Computer Corp* 63 F3d 773; *Regent Seven Seas Cruise Inc v Rolls Royce PLC et al*., US District Court, Southern District of Florida, 21 February 2007 (2008) YB Comm Arb 879; THOMAS, 957.

2410 *Egiazaryan & Anor v OJSC OEK Finance & Anor* [2015] EWHC 3532 (Comm). An arbitration agreement may also be extended to a third party on the basis of the Contracts (Rights of Third Parties) Act 1999, see *Nisshin Shipping v Cleaves & Co* [2003] EWHC 2602 (Comm).

1577. Under French law, the doctrines of assignment, third party beneficiary, guarantee, group of companies and group of contracts have been utilized to extend an arbitration agreement to a non-signatory.[2411]

1578. The Swiss Federal Supreme Court has held that an arbitration agreement may, in certain circumstances, be extended to a non-signatory on the basis of an assignment of claim (Arts. 164–174 SwCO), assumption of debt (Arts. 175–181 SwCO) or assignment of contract, consent by implied actions, and by a contract in favour of a third party (Article 112(2) SwCO).[2412]

1579. One Swiss commentator has argued that the principle of good faith can be found at the core of all the various doctrines and theories extending the arbitration agreement to a non-signatory.[2413]

1580. In the same vein, a US commentator has argued that the US courts should exclusively apply the principle of good faith in determining whether an arbitration agreement should be extended to a non-signatory.[2414] She argues that the principle of good faith may be used firstly as a tool for interpreting the contract to identify the parties to the contract and secondly as a means of obtaining a just result in cases where a party has violated its duty to act in good faith and justice requires the non-signatory to arbitrate.[2415]

It is noteworthy that in *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48, the Supreme Court held that the obligation of good faith and fair dealing set out in the parties' contract could not be used to determine whether Kout Food Group was a party to the contract or was precluded from contending otherwise.

2411 See in general, SERAGLINI/ORTSCHEIDT, 248–254, §§201–206. With respect to assignment, see Cass civ 1e, 5 janvier 1999, no 96-20202 (holding that an arbitration agreement was binding on the non-signatory who was the assignee of the contract in which the arbitration agreement was contained); with respect to the extension to a third party directly involved in the performance of the contract, see Cass civ 1e, 7 novembre 2012, no 11-25891 and Cass civ 1e, 26 octobre 2011, no 10-17708; with respect to the theory of group of contracts, see Cass civ 1e, 27 mars 2007, no 04-20842; with respect to the doctrine of group of companies, see decision of the Paris Court of Appeal of 21 October 1983 (1984) Rev Arb 98.

2412 SFSCD 134 III 565 [567]–[568], 4A_128/2008 of 19 August 2008; SFSCD 129 III 727 [735, 737], 4P.115/2003 of 16 October 2003.

2413 MARC BLESSING, Extension of the Arbitration Clause to Non-Signatories (1994) ASA Special Series No 8, 151, 162.

2414 THOMAS, 953.

2415 THOMAS, 964–965.

1581. However, it has been convincingly argued that the principle of good faith is not specific enough and is not a valid ground for binding a person to an arbitration agreement to which it never consented to be a party.[2416]

C. Conclusion

1582. Good faith has been applied to the issue of the extension of the arbitration agreement on the basis of its inclusion in the law deemed applicable to this issue or directly as a transnational or general principle of law.

1583. It has been employed in order to determine whether an arbitration agreement should be extended to a non-signatory, namely to another company or companies related to the signatory company, to an individual owner or chairperson of the signatory company and to the relevant State of the signatory State-owned company.

1584. It is not, however, clear whether good faith is the most appropriate tool to employ in order to extend an arbitration agreement to a non-signatory. Indeed, arbitral tribunals have relied on a multitude of other doctrines and theories in order to extend the arbitration agreement to non-signatories. Some of these are based on consent (such as the doctrines of assignment, third party beneficiary, implied consent, and group of companies) whilst others are based on equity and good faith (such as the doctrines of apparent authority, piercing of the corporate veil, and estoppel). Some commentators argue that good faith is at the core of all doctrines extending the arbitration agreement to non-signatories and that it should be applied exclusively to this issue whilst other commentators argue that the general principle of good faith is not a specific enough concept to bind a non-signatory to an arbitration agreement.

1585. In some of the awards and decisions reviewed, the interpretative function of good faith has been employed. In such cases, the application of the interpretative function of good faith has led to the extension of the arbitration agreement in some cases and to the rejection of the extension in other cases. Hence, in ICC Case No 1434, the interpretative function of good faith was employed to justify

[2416] PIERRE MAYER, The Extension of the Arbitration Clause to Non-Signatories – The Irreconcilable Positions of French and English Courts (2012) 27 Am U Intl L Rev 831, 836. See also, in this regard, *M1 v Y1 and Y2* (Final Award), CRICA Case No. WWW/2017, 8 April 2020, (2021) 46 YB Comm Arb 58–65 in which the arbitral tribunal held that the principle of good faith cannot create an independent basis for the arbitral tribunal's jurisdiction but that the principle of good faith is relevant to the arbitral tribunal's interpretation of the arbitration agreement insofar as it may assist in understanding whether the arbitration agreement can be extended to a third party by application of the legal provisions/principles recognized by the applicable law.

the extension of the arbitration agreement to the other non-signatory companies of the group.[2417] Indeed, the arbitral tribunal held that the arbitration agreement should not be interpreted literally but should be interpreted in good faith, in light of the context of all of the contracts and in line with the actual intention of the parties and the spirit of the operation.[2418] Conversely, in ICC Case No 5721, the application of the interpretative function of good faith led to the arbitration agreement not being extended to the non-signatory.[2419] Applying the general notion of good faith in business, the arbitral tribunal examined the facts and held that it was not certain that the claimant intended to contract with Mr. Z through the company or that Mr. Z intended to be party to the arbitration agreement.[2420]

1586. In other cases, the corrective function of good faith has been employed in order to prevent a non-signatory from alleging that it was not a party to the arbitration agreement.[2421] Indeed, in ICC Case No 5065 (Paris (France)), it was held that it would be contrary to good faith for an entity to initial the contract, benefit from its performance for a long period and then assert that it has no obligations under the contract as it was concluded with a future entity which it was responsible for creating.[2422] In addition, the Swiss Federal Supreme Court has held that it would be contrary to the rules of good faith which govern international commercial relations for an individual that has repeatedly and constantly performed the contract to hide behind the legal entities signing the contract and deny being bound by the arbitration agreement contained therein.[2423]

1587. In some cases, the recourse to good faith was superfluous. Hence in one ICC arbitration, the arbitral tribunal held that the non-signatory company was in fact the successor of the signatory company before going on to hold that the principle of good faith and loyalty (and in particular, the duty to inform) also prevented the respondent from arguing that it could not be a party to the arbitration as it was not the party that signed the arbitration agreement.[2424] Again, this

[2417] ICC Case No 1434 (1976) JDI 978, 980. See also SFSCD 4A_450/2013 of 7 April 2014, c. 3.2.

[2418] *Ibid*.

[2419] ICC Case No 5721 of 1990 (1990) 117 JDI 1019, 1024.

[2420] *Ibid*. See also *M1 v Y1 and Y2* (Final Award), CRICA Case No. WWW/2017, 8 April 2020, (2021) 46 YB Comm Arb 58–65 in which the arbitral tribunal considered the interpretative function of good faith in relation to the extension of the arbitration agreement to a non-signatory.

[2421] *Alpha SA v Beta & Co*, Award, 1991, (1992) 10 YB Comm Arb 202, 218.

[2422] ICC Case No 5065 of 1986 (1987) 4 JDI 1039, 1043.

[2423] SFSCD 129 III 727 [730] of 16 October 2003.

[2424] ICC arbitration (before an arbitral tribunal composed of PAUL A GELINAS (President) (Canada), MICHAEL TUGENDHAT (United Kingdom), HABIB MALOUCHE (Tunisia)) referred to in *ABC International (UK) v Diverseylever Limited (UK)*, Paris Court of Appeal, 11 April 2002, 2001/10769 (2003) YB Comm Arb 209, 215.

approach may be explained by a certain desire of the arbitral tribunal to show that its decision, reached on the basis of the application of the law, also accords with values of fairness and justice as well as a desire to highlight and express disapproval of the bad faith conduct of one of the parties.

1588. It is noteworthy that the legal background of the arbitrators influenced their view on the applicability of good faith to the issue of the extension of an arbitration agreement to a non-signatory. Indeed, in the *Dallah v Pakistan* case, the two arbitrators with a Common law background were of the view that the principle of good faith could not be employed to make someone a party to an arbitration who on other grounds could not be regarded as such, whereas the arbitrator with a Civil law background was of the contrary view.[2425] It can accordingly be surmised that arbitrators with a Common law background are less likely to agree to the utilization of the principle of good faith to extend an arbitration agreement to a non-signatory.

D. Proposed Guidelines

1589. When extending an arbitration agreement to a non-signatory, arbitral tribunals should give preference to any consent-based theories over the application of theories grounded on equitable considerations. As it has been stated, doctrines based on equity and good faith (such as estoppel, apparent authority, piercing of the corporate veil) should only be employed in extraordinary circumstances as their objective is to correct the strict application of the law.[2426]

1590. Such consent-based theories include the application of the interpretative function of good faith. Indeed, the interpretative function of good faith comes to a solution which reflects the actual or hypothetical intention of the parties.

1591. In the absence of any applicable consent-based theories, an arbitral tribunal may apply good faith – and more specifically the corrective function of good faith – to the issue of the extension of an arbitration agreement to a non-signatory if such principle forms part of the applicable law. Arbitral tribunals should give preference to the specific doctrines derived from good faith such as the doctrines of apparent authority, piercing of the corporate veil and estoppel rather than directly applying good faith to the issue of the extension of the arbitration agreement.

2425 *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs*, Government of Pakistan, ICC Case No 9987, 26 June 2001 (2010) 2 International Journal of Arab Arbitration 337, 366–367.

2426 BREKOULAKIS, 624.

Chapter 3: Good Faith and the Performance of Pre-arbitration Requirements

1592. International contracts often contain arbitration agreements with pre-arbitration requirements including, most notably, the obligation to negotiate or mediate in good faith prior to resorting to arbitration (I.).

1593. This Chapter firstly explores the validity and enforceability of the obligation to negotiate or mediate in good faith prior to resorting to arbitration (II.). This Chapter then goes on to examine the sources of such obligations (III.), the content of these obligations (IV.), the evidence required to prove a violation of these obligations (V.) as well as the consequences of a violation of these obligations (VI.).

1594. Following a conclusion on the application by arbitral tribunals of good faith to pre-arbitration requirements (VII.), guidelines for its application will be proposed (VIII.).

I. Pre-arbitration Requirements: the Obligation to Negotiate and/or Mediate in Good Faith

1595. International contracts often contain multi-tiered dispute resolution clauses[2427] (also known as multi-step, ADR-first or escalation clauses[2428]) providing for several distinct stages in the handling of disputes arising under a contract.[2429] These clauses commonly oblige the parties to negotiate and to attempt to settle any dispute between themselves prior to resorting to arbitration.[2430] Such clauses may also oblige the parties, in the alternative or in addition, to submit their dispute to mediation in an attempt to resolve their dispute with the assistance of a third party neutral prior to resorting to arbitration.[2431]

1596. These clauses obliging the parties to negotiate or mediate prior to resorting to arbitration often encompass a good faith component.

1597. Such obligations to negotiate or mediate *in good faith* prior to resorting to arbitration entail the application of good faith in a procedural context.

[2427] According to the 2006 Queen Mary/PwC survey on International Arbitration: Corporate Attitudes and Practices, 5, 44% of respondents stated that they preferred to use arbitration in conjunction with ADR mechanisms in a multi-tiered, or escalating, dispute resolution process. See also REDFERN/HUNTER (6TH EDN), 40, §1.135: "it is becoming commonplace for parties to provide that if a dispute arises, they should attempt to resolve it by negotiation before going to arbitration."

[2428] BERGER, Escalation Clauses, 1.

[2429] CARTER JAMES H., Part I – Issues Arising from Integrated Dispute Resolution Clauses in Albert Jan van den Berg (ed), New Horizons in International Commercial Arbitration and Beyond, ICCA Congress Series 2004 Bejing (Kluwer Law International 2005) 446–469, 446.

[2430] BORN, 973.

[2431] *Ibid*.

II. Validity and Enforceability of the Obligation to Negotiate or Mediate in Good Faith Prior to Resorting to Arbitration

1598. According to BORN:

> There is substantial uncertainty regarding the validity and enforceability of one of the central components of many pre-arbitration procedural mechanisms – namely, agreements to negotiate (or mediate) disputes. In particular, disputes frequently arise regarding the validity and enforceability of agreements requiring that parties attempt to resolve disputes by negotiation or mediation prior to commencing arbitral (or other) proceedings.[2432]

1599. Under English law, a bare agreement to strive to settle a dispute is unenforceable due to a lack of certainty as a court is deemed to have insufficient objective criteria to decide whether both parties were in compliance or breach of such provisions.[2433] Indeed, it has been held that an agreement to negotiate a dispute prior to resorting to arbitration must be sufficiently clear and certain in order to be enforceable.[2434] In this regard, a clause referring the parties to participate in an ADR procedure recommended by the CEDR[2435] and a clause providing that the parties should seek to resolve the dispute by friendly discussion for a period of four continuous weeks were deemed sufficiently certain to be enforced.[2436] Conversely, a clause which provided that the parties should seek to resolve their dispute amicably by mediation prior to resorting to arbitration was held to be insufficiently certain as the relevant clause did not set out any defined mediation

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2432 BORN, 976.

2433 *Cable & Wireless PLC v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm): "if in the present case the words of clause 41.2 had simply provided that the parties should "attempt in good faith to resolve the dispute or claim", that would not have been enforceable." See also *Paul Smith v H & S Int'l Holding* [1991] 2 Lloyd's Rep 127 in which an obligation to strive to settle disputes amicably was held to be too uncertain to be enforceable and *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWHC 42 (Comm) in which an agreement to seek to have the dispute resolved by mediation was held to be too uncertain to be enforced.

2434 *Wah and Another v. Grant Thornton International Ltd and Others* [2012] EWHC 3198 (Ch), [60]: "In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the provision prescribes, without the need for further agreement, (a) a sufficiently certain and unequivocal commitment to commence a process (b) from which may be discerned what steps each party is required to take to put the process in place and which is (c) sufficiently clearly defined to enable the Court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach."

2435 *Cable & Wireless PLC v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm).

2436 *Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm).

process or refer to the procedure of a specific mediation provider.[2437] In addition, a clause providing that any dispute should be referred to the chief executive with a view to him attempting to resolve the dispute in an amicable fashion, failing which the dispute should be submitted to three members of the board was held to be "too equivocal in terms of the process required and too nebulous in terms of the content of the parties' respective obligations to be given legal effect as an enforceable condition precedent to arbitration."[2438]

1600. Similarly, under New York law, agreements to negotiate are only enforceable if the contract provides some definite and objective criteria for determining whether sufficient negotiations took place.[2439] For example, an obligation of good faith negotiation was found to be sufficiently certain to be breached where the parties' agreement provided for forty five days of exclusive negotiation followed by another forty five day negotiation period.[2440] In addition to being sufficiently certain, such obligations will only be enforced if they are interpreted as being of a mandatory nature.[2441]

1601. Under Swiss law, pre-arbitration requirements are enforceable when the clause is interpreted as being mandatory and such clause is clear as to the time frame and the procedure to be followed.[2442] Similarly, under French law, such

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2437 *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA 638 at [36].

2438 *Wah and Another v. Grant Thornton International Ltd and Others* [2012] EWHC 3198 (Ch), [72].

2439 *Jillcy Film Enterprises, Inc. v Home Box Office, Inc*. 593 F Supp 515 (SDNY 1984), 520–521. See also AMY J SCHMITZ, Confronting ADR Agreements' Contract/No-Contract Conundrum with Good Faith (2006) 56 DePaul Law Review, 55, 68 (stating that courts are reluctant to enforce ADR agreements that call for good-faith negotiations without setting "clear parameters for what good faith means" or without stating "sufficiently specific and objective guidelines for the process.").

2440 *American Broadcasting Companies, Inc., Appellant, v. Warner Wolf et al*., 52 NY2d 394 (1981).

2441 *Consolidated Edison Co of NY v Cruz Constr Corp*, 685 NYS2d 683, 684 (NY App Div 1999) (in which a requirement to give notice of the dispute and attempt to settle it for thirty days was deemed to be mandatory); *In re Jack Kent Cooke Inc & Saatchi & Saatchi N Am*, 635 NYS2d 611 (NY App Div 1995) (in which the requirement to give notice and the two hundred and seventy day negotiation requirements were deemed to be mandatory).

2442 BAIZEAU, 2787, §30; KAUFMANN-KOHLER/RIGOZZI, 244, §5.22; see also SFSCD 4A_124/2014 of 7 July 2014 c. 3.4.1 (holding that the DAB proceedings were a mandatory pre-condition to arbitration); SFSCD 4A_18/2007 of 6 June 2007 c. 4.1.1 (holding that the pre-arbitration steps were not mandatory as the clause did not set out a specific time frame for mediation and it clearly indicated that arbitration could commence while negotiations were underway); SFSCD 4A_46/2011 of 16 May 2011, c. 3.1.1 (holding that Article 20.2 of the Contract was not a mandatory conciliation clause as it did not provide a time limit for the initiation of conciliation proceedings, or indicate whether a mediator should be appointed or

obligations are enforceable provided that the negotiation or conciliation/mediation is expressed as being mandatory.[2443]

establish any procedural framework); SFSCD 4A_628/2015 of 16 March 2016 (holding that the parties had made the arbitration subject to a mandatory conciliation attempt).

[2443] *Poiré v Tripier*, Cass ch mixte 14 fév. 2003 n° 00-19424, followed in Cass com 17 juin 2003 n° 99-16001. See also Cass civ 1e, 6 fév. 2007 n° 05-17573 (holding that a clause which required the parties to engage in consultations in order to decide whether to submit or not their dispute to arbitration was unenforceable as a mediation clause due to the parties' failure to reference the process properly as conciliation); for a case containing a similar clause, see Cass civ 3re 29 janv. 2014 n° 13-10833. See further Cass civ 1e 28 mars 2012 n° 11-10347 (holding that a clause providing that disputes arising out of the performance of the agreement could be settled by amicable consultation and disputes that could not be so settled should be submitted to the CIETAC for mediation or arbitration was enforceable).

III. Sources of the Obligation to Negotiate/Mediate in Good Faith Prior to Resorting to Arbitration

1602. There are a multitude of possible sources of both the obligation to negotiate in good faith (A.) and the obligation to mediate in good faith (B.) prior to resorting to arbitration.

A. Obligation to negotiate in good faith prior to resorting to arbitration

1603. The source of the obligation to negotiate in good faith prior to resorting to arbitration is found either expressly (1.) or implicitly (2.) in the relevant contractual provision or is implied by the law applicable to the arbitration agreement (3.).

1. Express requirement in contractual provision

1604. Some dispute resolution clauses include an express obligation to negotiate in good faith prior to resorting to arbitration, a few examples of which are set out below:

– The dispute resolution clause in a long-term, cross border energy supply agreement provided that "[…] any dispute arising out of or in connection with this contract shall be settled *in good faith* through mutual discussions between the parties"; [2444]
– The dispute resolution clause in an international patent licence agreement provided as follows: "Good Faith Resolution. The Parties shall attempt to settle amicably *by good faith discussions* any dispute or disagreement between them relating to or arising out of any provision of this Agreement. If the Parties are unable to resolve the dispute or disagreement by such discussions, then the Parties shall refer the dispute or disagreement for resolution to the following designated officers (or designees) of the Parties: […]";[2445] and
– The dispute resolution clause in a supply contract for two steam generation units provided that "disagreements and *casus omissus* arising under

[2444] Emphasis added, ICC Case 10256, Interim Award of 8 December 2000 referred to in FIGUERES, 87.

[2445] Emphasis added, referred to in SFSCD 140 III 134 [136], 4A_438/2013 of 27 February 2014.

this contract that cannot be amicably settled by the *good faith negotiation* of the parties, […] shall be submitted to the arbitral court."[2446]

1605. The dispute settlement clauses in many BITs also contain an express obligation to negotiate in good faith prior to resorting to arbitration:

– The Turkey-Pakistan BIT, for example, contains the following dispute settlement clause at Article VII: "Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavour to settle the disputes by consultations and negotiations *in good faith*";[2447] and
– The US-Morocco BIT also provides, in relevant part, as follows at Article VI(2): "In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultations and negotiations *in good faith*."[2448]

1606. Further, some model ADR/arbitration clauses include an obligation to negotiate in good faith prior to resorting to arbitration:

– For instance, the JAMS model ADR clause provides that "[t]he parties shall attempt *in good faith* to resolve any dispute arising out of or relating to this Agreement promptly by negotiation between executives who have authority to settle the controversy and who are at a higher level of management than the persons with direct responsibility for administration of this Agreement";[2449] and
– The Freshfields sample tiered dispute resolution clause also provides as follows: "In the event of a dispute, difference, controversy or claim arising out of or in connection with this contract including any question regarding its existence, breach, validity or termination (a Dispute), the Dispute shall first be referred by notice in writing to the [Chief Executive]

[2446] *Alstom Brasil Energia e Transporte Ltda v Mitsui Sumitomo Seguros S.A.*, United States District Court, Southern District of New York, 15 Civ. 8221 (AKH), 20 June 2016 (2017) 42 YB Comm Arb 1–17.

[2447] Emphasis added, referred to in *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, Award, ICSID Case No. ARB/03/29, 27 August 2009.

[2448] Treaty between the United States of America and the Kingdom of Morocco concerning the encouragement and reciprocal protection of investments dated 22 July 1985, entered into force on 29 May 1991.

[2449] Emphasis added, available at <www.jamsadr.com/clauses/>, accessed 1 March 2023.

of each of the parties who shall consult *in good faith* and endeavour to resolve the dispute by negotiation".[2450]

2. Implicit requirement in contractual provision providing for negotiations

1607. In most cases, despite the explicit lack of a reference to "good faith" in the clause requiring the parties to negotiate prior to resorting to arbitration, arbitral tribunals have interpreted this clause as including an obligation to negotiate *in good faith*. The inclusion of such terms as "friendly", "amicably" and "mutual goodwill" in the relevant dispute resolution clauses appears to comfort such an interpretation:

– For instance, in an SCC arbitration (law of the PRC, Stockholm), the relevant dispute resolution clause provided that "[a]ll disputes or claims arising out of the Agreement shall be settled by friendly consultation between the parties if possible."[2451] In this case, the arbitral tribunal appeared to implicitly sanction the respondent's argument that the obligation to participate in friendly consultations entailed an obligation to participate in such consultations in good faith;[2452]
– In addition, in ICC Case No 6276, the dispute resolution clause provided that "any difference arising out of the execution of the Contract shall be settled friendly and according to mutual goodwill between the two parties." The use of the words "friendly" and "mutual goodwill" appears to have been considered by the arbitral tribunal as synonymous with good faith. Indeed, in determining whether this precondition to arbitration had been satisfied, the arbitral tribunal stated that "[e]verything depends on the circumstances and chiefly on the good faith of the parties";[2453] and
– Further, in ICC Case No 6515 (Greek law, Athens (Greece)), the relevant arbitration agreement provided that "[a]ny eventual dispute between the Parties arising here from should be ironed out by the Parties undertaking to make all necessary efforts for settling them amicably."[2454] The arbitral

[2450] Emphasis added, Appendix 4: Sample tiered dispute resolution clause in Jan Paulsson/Nigel Rawding et al. (eds), The Freshfields Guide to Arbitration Clauses in International Contracts (3rd edn Kluwer Law International 2010) 155–156.

[2451] Emphasis added. *Licensor and buyer v Manufacturer*, Interim Award and Final Award, 17 July 1992 and 13 July 1993, (1997) 22 YB Comm Arb 197–210.

[2452] *Idem*, §§9–10.

[2453] Extract from FIGUERES, 77. The law applicable to the substantive contract and the place of arbitration are unknown.

[2454] ICC Case No 6515 (1999) 24 YB Comm Arb 80–106.

tribunal held that this clause clearly called for "a bona fide attempt at amicable settlement".[2455]

1608. National courts have also read a requirement of good faith into clauses providing for an obligation to negotiate prior to resorting to arbitration. Such an interpretation appears to be supported by the inclusion of such terms as "friendly", "amicably" and "do their utmost" in the relevant dispute resolution clauses:

- In a case before the Eastern District of Louisiana Court, the parties' contract provided that "the parties hereto will do their utmost to settle by mutual agreement the disputes relating to this Contract". The Eastern District of Louisiana Court, held that the parties were obliged to make a good faith attempt at settlement;[2456]
- In another case before the Southern District of New York, the parties contract provided for arbitration "in case no settlement of disputes between the parties can be reached amicably through friendly negotiation". The Southern District of New York Court held that "the only rational reading of the clause is that the parties were obliged to attempt in good faith to resolve any disputes before resorting to arbitration";[2457] and
- Finally, in the *Emirates Trading* case before the English High Court, the dispute resolution clause provided that "[…] the parties shall first seek to resolve the dispute or claim by friendly discussion."[2458] The English High Court held that "[t]he obligation to seek to resolve disputes by friendly discussion must import an obligation to seek to do so in good faith."[2459]

3. Requirement imposed by virtue of the applicable law

1609. The obligation to negotiate *in good faith* prior to resorting to arbitration may also be imposed by virtue of the relevant applicable law. As we have seen, many national and non-national laws/rules impose a general duty on contracting parties to act in accordance with good faith during the performance of their contract.[2460] This general duty may be applied to the parties when they are

[2455] *Idem,* §55.

[2456] *Halter Marine Inc v OK Shipping Limited*, United States District Court, Eastern District of Louisiana, 98-3184, 25 November 1998 (2000) 25 YB Comm Arb 641, §6.

[2457] *Hart Enterprises International Inc. v Anhui Provincial Import & Export Corp*, US District Court, Southern District of New York, 94 Civ 9107 (1996) 12 YB Comm Arb 767–772, §3.

[2458] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm).

[2459] *Idem*, §51.

[2460] See Part III of the present thesis.

complying with a contractual obligation to negotiate any dispute arising between them prior to resorting to arbitration.

1610. The issue of which law is applicable to pre-arbitration requirements has received little attention although the consensus appears to be that it is governed by the same law as that applicable to the arbitration agreement.[2461] In the absence of an express or implied choice, this is usually either the law of the seat of the arbitration or the law applicable to the substantive contract.[2462] In France, however, the parties' common intention, rather than any law, is applied to the existence and validity of the arbitration agreement.[2463]

1611. Two arbitral awards were found in which the arbitral tribunal explicitly referred to good faith under the applicable law and applied it to the parties' negotiations to resolve their dispute:

– First, in the *ad hoc* case of 4 March 2004 (French law, seat of arbitration unknown) the arbitral tribunal referred to the good faith principle found in Articles 1134(3) and 1135 former FrCC (the law applicable to the substantive contract) as well as Article 1.7(1) PICC before holding that the parties were obliged when a dispute arose by virtue of this principle to attempt to resolve their dispute in good faith by amicable negotiation;[2464] and

[2461] Determining the law applicable to the arbitration agreement, however, is not always a simple matter. For a discussion of the complexity of the determination of the law applicable to the arbitration agreement, see BORN, 507–510. That the law applicable to the arbitration agreement is applicable to pre-arbitration procedures was confirmed in ICC Case No 16083 (law of respondent's state, Paris). In this case, the arbitral tribunal determined that the applicable law to the pre-arbitral procedures (in this case the FIDIC DAB procedure) was the French law of international arbitration given that France was the seat of the arbitration. The arbitral tribunal accordingly held that the issue of whether there had been compliance with the pre-arbitral procedures should be determined based on a good faith interpretation of the parties' true common intention in regard to the arbitration agreement, without reference to any specific national law (ICC Case No 16083 of July 2010 (2015) 1 ICC Bull 57, §59). This was also the approach taken by the Swiss Federal Supreme Court in its decision of 7 July 2014 (SFSCD 4A_124/2014, c. 3.3). The Swiss Federal Supreme Court held that the arbitration and pre-arbitral procedures (again the FIDIC DAB procedure) should be subject to the same law. The Supreme Court thus sanctioned the approach taken by the arbitral tribunal who applied Swiss law (the law applicable to the arbitration agreement and the law of the seat of the arbitration) to the pre-arbitration requirements.

[2462] REDFERN/HUNTER, §3.18 et seq and §3.27 et seq.

[2463] *Idem*, §3.33.

[2464] See <www.unilex.info/case.cfm?id=973>, accessed 1 March 2023. In this case, it does not appear that there was a contractual provision obliging the parties to negotiate but that the parties spontaneously entered into negotiations. The arbitral tribunal held that: "When the

– Second, in the ICAC at RFCCI Case No 18/2007, the arbitral tribunal referred to the principle of good faith and fair dealing found in Articles 7 and 8 CISG and Article 1.7 PICC as well as the fact that international practice considered good faith and fair dealing as implied terms pursuant to Article 5.1.2 PICC and held that this principle applied to the parties' conduct at the pre-arbitral stage and notably to determine whether they had complied with their contractual pre-arbitration requirement.[2465]

B. Obligation to mediate/conciliate in good faith prior to resorting to arbitration

1612. The source of the obligation to mediate/conciliate in good faith prior to resorting to arbitration may be found either expressly (1.) or implicitly (2.) in the terms of the relevant contractual provision or in the applicable institutional mediation or conciliation rules (3.). Such an obligation to mediate in good faith prior to resorting to arbitration may also be imposed by the relevant applicable law (4.).

1. Express requirement in contractual provision

1613. Some dispute resolution clauses include an express obligation to mediate in good faith prior to resorting to arbitration, some examples of which are set out below:

– [...] "If the Parties reach impasse in the mediation *despite good faith efforts,* the dispute shall be referred to binding arbitration under the Rules of the {London Court of International Arbitration/International Chamber of Commerce/United Nations Commission on International Trade Law / Stockholm Chamber of Commerce} in effect on the date of this Agreement, by three arbitrators appointed in accordance with said Rules [...]";[2466]
– The dispute resolution clause in an Australian construction contract provided that "[t]he Parties agree to use all reasonable endeavours *in good faith* to expeditiously resolve the Dispute by mediation";[2467] and
– The dispute resolution clause in an International Distribution Agreement between a Brazilian company and a US company provided as follows:

dispute arose and parties entered into negotiations, both Claimant and Respondent were bound to act in good faith in search of an amicable solution."

2465 See < http://www.unilex.info/principles/case/1478>, accessed 1 March 2023.

2466 Example referred to in LARRY DIMATTEO, International Contracting: Law and Practice (4th edn Kluwer Law International 2016) 86.

2467 Emphasis added, *Aiton Australia Pty Ltd. v Transfield Pty Ltd.* [1999] NSWSC 996.

> "The Parties agree that any controversy, claim or dispute between the Parties arising out of or relating in any way to this Agreement which the Parties are unable to resolve by mutual negotiation will be submitted to *good faith*, non-binding mediation before a qualified mediator […]."[2468]

1614. Some model ADR clauses also include an obligation to mediate in good faith prior to resorting to arbitration:

- As an example, the JAMS model ADR clause provides that "[t]he parties agree that they will participate in the mediation *in good faith* and that they will share equally in its costs";[2469] and
- The SIAC-SIMC Arb-Med-Arb Model Clause also provides that "[t]he parties further agree that following the commencement of arbitration, they will attempt *in good faith* to resolve the Dispute through mediation at the Singapore International Mediation Centre, in accordance with the SIAC-SIMC Arb-Med-Arb Protocol for the time being in force."[2470]

2. Implicit requirement in contractual provision

1615. As with the obligation to negotiate in good faith prior to resorting to arbitration, an obligation to mediate in good faith may be deemed to be implicit in the dispute resolution clause providing for mediation or conciliation prior to resorting to arbitration.[2471]

3. Express requirement in institutional mediation/conciliation rules

1616. Some international institutional mediation/conciliation rules provide for an obligation to mediate/conciliate in good faith.

1617. Some of these rules impose a general duty on the parties to participate in the mediation/conciliation in good faith:

[2468] Emphasis added, *Paramedics Electromedicina Comercial Ltda (Brazil) v GE Medical Systems Information Technologies Inc (US)*, US Court of Appeals, 2nd Circuit, 25 May 2004 (2004) 29 YB Comm Arb 1321.

[2469] Emphasis added, available at < https://www.jamsadr.com/clauses/#Standard/>, accessed 1 March 2023.

[2470] Emphasis added, available at <www.siac.org.sg/model-clauses/the-singapore-arb-med-arb-clause>, accessed 1 March 2023.

[2471] See above at para. 1607 et seq.

– For example, Article 7(4) ICC Mediation Rules 2014 provides that "[e]ach party shall act *in good faith* throughout the mediation";[2472]
– Article 9(5) of the VIAC Rules of Investment Mediation 2021 provides as follows: "Throughout the proceedings, the parties shall act *in good faith*, fairly and respectfully."[2473]; and
– Article 1 CAS Mediation Rules also provides that "CAS mediation is a non-binding and informal procedure, based on an agreement to mediate in which each party undertakes to attempt *in good faith* to negotiate with the other party with a view to settling a sports-related dispute."[2474]

1618. Other rules are more specific and impose a duty on the parties to cooperate in good faith with the mediator in order to expediate the mediation including:

– Article 11 WIPO Mediation Rules 2020 which provides that "[e]ach party shall cooperate *in good faith* with the mediator to advance the mediation as expeditiously as possible";[2475]
– Article 8(4) CRCICA Mediation Rules 2013 which provides that "[t]he parties shall cooperate with the mediator *in good faith* to advance the mediation as expeditiously as possible";[2476] and
– Article 8 CAS Mediation Rules which provides that: "[e]ach party shall cooperate *in good faith* with the mediator and shall guarantee him the freedom to perform his mandate to advance the mediation as expeditiously as possible."[2477]

1619. Out of the rules imposing a duty on the parties to cooperate in good faith with the mediator, some rules elaborate on the type of conduct required:

– Hence, Article 12 ACICA Mediation Rules 2007 provides that "[t]he parties will *in good faith* co-operate with the mediator and, in particular, will

[2472] Emphasis added, available at <www.iccwbo.org/products-and-services/arbitration-and-adr/mediation/rules/>, accessed 1 March 2023.
[2473] Emphasis added. The VIAC Rules of Investment Mediation 2021 are available at https://www.viac.eu/en/investment-arbitration/content/vienna-rules-investment-2021-online, accessed 1 March 2023.
[2474] Emphasis added, available at < http://www.tas-cas.org/en/mediation/rules.html>, accessed 1 March 2023.
[2475] Emphasis added, available at <https://www.wipo.int/amc/en/mediation/rules/>, accessed 1 March 2023.
[2476] Emphasis added, available at < https://crcica.org/crcica-mediation-rules/> accessed 1 March 2023.
[2477] Emphasis added, available at < http://www.tas-cas.org/en/mediation/rules.html>, accessed 1 March 2023.

endeavour to comply with requests by the mediator to submit written materials, provide evidence and attend meetings";[2478]

– Similarly, Article 11 UNCITRAL Conciliation Rules 1980 provides that "[t]he parties will *in good faith* co-operate with the conciliator and, in particular, will endeavour to *comply with requests by the conciliator to submit written materials, provide evidence and attend meetings*";[2479] and

– Rule 23 ICSID Convention Conciliation Rules 2006 further provides that "[t]he parties shall cooperate *in good faith* with the Commission and, in particular, at its request *furnish all relevant documents, information and explanations as well as use the means at their disposal to enable the Commission to hear witnesses and experts whom it desires to call*. The parties shall also *facilitate visits to and inquiries at any place connected with the dispute* that the Commission desires to undertake."[2480]

4. Requirement imposed by virtue of the applicable law

1620. As noted above, although there is little case law on this issue, it has been held that the law applicable to pre-arbitration requirements is the law applicable to the arbitration agreement.[2481]

1621. Such laws may impose a general duty on contracting parties to act in accordance with good faith during the performance of their contract.[2482] This general duty may be applied to the parties when they are complying with a contractual obligation to mediate any dispute arising between them prior to resorting to arbitration.[2483]

[2478] Emphasis added, available at <https://acica.org.au/wp-content/uploads/Rules/Mediation_Rules_2007/ACICA-Mediation-Rules-2007.pdf>, accessed 1 March 2023.

[2479] Emphasis added, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/conc-rules-e.pdf>, accessed 1 March 2023.

[2480] Emphasis added, available at <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partE-chap04.htm#r23>, accessed 1 March 2023.

[2481] See above, para. 1610.

[2482] See, in general, Part III of the present thesis.

[2483] With respect to the obligation to negotiate in good faith being imposed by the applicable law, see para. 1609. See also WESTON, 619.

IV. Content of the Obligation to Negotiate or Mediate in Good Faith Prior to Resorting to Arbitration

1622. The content of the obligation to negotiate or mediate in good faith prior to resorting to arbitration has given rise to many difficulties.[2484] The following section therefore attempts to outline the contours of the obligation to negotiate in good faith (A.) as well as the obligation to mediate in good faith (B.) prior to resorting to arbitration.

A. Obligation to negotiate in good faith prior to resorting to arbitration

1623. A review of the existing arbitral and national court case law shows that the obligation to negotiate in good faith prior to resorting to arbitration includes, first and foremost, a duty to submit to negotiations (1.). Second, it entails a duty to send a representative with authority to settle the dispute (2.) and to invite all relevant parties to the discussions (3.). Third, with respect to the extent of the obligation, it encompasses a duty to seize every available opportunity to settle the dispute (4.). Once negotiations are underway, the obligation to negotiate in good faith obliges the parties to act honestly and reasonably (5.) and to be open-minded (6.). Conversely, it does not encompass a duty to discuss the merits and quantum of the claim or specific claims (7.). Neither does it impose a duty to act on or on behalf of the interests of the other party (8.) or a duty to reach a settlement (9.).

1. Duty to submit to negotiations

1624. The obligation to negotiate in good faith entails a duty to submit oneself to the process of negotiation:[2485]

- Accordingly, an outright refusal by a party to negotiate and the immediate commencement of arbitral proceedings would constitute a breach of a party's obligation to negotiate in good faith;[2486]
- In addition, a failure to respond to a party's overtures to negotiate a dispute or attempts to block direct negotiations will constitute a violation of

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[2484] See above para. 92 et seq.

[2485] *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) NSWSC 996, §156; see also SOURDIN, 23.

[2486] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm), [52].

the obligation to negotiate in good faith. Indeed, in ICC Case No 6515 (Greek law, Athens (Greece)), the arbitral tribunal noted that the claimant had attempted to open negotiations but that the respondents did not respond and pretended that there was no dispute between the parties and that the claimant was trying to shift the burden of the taxes onto them. Moreover, the arbitral tribunal noted that the respondents employed their best efforts in order to block a direct negotiation between the parties. The arbitral tribunal went on to hold that such conduct was inconsistent with the obligation to negotiate in good faith;[2487] and

– It is argued that even if negotiations may appear futile, a party should still make a good faith effort to engage in the negotiations by requesting the other party to enter into negotiations.[2488]

1625. It may be the case that the other contracting party does not respond to overtures to negotiate the dispute. In such a case, what does good faith require the participating party to do in order for it to comply with its obligation to negotiate in good faith? In light of the case law discussed below, the sending of several letters inviting the other contracting party to negotiate the dispute would seem to be sufficient:

– Indeed, in *Tradex v Albania*, the arbitral tribunal noted that Tradex had sent five letters over four months to the competent Albanian Ministry but that none of these was answered or resulted in any relevant action. The arbitral tribunal found these letters to be evidence of a sufficient good faith effort to reach an amicable settlement;[2489] and
– In addition, in *Tulip v Turkey*, the arbitral tribunal held that the claimant had complied with its obligation to seek to resolve the investment dispute by consultations and negotiations in good faith by sending three letters offering to negotiate: the first indicating an interest in engaging in consultations and negotiations by submitting a proposal for the resolution of the dispute; the second seeking to engage with the President of Turkey to resolve the dispute; and the third offering to be at the disposition of the other party to discuss the issue and legally relevant facts.[2490]

2487 ICC Case No 6515 (1999) 24 YB Comm Arb 80–106, §69.

2488 See BERGER/KELLERHALS, §583a.

2489 *Tradex v Albania,* Decision on Jurisdiction, 24 December 1996, available at < https://www.italaw.com/cases/documents/1111>, accessed 1 March 2023; (1999) 14 ICSID Review, 159, 182–183.

2490 *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, available at < https://www.italaw.com/cases/1124>, accessed 1 March 2023, §§124–129.

2. Duty to send a representative with the authority to settle

1626. The obligation to negotiate in good faith may require a party to send a representative with the authority to settle.

1627. Indeed, in ICC Case No 2020-001 of 2008, the arbitral tribunal held that the respondent had breached its obligation of dealing in good faith and in a fair way by, *inter alia*, sending a representative without any authority to negotiate in order to resolve the problems between the parties.[2491]

3. Duty to invite all relevant participants to the negotiations

1628. The obligation to negotiate in good faith may require a party to invite third parties to take part in the negotiation discussions.

1629. Indeed, in ICAC at the RFCCI Case No 18/2007, the arbitral tribunal held that the claimant had failed to comply with the pre-settlement dispute mechanism in good faith by not inviting a third party to the negotiations given that the contract foresaw delivery of goods to the third party and payment by the latter.[2492]

4. Duty to seize every opportunity to settle the dispute

1630. The obligation to negotiate in good faith imports a duty to seize every opportunity to try and settle the dispute.[2493]

1631. Although this may appear, at first blush, to be a particularly onerous obligation, it would seem that numerous meetings and correspondence over a relatively short period of time should be sufficient to fulfill this obligation.

2491 ICC Case No 2020-001 (2020) ICC Disp Res Bull 125.

2492 See < www.unilex.info/case.cfm?id=1478>, accessed 1 March 2023.

2493 ICC Case No 6276, extracted taken from FIGUERES, 77: "What matters is that they should have shown their good will by seizing every opportunity to try to settle their dispute in an amicable manner." See also with respect to ICC Case No 6276, BERGER, Escalation Clauses, 12. See further ICC Case No 6515 (1999) 24 YB Comm Arb 80–106, §55, where the relevant arbitration agreement provided that "[a]ny eventual dispute between the Parties arising here from should be ironed out by the Parties undertaking to make all necessary efforts for settling them amicably." The arbitral tribunal held that this arbitration agreement clearly called for "a bona fide attempt at amicable settlement" and that the parties were thus obliged to "exhaust each and every possibility to amicably settle before they file a Request for Arbitration". It should be noted, however, that the fact that the clause provided for the parties to undertake "all necessary efforts" may have influenced the arbitral tribunal's interpretation of the requirement for a *bona fide* attempt at amicable settlement.

1632. For example, in the *Emirates Trading v Sociedade de Fomento* case, the English High Court held that the continuation of discussions between the parties for more than three months (involving eight meetings and more than eight email exchanges) prior to initiating arbitration "could not possibly be characterized as involving a lack of good faith".[2494]

5. Duty to act honestly and reasonably

1633. According to one commentator, arbitral tribunals, faced with a clause obliging the parties to attempt to settle their disputes by negotiations, will not be able to require anything more than that the parties have made an honest, reasonable and conscientious effort to resolve the dispute.[2495]

1634. Indeed, it was held in the Australian case of *United Group Rail Services* that the obligation to negotiate in good faith imposes a duty on the parties to act honestly during the negotiation discussions. The obligation to negotiate in good faith will therefore be breached if a party has decided not to settle but pretends to negotiate in order to drive the other party into an expensive arbitration that it believes the other party cannot afford. This duty will also be breached if a party threatens a future breach of contract in an attempt to reduce the settlement sum to a lower amount than it genuinely recognizes as due.[2496]

6. Duty to have an open mind

1635. During the negotiation discussions, it is argued that good faith requires the parties to have an open mind in the sense of a willingness to consider the options put forward by the other party and a willingness to propose options for the resolution of the dispute.[2497]

1636. In this regard, it has been considered that the fact that parties put forward settlement proposals is evidence of good will/good faith conduct. Indeed, in ICC Case No 6276, the arbitral tribunal referred to the proposal by the claimant to obtain payment of sums due in the form of petroleum and the request made by

2494 *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Limited* [2015] EWHC 1452 (Comm), [47]–[56].

2495 BERGER, Escalation Clauses, 12–13.

2496 *United Group Rail Services Ltd. v Rail Corp. New South Wales* (2009) NSWCA 177, §70.

2497 *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) NSWSC 996, §156; BERG, 363.

the respondent to the Court of Account for authorisation to pay to the claimant the sums due, as evidence of good will/good faith conduct.[2498]

7. No duty to discuss merits, quantum or specific claims

1637. With respect to the content of the negotiation discussions, it has been held that the obligation to negotiate in good faith does not oblige the parties to address the quantum of the claims or all specific claims or even the legal merits of the claims. A discussion of the claim or dispute in general is deemed to be sufficient.[2499]

8. No duty to act for, or on behalf of, or in the interests of the other party

1638. The obligation to negotiate in good faith does not oblige a party to act for or on behalf of or in the interests of the other party or to act otherwise than by having regard to self-interest.[2500]

9. No duty to reach a settlement

1639. The obligation to negotiate in good faith does not oblige a party to reach a settlement with the other party and it does not oblige a party to accept the terms of a settlement proposed by the other party.

1640. For example, in the *ad hoc* case of 4 March 2004, the arbitral tribunal held that the claimant did not act contrary to good faith when no settlement agreement was reached.[2501]

[2498] Extract from FIGUERES, 77. See also with respect to this case, BERGER, Escalation Clauses, 12.

[2499] *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Limited* [2015] EWHC 1452 (Comm), [57], [59]–[61].

[2500] *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) NSWSC 996, §156. See also *United Group Rail Services Ltd. v Rail Corp. New South Wales* (2009) NSWCA 177, §70.

[2501] *Ad hoc* case of 4 March 2004, available at <http://www.unilex.info/case.cfm?id=973>, accessed 1 March 2023 holding as follows: "The mere fact that the parties did not agree on a compromise settlement does not in itself reveal lack of good faith on Claimant's side. [Western] saw no reason to grant large concessions on the remaining stock because it insisted that its [products] were still available […], a fact that has been found to be accurate […] Claimant's views on the scope of [a preceding agreement between the parties] may not be shared by the Tribunal […], but it had no apparent impact on the failure of the negotiations.

B. Obligation to mediate in good faith prior to resorting to arbitration

1641. With respect to the content of the obligation to mediate in good faith prior to resorting to arbitration, given the paucity of arbitral and other relevant national court case law, reference is also made to US national court case law on what is considered to be good faith participation in court-mandated mediation.[2502]

1642. The obligation to mediate in good faith prior to resorting to arbitration obliges a party to prepare for the mediation (1.). It also obliges a party to actually participate in the mediation (2.) and to send an appropriate representative with the requisite authority (3.). During the course of the mediation proceedings, it entails a duty to comply with any contractual terms concerning mediation (4.), a duty to follow the procedural rules set by the mediator (5.), a duty to cooperate (6.), a duty to act honestly and reasonably (7.) as well as a duty to inform and to be transparent (8.). It further encompasses a duty to be open to proposing and considering settlement options (9.), a duty to maintain the confidentiality of the mediation process (10.), a duty to abide by any agreement reached in the mediation (11.) and a duty to refrain from filing any new motions before the courts (12.). It does not, however, encompass a duty to act for, or on behalf of, the interests of the other party (13.) or a duty not to withdraw or to reach an agreement (14.).

1. Duty to prepare for mediation

1643. It has been held that the obligation to mediate in good faith encompasses a duty to prepare for a mediation session.[2503]

Claimant's refusal to consider the different types of prejudice allegedly suffered by Respondent cannot certainly be considered as a breach of good faith since Claimant rightly denied that it was no longer in a position to perform its contractual obligations. Consequently, the tribunal does not find that Claimant has breached the requirements of good faith during the negotiations that parties engaged into in order to reach an amicable settlement of their dispute."

2502 Indeed, at least twenty-two states and the territory of Guam have established a statutory good faith requirement in mediation and at least twenty-one federal district courts and seventeen state courts have local rules requiring good-faith participation, see LANDE 78–80.

2503 *Francis v. Women's Obstetrics and Gynecology Group, P.C.* 144 FRD 646 (WDNY 1992) (holding that the failure to prepare for a mediation conference was contrary to good faith participation in mediation). See also KOVACH, 622 setting out as one suggested model rule for lawyers requiring good faith participation in the mediation process: "e. Preparation for the mediation by the parties and their representatives, which includes the exchange of any documents requested or as set forth in a rule, order, or request of the mediator."

1644. This may encompass a duty to prepare or provide documents or reports.[2504] It may further encompass a duty to confer with the other party as ordered by the mediator.[2505]

2. Duty to participate in the mediation

1645. The obligation to mediate in good faith comprises a duty to actually submit to the mediation.[2506]

[2504] CARTER, 400 submitting that it encompasses a duty to cooperate in preparing pre-mediation forms and reports required by the mediator; KOVACH, 622 submitting that good faith participation includes preparation for the mediation by all parties and their representatives, which includes the exchange of any documents requested or as set forth in a rule, order, or request of the mediator; Wash.Rev.Code Ann §61.24.163(12) providing that a violation of the obligation to mediate in good faith may include "(b) failure of the borrower or the beneficiary to provide the documentation required before mediation or pursuant to the mediator's instructions." See also *Seidel v Bradberry* 1998 WL 386161 in which it was held that the defendant failed to proceed in a good faith effort to resolve the case because, *inter alia*, it did not prepare a mediation summary.

[2505] See in this regard *Schwartzman Inc v ACF Industries Inc* 167 FRD 694, 699 (DNM 1996) in which the federal district court ordered sanctions against the US Department of Justice for failing to participate in good faith in a pre-trial settlement because they had failed to confer with opposing counsel prior to the conference as required by the pre-trial conference order.

[2506] *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) NSWSC 996, §156 (holding that "the essential or core content of an obligation to negotiate or mediate in good faith may be expressed in the following terms: (1) to undertake to subject oneself to the process of negotiation or mediation […]"); see also *Seidel v Bradberry* 1998 WL 386161 at §3 (holding that the defendant's failure to attend the mediation was contrary to good faith); *Luxenberg v Marshall*, 835 SW2d 136 (Tex Ct App 1992) (holding that the plaintiff acted in bad faith by *inter alia* not attending the mediation process); *In re Bambi*, 492 BR 183, 188 (Bankruptcy Division SDNY 2013) (holding that "good faith generally requires that parties attend conferences […]"; *Texas Department of Transportation v Pirtle* 977 SW2d 657 (Tex App Fort Worth 1998) (holding that a party failed to mediate in good faith when it failed to file a written objection to the mediation but then appeared and refused to participate.); *Outar v Grena Industr*, 2005 WL 2387840 (NDNY, Sept 27 2005) in which it was held that the plaintiff failed to mediate in good faith as he refused to negotiate or speak though requested repeatedly and did not fairly and reasonably participate in the mediation; see further SOURDIN, 23; WESTON, 628; Australia AAT Guidelines, available at < https://www.aat.gov.au/landing-pages/practice-directions-guides-and-guidelines/the-duty-to-act-in-good-faith-in-adr-processes-at->, accessed 1 March 2023, 2, §8, stating that a failure to attend an ADR process without sufficient notice or reason is not consistent with a party's duty to act in good faith; Wash.Rev.Code Ann §61.24.163(12) providing that a violation of the obligation to mediate in good faith may include a "failure to timely participate in mediation without good cause."

1646. More specifically, the obligation to mediate in good faith comprises a duty to participate in the mediation proceedings for a reasonable period of time.[2507]

1647. One commentator is of the view that if one day is spent in a good faith effort to attempt to resolve the dispute, this should be sufficient.[2508] However, another commentator has submitted that a party must remain at the mediation until the mediator determines that the proceedings are at an end or excuses the parties.[2509] Yet another commentator has argued that the parties should remain at the mediation until opening statements have been made and each party has made one offer, or for one hour, whichever is shorter.[2510]

1648. It has also been held that parties must participate in a meaningful manner and not just "go through the motions".[2511]

2507 See CARTER, 398; PLANT, 80; WESTON, 628; see also ABA Section of Dispute Resolution: Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs, 2 stating that parties should be held to specific objective standards, namely an obligation to attend the mediation for a limited and specified period but that this rule should not be labeled as a good faith requirement because of the widespread confusion about the meaning of the term; see further Minn.Stat.Ann §583.27(1)(a) providing that "Not participating in good faith includes (1) a failure on a regular or continuing basis to attend and participate in mediation sessions without cause."; *Allman v Allman*, 2009 WL 874499 (NJ Super Ct App Div 2009) awarding attorney's fees when a party that was obligated to mediate refused to attend any mediation beyond an initial meeting, and subsequently filed a groundless motion in bad faith.

2508 PLANT, 80.

2509 KOVACH, 622 setting out as one suggested model rule for lawyers requiring good faith participation in the mediation process: "i. Remaining at the mediation until the mediator determines that the process is at an end or excuses the parties."

2510 CARTER, 398.

2511 *Gilling v. Eastern Airlines*, Inc., 680 F Supp 169 (DNJ 1988) (holding that "[i]n order for the compulsory arbitration program to function properly, it is essential that the parties participate in a meaningful manner […] Explicit in this court's arbitration program is the need for the parties to participate in good faith."); see also KOVACH, 611 and 622 setting out as one suggested model rule for lawyers requiring good faith participation in the mediation process: "f. Participation in meaningful discussions with the mediator and all other participants during the mediation." See further *Outar v Greno Industries Inc*. No. 03-CV-0916, 2005 WL 2387840 (SDNY Sep. 27, 2005): "From the outset, Mr. Outar refused to have his attorney negotiate or speak on his behalf in terms of settlement. Consistently, he refused to negotiate or speak on his behalf, though requested repeatedly. He had hamstrung his lawyer from even providing him with a basic understanding of the purpose and benefit of negotiations and, moreover, effectively curtailing the ability to craft optional legal strategy. In essence, Mr. Outar failed to listen to the basic explanation being provided by his attorney and, thus, went to this mediation substantially unprepared. Even if he was ignorant of the process, if he went to the mediation prepared to act in good faith, he would have been more receptive to the importunes of all of the participants, including his attorney and the mediator, and would have fairly and

1649. In this regard, it has been held that refusing to make a demand or an offer after a party has indicated that it will be engaging in the mediation process is contrary to good faith.[2512]

3. Duty to send an appropriate representative with requisite authority

1650. The obligation to mediate in good faith requires a party to send an appropriate representative with the requisite authority to participate in the mediation proceedings.[2513] This duty may also be expressly set out in the applicable institutional mediation rules.[2514]

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reasonably participated in the process. The Court finds that he did not act in good faith in abiding by this Court's Order. It is evident that Mr. Outar had established an irrefutable and irreplaceable course for this litigation, independent of his attorneys, and had no intention of deviating from it, even if it runs afoul of court orders."

2512 *Vay v Huston* 2015 WL 791430 (WD Pa 2015) holding that: "If the parties indicate that they will be engaging in a mediation process, a plaintiff would be proceeding in bad faith, if he or she refused to make a demand for settlement. Likewise, a defendant would be proceeding in bad faith, if the defendant refused to make an offer."

2513 *Nick v. Morgan's Foods Inc* 99 FSupp2d 1056 (holding that good faith participation in ADR requires the participation of a corporate representative with authority to settle); *Francis v. Women's Obstetrics and Gynecology Group*, P.C. 144 FRD 646 (holding that the defendant's failure to confirm coverage and obtain authority from the carrier was contrary to good faith participation in mediation); *Negron v Woodhull Hosp*. No. 05 Civ. 4147, 173 Fed Appx 77, 79, 2006 WL 759806 at 1 (2d Cir 2006) (holding that the Hospital had violated a court order to participate in good faith in mediation by failing to bring a "principal" to the mediation conference); *In re Bambi*, 492 BR 183, 188 (Bankruptcy Division SDNY 2013); *Schwartzman Inc v ACF Industries Inc* 167 FRD 694, 699 (DNM 1996); *Performance Chevrolet, Inc. v Market Scan Infi. Sys.s, Inc*., No. CV04-244-S-BLW, 2005 WL 1768650 (D.Idaho July 25, 2005); see also Australia AAT Guidelines, 1, §6 stating that good faith conduct includes ensuring that the person attending an ADR process on behalf of a party has the necessary authority to settle the matter; Minn.Stat.Ann §583.27(1)(a) providing that "Not participating in good faith includes […] (3) failure of the creditor to designate a representative to participate in the mediation with authority to make binding commitments within one business day to fully settle, compromise, or otherwise mediate the matter." Wash.Rev.Code Ann §61.24.163(12) providing that a violation of the obligation to mediate in good faith may include "(c) failure of a party to designate representatives with adequate authority to fully settle, compromise, or otherwise reach resolution with the borrower in mediation."; see further CARTER, 400–401; KOVACH, 622 submitting that good faith participation in mediation includes personal attendance at the mediation by all parties who are fully authorized to settle the dispute, which shall not be construed to include anyone present by telephone; WESTON, 628.

2514 For example, Article 12 SCAI Swiss Rules of Mediation 2019 provides as follows: "The parties shall appear at all mediation sessions in person or, for legal entities, through duly

4. Duty to comply with contractual terms regarding mediation

1651. It is submitted that the obligation to mediate in good faith includes the duty to comply with all contractual terms regarding mediation which the parties may have previously agreed to.[2515]

5. Duty to follow rules set out by the mediator

1652. It is also submitted that the obligation to mediate in good faith includes the duty to follow the rules set out by the mediator during the introductory phase of the process.[2516]

6. Duty to cooperate

1653. The obligation to mediate in good faith comprises a duty to cooperate.

1654. This includes, first of all, a duty to cooperate in the appointment of a mediator.[2517]

1655. Second, it includes a duty to cooperate with the mediator.[2518] This encompasses a duty to comply with the mediator's requests to submit written materials

authorized and empowered representatives of the entity […]." Article 6.5 LCIA Mediation Rules 2020 provides as follows: "Each party shall identify a representative of that party who is authorized to settle the dispute on behalf of that party, and shall confirm that authority in writing."

2515 KOVACH, 622.

2516 KOVACH, 623.

2517 *Cable & Wireless Plc v IBM United Kingdom Ltd* [2002] 2 All ER (Comm) 1041 (holding that if one party simply fails to cooperate in the appointment of a mediator, there would be a breach of the parties' agreement to attempt in good faith to resolve a dispute through ADR). See also *Seidel v Bradberry* 1998 WL 386161 in which it was held that the defendant failed to proceed in a good faith effort to resolve the case because, *inter alia*, it did not participate in the selection of the mediator.

2518 See Article 10 WIPO Mediation Rules 2014; Article 8(4) CRCICA Mediation Rules 2013 and Article 8 CAS Mediation Rules 2016.

including written memoranda,[2519] explanations,[2520] documents/information,[2521] and evidence[2522] as well as the mediator's requests to attend meetings.[2523]

1656. Third, this duty to cooperate includes a duty to facilitate visits to, and inquiries at, any place connected with the dispute as well as to use the means at their disposal to enable the mediator to hear witnesses.[2524]

[2519] *In re Bambi*, 492 BR 183, 188 (Bankruptcy Division, SDNY 2013) (holding that good faith requires the parties to produce the requested memoranda); *Nick v Morgan's Foods Inc* 99 FSupp2d 1056 (holding that good faith participation in ADR requires providing the neutral with a mediation memorandum); *Vay v Huston* 2015 WL 791430 (WD Pa 2015) (holding that the plaintiff violated the duty of good faith by not filing the required ENE position statement); *Francis v Women's Obstetrics and Gynecology Group, P.C.* 144 FRD 646 (WDNY 1992) (where counsel failed to provide a statement of facts and legal issues); see also ABA Section of Dispute Resolution: Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs, 2 stating that parties should be held to specific objective standards, namely an obligation to provide written memoranda prior to the mediations but that this rule should not be labeled as a good faith requirement because of the widespread confusion about the meaning of the term.

[2520] Rule 23 ICSID Convention Conciliation Rules 2006. See also Australia AAT Guidelines, 1 stating that the parties have a responsibility to take steps to clarify disputes.

[2521] See Australia AAT Guidelines, 2 stating that the duty to act in good faith includes a duty to disclose information relevant to the dispute in a timely manner; Article 12.1 ACICA Mediation Rules 2007; Article 11 UNCITRAL Conciliation Rules 1980; Rule 23 ICSID Convention Conciliation Rules 2006; COX, 1425; WESTON, 628 (stating that a refusal to provide necessary and unprivileged information or witnesses is contrary to good faith participation).

[2522] *Employer's Consortium Inc. v Aaron*, 698 NE2d 189, 190 (III App Ct 1998) (holding that the plaintiffs failed to participate in good faith in the mandatory arbitration as they failed to present any evidence. Indeed, the attorney for the plaintiffs had only made a brief opening statement and submitted a copy of the unverified complaint with attached exhibits to the arbitrator but had declined to present any witnesses); *Wertheimer v Acret*, 5 Cal Rptr 2d 423, 424 (Cal Ct App 1992) (affirming sanctions against the plaintiffs for failing to participate in judicial arbitration in good faith by deliberately failing to produce an expert witness); *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California*, *Inc* 92 Cal Rptr 2d 916 (holding that the defendant failed to mediate in good faith by failing to bring expert witnesses to the mediation session). See further WESTON, 630 stating that bad faith is indicated by the refusal to identify witnesses and offer any evidence.

[2523] See Article 12.1 ACICA Mediation Rules 2007 providing that "The parties will in good faith co-operate with the mediator and, in particular, will endeavour to comply with requests by the mediator to submit written materials, provide evidence and attend meetings."; Article 11 UNCITRAL Conciliation Rules 1980 contains an identical provision. Rule 23 ICSID Convention Conciliation Rules 2006 provides as follows: "The parties shall cooperate in good faith with the Commission and, in particular, at its request furnish all relevant documents, information and explanations as well as use the means at their disposal to enable the Commission to hear witnesses and experts whom it desires to call. The parties shall also facilitate visits to and inquiries at any place connected with the dispute that the Commission desires to undertake."

[2524] See Rule 23 ICSID Convention Conciliation Rules 2006.

1657. Furthermore, the obligation to mediate in good faith includes a duty to cooperate with the other party including a duty to conduct direct communications and discussions with the other party[2525] as well as a duty to fully cooperate in discovery proceedings.[2526]

1658. Finally, the duty to cooperate also encompasses a negative component namely a duty not to unnecessarily delay the proceedings.[2527]

7. Duty to act honestly and reasonably

1659. The obligation to mediate in good faith obliges the parties to act honestly and reasonably as well as respectfully during the mediation.[2528]

1660. Accordingly, a party will breach this obligation if it: (i.) makes unrealistic proposals or gives hints at possible concessions which it has no intention of making;[2529] (ii.) makes affirmative misrepresentations or misleading statements to the other parties or the mediator;[2530] (iii.) requests an excessive settlement sum

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2525 KOVACH, 622 setting out as one suggested model rule for lawyers requiring good faith participation in the mediation process: "(j) Engaging in direct communication and discussion between the parties to the dispute, as facilitated by the mediator."; WESTON, 628; see also *Seidel v Bradberry* 1998 WL 386161 in which it was held that the defendant failed to proceed in a good faith effort to resolve the case because, *inter alia*, it did not communicate with the other parties concerning the mediation and it did not respond to any of the plaintiff's correspondence concerning the mediation.

2526 *Kalain v Smith*, 25 Ohio St. 3d 157, 495 NE2d, 572, 574 (1986) holding that "A party has not failed to make a good faith effort to settle […] if he has fully cooperated in discovery proceedings."

2527 *Kalain v Smith*, 25 Ohio St. 3d 157, 495 NE2d, 572, 574 (1986) holding that "A party has not failed to make a good faith effort to settle […] if he has […] not attempted to unnecessarily delay any of the proceedings."; *US Bank v Sawyer*, 2014 ME 81 (Me 2014) where a party continually asked during four mediations sessions for documents the other party had previously provided; see also COX, 1418 (referring to the stalling of negotiations by unexplained delays in answering correspondence and the unnecessary postponement of meetings);WESTON, 628, 630 stating that repeated delays and postponement of meetings or hearings is contrary to good faith participation in mediation.

2528 See in this regard Australia AAT Guidelines, 1, §6 stating that good faith conduct includes adopting an honest and genuine approach to resolving a dispute as well as treating other parties respectfully and at 3, §13 stating that the duty to act in good faith prohibits misleading conduct.

2529 JARROSSON, ADR, §24.

2530 KOVACH, 622 submitting that good faith participation in mediation includes "making no affirmative misrepresentations or misleading statements to the other parties or the mediator during the mediation."; see also WESTON, 628.

on the basis of a threat;[2531] (iv.) does not rationally evaluate its risks and potential liability;[2532] (v.) makes a derisory counter offer;[2533] (vi.) does not respond to an initial offer and directs the mediator to tell the other party that it has five minutes to put a serious settlement offer on the table or the mediation is over;[2534] (vii.) does not allow the mediator to explain offers from the other party;[2535] (viii.) constantly shifts positions or injects new demands just as an agreement seems imminent;[2536] (ix.) insists on a verbatim transcript of the negotiation;[2537] (xi.) goes through the motions of negotiating but refuses to sign a written agreement reflecting the negotiations;[2538] (xii.) uses the mediation process to gain a strategic advantage in the litigation or arbitration process;[2539] and (xiii.) uses the mediation to impose hardship rather than to promote understanding and conflict resolution.[2540]

1661. Unilaterally terminating or abandoning the mediation process without reason has moreover been considered contrary to good faith participation in mediation.[2541]

2531 *Del Fuoco v Wells* 2005 WL 2291720 where the plaintiff and his attorney sought to obtain a settlement of the case for USD 500,000 plus an attorney's fee – an amount far in excess of any credible value of the case – in exchange for not disclosing alleged campaign violations by the sheriff, who was then conducting a re-election campaign.

2532 *Kalain v Smith*, 25 Ohio St. 3d 157, 495 NE2d, 572, 574 (1986) holding that "A party has not failed to make a good faith effort to settle […] if he has rationally evaluated his risks and potential liability."

2533 *Borror v MarineMax of Ohio, Inc*., 2007-Ohio-562, 2007 WL 431737 (concerning a dispute over a USD 780,000 boat in which the plaintiff demanded USD 900,000 in the mediation and the defendant countered with USD 35,000. The court held that the offer was not in good faith and so inadequate to justify terminating the negotiations.).

2534 *Brooks v Lincoln Nat'l Life Ins Co* (D Neb Aug 25, 2006).

2535 *Ibid*.

2536 COX, 1419.

2537 *Ibid*.

2538 COX, 1422.

2539 CARTER, 372; see also KOVACH 593–594 (stating that bad faith conduct in mediation includes the request of mediation for the sole purpose of discovery and using the mediation in order to assess the other side in terms of their potential effectiveness at trial) and WESTON, 630 (stating that there is a violation of the good faith requirement when the ADR process is used for the sole purpose of discovery).

2540 CARTER, 372. See also KOVACH 593–594 (stating that bad faith conduct in mediation includes using the mediation to wear down a litigant where one party is more financially able than the other); WESTON, 630 stating that there is a violation of the good faith requirement when the ADR process is used for the sole purpose of outspending or harassing the other side.

2541 *Brooks v Lincoln Nat'l Life Ins Co* (D Neb Aug 25, 2006).

8. Duty to inform and be transparent

1662. The obligation to mediate in good faith requires a party to inform the others that it does not intend to settle prior to attending a settlement conference.[2542]

1663. It has also been held that a party fails to act in good faith if it allows the opposing party to expend time and expense to prepare and participate in the mediation when it knows that it is only willing to settle on terms that are not feasible or acceptable to the opposing party.[2543] Similarly, it has been held that a party failed to mediate in good faith when it did not reach out to the other party to

[2542] *Apelian v Allstate Insurance Company* 2016 WL 7388276 (holding that if a party has no intention of settling, and therefore cannot participate in settlement discussions in good faith, they have an obligation to inform the Court as soon as possible.); *Fisher v SmithKline Beecham Corp*, 2008 WL 4501860 (WDNY 2008) (holding that the defendant did not mediate in good faith when it did not inform the plaintiffs that it was not willing to fully participate in the mediation and waited until the plaintiff's counsel was in route to the mediation across the country to file a summary judgment motion); *Grigorants v Safety-Kleen Corp*, 2014 WL 2214272 (WD Pa 2014) (holding that Safety-Kleen did not participate in the mediation process in good faith as it did not notify the plaintiffs and the court that it had a standard policy to wait until after the close of discovery to make any offer of settlement.); *Pitman v Brinker Intern Inc*., 216 FRD 481, 484 (D Ariz 2003) (holding that the good faith obligation was violated when the defendant attended the settlement conference but had no intention of settling and failed to notify the court of this intention); *Smith Wholesale Co v Philip Morris USA Inc* 2005 WL 1230436 (ED Tenn 2005) (order vacated on reconsideration - see 2005 WL 2030655 (ED Tenn 2005) where defendant was held to have failed to mediate in good faith as plaintiffs had spent significant time preparing for and traveling to mediation, and defendant refused to mediate after five hours but had previously failed to communicate to the court or opposing counsel that mediation was likely to be futile. See further ICC Case No 14079, Procedural Order of September 2006 in ICC Special Supplement 2014: Procedural Decisions in ICC Arbitration, 38, §68. Although concerning an adjudication process rather than a mediation process, the holding of the arbitral tribunal in ICC Case No 14079 (law of employer's state, Zurich (Switzerland)) would nevertheless seem to be pertinent. In this case, the arbitral tribunal held that the adjudication process foreseen in the dispute resolution provisions in a construction contract required "a genuine good faith approach and good faith endeavor to accomplish the goal of a meaningful procedure." The arbitral tribunal insisted, in particular, that this process should not be used with the aim of making it more costly and burdensome for the respondent to bring its claims. Interestingly, the arbitral tribunal appeared to suggest that good faith would in fact oblige the claimant to waive the compliance with this process if it was of the view that it would be useless or to negotiate with the respondent in order to come up with a better or more efficient process if it had quality concerns about the foreseen mechanism.

[2543] *Corporations for Character v Federal Trade Commission*, 2018-2 Trade Cases (CCH) §80454, 2018 WL 3539830 holding that "Professional courtesy, candor, and good faith impose a duty to advise opposing counsel of non-negotiable terms, information required, or other conditions that must be met before a settlement will be considered."

explain that its demand was well beyond an amount to which his client might be agreeable.[2544]

1664. In this regard, it has been held that a party mediated in good faith when it arrived at the mediation and stated its willingness to proceed even though it did not believe that it was liable and did not intend to offer the other party money to settle their claims.[2545]

1665. It has further been submitted that it is important for the parties to provide an explanation for the proposed settlement or lack thereof.[2546]

1666. Moreover, it has been held that a party violated its obligation of good faith by failing to inform the mediator and the other party that a third party had paid its claims.[2547]

9. Duty to have an open mind

1667. As with the obligation to negotiate in good faith,[2548] the obligation to mediate in good faith obliges the parties to be open to consider, as well as to propose, settlement terms.[2549] As stated by one judge: "I expect parties to go to the

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2544 *Lea v PNC Bank* 2016 WL 738053 (WD Pa 2016).

2545 *Stoehr v Yost*, 765 NE2d 684 (Ind Ct App 2002).

2546 KOVACH, 611.

2547 *Kalgren v Cent Mut Ins Co*, 418 NYS2d 1, 3 (NY App Div 1979).

2548 See above, para. 1635 et seq.

2549 *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) NSWSC 996, §156 holding that: "the essential or core content of an obligation to negotiate or mediate in good faith may be expressed in the following terms […] to undertake in subjecting oneself to that process, to have an open mind in the sense of: (a) a willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator, as appropriate; (b) a willingness to give consideration to putting forward options for the resolution of the dispute."; see also Australia AAT Guidelines, 1, §5 stating that the duty to act in good faith includes a duty to listen to other views and put forward and consider options for resolution and at 2, §6 stating that the duty to act in good faith includes a duty to have an open mind and a willingness to consider the interests of the other, a duty to have a willingness to propose options for the resolution of the dispute and to discuss one's position in detail, a duty to be explain the rationale behind an offer of settlement or the refusal of the other party's offer of settlement as well as a duty to be prepared to make concessions; BERG, 363; KOVACH, 615–616: "Good faith includes coming to the mediation with an open mind, not necessarily a promise to change a view, but a willingness to be open to others […] One party need not agree with the other, but attempt to understand, and, at the very least, not summarily and without consideration immediately reject what the person has to say."

mediation and participate in good faith, meaning that they go to the mediation with the idea to see if the matter can be resolved."[2550]

1668. In one case, the plaintiff was sanctioned for appearing at a settlement conference with "no good faith intention whatsoever of resolving [the] matter in any manner other than a complete and forcible devolution of title."[2551]

1669. KOVACH, however, submits that good faith does not oblige a party "to possess a sincere desire to resolve the matter" as it would be too difficult to attempt to rule on a party's state of mind.[2552]

10. Duty to maintain the confidentiality of the mediation

1670. It is submitted that the obligation to mediate in good faith includes a duty to maintain the confidentiality of the mediation.[2553] However, this duty could also be expressly imposed by the applicable institutional mediation rules[2554] or by the applicable law.

11. Duty to keep any agreement reached in the mediation

1671. It is also submitted that the obligation to mediate in good faith includes a duty to abide by any agreement reached in the mediation.[2555]

12. Duty to refrain from filing any new motions

1672. It is further submitted that the obligation to mediate in good faith includes the duty to refrain from filing any new motions in a pending lawsuit until the conclusion of the mediation.[2556]

2550 *Stafford v Fockaert*, 2016 MT 28, 366 P3d 673, 676 (2016).

2551 *IndyMac Bank FSB v Yano-Horoski*, 26 Misc 3d 717, 718, 890 NYS 2d 313, 315 (Supreme Court Suffolk County 2009).

2552 KOVACH, 610.

2553 See Australia AAT Guidelines, 1, §6.

2554 See, for example, Article 9 ICC Mediation Rules 2014; Article 13 Swiss Rules of Mediation 2019; Article 12 LCIA Mediation Rules 2020.

2555 See Australia AAT Guidelines, 2, §6; see also COX, 1419 and WESTON, 630 stating that indicia of bad-faith participation including repudiating commitments made during bargaining.

2556 KOVACH, 622.

13. No duty to act for or on behalf of the interests of the other party

1673. As with respect to the obligation to negotiate,[2557] the obligation to mediate in good faith does not oblige a party to act for or on behalf of or in the interests of the other party or to act otherwise than by having regard to self-interest.[2558]

14. No duty not to withdraw or to reach an agreement

1674. The obligation to mediate in good faith also does not prevent a party from withdrawing from the mediation, if appropriate, or require that an agreement is reached or that any particular outcome is achieved.[2559] Indeed, the obligation to mediate in good faith does not encompass a duty to make, or to accept, an offer.[2560]

2557 See above, para. 1638.

2558 *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) NSWSC 996, §156; see also *United Group Rail Services Ltd. v Rail Corp. New South Wales* (2009) NSWCA 177, §70; Australia AAT Guidelines, 2, §11 stating that the duty to act in good faith does not oblige a party to act against his or her own interests or to act in the interests of the opposing party; see further KOVACH, 626.

2559 See *Nick v Morgan's Foods Inc* 99 FSupp2d 1056 (holding that good faith participation in ADR does not require a settlement to be reached); *Palmer v Fed Express Corp* 2015 WL 9295917 (WD Pa Dec 18 2015) (holding that sanctions are imposed for a refusal to participate and not for a refusal to settle); *Corporations for Character v Federal Trade Commission*, 2018-2 Trade Cases (CCH) §80454, 2018 WL 3539830 (holding that "No party […] can or should be required to resolve a case or to offer to settle on terms that are inconsistent with its own assessment of its legal position and rights."); *Toscano v Lewis*, 2015 WL 6744580, (ND Cal 2015) (holding that a party does not have to reach a settlement or other resolution); *Dawson v United States*, 68 F3d 886 (5th Cir 1995) (holding that good faith does not require a party to settle or to make a settlement offer); see also Australia AAT Guidelines, 2 §7; KOVACH, 603 (submitting that bad faith does not include failure to make an offer or "come down enough"), 610 (no duty to reach an agreement), 611 (no duty to reach a settlement); WESTON, 626, 627.

2560 See CARTER, 400 who submits that no party should be under any obligation to make any offer at the mediation and WESTON, 626 who states that parties are not precluded from refusing to make or accept a settlement offer.

V. Invoking and Proving a Violation of the Obligation to Negotiate or Mediate in Good Faith Prior to Resorting to Arbitration

1675. It goes without saying that an allegation that a party failed to comply with the obligation to negotiate or mediate in good faith prior to resorting to arbitration must not itself be contrary to good faith. In this regard, the Swiss Federal Supreme Court has held that it was contrary to good faith for a party to invoke the lack of compliance of the other party with a pre-arbitral step to conciliate when such party had not itself made an attempt to conciliate.[2561]

1676. Proving a violation of the obligation to negotiate or mediate in good faith may be difficult.

1677. This is firstly because most negotiations and mediations may be privileged or covered by confidentiality.[2562]

1678. As noted by FLANNERY and MERKIN with respect to settlement discussions:

> there is also of course the evidential problem that will undoubtedly arise, if the settlement discussions are conducted—as they invariably are—'without prejudice', i.e., attracting the cloak of privilege, and the complaint is not so much about whether the discussions took place at all, but that they did not do so 'in good faith'. […] If the discussions are expressly (or even impliedly) held 'without prejudice' (and it is difficult to see how they could be otherwise), this will mean that neither the tribunal nor the court will be permitted to review the contents of the privileged discussions, in order to determine whether they took place 'in good faith'. It is commonly accepted that frank and open negotiations provide the best opportunity to settle a dispute. If an allegation is made that a party acted in bad faith, and therefore in breach of the implied term, how would such a party be able to rebut the allegation, without removing the 'without prejudice' lid?[2563]

1679. Indeed, depending on the applicable law[2564] and any applicable institutional mediation rules, statements made during, and communications or documents

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[2561] SFSCD 4A_90/2021 of 9 September 2021, c. 4.3.

[2562] See in general, BERGER, Settlement Privilege, 265 et s.

[2563] FLANNERY/MERKIN, 103–104; see also WESTON, 633 referring to the impact of confidentiality privileges on proving bad faith.

[2564] There are a multitude of laws that may be considered applicable to the existence and scope of a privilege (such as the privilege that may be applicable to settlement discussions and mediation proceedings), including the procedural law of the arbitration, the law applicable to the arbitration agreement and the law most closely connected to the privileged communication. Commentators, however, give preference to the law most closely connected to the privileged communication (see BORN, 2558–2560; GREGOIRE, 157; MOSK/GINSBURG, 381).

relating to, settlement negotiations[2565] as well as mediation proceedings[2566] may be privileged or covered by confidentiality.

1680. Furthermore, there is deemed to be a transnational privilege rule covering settlement negotiations which applies in international arbitration, and which is acknowledged by Article 9(4)(b) IBA Rules on the Taking of Evidence in

[2565] Under French law, communications between lawyers concerning settlement negotiations are covered by professional secrecy (*Article 3.1 Décision du 12 juillet 2007 portant adoption du règlement intérieur national (RIN) de la profession d'avocat; Article 66-5 Loi No 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques*). However, communications exchanged between the parties are not protected (see GREGOIRE, 87.); Under Swiss law, without prejudice communications between attorneys cannot be produced in court (SFSCD 140 III 6 of 11 December 2013). Pursuant to Articles 6 and 26 National Rules of Professional Conduct of the Swiss Bar Association (available at < https://www.sav-fsa.ch/en/anwaltsrecht/berufsregeln-national.html>, accessed 1 March 2023), attorneys are prohibited from informing the court of the existence of a settlement proposal and from producing evidence containing settlement proposals; Under English law, all oral and written negotiations which are genuinely aimed at settlement are excluded from evidence (*Rush & Tomkins v GLC* [1989] 1 AC 1280); Rule 408 Federal Rule of Evidence precludes admissibility in court of evidence of offers to compromise, including conduct and statements made during settlement discussions but only when offered to prove liability for, or invalidity of, a claim or its amount; Section 4547 New York Civil Practice Law and Rules contains a similar provision.

[2566] Under French law, mediation proceedings are confidential (Article 131-14 French Code of Civil Procedure; Article 21-3 French Law on the Organization of Jurisdictions and Administrative, Criminal and Civil Procedure of 8 February 1995); Under Swiss law, mediations proceedings are confidential and statements of the parties may not be used in court proceedings (Article 216 Swiss Code of Civil Procedure); Under English law, mediation proceedings are covered by the without prejudice privilege (*Brown v Rice and Patel* [2007] EWHC 625 (Ch) at [13], [21]); Under US law, the existence and applicability of a federal mediation privilege is uncertain, see SARAH COLE/CRAIG MCEWEN/NANCY ROGERS/ JAMES COBEN/PETER THOMPSON, Mediation: Law, Policy and Practice, §8.18 (updated December 2019). With respect to the confidentiality imposed by institutional mediation rules, see, for example, Article 9 ICC Mediation Rules 2014, Article 13 Swiss Rules of Mediation 2019 and Article 12 LCIA Mediation Rules 2020.

International Arbitration 2020.[2567] Moreover, commentators are unanimous in their view that a general mediation privilege exists.[2568]

1681. The extent to which an exception to the applicable settlement/mediation privilege may apply in order to allow an arbitral tribunal to examine whether the parties acted in good faith is unclear.[2569]

[2567] ASHFORD, 158, §9-38; ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 213, §33; Article 9(4)(b) IBA Rules on the Taking of Evidence in International Arbitration 2020 provides in relevant part as follows: "In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account […] (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations." Trans-Lex Principle No XII.5 'Settlement Privilege' provides as follows: "(a) Privileged information is inadmissible as evidence in subsequent arbitration or court proceedings between the same parties, provided that the privilege objection i) is raised in the arbitration or court proceedings in good faith, and ii) does not relate to evidence which one side would have been able to prove had there been no settlement negotiations between the parties. (b) Privileged information relates to i) statements, views, admissions, proposals, suggestions, indications of readiness to accept a certain proposal for settlement, whether written or oral, submitted by a party during settlement negotiations, mediation/ conciliation or any other ADR proceedings, or ii) statements made or views expressed by a third neutral involved in such proceedings, or iii) any document, witness statement or expert report submitted in or prepared by a party solely for these negotiations, mediation/conciliation or any other ADR process between the parties." See also ICC Case No 6653 of 1993 referred to in JASON FRY, Without Prejudice and Confidential Communications in International Arbitration (When Does Procedural Flexibility Erode Public Policy?) (1998) International Arbitration Law Review 209, 212; BERGER, Settlement Privilege, 271.

[2568] ASHFORD, 158, §9-39; BERGER, Settlement Privilege, 266–269.

[2569] Under US law, it is submitted that evidence offered to show misconduct or abuse of a good-faith requirement in an ADR process may be admissible under the exception found in Federal Rule of Evidence 408 which permits such evidence when offered for "another purpose", such as "proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."(see WESTON, 634–635). In addition, it has been submitted that contractual confidentiality provisions would not necessarily prevent the admission of evidence of a violation of a good faith requirement (see WESTON, 635); For the exceptions to the "without prejudice" privilege under English law, see ANDREWS, Civil Process, 312–319, §§12.99-12.120; It has also been held in *obiter dicta* that a court is more likely to inquire into events that take place in mediation when there has been an assault or threats which are irrelevant to the underlying dispute (see *Hall and Another v Pertemps Group Ltd and Another* [2005] ADR LR 11/01 where, however, evidence of the parties' conduct during the mediation was admitted because the court considered that the parties had waived the privilege by mutual conduct in satellite litigation). Under Swiss law, commentators submit that confidentiality does not apply to statements made in mediation which are to serve as evidence of a legally relevant fact concerning new claims arising during the mediation (JAMES T PETER, Art. 216 SwCCP in Heinz Hausheer/Hans Peter Walter (eds) Berner

1682. In light of the fact that statements made during, and communications or documents relating to, settlement negotiations as well as mediation proceedings may be privileged or covered by confidentiality, some arbitral tribunals may refuse to examine whether or not the parties acted in accordance with their obligation to negotiate or mediate in good faith.

1683. Indeed, the arbitral tribunal in ICC Case No 7422 took this approach.

> [Claimant] stated, also without being contradicted, that the Parties agreed to confidentiality so far as the negotiations are concerned […] Under these circumstances the Arbitrators are of the opinion that they should not evaluate the Parties' conduct in respect of the substance, thoroughness and sincerity of their confidential negotiations and must therefore disregard the Defendant's allegation that [Claimant] did not act in good faith.[2570]

1684. Proving a violation of the obligations to negotiate or mediate in good faith is secondly complex because some violations of the obligation to negotiate or mediate in good faith require an inquiry into the mind of the other party.[2571]

1685. Indeed, proving whether a party actually has an open mind or not, is fraught with difficulties. A party may be pretending to not be interested in the options put forward by the other party when it is in fact closely considering the options. A party may also be pretending that it is not interested in the negotiations as a tactic in order to achieve a better result while at the same time waiting for an offer from the other party or waiting for, what it deems to be, an appropriate time to make an offer.[2572]

1686. Furthermore, proving that a party is employing the alternative dispute resolution as a dilatory tactic is difficult:

> A party who deliberately uses ADR as a dilatory tactic would be in breach of its obligations of good faith; however, […] proof of that breach [is] difficult to adduce (i.e., it would be necessary to show that the party entered into the ADR proceedings with no intention of permitting them to reach a successful conclusion)…[2573]

Kommentar: ZPO, Band I: Art. 1-149 ZPO; Band II: Art. 150-352 ZPO und Art. 400-406 ZPO Schweizerische Zivilprozessordnung (2012), §31; PETER RUGGLE, Art. 216 SwCCP in Karl Spühler/Luca Tenchio/Dominik Infanger (eds) Basler Kommentar Schweizerische Zivilprozessordnung (ZPO) (3rd edn 2017) §14a). This could perhaps extend to new claims of a bad faith conduct arising during the mediation; Under French law, an exception to the confidentiality which applies to mediations only applies if there are overriding considerations of public policy (see Article 21-3 French Law on the Organization of Jurisdictions and Administrative, Criminal and Civil Procedure of 8 February 1995).

2570 ICC Case 7422, Interim Award of 29 June 1998, reported in FIGUERES, 78–79.

2571 JARROSSON, ADR, §24: "it would be very unusual for a party to be held liable for breach of this duty, since that would require proof of its bad faith which, in practice, would be most difficult to produce."

2572 *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) NSWSC 996, §159.

2573 JARROSSON, ADR, §44.

VI. Consequences of a Violation of an Obligation to Negotiate or Mediate in Good Faith Prior to Resorting to Arbitration

1687. Depending on the characterization of the obligation to negotiate or mediate in good faith prior to resorting to arbitration, a failure to comply with such an obligation, may either lead to the substantive solution of the contractual liability of the party that has failed to comply with this obligation (A.), or the procedural solution of the inadmissibility of said party's claims and the suspension of the arbitral proceedings until compliance with this obligation (B.). In addition, it is possible that any eventual arbitral award rendered may be set aside for lack of jurisdiction due to a failure of a party to comply with its obligation to negotiate or mediate in good faith (C.).

A. Substantive solution: contractual liability of non-compliant party

1688. It is possible to deem the violation of a pre-arbitration requirement to be of a contractual nature and consider therefore that a party may be potentially contractually liable for the violation of such a requirement.[2574]

1689. However, proving the loss suffered is problematic.[2575] Indeed, what loss does a party suffer due to the other party's failure to negotiate or mediate in good faith?[2576] It is not at all clear that even if such negotiations and mediations had been conducted in good faith, a successful settlement would have resulted, and the arbitration would not have gone ahead.[2577]

1690. Indeed, the Swiss Federal Supreme Court has recently rejected this approach and held that damages are not an appropriate and satisfactory means to sanction the non-compliance with a multi-tiered clause.[2578] Similarly, there are no known arbitral awards in which this approach was taken.

[2574] BORN, 990; see also DOUG JONES, Dealing With Multi-Tiered Dispute Resolution Process, (2009) 75 Arbitration 2, 191 stating that pre-arbitration procedures "could be addressed as a matter of substantive contract law under which non-compliance with previous tiers may amount to a breach, the classical remedy for which would be damages."

[2575] JARROSSON, ADR, §21, §44.

[2576] FLANNERY/MERKIN, 104–105.

[2577] *Ibid*.

[2578] SFSCD 142 III 296 [316], SFSCD 4A_628/2015 of 16 March 2016: "*Cela étant, sanctionner par des dommages-intérêts la partie qui refuse de se soumettre à l'obligation de recourir à un préalable obligatoire à l'arbitrage ou de poursuivre jusqu'au bout la procédure spécifique*

1691. Conversely, the English courts, in *obiter dicta*, have held that it may be possible to award damages in appropriate cases for loss of a chance as a result of the breach of the obligation to negotiate in good faith.[2579]

B. Procedural solution: inadmissibility of the claim of the party and suspension of the arbitral proceedings

1692. The majority of national courts, arbitral tribunals and commentators consider that the violation of a pre-arbitration requirement to negotiate or mediate in good faith has procedural consequences. Hence, a failure to comply with the obligation to negotiate or mediate in good faith may lead to a party's claim being

en cours visant à favoriser un règlement du différend à l'amiable n'est pas une solution satisfaisante. Premièrement, cette sanction viendra trop tard, vidant de tout son sens l'obligation de recourir à la médiation avant d'introduire une procédure d'arbitrage. Secondement, il sera difficile, sinon impossible, à la partie victime de la violation de la clause de médiation de justifier le montant du dommage subi. Il ne devrait certes pas être facile de prouver que le fait de ne pas avoir mené le processus de médiation à son terme est constitutif d'un dommage, puisque l'un des principes de la médiation est qu'il n'y a aucune obligation d'aboutir à un accord. C'est pourquoi les seules sanctions potentiellement efficaces - déclarer la demande irrecevable, la rejeter en l'état ou suspendre la cause arbitrale jusqu'à ce que le processus de médiation ait été mené à terme - sont de nature procédurale, et non pas contractuelle." ("However, punishing a party who refuses to submit to the obligation to use a mandatory precondition for arbitration or to pursue to the end the specific procedure under way to promote an amicable settlement of the dispute with damages is not a satisfactory solution. First, this sanction will come too late, rendering meaningless the obligation to resort to mediation before initiating arbitration proceedings. Secondly, it will be difficult, if not impossible, for the party who is the victim of the violation of the mediation clause to justify the amount of damages suffered. It should certainly not be easy to prove that failure to complete the mediation process constitutes damage, since one of the principles of mediation is that there is no obligation to reach an agreement. Therefore, the only potentially effective sanction - to declare the claim inadmissible, reject it as it stands or suspend the arbitral case until the mediation process has been completed - are procedural, not contractual in nature.") (informal English translation of the French original).

[2579] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm), at [47]: "Whilst it may be difficult in some circumstances to establish a breach of the obligation there will be other circumstances in which a court is likely to be able to identify conduct, if it exists, which departs from the conduct expected of parties who have agreed to seek to resolve contractual disputes by friendly discussions. For example, a party who refused to discuss his claim at all could easily be shown to have breached the obligation to seek to resolve his claim by friendly discussion. Difficulty of proof of breach in some cases does not mean that the clause lacks real content. If a party were to seek damages for breach of the obligation it might be difficult to establish what the outcome of the discussions would have been but in such a case damages could, in appropriate cases be awarded for loss of a chance."

deemed inadmissible by the arbitral tribunal if the requirement to negotiate in good faith is interpreted as a condition precedent to arbitration.[2580]

1693. Some arbitral tribunals have held that a failure to comply with pre-arbitration requirements prevents a party from arbitrating.[2581]

1694. This is also the approach taken by the French courts which have held that claims were not admissible before the courts until the prior requirement of conciliation proceedings had taken place.[2582] According to JARROSSON, an arbitral tribunal faced with a situation where pre-arbitral requirements have not been met may declare the request "inadmissible as it stands" and declare that its mission is suspended until the cause of inadmissibility has disappeared, i.e., until it is shown, where applicable, that the negotiations/mediation provided for have been initiated and have failed.[2583]

1695. Similarly, according to the Swiss Federal Supreme Court, the preferable solution in case of the breach of a pre-arbitration requirement is for the arbitral tribunal to suspend the arbitral proceedings until the mediation or negotiation requirement has been complied with.[2584]

1696. This approach has further been taken by the English courts who had stayed court proceedings pending compliance with prior ADR requirements.[2585] In this regard, it is also considered that an arbitral tribunal faced with a situation where pre-arbitral requirements have not been met will similarly stay the arbitral proceedings.[2586]

1697. Moreover, the New York courts have issued a permanent stay of the arbitral proceedings in a case where a party did not comply with the pre-arbitration

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[2580] BORN, 988 et seq.

[2581] See e.g., ICC Case No 12739 (Tunisian law, Switzerland) in which the arbitral tribunal held that the request for arbitration was inadmissible as the pre-arbitral phase had not been completed. The arbitral tribunal refused to suspend the arbitration pending the completion as this had not been provided for by the parties in the arbitration agreement. The arbitral tribunal went on to hold that it had no jurisdiction to hear the case as the request for arbitration was filed prematurely (cited in WEBSTER/BÜHLER, 92, §5-14).

[2582] Cass ch mixte, 14 févr. 2003, *Poiré v. Tripier* holding that the court proceedings were inadmissible before the conciliation proceedings had been carried out.

[2583] CHARLES JARROSSON, Note on *Poiré v Tripier* (2003) Rev Arb 403.

[2584] SFSCD 142 III 296 [317]–[318] (4A_628/2015) of 16 March 2016.

[2585] See *Cable & Wireless plc v. IBM United Kingdom Ltd* [2002] EWHC 2059, [2002] 2 All ER (Comm) 1041 (in which the stay was for an unspecified period until after the parties had referred all their outstanding disputes to ADR. The Court stated that in the event that this was unsuccessful, the parties could lift the stay and resume the proceedings) and *Mann v Mann*, [2014] EWHC 537 (Fam) (in which proceedings were stayed for a fixed 8-week period to allow the ADR step to be completed, failing which the stay was to automatically be lifted).

[2586] KAJKOWSKA, 44, §2.23.

requirements to refer the dispute first to an architect and then to mediation prior to resorting to arbitration.[2587]

C. Possible annulment of the award rendered in violation of a pre-arbitral requirement

1698. A failure to comply with the obligation to negotiate or mediate in good faith prior to resorting to arbitration may also constitute a ground for the challenge, or non-recognition and enforcement, of any award eventually rendered by the arbitral tribunal.[2588]

1699. For example, in Switzerland, a violation of a pre-arbitral requirement is a ground for challenging an international arbitration award rendered in Switzerland on the basis of a lack of jurisdiction (Art. 190(2)(b) PILA).[2589] In addition, in Singapore, an appeal on a ruling of jurisdiction may be made in case of a violation of a pre-arbitral requirement pursuant to Section 10 SIAA.[2590]

1700. Under English law, it also appears that an award may be set aside on the ground of a lack of jurisdiction due to non-compliance with a valid and mandatory pre-arbitral requirement.[2591] Similarly, under US law, it appears that an arbitral award may be vacated, or its recognition or enforcement may be denied if a

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2587 *Lakeland Fire Dist. v. E. Area Gen. Contractors, Inc*., 16 AD3d 417, 417–418 (NY App Div 2005) granting a permanent stay of the arbitration in a case where a party had not complied with the pre-arbitration requirements to refer the dispute first to an architect and then to mediation prior to resorting to arbitration.

2588 BORN, 975: "[…] in some instances, noncompliance with pre-arbitration procedural requirements has resulted in annulment or non-recognition of otherwise valid arbitral awards."

2589 See BAIZEAU, 2781–2797, §59, §65.

2590 See *International Research Corp PLC v. Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] SGCA 55, §63 in which the Singapore Court of Appeal held that the appeal was admissible as the arbitral tribunal lacked jurisdiction as a result of the violation of the pre-arbitral requirement.

2591 See *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm) [1] in which the claimant made an application pursuant to Section 67 EAA to challenge the arbitral award on the grounds that the arbitral tribunal did not have jurisdiction due to the violation of the pre-arbitral requirements. The court, however, found that the parties had complied with the pre-arbitration requirements and did not set aside the award. See also *Wah and Another v. Grant Thornton International Ltd and Others* [2012] EWHC 3198 (Ch) in which the claimant made an application pursuant to Section 67 EAA to challenge the arbitral award on the grounds that the arbitral tribunal did not have jurisdiction due to the violation of the pre-arbitral requirements. The High Court, however, dismissed the claim as it held that the pre-arbitration requirements lacked sufficient definition and certainty to constitute enforceable conditions precedent.

party fails to comply with a mandatory pre-arbitration requirement to negotiate or mediate prior to arbitration.[2592]

1701. The French courts, however, have held that the lack of compliance with a conciliation clause was not a jurisdictional issue which could lead to the setting aside of the award pursuant to Article 1502 FrCCP but an issue of admissibility of the claims.[2593]

[2592] Restatement of the Law, The US Law of International Commercial and Investor-State Arbitration, Proposed Final Draft (24 April 2019), 639, lines 4–6 stating that when an arbitration is not conducted in accordance with a precondition to arbitrate, the award rendered may be vacated or denied recognition and enforcement on the ground that the arbitral procedure is contrary in a material respect to the agreement of the parties.

[2593] *Société Nihon Plast Co. v. Société Takata-Petri Aktiengesellschaft*, Decision of the Paris Court of Appeal dated 4 March 2004, (2005) Rev Arb 143.

VII. Conclusion

1702. As we have seen, there is a great deal of uncertainty surrounding the validity and enforceability of obligations to negotiate or mediate in good faith prior to resorting to arbitration (A.). Given the abundant potential sources of good faith, there will rarely be any debate concerning the existence of an obligation to negotiate or mediate *in good faith* (B.). Through a review of the case law and legal doctrine, it has been possible to identify the contours of the content of the obligation to negotiate or mediate in good faith (C.). In this context, it is apparent that good faith has a supplementing function (D.). However, there are some evidentiary difficulties in proving certain violations of the obligation to negotiate or mediate in good faith (E.). Finally, the consequences of a violation of the obligation to negotiate or mediate in good faith are potentially significant (F.).

A. Uncertainty surrounding the validity and enforceability of pre-arbitration requirements

1703. There is a significant amount of uncertainty with respect to whether a given obligation to negotiate or mediate in good faith will be deemed valid and enforceable under the applicable law.

1704. Under English and New York law, such obligations must be deemed to be sufficiently certain in order to be enforceable. Indeed, there must be reasonably clear and objective criteria against which a parties' conduct can be measured. The degree of clarity and precision that is required in order for such obligations to be valid is uncertain.[2594]

1705. Under Swiss and French law, whilst such obligations are usually deemed to be *prima facie* valid, they must be interpreted as being mandatory in order to be enforceable.[2595] This interpretation of the parties' intent, as with any interpretation exercise, is inherently uncertain.

[2594] See above, para. 1599 and para. 1600.

[2595] See above, para. 1601.

B. Rare debate over the existence of the obligation to negotiate or mediate in good faith given the abundant potential sources

1706. Given the abundant potential sources of good faith, the existence of an obligation to negotiate or mediate *in good faith* prior to resorting to arbitration will rarely be debated.

1707. Indeed, with respect to the obligation to negotiate, there are many potential sources of the good faith requirement. The parties may expressly provide that pre-arbitral negotiations must be conducted in good faith or use similar language which may lead an arbitral tribunal to conclude that the parties intended that the obligation to negotiate must be conducted in good faith. Even absent an ascertainable party intent to impose an obligation to negotiate in good faith, the law applicable to the arbitration agreement may impose a general duty to perform obligations in accordance with good faith which may apply, by extension, to the contractual obligation to negotiate.[2596]

1708. With respect to the obligation to mediate, the potential sources of the good faith requirement in the obligation to mediate are even more numerous. Again, the parties may expressly provide that they are obliged to mediate in good faith or may employ language which, when interpreted, shows that this is what the parties intended. Even if no such intent can be ascertained, the applicable institutional mediation rules may impose such an obligation on the parties. Furthermore, the law applicable to the arbitration agreement may generally impose a duty on parties to perform their contractual obligations in accordance with good faith which, by extension, may also apply to the parties' contractual obligation to mediate.[2597]

C. Ascertainable contours of the content of the obligation to negotiate or mediate in good faith

1709. From a review of the case law and legal doctrine, it was possible to trace the (non-exhaustive) contours of the content of the obligations to negotiate and mediate in good faith prior to resorting to arbitration.

1710. In the author's view, the content of the obligation to negotiate a dispute in good faith differs from the content of the obligation to negotiate a contract in good faith. Indeed, at the pre-contractual stage, negotiations take place between two parties in an adversarial and competitive environment. Conversely, at the

[2596] See above, para. 1603 et seq.
[2597] See above, para. 1612 et seq.

contractual stage, negotiations take place between two parties who are already in a contractual relationship in a problem-solving environment.

1711. First and foremost, the obligation to negotiate in good faith prior to resorting to arbitration imposes a duty on the parties to actually enter into negotiations.[2598] It also encompasses a duty to send a representative to the negotiations with appropriate authority as well as a duty to invite all relevant participants.[2599]

1712. With respect to the compliance with such a duty when the other party refuses to enter into negotiations, the sending of several letters inviting the other contracting party to negotiate the dispute would seem to be sufficient to ensure compliance.[2600]

1713. With respect to the compliance with such a duty when the other contracting party is receptive to negotiations, numerous meetings and correspondence over a relatively short period of time discussing the claim in general should be sufficient to fulfill this obligation.[2601] In this respect, good faith would seem to oblige a party to invite all relevant participants to the negotiations, notably third parties who have been involved in the performance of the contract in question.[2602]

1714. Conduct contrary to the obligation to negotiate in good faith would include a party pretending to negotiate when it has no intention of settling or a party threatening a future contractual breach in order to get the other party to settle for a lower sum.[2603]

1715. Conversely, showing that a party has considered proposals put forward by the other party and has also itself put forward settlement proposals for consideration are supporting factors towards a conclusion that a party has negotiated in good faith.[2604]

1716. However, in order to comply with its obligation to negotiate in good faith, a party is not obliged to act for, or on behalf of, or in the interests of, the other party or to act otherwise than by having regard to self-interest and it is further not obliged to accept the terms of a settlement proposed by the other.[2605]

1717. With respect to the obligation to mediate in good faith prior to resorting to arbitration, the good faith requirement obliges the parties to prepare for mediation,

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[2598] See above, para. 1624 et seq.
[2599] See above, para. 1626 et seq. and para. 1628 et seq.
[2600] See above, para. 1625.
[2601] See above, paras. 1630 et seq.
[2602] See above, paras. 1628 et seq.
[2603] See above, para. 1634.
[2604] See above, paras. 1635 et seq.
[2605] See above, para. 1638 and paras. 1639 et seq.

to participate in the mediation, and to send an appropriate representative with the requisite authority.[2606] During the course of the mediation proceedings, it entails a duty to comply with contractual terms concerning mediation, a duty to follow the procedural rules fixed by the mediator, a duty to cooperate, a duty to act honestly and reasonably as well as a duty to inform and be transparent.[2607] It further encompasses a duty to be open to proposing and considering settlement options, a duty to maintain the confidentiality of the mediation process, a duty to abide by any agreement reached in the mediation and a duty to refrain from filing any new motions.[2608] It does not, however, encompass a duty to act for, or on behalf of, the interests of the other party or a duty not to withdraw or to reach an agreement.[2609]

1718. It is submitted that the content of the obligation to arbitrate in good faith discussed below[2610] may be instructive in determining further the contours of the obligation to mediate in good faith.

D. Good faith as a supplementing tool

1719. One can see that, in the context of its application to pre-arbitral requirements, good faith has a supplementing function.[2611] In this context, good faith thus acts as a supplementing tool imposing additional duties on the parties.

E. Evidentiary difficulties with some violations

1720. There are two main evidentiary difficulties with respect to the obligations to negotiate or mediate in good faith prior to resorting to arbitration.

1721. The first difficulty is that the negotiations and mediations may be privileged or covered by confidentiality which may make it impossible for a party to prove the violation of the obligation to negotiate or mediate in good faith or may lead to an arbitral tribunal refusing to examine this issue.[2612] Indeed, one arbitral tribunal refused to delve into the question of whether a party had complied with its obligation to negotiate in good faith given that the parties had agreed that the

[2606] See above, paras. 1643 et seq, paras. 1645 et seq. and para. 1650.
[2607] See above, para. 1651, para. 1652, paras. 1653 et seq., paras. 1659 et seq. and paras. 1662 et seq.
[2608] See above, para. 1667 et seq., para. 1670, para. 1671 and para. 1672.
[2609] See above, para. 1673 and para. 1674.
[2610] See below, para. 1782 et seq.
[2611] With respect to the supplementing function of good faith, see para. 594.
[2612] See above, para. 1677 et seq.

negotiations would be covered by confidentiality.[2613] Whether the relevant evidence related to the negotiations and mediations are privileged or covered by confidentiality – and whether there are any applicable exceptions which may allow evidence of bad faith conduct to be adduced – will depend on the applicable law.[2614]

1722. The second difficulty concerns the fact that some violations entail proving the subjective state of mind of the party concerned which is extremely difficult – if not impossible – to prove. This concerns, in particular, the duty to have an open mind.[2615]

F. Potentially significant consequences of the failure to negotiate or mediate in good faith prior to resorting to arbitration

1723. The consequences of a violation of the obligation to negotiate or mediate in good faith prior to resorting to arbitration are potentially significant.

1724. Whilst a few authorities suggest a violation of a pre-arbitration requirement may lead to a party being contractually liable,[2616] the majority of authorities support the view that a claim will be inadmissible, and the arbitral proceedings will be suspended pending compliance with the pre-arbitration requirements.[2617]

1725. In addition, in some cases – and depending on the applicable law – an award may be set aside on the grounds of a lack of jurisdiction in the event of the violation of a pre-arbitral requirement.[2618]

[2613] See above, para. 1683.
[2614] See above, para. 1677 et seq.
[2615] See above, paras. 1684 et seq.
[2616] See above, paras. 1688 et seq.
[2617] See above, paras. 1692 et seq.
[2618] See above, paras. 1698 et seq.

VIII. Proposed Rationalization and Guidelines

1726. With respect to the proposed guidelines for the application of good faith by arbitral tribunals to pre-arbitration requirements, it is submitted that arbitral tribunals should first determine whether the relevant pre-arbitration requirement is valid and enforceable under the applicable law (A.). If such pre-arbitration requirement is valid and enforceable, arbitral tribunals should firstly, before having recourse to good faith in connection with any pre-arbitration requirements to negotiate or mediate, proceed to identify the source of the obligation to negotiate or mediate in good faith (B.).

1727. It is proposed that arbitral tribunals should apply a specific rule implementing the obligation to negotiate or mediate in good faith (C.) and that the content of the obligations to negotiate or mediate prior to resorting to arbitration should be rationalized using the *fallgruppen* methodology (D.).

1728. If it is alleged that evidence of bad faith conduct is covered by privilege or confidentiality, the arbitral tribunal should proceed to determine whether this is the case and whether any exceptions apply (E.). In case of a violation of the pre-arbitration requirements to negotiate or mediate in good faith, arbitral tribunals should ascertain the relevant consequence based on the applicable law (F.).

A. Determination of the validity and enforceability of the relevant obligation to negotiate/mediate in good faith prior to resorting to arbitration

1729. Prior to applying the pre-arbitration obligation to negotiate or mediate in good faith, arbitral tribunals should first determine whether such obligation is valid or enforceable under the applicable law.[2619]

B. Identification of the source of the obligation to negotiate or mediate in good faith

1730. If the relevant pre-arbitration obligation to negotiate or mediate is valid and enforceable under the applicable law, then the arbitral tribunal should determine whether there is an obligation to negotiate or mediate *in good faith* by identifying the source of the good faith component.

[2619] See above, paras. 1598 et seq.

1731. Although, as stated above,[2620] there will rarely be any debate over the existence of an obligation to negotiate or mediate *in good faith* given the abundant potential sources of good faith, and although it is advocated that the content of these obligations should not vary according to the source of the obligation to negotiate or mediate *in good faith*,[2621] it is submitted that a dogmatic approach should be taken and that the source of the good faith component should be identified.

1732. In case of a pre-arbitral obligation to negotiate, arbitral tribunals should first look to see if there is a contractual source of good faith, i.e., an express or implied contractual provision obliging the parties to negotiate in good faith. If there is no contractual source, arbitral tribunals should turn to the general legal source of the law applicable to the arbitration agreement which may impose a duty on parties to perform contractual obligations in good faith which may also, by extension, be applied to the contractual obligation to negotiate prior to resorting to arbitration.

1733. In case of a pre-arbitral obligation to mediate, arbitral tribunals should first ascertain whether there is a contractual source of good faith, i.e., an express or implied contractual provision obliging the parties to mediate in good faith or a specific legal source, i.e., such as an obligation to mediate in good faith found in the applicable mediation rules. If there is no contractual or specific legal source, arbitral tribunals should then turn to the general legal source of the law applicable to the arbitration agreement which may impose a duty on parties to perform contractual obligations in good faith which may also, by extension, be applied to the contractual obligation to mediate prior to resorting to arbitration.

C. Application of the specific rules implementing the obligation to negotiate or mediate in good faith

1734. It is submitted that arbitral tribunals should ascertain the established specific rule derived from the obligation to negotiate or mediate in good faith prior to resorting to arbitration (such as the duty to invite all relevant participants or the duty to send a representative with appropriate authority) which is applicable to the case before them. If there is no established specific rule, an arbitral tribunal may create a new specific rule implementing the obligation to negotiate or mediate in good faith. In the latter case, the arbitral tribunal should aim to craft the new rule as specifically and precisely as possible.

1735. Notwithstanding the above, where the applicable institutional mediation rules explicitly stipulate a duty, which also flows from the obligation to mediate in

[2620] See paras. 1706 et seq.
[2621] See below, para. 1738.

good faith, arbitral tribunals should give preference to this explicit source of the duty rather than the general obligation to mediate in good faith. This may be the case with respect to the duty to send an appropriate representative with requisite authority,[2622] the duty to cooperate with the mediator,[2623] the duty to facilitate visits to and inquiries at, any place connected with the dispute, as well as to use the means at their disposal to enable the mediator to hear the witness,[2624] and the duty to maintain the confidentiality of the mediation.[2625] This does not prevent the arbitral tribunal from additionally noting that the failure to comply with the duty set out in the specific provision in question also constitutes a violation of the obligation to mediate in good faith and to sanction this violation accordingly.

D. Rationalization of the content of the obligation to negotiate/mediate in good faith using the *fallgruppen* methodology

1736. As seen above,[2626] the main difficulty with pre-arbitration requirements to negotiate or mediate in good faith (aside from their validity and enforceability and the consequences of their breach) is the identification of the content of this requirement.

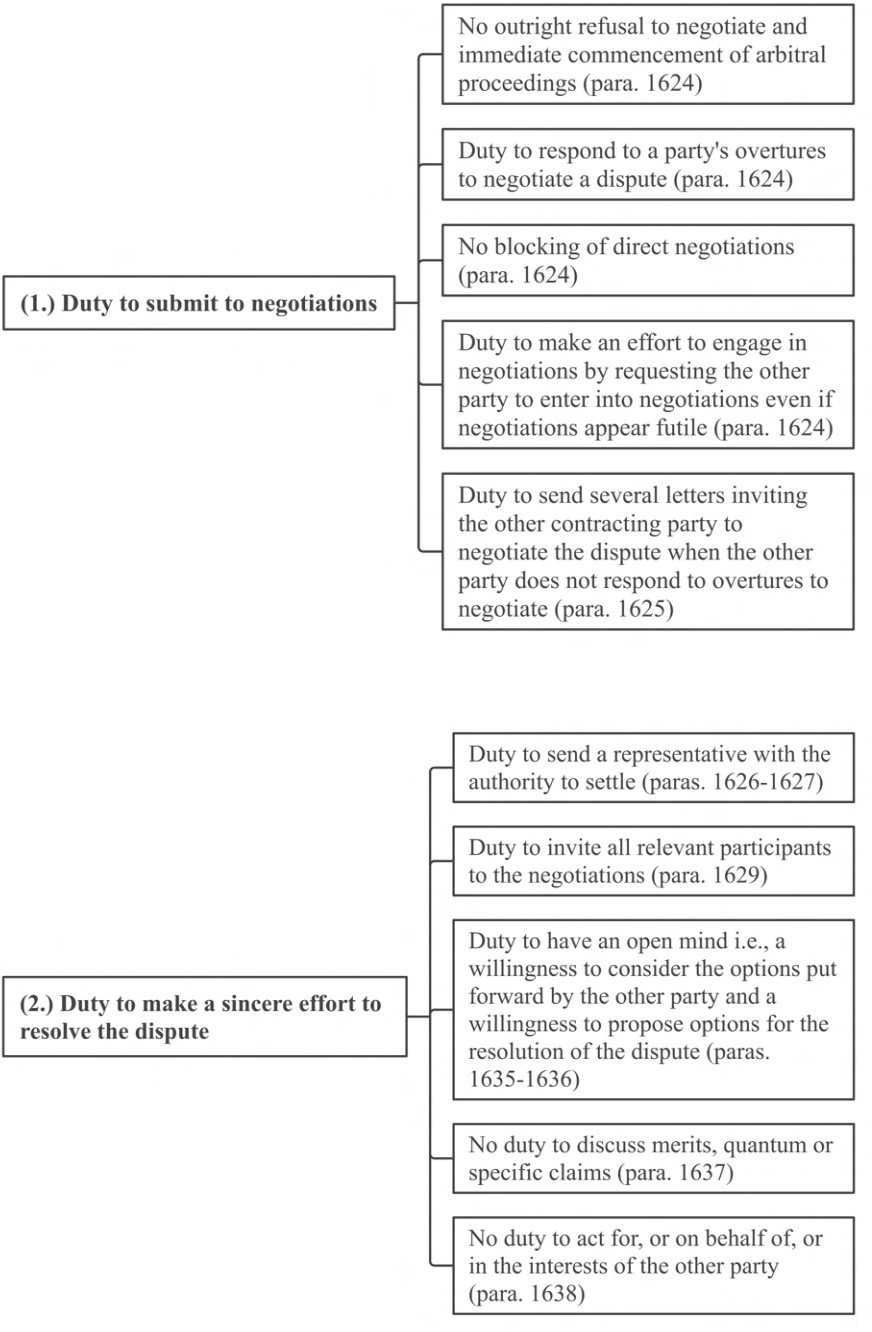
1737. In this regard, it is proposed that the *fallgruppen* methodology[2627] should be employed in order to rationalize the content of the obligation to negotiate or mediate in good faith prior to resorting to arbitration as depicted below. By employing the *fallgruppen* methodology, it is hoped that the application of good faith to the pre-arbitration requirements will become more objective, rational and predictable. However, this "inner system" of the content of the obligation to negotiate or mediate in good faith should not become a straitjacket. Indeed, it should retain a certain flexibility so that further specific applications of the obligation to negotiate or mediate in good faith may be added and that existing specific applications can be modified where necessary.

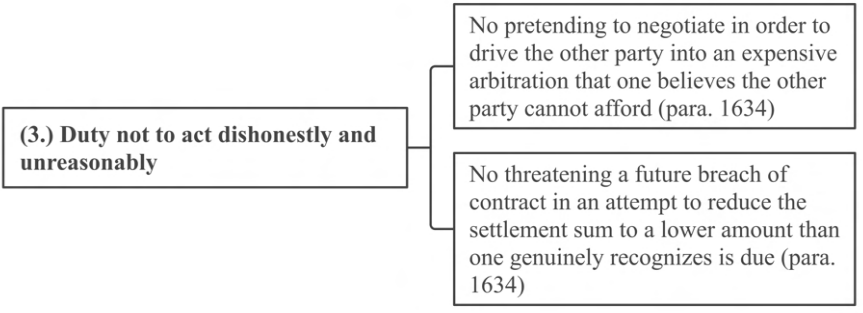
1738. It is advocated that a harmonized stance with respect to the content of the pre-arbitration requirements to negotiate or mediate in good faith should be applied in international commercial arbitrations and that the content of these requirements should not vary according to the source of the obligation to negotiate or

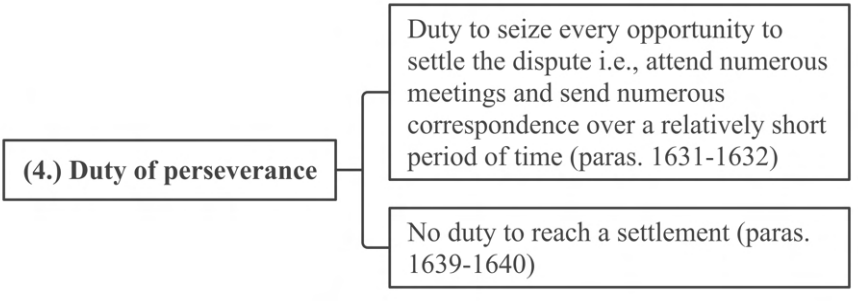
[2622] See para. 1650.
[2623] See para. 1655.
[2624] See para. 1656.
[2625] See para. 1670.
[2626] See above, paras. 92 et seq.
[2627] See above, para. 598.

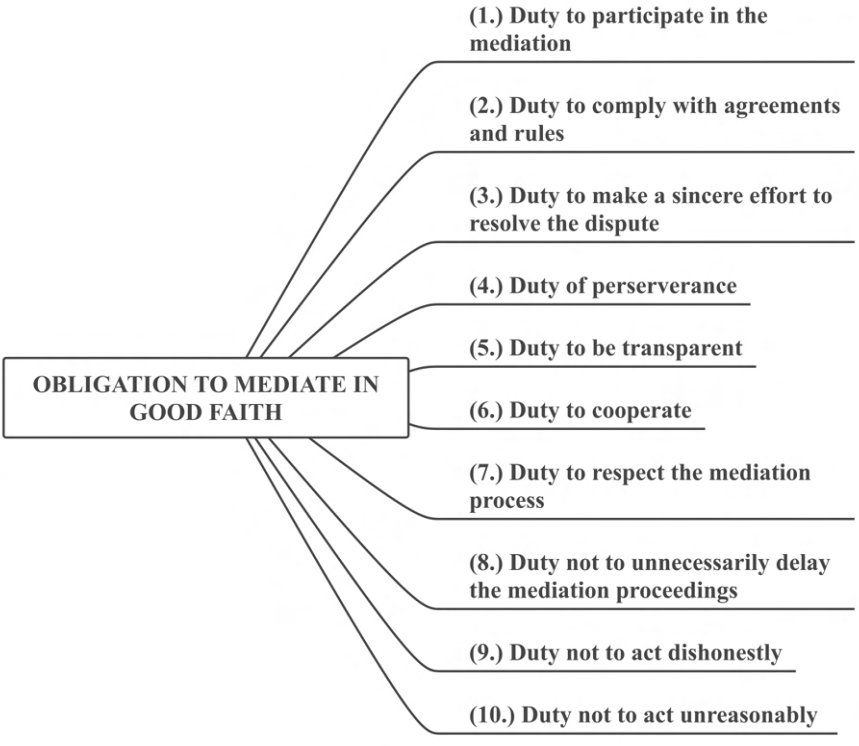
mediate *in good faith*. Such a harmonized content would give valuable guidance to international commercial arbitration users on how they should conduct themselves in pre-arbitral negotiations and mediations and would lead to increased certainty and predictability.

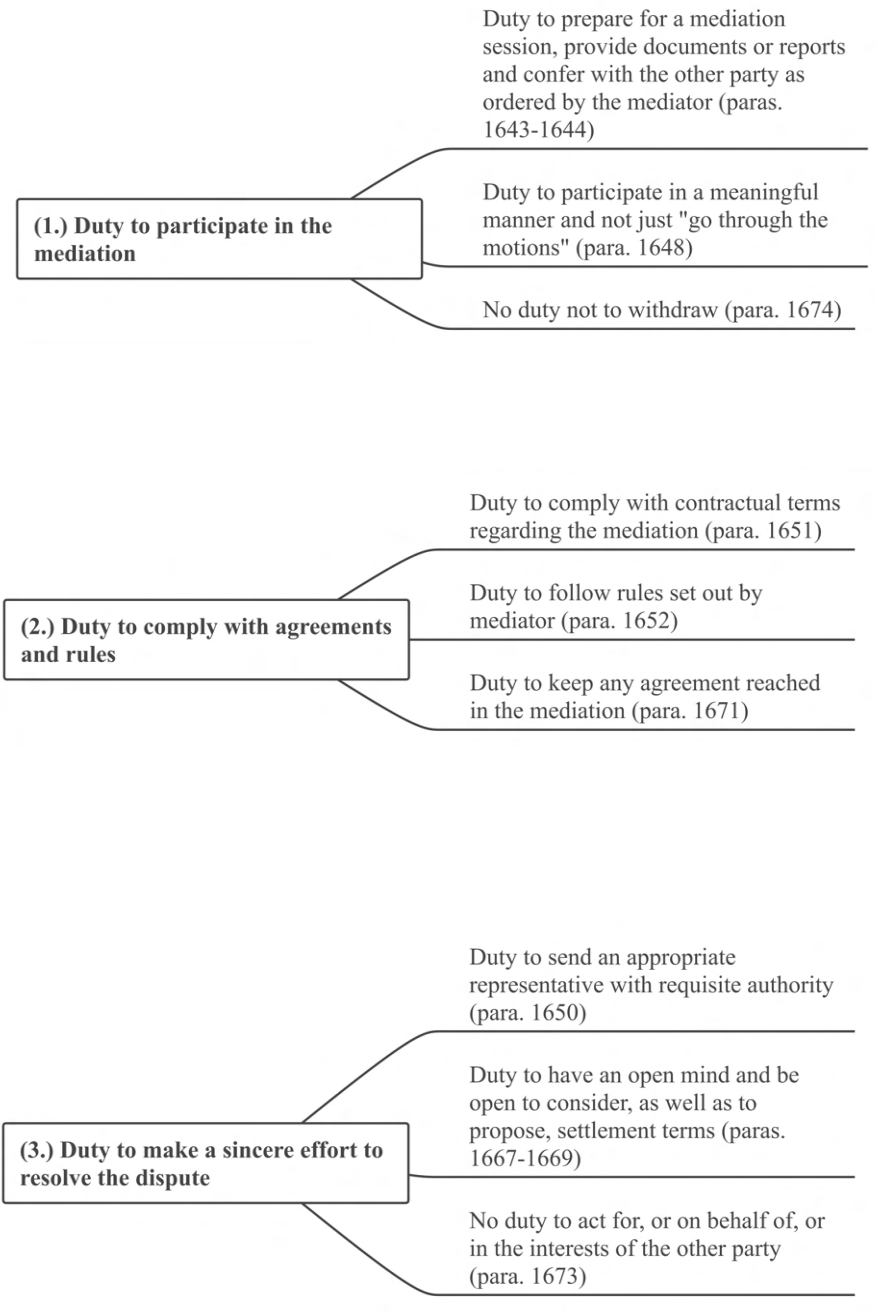

OBLIGATION TO NEGOTIATE IN GOOD FAITH
(1.) Duty to submit to negotiations
(2.) Duty to make a sincere effort to resolve the dispute
(3.) Duty not to act dishonestly and unreasonably
(4.) Duty of perseverance

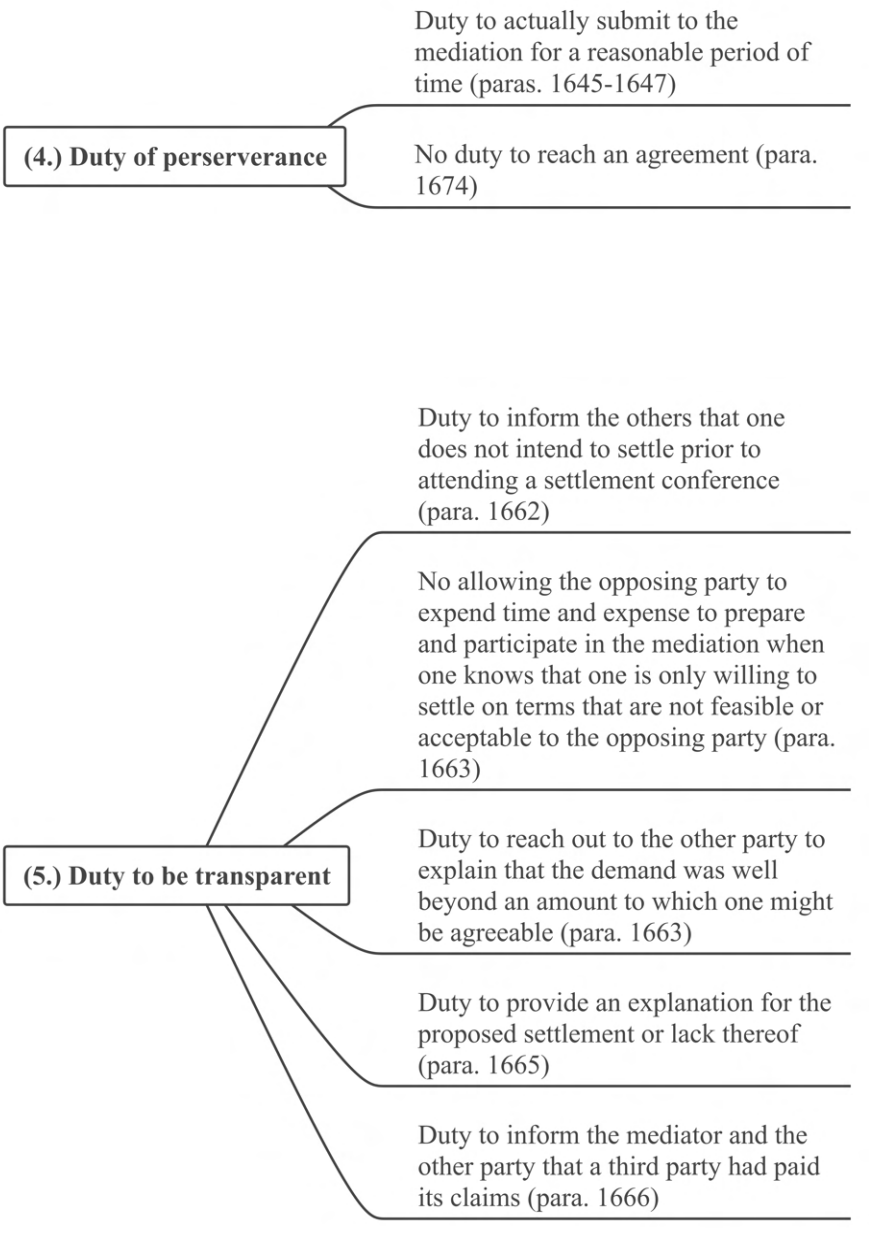

(1.) Duty to submit to negotiations
No outright refusal to negotiate and immediate commencement of arbitral proceedings (para. 1624)
Duty to respond to a party's overtures to negotiate a dispute (para. 1624)
No blocking of direct negotiations (para. 1624)
Duty to make an effort to engage in negotiations by requesting the other party to enter into negotiations even if negotiations appear futile (para. 1624)
Duty to send several letters inviting the other contracting party to negotiate the dispute when the other party does not respond to overtures to negotiate (para. 1625)
(2.) Duty to make a sincere effort to resolve the dispute
Duty to send a representative with the authority to settle (paras. 1626-1627)
Duty to invite all relevant participants to the negotiations (para. 1629)
Duty to have an open mind i.e., a willingness to consider the options put forward by the other party and a willingness to propose options for the resolution of the dispute (paras. 1635-1636)
No duty to discuss merits, quantum or specific claims (para. 1637)
No duty to act for, or on behalf of, or in the interests of the other party (para. 1638)

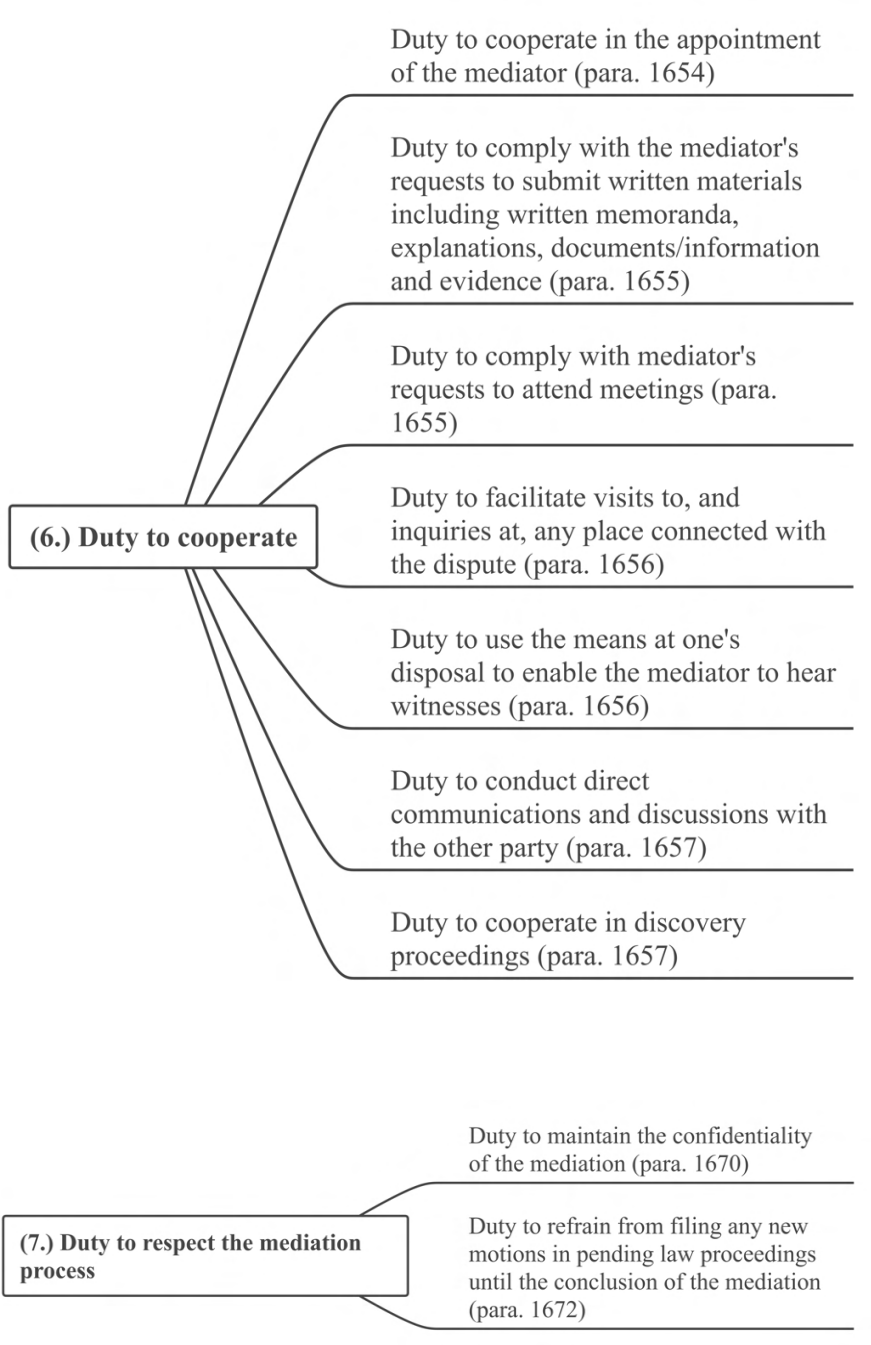

(3.) Duty not to act dishonestly and unreasonably
No pretending to negotiate in order to drive the other party into an expensive arbitration that one believes the other party cannot afford (para. 1634)
No threatening a future breach of contract in an attempt to reduce the settlement sum to a lower amount than one genuinely recognizes is due (para. 1634)

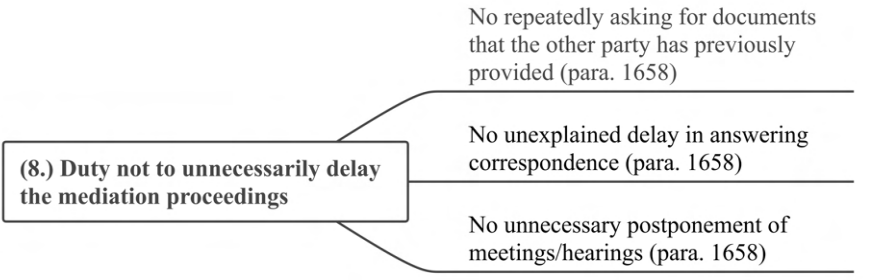

(4.) Duty of perseverance
Duty to seize every opportunity to settle the dispute i.e., attend numerous meetings and send numerous correspondence over a relatively short period of time (paras. 1631-1632)
No duty to reach a settlement (paras. 1639-1640)

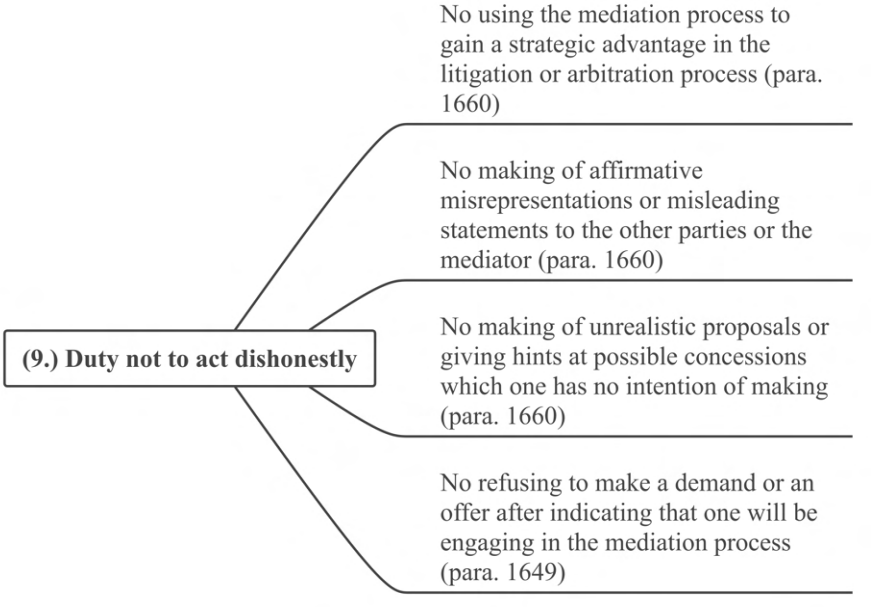

OBLIGATION TO MEDIATE IN GOOD FAITH
(1.) Duty to participate in the mediation
(2.) Duty to comply with agreements and rules
(3.) Duty to make a sincere effort to resolve the dispute
(4.) Duty of perserverance
(5.) Duty to be transparent
(6.) Duty to cooperate
(7.) Duty to respect the mediation process
(8.) Duty not to unnecessarily delay the mediation proceedings
(9.) Duty not to act dishonestly
(10.) Duty not to act unreasonably

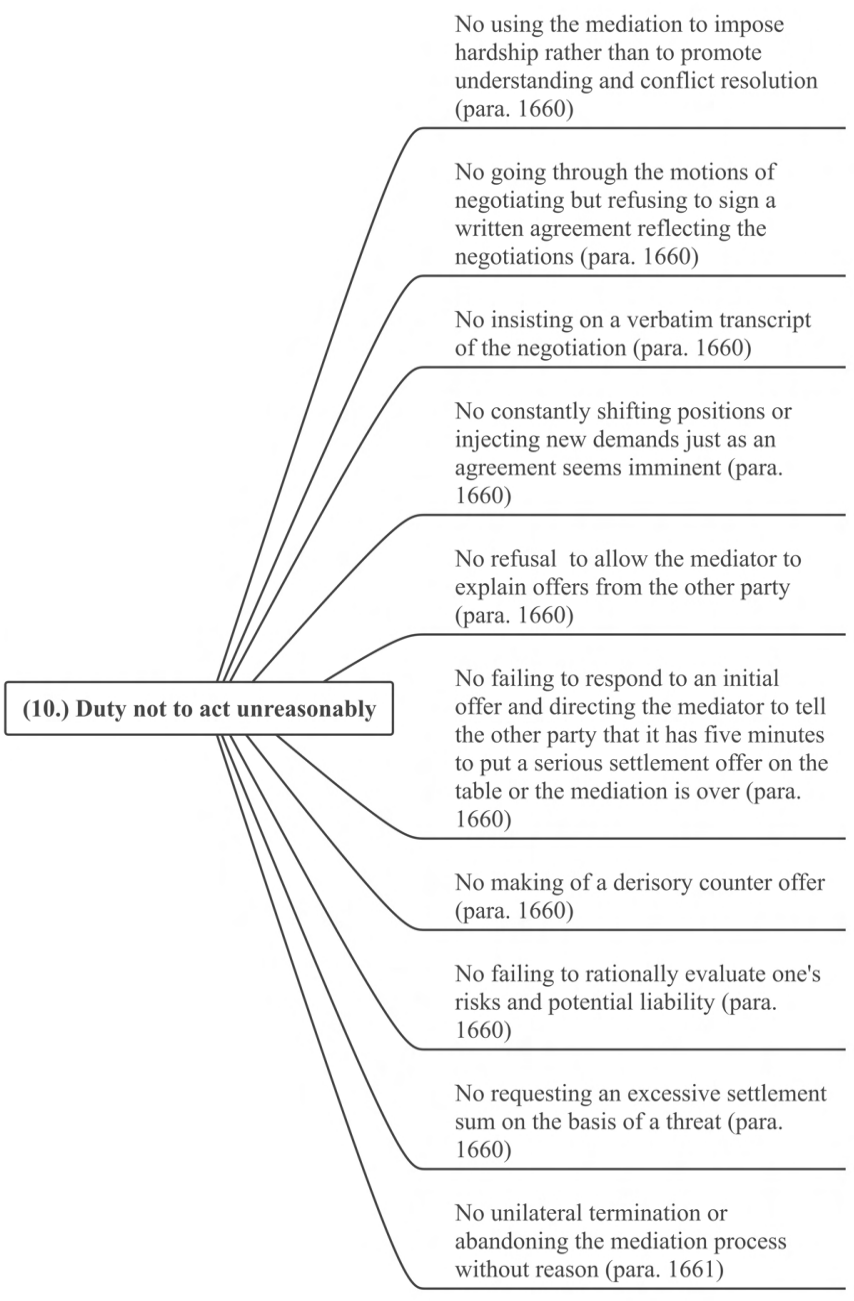

(1.) Duty to participate in the mediation
Duty to prepare for a mediation session, provide documents or reports and confer with the other party as ordered by the mediator (paras. 1643-1644)
Duty to participate in a meaningful manner and not just "go through the motions" (para. 1648)
No duty not to withdraw (para. 1674)
(2.) Duty to comply with agreements and rules
Duty to comply with contractual terms regarding the mediation (para. 1651)
Duty to follow rules set out by mediator (para. 1652)
Duty to keep any agreement reached in the mediation (para. 1671)
(3.) Duty to make a sincere effort to resolve the dispute
Duty to send an appropriate representative with requisite authority (para. 1650)
Duty to have an open mind and be open to consider, as well as to propose, settlement terms (paras. 1667-1669)
No duty to act for, or on behalf of, or in the interests of the other party (para. 1673)


(4.) Duty of perserverance
Duty to actually submit to the mediation for a reasonable period of time (paras. 1645-1647)
No duty to reach an agreement (para. 1674)
(5.) Duty to be transparent
Duty to inform the others that one does not intend to settle prior to attending a settlement conference (para. 1662)
No allowing the opposing party to expend time and expense to prepare and participate in the mediation when one knows that one is only willing to settle on terms that are not feasible or acceptable to the opposing party (para. 1663)
Duty to reach out to the other party to explain that the demand was well beyond an amount to which one might be agreeable (para. 1663)
Duty to provide an explanation for the proposed settlement or lack thereof (para. 1665)
Duty to inform the mediator and the other party that a third party had paid its claims (para. 1666)


(6.) Duty to cooperate
Duty to cooperate in the appointment of the mediator (para. 1654)
Duty to comply with the mediator's requests to submit written materials including written memoranda, explanations, documents/information and evidence (para. 1655)
Duty to comply with mediator's requests to attend meetings (para. 1655)
Duty to facilitate visits to, and inquiries at, any place connected with the dispute (para. 1656)
Duty to use the means at one's disposal to enable the mediator to hear witnesses (para. 1656)
Duty to conduct direct communications and discussions with the other party (para. 1657)
Duty to cooperate in discovery proceedings (para. 1657)
(7.) Duty to respect the mediation process
Duty to maintain the confidentiality of the mediation (para. 1670)
Duty to refrain from filing any new motions in pending law proceedings until the conclusion of the mediation (para. 1672)


(8.) Duty not to unnecessarily delay the mediation proceedings
No repeatedly asking for documents that the other party has previously provided (para. 1658)
No unexplained delay in answering correspondence (para. 1658)
No unnecessary postponement of meetings/hearings (para. 1658)


(9.) Duty not to act dishonestly
No using the mediation process to gain a strategic advantage in the litigation or arbitration process (para. 1660)
No making of affirmative misrepresentations or misleading statements to the other parties or the mediator (para. 1660)
No making of unrealistic proposals or giving hints at possible concessions which one has no intention of making (para. 1660)
No refusing to make a demand or an offer after indicating that one will be engaging in the mediation process (para. 1649)


(10.) Duty not to act unreasonably
No using the mediation to impose hardship rather than to promote understanding and conflict resolution (para. 1660)
No going through the motions of negotiating but refusing to sign a written agreement reflecting the negotiations (para. 1660)
No insisting on a verbatim transcript of the negotiation (para. 1660)
No constantly shifting positions or injecting new demands just as an agreement seems imminent (para. 1660)
No refusal to allow the mediator to explain offers from the other party (para. 1660)
No failing to respond to an initial offer and directing the mediator to tell the other party that it has five minutes to put a serious settlement offer on the table or the mediation is over (para. 1660)
No making of a derisory counter offer (para. 1660)
No failing to rationally evaluate one's risks and potential liability (para. 1660)
No requesting an excessive settlement sum on the basis of a threat (para. 1660)
No unilateral termination or abandoning the mediation process without reason (para. 1661)

E. Determination of whether the evidence is covered by privilege or confidentiality

1739. If it is alleged that evidence of the violation of the obligation to negotiate/mediate in good faith is covered by privilege or is confidential, arbitral tribunals should set out the scope of the settlement/mediation privilege or confidentiality doctrine under the applicable law and determine whether the evidence of the violation of the obligation to arbitrate/mediate in good faith is covered by privilege/confidentiality and, if so, determine whether any legally recognized exceptions may apply or if the parties can be deemed to have waived the privilege/confidentiality.[2628]

1740. If there are no legally recognized exceptions, and if the parties cannot be deemed to have waived the privilege/confidentiality, then the arbitral tribunal should weigh the need for the evidence of the violation of the obligation to negotiate/mediate in good faith against the policy behind the asserted settlement/mediation privilege/confidentiality.[2629] In the author's view, the arbitral tribunal should lean towards admitting the evidence, in particular, if such evidence does not include information about the substantive claims, in particular, the various offers and proposals made.

F. Determination of the consequences of a violation in accordance with the applicable law

1741. After having ruled that there has been a violation of the obligation to negotiate or mediate in good faith prior to resorting to arbitration, arbitral tribunals should ascertain the relevant consequence in accordance with the applicable law. In most cases, this will be the declaration of the inadmissibility of the claims and the suspension of the arbitral proceedings pending compliance with the pre-arbitration requirements.[2630]

2628 See in this regard, MOSK/GINSBURG, 384.

2629 *Ibid*.

2630 See para. 1687 et seq.

Chapter 4: Good Faith and the Performance of the Arbitration Agreement

1742. When applied to the performance of the arbitration agreement, good faith imposes on the parties an obligation to arbitrate in good faith (I.).

1743. This Chapter explores the sources of the obligation to arbitrate in good faith (II.), the content of this obligation (III.) and the measures employed by arbitral tribunals to sanction the violation of this obligation (IV.).

1744. Following a conclusion on the application by arbitral tribunals of good faith to the performance of the arbitration agreement (V.), a rationalization and guidelines for its application will be proposed (VI.).

I. Obligation to Arbitrate in Good Faith

1745. The application of good faith to the performance of the arbitration agreement imposes on the parties an obligation to arbitrate in good faith and involves the application of good faith in a procedural context.

1746. According to both commentators and case law, parties have an obligation to act in accordance with good faith when arbitrating a dispute arising between them.

1747. Indeed, according to BORN, the positive effect of a valid arbitration agreement is an obligation to participate cooperatively, diligently and in good faith in the arbitration of disputes pursuant to the arbitration agreement.[2631] HANOTIAU has also stated that it is a "basic principle of international commercial arbitration that the parties have the duty to co-operate in good faith […] in the arbitral proceedings."[2632]

1748. In addition, in *Libananco Holdings Co Ltd v Turkey*, the arbitral tribunal held that the "parties have an obligation to arbitrate fairly and in good faith […] this principle applies in all arbitration, including investment arbitration, and to all parties, including States […]."[2633] Similarly, the arbitral tribunal in *Methanex Corp v United States* held that "the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings."[2634]

1749. The majority of commentators agree that the principle of good faith should be employed in order to ensure ethical conduct in arbitral proceedings.

1750. Indeed, CREMADES has lamented the fact that many arbitral proceedings are brought with the sole aim of forcing the other party to negotiate, that there are many excessive extensions of deadlines agreed to by counsel, as well as discovery battles which ground the proceedings to a halt.[2635] He also laments the abuse

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2631 BORN, 1350; see also RUBINO-SAMMARTANO, 297, 886.

2632 BERNARD HANOTIAU, Complex Multicontract-Multiparty Arbitration (1998) 14 Arb Intl 369, 374.

2633 *Libananco Holdings Co Ltd v Turkey*, ICSID Case No ARB/06/8 (MICHAEL HWANG (President) (Singapore); HENRI ALVAREZ (Canada); FRANKLIN BERMAN (United Kingdom)), Decision on Preliminary Issues, 23 June 2008, §78.

2634 *Methanex Corporation v United States of America* (V VEEDER (President) (United Kingdom); WILLIAM F ROWLEY (Canada); MICHAEL REISMAN (US)) NAFTA Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, §54.

2635 CREMADES, 787–788.

of experts, the submission of irrelevant documentation and the ill preparation of submissions causing excessively costly and time-wasting hearings.[2636]

1751. In this regard, good faith has been touted as one of the potential solutions to the "ethical problem" in international arbitration and the perceived increasing use of "guerilla tactics" by counsel in international arbitration.[2637]

1752. According to one commentator:

> good faith is no longer a spontaneous quality among arbitration stakeholders. Indeed, new profiles and actors are entering the world of arbitration without sharing its ethics and codes, out of ignorance or nuisance, undermining the principle of good faith in arbitration. We then move from a spontaneous system of good faith to a system of imposed good faith.[2638]

1753. Indeed, it has been argued that good faith in arbitral proceedings is essential if arbitration is to remain more efficient and more effective than national court proceedings.[2639]

1754. Moreover, it has been contended that a heightened obligation to act in good faith is required in arbitral proceedings in order to safeguard the spirit of arbitral proceedings and to ensure the relative serenity and lack of excessive formalism of arbitral proceedings as compared to national court proceedings. Indeed, these are some of the main reasons why parties agree to have recourse to arbitration in the first place.[2640]

2636 *Idem*, 788.

2637 See, in this regard, DASSER/GAUTHEY, 239–241. See also DE FONTMICHEL, 104; DETLEV KÜHNER, The Revised IBA Rules on the Taking of Evidence in International Arbitration (2010) Journal of International Arbitration 667, 670; LAZOPOULOS, 613–614, §42 and BENEDICT TOMPKINS, The duty to participate in international commercial arbitration (2015) 18 International Arbitration Law Review 14–26.

2638 Informal English translation of the French original: DE FONTMICHEL, 105: "*la bonne foi n'est plus une qualité spontanée chez les acteurs de l'arbitrage. En effet, des nouveaux profils et des nouveaux acteurs s'immiscent dans le monde de l'arbitrage sans en partager l'éthique et les codes, par ignorance ou par nuisance, mettant à mal le principe de bonne foi dans l'arbitrage. On glisse alors d'un système de bonne foi spontanée à un système de bonne foi imposée*."

2639 ORTSCHIEDT, 86 stating that loyalty is required in arbitral proceedings in order to ensure its efficiency in particular in light of the fact that arbitral tribunals do not have powers of enforcement over the disputing parties like national courts do; TETLEY, 561; *ReliaStar Life Insurance Company of New York v EMC National Life Company* 546 F.3d 81 (2d Cir. 2009): "Indeed, the underlying purposes of arbitration, i.e., efficient and swift resolution of disputes without protracted litigation, could not be achieved but for good faith arbitration by the parties."

2640 DASSER/GAUTHEY, 264–265.

1755. Some commentators have even gone so far as to say that good faith is to arbitral proceedings what conscience is to science – without good faith, the very idea behind arbitration is destroyed.[2641]

[2641] DASSER/GAUTHEY, 271: "*La bonne foi est à l'arbitrage ce que la conscience est à la science. Sans bonne foi l'idée même de l'arbitrage est réduite à néant*." See also DE FONTMICHEL, 104 stating that the survival of arbitration depends on the good faith of the actors involved.

II. Source of the Obligation to Arbitrate in Good Faith

1756. The source of the obligation to arbitrate *in good faith* can be found in, or may flow from, the arbitration agreement (A.). Such a specific obligation may also be found in the institutional arbitration rules chosen by the parties (B.), in the *lex arbitri* (C.), or in transnational soft law (D.). The obligation to arbitrate *in good faith* may further be imposed by the national or non-national law governing the arbitration agreement (E.). Finally, it has been argued that the obligation to arbitrate in good faith is imposed by the arbitral process itself (F.).

A. Arbitration agreement

1757. The first potential source of the parties' obligation to arbitrate in good faith is the arbitration agreement itself. The duty may be explicitly stated in the arbitration agreement (1.) or may flow from the principle of *pacta sunt servanda* (2.).

1. Express obligation to arbitrate in good faith

1758. Some arbitration agreements contain a clause expressly obliging the parties to arbitrate in good faith.

1759. As an example, an arbitration agreement in a shareholders' agreement provided that "[a]ny dispute arising out of the interpretation and performance of this agreement shall be submitted to arbitration and all parties shall participate in its constitution and operation according to the principles of good faith."[2642]

2. Pacta sunt servanda

1760. The obligation to arbitrate in good faith may also be deemed to effectively flow from the application to the arbitration agreement of the fundamental rule of *pacta sunt servanda*.[2643]

[2642] Arbitration clause referred to in HENRIQUES, pathological, 350. See also *Zachariou v. Manios* (LOUIS CRACO (President) (US); MICHAEL CHALOS (US); HERBERT STERN (US), (Final Award), ICDR Case No. 50 181 T 00107 09, 19 March 2014, Arbitrator Intelligence Materials, in which the parties' agreement instructed the parties to bargain in good faith towards an agreeable, family-based resolution.

[2643] BÉDARD/NELSON/RAYMOND KALANTIRSKY, 744–746.

1761. This is the approach taken by BORN who states that "[the duty] to participate in good faith and cooperatively in the arbitral process […] follows […] from the general rule of *pacta sunt servanda*."[2644]

B. Institutional arbitration rules

1762. The second potential source of the obligation to arbitrate in good faith is the institutional arbitration rules chosen by the parties in their arbitration agreement to govern the arbitration proceedings.

1763. Some institutional arbitration rules include provisions expressly obliging the parties to arbitrate in good faith:

- Hence, Article 16(1) Swiss Rules of International Arbitration 2021 provides for example that "[a]ll participants in the arbitral proceedings shall act *in good faith* and make every effort to contribute to the efficient conduct of the proceedings and to avoid unnecessary costs and delays. […]";[2645]
- Article 15(1) Liechtenstein Rules of Arbitration 2012 also provides, in relevant part, that "[t]he parties are required to participate *in good faith*";[2646]
- In addition, Article 24(1) CEPANI Arbitration Rules 2023 provides that: "[i]n the conduct of the proceedings the Arbitral Tribunal and the parties shall act in a rapid manner and *in good faith*. In particular, the parties shall abstain from any dilatory acts as well as from any other action having the object or effect of delaying the proceedings";[2647]
- Article 26.3 Arbitration Rules of the Finland Chamber of Commerce 2020 further provides that "[a]ll participants in the arbitral proceedings shall act *in good faith* and make every effort to contribute to the efficient conduct of the proceedings in order to avoid unnecessary costs and delay;[2648]

2644 BORN, 1353.

2645 Emphasis added. The Swiss Rules of International Arbitration 2021 are available at < https://www.swissarbitration.org/resources/swiss-rules-2021/ >, accessed 1 March 2023.

2646 Emphasis added. The Liechtenstein Rules 2012 are available at <https://www.lihk.li/wp-content/uploads/Liechtensteinische-Schiedsordnung.pdf>, accessed 1 March 2023.

2647 Emphasis added. The CEPANI Rules 2023 are available at <https://www.cepani.be/rules/>, accessed 1 March 2023. With respect to this provision, see BENOÎT ALLEMEERSCH/OLIVIER CAPRASSE/DIRK DE MEULEMEESTER/EMMA VAN CAMPENHOUDT, Guide to the CEPANI Arbitration Rules, Article 24 (Wolters Kluwer 2021) 138, §357.

2648 Emphasis added. The Arbitration Rules of the Finland Chamber of Commerce 2020 are available at < https://arbitration.fi/en/arbitration/rules-and-guidelines/ >, accessed 1 March 2023.

– Article 14.2 LCIA Arbitration Rules 2020 provides, in relevant part, that "[…] at all times the parties shall do everything necessary *in good faith* for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duties."[2649] Article 32.2 also provides that "[f]or all matters not expressly provided in the Arbitration Agreement, the LCIA Court, the LCIA, the Registrar, the Arbitral Tribunal, any tribunal secretary and each of the parties shall act at all times *in good faith*, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the arbitral seat."[2650];
– Article 22(2) of the Arbitration Rules of the Russian Arbitration Center 2021 states that "the parties and their representatives shall exercise their procedural rights *in good faith and without abuse*."[2651];
– Article 38(3) of the International Rules of the Arbitration Foundation of Southern Africa 2021 provides as follows: "For all matters not expressly provided in the arbitration agreement, AFSA, the Court, the Secretariat, the Arbitral Tribunal and each of the parties shall act at all times *in good faith*, respecting the spirit of the arbitration agreement, and shall make every reasonable effort to ensure that any award is legally recognised and enforceable at the seat of arbitration."[2652];
– Article 21(5) Rules of Arbitration of the Court of Arbitration of Madrid 2020 provides that "[a]ll persons participating in the arbitration proceedings shall act *in accordance with the principle of good faith* and will ensure that the arbitration is carried out efficiently and without delay."[2653]; and
– Rule 3(1) of the ICSID Arbitration Rules 2022 provides that "[t]he Tribunal and the parties shall conduct the proceeding *in good faith* and in an expeditious and cost-effective manner."

[2649] Emphasis added. The LCIA Arbitration Rules 2020 are available at <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx>, accessed 1 March 2023.

[2650] Emphasis added. With respect to the inclusion of good faith in the LCIA Rules in 2014, see DUARTE GORJÃO HENRIQUES, ArbWorld – Good Faith: The "LCIA Rules 2.0" Hidden Feature, Kluwer Arbitration Blog, 29 October 2014.

[2651] Emphasis added. The Arbitration Rules of the Russian Arbitration Center 2021 are available at < https://centerarbitr.ru/en/arbitration-rules-2021/>, accessed 1 March 2023.

[2652] Emphasis added. The International Rules of the Arbitration Foundation of Southern Africa are available at https://arbitration.co.za/international-arbitration/international-rules/, accessed 1 March 2023.

[2653] Emphasis added. The Rules of Arbitration of the Court of Arbitration of Madrid 2021 are available at < https://madridarb.com/wp-content/uploads/2020/09/Arbitration-rules-EN.pdf>, accessed 1 March 2023.

C. Lex arbitri

1764. The third potential source of the specific obligation to arbitrate in good faith is the applicable *lex arbitri*.[2654]

1765. Although their number is small, some national arbitration laws explicitly provide that the parties must arbitrate in good faith.

1766. Hence, Article 38 Peruvian Arbitration Act 2008 provides that "[t]he parties are obliged to *observe the principle of good faith* in all their actions and interventions during the arbitral proceedings and to cooperate with the arbitral tribunal in the development of the arbitration."[2655]

1767. Similarly, Article 1464(3) FrCCP provides that "[b]oth parties and arbitrators shall act diligently and *in good faith* in the conduct of the proceedings."[2656]

1768. Furthermore, in Spain, Article 247.1 Law on Civil Procedure of 7 January 2000 provides that parties involved in any kind of proceeding must comply with the rules of good faith.[2657]

1769. In spite of the lack of an express provision in the PILA, it is generally recognized that the principle of good faith, as a general principle of law forming part of public policy, applies to arbitral proceedings seated in Switzerland.[2658]

2654 BÉDARD/NELSON/RAYMOND KALANTIRSKY, 747.

2655 Legislative Decree No. 1071 Regulating Arbitration, in effect 1 September 2008, in LISE BOSMAN (ed), ICCA International Handbook on Commercial Arbitration, (ICCA & Kluwer Law International 2019, Supplement No. 98, March 2018) 1 – 33; see also CREMADES, 769.

2656 Article 1464(3) FrCCP provides in the French original as follows: "*Les parties et les arbitres agissent avec célérité et loyauté dans la conduite de la procédure*."

2657 Article 247(1) 'Respect of the rules of procedural good faith' of the Ley N° 1/2000, de 7 de enero de 2000, de Enjuiciamiento Civil provides in the Spanish original as follows: "*Artículo 247. Respeto a las reglas de la buena fe procesal. Multas por su incumplimiento.1. Los intervinientes en todo tipo de procesos deberán ajustarse en sus actuaciones a las reglas de la buena fe*."

2658 BERGER/KELLERHALS, 419–420, §1156; DASSER/GAUTHEY, 248; CESARE JERMINI/LUCA CASTIGLIONI, Article 16 in Zuberbühler/Müller/Habegger (eds.), Swiss Rules of International Arbitration : Commentary (3rd edn Schulthess 2023), 249, §2. See also SFSCD 4A_65/2018 of 11 December 2018, c. 3.2.3.3.1, SFSCD 4A_247/2017 of 18 April 2018, c. 5.1.2, SFSCD 4A_600/2016 of 29 June 2017, c. 1.1.4, SFSCD 4A_136/2015 of 15 September 2015, c. 2.2.3.4, SFSCD 4A_374/2014 of 26 February 2015, c. 4.2.2, SFSCD 4A_214/2013 of 5 August 2013, c. 4.3.1 holding that the principle of good faith governs both domestic and international arbitral proceedings.

1770. Similarly, the minimal standards of procedural law, including the principle of good faith, are applicable to arbitral proceedings conducted in Germany.[2659]

D. Transnational soft law rules

1771. The fourth potential source of the obligation to arbitrate in good faith is transnational soft law rules which have either become hard law by virtue of the parties' agreement or are applied by the arbitral tribunal of its own initiative.

1772. For example, Section 1 Ethical Charter of the French Arbitration Association adopted on 23 December 2013 provides that all participants should act in good faith.[2660]

1773. In addition, Article 11.1 ALI/PICC Principles of Transnational Civil Procedure 2004[2661] provides that "[t]he parties and their lawyers must conduct themselves *in good faith* in dealing with the court and other parties."

1774. The obligation to arbitrate in good faith is further implied by Article 27(d) IBA Guidelines on Party Representation in International Arbitration 2013 which provides that the arbitral tribunal in addressing issues of misconduct shall take into account the good faith of the party representative.[2662]

1775. Furthermore, in the specific context of the taking of evidence, Article 3 of the Preamble of the IBA Rules on the Taking of Evidence in International Arbitration 2020 provides that "[t]he taking of evidence shall be conducted on the principles that each Party shall act *in good faith* and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the

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[2659] KARL-HEINZ BOCKSTIEGEL/STEFAN MICHAEL KROLL, ET AL., Part I: Germany as a Place for International and Domestic Arbitrations – General Overview, in Patricia Nacimiento/Stefan Michael Kroll et al. (eds), Arbitration in Germany: The Model Law in Practice (2nd edn Kluwer Law International 2015) 25–26, §64; see also DASSER/GAUTHEY, 253.

[2660] This Charter states that it will apply if the parties agree on its application or the arbitrators order that it shall apply and may also apply where the arbitral institution administering the proceedings has adopted the Charter, see Introduction, available at <http://www.afa-arbitrage.com/l-arbitrage/charte-ethique/?lang=fr>, accessed 1 March 2023 which provides in the French original as follows: "*Les acteurs de l'arbitrage doivent, en toute circonstance, respecter la Charte. Ils doivent agir avec loyauté, bonne foi, conscience, diligence, compétence, honnêteté, probité, courtoisie, et dans le respect de leurs obligations professionnelles*."

[2661] Emphasis added. The ALI/PICC of Transnational Civil Procedure 2004 are available at <https://www.unidroit.org/civil-procedure#PrinciplesofTransnationalCivilProcedure>, accessed 1 March 2023.

[2662] The IBA Guidelines on Party Representation in International Arbitration 2013 are available at <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#Practice%20Rules%20and%20Guidelines>, accessed 1 March 2023.

evidence on which the other Parties rely."[2663] In this regard, it has been submitted that the use of the word "shall" suggests that an arbitral tribunal should not diverge from this core underlying principle concerning the taking of evidence.[2664] In addition, the fact that Article 9(8) IBA Rules on the Taking of Evidence in International Arbitration 2020 provides that an arbitral tribunal may take a failure to act in good faith in the taking of evidence into account in its assignment of the costs of the arbitration, confirms that there is an obligation of good faith under these Rules.[2665] It is submitted that this obligation is owed primarily to the other party to the arbitral proceedings.[2666]

1776. Finally, Guideline I.A of the recent ICCA Guidelines on Standards of Practice in International Arbitration 2021 provides as follows: "All participants shall act with integrity, respect and civility vis-à-vis other participants in the arbitral process." The Explanation to this Guideline states that the "arbitral process cannot work effectively and fulfill its purpose unless each participant in the arbitral proceeding acts in good faith …".[2667]

E. Implied/imposed obligation under national or non-national law governing the arbitration agreement

1777. The fifth potential source of the obligation to arbitrate in good faith is the national law or non-national law or rules applicable to the arbitration agreement.

1778. As we have seen, a national law may impose a duty on parties to perform contractual obligations in good faith.[2668] Such duty may also be applied to the contractual obligation to arbitrate.[2669]

[2663] Emphasis added. The IBA Guidelines on the Taking of Evidence in International Arbitration 2020 are available at < http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>, accessed 1 March 2023.

[2664] KHODYKIN/MULCAHY/FLETCHER, 22, §2.42.

[2665] *Idem*, 22, §2.43 and 505, §12.388.

[2666] *Idem*, 23, §2.45.

[2667] The ICCA Standards of Practice in International Arbitration can be found at https://www.arbitration-icca.org/icca-task-force-standards-practice-international-arbitration, accessed 1 March 2023.

[2668] See Part III of the present thesis.

[2669] BÉDARD/NELSON/RAYMOND KALANTIRSKY, 746–747. See in this regard, BERNARDO M CREMADES, Reflections on Good Faith in Investor-State Arbitration in Peter Gauch/Franz Werro/Pascal Pichonnaz, Mélanges en l'honneur de Pierre Tercier (Schulthess 2008) 783–784: "[i]f the law applicable to this arbitration agreement recognizes a duty of good faith in the interpretation and performance of an agreement, then it follows that there is a duty of good faith in any arbitration arising from the agreement."

1779. This was the approach taken by the arbitral tribunal in ICC Case No 18769 (law of Kansas, New York) in which the arbitral tribunal held that the duty of good faith and fair dealing under the laws of Kansas and New York extended to the contractual right and obligation to arbitrate.[2670]

1780. In addition, as shown above,[2671] it is generally accepted that the principle that contracts must be performed in good faith is a general principle of law and is also found in many codified non-national laws. This principle may thus also be applied to the arbitration agreement by virtue of the fact that a non-national law or rules are deemed to apply to the arbitration agreement.

F. Obligation imposed by the arbitral process

1781. Finally, BORN is of the view that the obligation to arbitrate in good faith also flows from the nature of the arbitral process.[2672]

[2670] *Cessna Finance Corporation v. Gulf Jet LLC*, ICC Case No 18769/VRO/AGF (JOHN A JUDGE (Canada)), Final Award, 17 January 2014, Arbitrator Intelligence Materials, §232. This was also the approach taken in *Neurosigma, Inc. v. De Salles*, AAA Case No. 72-20-1300-0792, Final Award, 26 February 2016, Arbitrator Intelligence Materials, in which the arbitral tribunal held that the party's conduct in the course of the dispute and the proceedings was contrary to the covenant of good faith and fair dealing expected and implied in performance of every contract entered into in California.

[2671] See Part III of the present thesis. See also BÉDARD/NELSON/RAYMOND KALANTIRSKY, 747–748.

[2672] BORN, 1353. See also BÉDARD/NELSON/RAYMOND KALANTIRSKY, 748. Under Swiss law, the principle of good faith applicable in civil proceedings is also said to flow from the proceedings themselves, see FRANÇOIS BOHNET, Article 52 in François Bohnet/Jacques Haldy/Nicolas Jeandin/Philippe Schweizer/Denis Tappy (eds), *Code de procédure commenté* (2nd edn Helbing Lichtenhahn 2019) §6.

III. Content of the Obligation to Arbitrate in Good Faith

1782. The precise contours of the obligation to arbitrate in good faith are varied and potentially complex.[2673] This section accordingly aims to trace the contours of this obligation.

1783. The content of the obligation to arbitrate in good faith will be considered in the context of the commencement of the arbitral proceedings (A.), the costs of the arbitration (B.), and the consolidation of disputes and joinder of third parties (C.).

1784. Thereafter, the content of the obligation to arbitrate in good faith will be analyzed with respect to the constitution of the arbitral tribunal (D.), the appointment of counsel (E.), jurisdictional objections (F.), and the claims and defences brought by the parties (G.).

1785. The content of the obligation to arbitrate in good faith will afterwards be examined in connection with the participation of the parties in the proceedings (H.), the formulation of, and compliance by the parties with, procedural rules (I.) and the contact by the parties with the arbitral tribunal (J.).

1786. Subsequently, the content of the obligation to arbitrate in good faith will be considered in the context of the issue of evidence (K.), the oral hearing (L.) and procedural objections (M.).

1787. Finally, the obligation to arbitrate in good faith will be analyzed with respect to party conduct outside of the arbitral proceedings (N.), and the recourse by the parties to other forums (O.).

A. Commencement of the arbitration

1788. It is submitted that the very commencement of arbitration may be contrary to good faith if such proceedings are commenced in order to harass the other party or to prevent such party from being able to bring court proceedings.[2674]

1789. However, it has been held that, the failure of the claimant to bring arbitral proceedings for six years was not contrary to good faith in circumstances where there was a hope that the parties might be able to settle their dispute and when

[2673] BORN, 1357.
[2674] LEW, 245.

the claimant had in fact negotiated with the respondent in view of a settlement.[2675]

B. Costs of the arbitration

1790. The content of the obligation to arbitrate in good faith will be considered with respect to the issues of the advance on costs (1.), security for costs (2.), and third-party funding (3.).

1. Advance on costs

1791. It is argued that the obligation for the parties to advance the costs of arbitration flows from the parties' obligation to arbitrate in good faith.[2676]

1792. Indeed, in an *ad hoc* arbitration seated in Switzerland, one arbitral tribunal held that:

> […] the obligation to make advance payment on costs, either in equal shares or as 'directed' or 'requested' by the arbitral tribunal, derives from the parties' duty to cooperate in good faith in order to allow the arbitration to proceed. It may thus be regarded as an implicit procedural obligation of the parties stemming from the underlying agreement to arbitrate.[2677]

1793. Other arbitral tribunals have similarly considered that the duty to pay the costs of the arbitration flows from the obligation to arbitrate in good faith.[2678]

[2675] *Alpha SA v Beta & Co*, Ad-hoc case dated 1 January 1991 (1992) 10 YB Comm Arb 202: "*Bien que le solde dû à ALPHA S.A. ait été arrêté fin février 1980 et que la demanderesse n'ait initié l'arbitrage que le 30 septembre 1986, son action n'est pas tardive et encore moins forclose. Le fait pour un créancier d'attendre avant d'ouvrir une action, dans l'espoir de pouvoir régler les choses à l'amiable, n'est en effet pas contraire à la bonne foi, du moins pas lorsque – comme en l'espèce - il a effectivement négocié avec le débiteur en vue d'une transaction*." ("Although the balance due to ALPHA S.A. was finalized at the end of February 1980 and the claimant did not initiate arbitration until 30 September 1986, its action is not late and even less time-barred. The fact that a creditor waits before bringing proceedings, in the hope of being able to settle things amicably, is not contrary to good faith, at least not when - as in this case - he has actually negotiated with the debtor for a settlement.") (informal English translation of the French original).

[2676] REYMOND, 498, §5. See also BORN, 1357–1358 and LAZOPOULOS, 613, §41.

[2677] Partial Award of 2008 (2009) 34 YB Comm Arb 15–26.

[2678] *Manufacturer v Buyer*, ICC Case No 8486 of 1996, Final Award, (1999) 24 YB Comm Arb 162, 173 considering the failure to pay the advance on costs as bad faith conduct §26; ICC Case No 11798 of December 2002 (Swiss law, Lausanne (Switzerland)), ICC Special Supplement 2011: Interim, Conservatory and Emergency Measures in ICC Arbitration, 44 in which

1794. Certain commentators, however, argue that, with respect to the arbitral tribunal's fees and expenses, there is a contractual obligation on the basis of the *receptum arbitrii* for the parties to pay such costs.[2679] This view is countered by the argument that an arbitral tribunal cannot necessarily impose the sharing of the costs i.e., the proportions that should be borne by each party on the basis of the *receptum arbitrii,* and that, accordingly, this obligation arises from the obligation to arbitrate in good faith.[2680]

2. Security for costs

1795. The good or bad faith conduct of a party is a factor considered by arbitral tribunals when deciding whether or not to grant an order for security for costs.

1796. On the one hand, the bad faith conduct of the party against whom the order is sought may lead an arbitral tribunal to grant the order.

1797. Indeed, it has been argued that if a party against whom an order is sought attempts to escape a potential obligation to reimburse the requesting party by, for example, transferring its claim to an impecunious party, it will be acting contrary to the principle of good faith and that as a result, the awarding of security for costs may be appropriate.[2681]

1798. In addition, in an arbitration seated in Switzerland conducted by the Geneva Chamber of Commerce, the sole arbitrator held that tactics employed by the party against whom an order is sought which are contrary to good faith could justify an order for security for costs.[2682] However, in that particular case, it was not established that the voluntary liquidation of the party against whom security for costs was sought had been made in circumstances amounting to bad faith

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the arbitral tribunal held that by including an ICC arbitration clause in their contract, the parties obliged themselves to make an advance on costs in equal shares and that this obligation flowed from the principle of *pacta sunt servanda* and indirectly from the superior principle of good faith; *Cessna Finance Corporation v. Gulf Jet LLC* (Final Award), ICC Case No. 18769/VRO/AGF, 17 January 2014, Arbitrator Intelligence Materials, §232 holding that the respondent's failure to advance any of the costs of the arbitration (amongst other behaviour) constituted a failure of its obligation to arbitrate in good faith.

2679 POUDRET/BESSON, 371, §443.

2680 REYMOND, 496–498, §§3–5.

2681 MARCO STACHER/CHLOÉ TERRAPON CHASSOT, Article 41 in Zuberbühler/Müller/Habegger (eds), Swiss Rules of International Arbitration: Commentary (3rd edn Schulthess 2023), 547–548, §38.

2682 *A. S.p.A. (Italy) v B AG (Germany),* 25 September 1997, Geneva Chamber of Commerce (2001) 19 ASA Bull 745, §8.

conduct and, accordingly, the sole arbitrator held that this was therefore a commercial risk to be borne by the party requesting security.[2683]

1799. On the other hand, if the requesting party has acted contrary to good faith, it may be precluded from being awarded security for costs.

1800. For example, in ICC Case No 15218 (Bern (Switzerland)), the arbitral tribunal held that if there is no reasonable chance of the requesting party enforcing a future cost award in its favour against the opposing insolvent party, then such an order will usually be granted unless the insolvent party proves that its insolvency is due to the behaviour of the requesting party contrary to the principle of good faith.[2684]

3. Third party funding

1801. It is unclear whether the obligation to arbitrate in good faith obliges a party to disclose the existence of third-party funding.

1802. CREMADES has put forward the view that in certain cases, a failure of a party to disclose the participation of third-party financiers could constitute a violation of the obligation to arbitrate in good faith referring in particular to the fact that "many objections and delays in the proceedings could be due to a clear lack of procedural strategy deriving from the participation of third-party financiers."[2685]

1803. However, LEVY and BONNAN argue that the obligation to arbitrate in good faith should only rarely oblige a party to disclose the existence of a third-party funder such as in the case where the third party is "enjoying the full benefits (and incurring all the risks) of the arbitration" or where the third party's aim is to either acquire a personal interest in the claim against the non-funded party or to harm the latter.[2686]

1804. In the context of investment arbitrations, and in particular with respect to mass claims, CRIVELLARO supports the view that the obligation to arbitrate in good faith imposes on the parties a duty to disclose the third-party funding in such cases. He argues that disclosure is necessary in order to protect a respondent State against a puppet or impecunious claimant, to ensure due process, and to

2683 *Ibid*.

2684 ICC Case No 15218, Procedural Order of July 2008 in ICC Special Supplement 2014: Procedural Decisions in ICC Arbitration, 79.

2685 BERNARDO CREMADES, Third Party Funding in International Arbitration, 23 September 2011, 7, available at <https://www.cremades.com/en/publications-pag-4/> accessed 1 March 2023.

2686 LAURENT LÉVY/RÉGIS BONNAN, Third-party funding. Disclosure, joinder and impact on arbitral proceedings in (2013) Dossier of the ICC Institute of World Business Law: Third-party Funding in International Arbitration, 78.

enable a respondent State to determine whether it has consented to arbitrate a mass claim.[2687]

1805. VON GOELER argues, on the other hand, that good faith is a "dangerously vague rationale for disclosure."[2688] He argues that this also suggests that there is something inherently morally reprehensible and dishonest in a party funding a claim for a profit which cannot be the case as there is no authority stating that third party funding is *per se* unlawful, illegitimate, inappropriate or unfair.[2689]

1806. VON GOELER submits that the non-disclosure of third-party funding may be sanctioned in various ways depending on the facts and the circumstances. Hence, when there is a conflict of interest between the third-party funder and one of the arbitrators, non-disclosure of the third-party funder may lead to the challenge of the arbitrator or the award. In addition, if a party fails to provide relevant information concerning the funding agreement as evidence for a security for costs request, this may lead the arbitral tribunal to draw adverse inferences with respect to the content of the funding agreement. Finally, when a party claims an uplift for its funder but does not mention the same in its costs submission, then an arbitral tribunal may decide that the claimant should bear its own costs.[2690]

C. Consolidation/Joinder

1807. In the event that all parties are involved in the same commercial transaction, with interrelated contractual obligations and performance and identical dispute resolution provisions, BORN argues that the obligation to arbitrate in good faith supports the conclusion that the parties have impliedly accepted the consolidation and/or joinder or intervention of other parties. Indeed, BORN argues that the obligation to arbitrate in good faith encompasses a duty to cooperate in an efficient dispute resolution process which avoids the risk of inconsistent decisions.[2691]

2687 ANTONIO CRIVELLARO, Third-party funding and "mass" claims in investment arbitrations in (2013) Dossier of the ICC Institute of World Business Law: Third-party Funding in International Arbitration 137.

2688 VON GOELER, 146 referring at fn 129 to PERRY, Global Arbitration Review (23 November 2011) (report of speech of VAN DEN BERG: "To my knowledge there are no specific rules" covering this [disclosure of third-party funding in connection with conflicts of interest], other than the general notion of good faith in arbitral proceedings, he said, which is "a pretty big basket").

2689 *Idem*, 147.

2690 *Idem*, 157.

2691 BORN, 2780.

1808. LEBOULANGER follows this view in the event that there is a dispute between two parties under different contracts but both containing identical arbitration agreements and both forming part of the same economic operation.[2692] He argues that a party would be acting contrary to the obligation to arbitrate in good faith if it refuses to constitute a single arbitral tribunal in such a situation[2693] given that this conduct will increase the costs of arbitration and create a risk of contradictory awards.[2694] In line with this approach, the arbitral tribunal in ICC Case No FA-2021-070 held that the claims filed by the seller, although they were related to two separate contracts of sale, could be heard in the same arbitration as the arbitration clauses were similar, there was no indication that the parties wished for the claims under the arbitration agreements to be determined separately, and the principle of good faith required that any dispute between the parties must be resolved as quickly and efficiently as possible, avoiding additional costs.[2695]

1809. LEBOULANGER also contends that, in such a case, a party would be acting contrary to the obligation to arbitrate in good faith if it requests the appointment of different arbitrators for the parallel proceedings due to the alleged risk of bias. According to LEBOULANGER, it would constitute contradictory conduct to argue, on the one hand, that the disputes should not be consolidated as they are separate and unrelated disputes and, on the other hand, to argue that there is a risk of bias if the same arbitrators are appointed for these two disputes.[2696]

D. Constitution of Arbitral Tribunal

1810. With respect to the constitution of the arbitral tribunal, the obligation to arbitrate in good faith will firstly be considered in relation to the appointment of an arbitrator (1.) and, secondly, in relation to the challenge of an arbitrator (2.).

1. Appointment of an arbitrator

1811. According to REYMOND, the obligation for the parties to nominate an arbitrator flows from the parties' obligation to arbitrate in good faith.[2697]

2692 LEBOULANGER, 86, 88.
2693 *Ibid*.
2694 LEBOULANGER, 91.
2695 ICC Case No FA-2020-070, available at https://www.unilex.info/principles/case/2333, accessed 1 March 2023.
2696 LEBOULANGER, 86, 88.
2697 REYMOND, 498, §5.

1812. However, this duty may flow more simply from the arbitration agreement and the principle of *pacta sunt servanda* where the arbitration agreement provides – as is often the case – that the parties shall each appoint an arbitrator.[2698] This duty may also flow from the chosen institutional arbitration rules.[2699]

1813. This duty has been recognized by national court case law.

1814. Thus, in a decision of the Swiss courts, it was held that a party who does not nominate an arbitrator despite the existence of an arbitration agreement may violate the principle of good faith.[2700] Similarly, in a decision of the PRC courts, it was held that the respondents' repetitive refusal to jointly nominate the co-arbitrator was contrary to good faith.[2701]

1815. The obligation to arbitrate in good faith also includes a duty to not deliberately delay the appointment of an arbitrator.

1816. Indeed, in a case where the parties had been referred to arbitration by the New York courts, one of the parties later submitted a further application to the New York courts requesting that the arbitration proceed under the rules of the Inter-American Commercial Arbitration Commission following difficulties which had arisen with respect to the appointment of the arbitrators. The court denied the application and ordered the parties to proceed with the appointment in accordance with the terms of the arbitration agreement adding that any further delay in appointing arbitrators would be contrary to good faith.[2702]

1817. In addition, it has been submitted that if a party deliberately takes a long time to appoint its arbitrator knowing full well that the arbitrator does not fulfill the

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2698 *Nat'l Iranian Oil Co v State of Israel*, Partial Award of 10 February 2012 discussed in MATTIAS SCHERER/DOMITILLE BAIZEAU, Swiss Federal Supreme Court Confirms NIOC vs Israel Award – No Review of French Court Decision to Appoint Arbitrator in Order to Avoid International Denial of Justice (2013) 31 ASA Bull 400, 402. See also SFSCD of 10 January 2013, 4A _146/2012. See further *Safond Shipping Sdn Bhd v E Asia Sawmill Corp* [1993] HKCFI 151, §19 where the arbitration clause provided that each party should appoint an arbitrator; *China Ocean Shipping Co v Mitrans Maritime Panama SA* (1995) 20 YB Comm Arb 282 where the court found that a party had failed to comply with its obligation under the arbitration agreement to nominate an arbitrator; *Uganda Post Ltd v R.4 Int'l Ltd* [2009] UGCADER 5 (Uganda Ctr Arb Disp Res) where the arbitration clause provided that each party should appoint an arbitrator.

2699 See for example Article 12(3) and (4) ICC Rules of Arbitration 2021.

2700 Decision of the Zurich Obergericht PG92016 dated 8 April 1993, 7 confirmed by decision of the Zurich Kassationsgericht Kass.-Nr. 93/160 dated 28 March 1994.

2701 *Zhang Lan & Grand Land Holdings Group (BVI) Limited & Qiao Jiang Lan Development Limited v La Dolce Vita Fine Dinings Holdings Ltd*, Supreme People's Court of the PRC, (2019) Zui Gao Fa Min Te No. 4, 29 December 2020.

2702 *Bancol y CIA S en C et al. v BanColombia SA et al*, US District Court, Southern District of New York, 20 December 2000 (2001) 26 YB Comm Arb 1161–1163.

requirements to be able to act as arbitrator, and then uses this as a reason to request the appointment of another arbitrator, it will be acting contrary to the obligation to arbitrate in good faith.[2703]

1818. It has further been submitted that increasing the amount claimed, leading to a consequent increase in the number of arbitrators and thereby delay due to the time needed to select and appoint further arbitrators, may be contrary to the obligation to arbitrate in good faith.[2704]

2. Challenge of an arbitrator

1819. Submitting unfounded challenges against an arbitrator with the sole aim of delaying the proceedings or preventing the other party from appointing an arbitrator is contrary to the obligation to arbitrate in good faith.[2705]

1820. In addition, submitting numerous unfounded challenges both before the arbitral tribunal and before the relevant national court is also deemed to be contrary to the obligation to arbitrate in good faith.[2706]

1821. In this regard, paragraph 2 of the LCIA General Guidelines for the Authorised Representatives of the Parties 2020 expressly prohibits a party representative from making repeated arbitrator challenges.[2707]

1822. The obligation to arbitrate in good faith further encompasses a duty to raise a challenge to an arbitrator as soon as possible in the arbitral proceedings, failing which it shall be deemed to have waived such an objection.[2708]

2703 ESTAVILLO-CASTRO, 405.

2704 *Neurosigma, Inc. v. De Salles* (Final Award), AAA Case No. 72-20-1300-0792, 26 February 2016, Arbitrator Intelligence Materials: "increasing the Demand to over $1,000,000 resulted in increasing the number of arbitrators from one to three, which required delay for the selection and appointment of two additional arbitrators and attendant fees and expenses. Despite this amendment, NeuroSigma never produced any evidence to support such monetary damages."

2705 ESTAVILLO-CASTRO, 405; see also CREMADES, 787; KLEIMAN/SALEH, 114–115, §46 and ROBIN, 723.

2706 ESTAVILLO-CASTRO, 405; see also LAZOPOULOS, 614, §42.

2707 Paragraph 2 LCIA General Guidelines for the Authorised Representatives of the Parties 2020 provides as follows: "An authorised representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award, including repeated challenges to an arbitrator's appointment or to the jurisdiction or authority of the Arbitral Tribunal where such challenges are known to be unfounded by that authorised representative."

2708 See e.g., DE FONTMICHEL, 107 and ORTSCHIEDT, 88.

1823. This latter rule can be found in many national arbitration laws[2709] and in many institutional arbitration rules.[2710]

1824. The same rule was applied by an arbitral tribunal when ruling on the challenge of an expert who had been appointed to make findings on alleged defects in cranes. Hence, in ICC Case No 12171, the arbitral tribunal held that the claimant had implicitly accepted the expert arbitrator as it had agreed to continue the proceedings leading to the expert report and therefore it could not subsequently contest the appointment of the expert as this would be contrary to good faith or *venire contra factum proprium*.[2711]

1825. As stated by FOUCHARD, GAILLARD and GOLDMAN, "[g]ood faith prevents a party who remains silent prior to the appointment of the arbitrator from using

[2709] For example, Section 73(1) EAA provides as follows: "(1)If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—(a) that the tribunal lacks substantive jurisdiction, (b) that the proceedings have been improperly conducted, (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or (d)that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection. Article 1466 FrCCP also provides that "[a] party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity." ("*La partie qui, en connaissance de cause et sans motif légitime, s'abstient d'invoquer en temps utile une irrégularité devant le tribunal arbitral est réputée avoir renoncé à s'en prévaloir*."). As per the case law of the Swiss Federal Supreme Court, a party waives its right to bring a challenge if it fails to timely raise such a challenge and this rule is an application of the principle of good faith to the arbitral proceedings, see e.g., SFSCD 136 III 605 of 29 October 2010 [609].

[2710] Article 40 ICC Rules of Arbitration 2021, for example, provides that "[a] party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object. See also Rule 28 ICSID Arbitration Rules 2022; Article 43 DIS Arbitration Rules 2018; Article 28 International Arbitration Chamber of Paris Rules 2019; Article 31 VIAC Rules of Arbitration and Mediation 2018; Article 21 Liechtenstein Rules of Arbitration 2013; Article 32 Swiss Rules of International Arbitration 2021 and Article 32.1 LCIA Arbitration Rules 2020. With respect to the LCIA Rules, see Chapter 23 General Rules in RÉMY GERBAY/LISA RICHMAN ET AL., Arbitrating under the 2014 LCIA Rules: A User's Guide (Kluwer Law International 2015) 380, §2 stating that this rule flows from the principle of good faith.

[2711] ICC Case No 12171, Special Supplement 2011: Interim, Conservatory and Emergency Measures in ICC Arbitration (2011), 74.

facts of which it was aware at that time to challenge, at a later stage, the independence of an arbitrator or the validity of an award."[2712]

1826. In this regard, Article 180(2) PILA provides that a party may only challenge the arbitrator that it appointed for reasons of which it became aware after the appointment.[2713] Indeed, the principle of *venire contra factum proprium* prevents a party from invoking reasons that it knew of when it appointed the arbitrator.[2714] It is argued that this extends to reasons which a party could not have been unaware of at the time of the appointment.[2715]

1827. LEBOULANGER submits that challenging an arbitrator on the sole ground of its participation in a parallel case submitted to the same arbitral institution between the same two parties and concerning interrelated agreements would be contrary to the principle of good faith.[2716] He argues, in particular, that it would be contrary to the principle of estoppel (*venire contra factum proprium*) for a party to argue, on the one hand, that there are two separate and unrelated disputes arising out of two separate agreements and, on the other hand, submit that the participation of the same arbitrator in both disputes would present a risk of bias.[2717]

E. Appointment of counsel

1828. It has been submitted that arranging to be represented by counsel who has a conflict of interest with a member of the arbitral tribunal would be considered as contrary to the obligation to act in good faith.[2718]

2712 FOUCHARD/GAILLARD/GOLDMAN, 583, §1067.

2713 Article 180(2) PILA provides in the informal English translation as follows: "A party may only challenge an arbitrator it has appointed or assisted in appointing for a reason that, although it exercised due diligence, it did not know about before the appointment." Article 12(2) UNCITRAL Model Law on International Commercial Arbitration 1985, as amended in 2006, also provides in relevant part as follows: "A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

2714 BERGER/KELLERHALS, 321, §874; JEAN MARGUERAT/TOMAS NAVARRO BLAKEMORE, Article 13 in Zuberbühler/Müller/Habegger (eds), Swiss Rules of International Arbitration: Commentary (3rd edn Schulthess 2023), 202, §4.

2715 BERGER/KELLERHALS, 321, §874.

2716 LEBOULANGER, 86.

2717 *Idem*, 88.

2718 HENRIQUES, good faith, 517; LAZOPOULOS, 614, §42.

1829. It has also been held that appointing counsel at the last minute[2719] and changing legal counsel numerous times[2720] may be contrary to the obligation to arbitrate in good faith.

F. Jurisdictional objections

1830. The obligation to arbitrate in good faith prevents a party from knowingly raising unfounded jurisdictional objections before the arbitral tribunal.[2721] This prohibition is expressly set out in paragraph 2 of the LCIA General Guidelines for Authorised Representatives of the Parties 2020.[2722]

1831. The obligation to arbitrate in good faith also prevents a party from raising a jurisdictional objection in the arbitral proceedings when it could have done so earlier.[2723]

[2719] *Manufacturer v Buyer,* ICC Case No 8486 of 1996, Final Award, (1999) 24 YB Comm Arb 162, 173, §26: "Further, it also contributed to unnecessary delay and confusion in the proceedings by appointing counsel at the last moment, that is, after the closing of the oral hearings and shortly before the expiry of the latest time limit for a statement concerning the minutes of the hearings; compounded by counsel's renunciation to the mandate only a few days afterward."

[2720] *Neurosigma, Inc. v. De Salles* (Final Award), AAA Case No. 72-20-1300-0792, 26 February 2016, Arbitrator Intelligence Materials, in which the fact that the respondent changed counsel three times resulting in extensions of time and the postponement of the hearing was considered to be an example of the violation of the obligation to arbitrate in good faith.

[2721] ROBIN, 723. See also LAZOPOULOS, 614, §43 stating that repeated challenges to the arbitral tribunal's jurisdiction is contrary to the obligation to arbitrate in good faith.

[2722] Paragraph 2 of the LCIA General Guidelines for Authorised Representatives of the Parties 2020 provides as follows: "An authorised representative should not engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of any award, including repeated challenges to an arbitrator's appointment or to the jurisdiction or authority of the Arbitral Tribunal where such challenges are known to be unfounded by that authorised representative."

[2723] See e.g., DE FONTMICHEL, 107; LAZOPOULOS, 614, §43 and ORTSCHIEDT, 88.

1832. This rule can be found in many national arbitration laws[2724] and in many institutional arbitration rules.[2725]

1833. It is also submitted that it is an independent rule of the *lex mercatoria*.[2726]

[2724] For example, Section 31(1) EAA provides as follows: "An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction." Section 73(1) EAA also provides that: "(1)If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—(a) that the tribunal lacks substantive jurisdiction, (b) that the proceedings have been improperly conducted, (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or (d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection. Article 1466 French Code of Civil Procedure provides that "[a] party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity." ("*La partie qui, en connaissance de cause et sans motif légitime, s'abstient d'invoquer en temps utile une irrégularité devant le tribunal arbitral est réputée avoir renoncé à s'en prévaloir*."). Article 186(2) PILA provides that "A plea of lack of jurisdiction must be raised prior to any defence on the merits."

[2725] Article 40 ICC Rules of Arbitration 2021, for example, provides that "[a] party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object. See also Rule 28 ICSID Arbitration Rules 2022; Article 43 DIS Arbitration Rules 2018; Article 28 International Arbitration Chamber of Paris Rules 2019; Article 31 VIAC Rules of Arbitration and Mediation 2018; Article 21 Liechtenstein Rules of Arbitration 2013; Article 32 Swiss Rules of International Arbitration 2021 and Article 32.1 LCIA Arbitration Rules 2020. With respect to the LCIA Rules, see Chapter 23 General Rules in RÉMY GERBAY/LISA RICHMAN ET AL., Arbitrating under the 2014 LCIA Rules: A User's Guide (Kluwer Law International 2015) 380, §2 stating that this rule flows from the principle of good faith.

[2726] MUSTILL, 113. Hence, Article XIII.3.9 TransLex Principles provides that "A party who knows that any provision of the applicable arbitration law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object." (See <https://www.trans-lex.org/970012/_/waiver-of-right-to-object/>, accessed 1 March 2023 stating that: "This Principle is a direct consequence of the prohibition of inconsistent behavior which in turn is derived from the Principle of good faith and fair dealing.").

1834. According to a recent decision of the English High Court, good faith requires a party to raise the specific jurisdictional objection in the arbitral proceedings and not just a general challenge to the arbitral tribunal's jurisdiction.[2727]

G. Claims and defences

1835. Depending on the circumstances, filing claims or defences late may constitute a violation of the obligation to arbitrate in good faith.[2728]

1836. Thus, in ICC Case No 8486 (Dutch law, Zurich (Switzerland)), the tardy filing of a counterclaim, after the first draft of the Terms of Reference had been drawn up, was considered to be an example of bad faith conduct.[2729]

1837. In addition, in ICC Case No 13384 (French law, Paris (France)), the arbitral tribunal dismissed the respondent's objection that the consultancy agreement was null and void *ab initio* because it involved the corruption of public officials. In addition to holding that the respondent had not established that there had been corruption, the arbitral tribunal noted that the respondent did not raise this argument during the performance of the agreement, in its termination notice, in its Answer to the Request for Arbitration or in the presentation of its argument in the Terms of Reference. The arbitral tribunal also noted that the respondent did not file a criminal complaint before the relevant court.[2730]

2727 *PAO Tatneft v Ukraine* [2020] EWHC 3161 (Comm) at [87].

2728 See in this regard ORTSCHIEDT, 88 submitting that the principle of good faith or loyalty requires the parties to raise their claims as soon as possible. See also ROMANA BRUEGGEMANN/NADIA SMAHI, New Claims and Amended Claims in International Arbitration – Finding Landmarks in Navigating the Tribunal's Discretion (2022) SchiedsVZ 52 stating that a party will be acting in bad faith if it files new or amended claims during the proceedings as a dilatory tactic to delay the arbitration.

2729 *Manufacturer v Buyer*, ICC Case No 8486 of 1996, Final Award, (1999) 24 YB Comm Arb 162, 173. In a further case (Unpublished award 17/72 of the Strasbourg Arbitration Chamber), the arbitral tribunal qualified as anti-commercial the behaviour of a party which had issued a claim only fourteen months after delivery (Unpublished award 69/71 of the Strasbourg Arbitration Chamber referred to in LOQUIN, *amiable composition*, 359, §618).

2730 ICC Case No 13384 of December 2005 in ICC Special Supplement 2013: Tackling Corruption in Arbitration, 62, §77 holding that: "These longstanding omissions give the impression that the argument has been fabricated by Respondent in a last minute, and maybe desperate, way of defence rather than in entirely good faith."

1838. With respect to the content of the claims and defenses, the obligation to arbitrate in good faith may preclude a party from making frivolous or vexatious claims or defenses that are not "reasonably arguable in law and fact".[2731]

1839. For example, in an ICDR arbitration (New York law, New York (US)), the arbitral tribunal held that the party's efforts to pursue doubtful and extreme claims showed that it had little inclination of bargaining in good faith towards the resolution of a dispute.[2732]

1840. It should be noted, however, that this duty not to make frivolous or vexatious claims does not prevent a party from attempting to extend an existing legal concept to the facts of its case on the basis that the circumstances of its case are different.[2733]

1841. Furthermore, it has been submitted that requesting excessive compensation may be deemed to constitute bad faith conduct.[2734]

1842. Thus, in ICC Case No 6527 (Turkish law, Rome (Italy)) the arbitral tribunal held that the parties should share the costs of the arbitral proceedings equally

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2731 The official commentary to Article 11.1 ALI/Unidroit Principles of Transnational Civil Procedure 2004 (provision on good faith) provides that "[a] party should not make a claim, defense, motion, or other initiative or response that is not reasonably arguable in law and fact. In appropriate circumstances, failure to conform to this requirement may be declared an abuse of the court's process and subject the party responsible to cost sanctions and fines. […] In appropriate circumstances, frivolous or vexatious claims or defenses may be considered an imposition on the court and may be subjected to default or dismissal of the case, as well as cost sanctions and fines." The Principles are available here: <https://www.unidroit.org/civil-procedure>, accessed 1 March 2023.

2732 *Zachariou v. Manios* (Final Award), ICDR Case No. 50 181 T 00107 09, 19 March 2014, Arbitrator Intelligence Materials, 21. See also unpublished award 69/71 of the Strasbourg Arbitration Chamber (referred to in LOQUIN, *amiable composition*, 359, §618) in which the arbitral tribunal condemned the conduct of a buyer as contrary to correct commercial conduct, when he had initially brought a claim for apparent defects and then had subsequently claimed that such defects were hidden defects. Although there appears to be no express mention of good faith in the award in question, LOQUIN refers to this cases in the section on equity and the taking into consideration of good faith by *amiable compositeurs*.

2733 See the Comment to Article 11.1 ALI/PICC Principles of Transnational Civil Procedure 2004 ("The parties and their lawyers must conduct themselves in good faith in dealing with the court and other parties."): "The obligation of good faith, however, does not preclude a party from making a reasonable effort to extend an existing concept based on difference of circumstances."

2734 ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 230, §77.

despite the fact that the claimant's claim was justified because its claim was considered excessive as to the amount of requested compensation.[2735]

1843. In certain situations, good faith may prevent a party from bringing a claim or raising a defence if it has promised, or led the other party to believe, that it would not bring such a claim or defence.

1844. However, in ICC Case No 6230 (Swiss law, Zurich (Switzerland)), the arbitral tribunal held that the claimant's claim for compensation under a construction contract was not estopped or barred on the ground of good faith by its passive behaviour when the respondent was conducting negotiations with the owner and government as it did not act in such a way as to lead the respondent to believe that it would forego its compensation.[2736]

1845. Similarly in ICC Case No 7301 (Swiss law), the arbitral tribunal held that it was not contrary to good faith for the respondent to raise the statute of limitation defence as there was no evidence that the respondent promised not to invoke this defence.[2737]

1846. Finally, it has been argued by some French commentators that good faith requires a party to present all of the legal grounds on which it relies on in the first arbitral proceedings ("*principe de concentration des moyens*") as good faith requires that a dispute should be finally and completely settled by an award which has binding force.[2738] However, it has been convincingly argued that this issue is better dealt with by the rules on *res judicata*.[2739]

[2735] ICC Case No 6527 of 1991 (1993) 18 YB Comm Arb 44, 52: "As far as the costs incurred by the parties [...], considering that the claimant's claim was justified as to the *an debeatur* but excessive as to amount of the requested compensation, the arbitral tribunal considers it appropriate for each party to bear its own legal costs and for the parties to share equally the other costs of the proceedings."

[2736] ICC Case No 6230 (1992) 17 YB Comm Arb 164–177, §27.

[2737] ICC Case No 7301 of 1993 (1998) 23 YB Comm Arb 42–48, §§17–18.

[2738] DOMINIQUE HASCHER, *L'autorité de la chose jugée des sentences arbitrales*, Trav. Com. fr. DIP, 2000-2002, Pédone 2004, 17, 26; JARROSSON, *bonne foi*, 201–202, §31; see also KLEIMAN/SALEH, 116, §52 (stating that although the French Court of cassation has applied this principle to domestic arbitral proceedings, it does not apply to international arbitral proceedings following the decision of the Paris Court of Appeal of 5 May 2011 no.10-5314); PIERRE MAYER, *Litispendance, connexité et chose jugée dans l'arbitrage commercial international* in *Liber amicorum Claude Reymond*, (Litec 2004) 196; see further DE FONTMICHEL, 107 and Cass civ 1ᵉ, 28 mai 2008, no 07-13266, *G&A distribution c. Prodim*.

[2739] See ORTSCHIEDT, 88.

H. Participation

1847. Failing to participate in the arbitral proceedings may be considered contrary to the obligation to arbitrate in good faith. Hence, in *LETCO v Liberia*, the arbitral tribunal held that Liberia acted in bad faith by not participating in the arbitral proceedings. Indeed, Liberia failed to respond to the request for arbitration and was absent from all hearings held throughout the proceedings.[2740]

1848. Erratic participation by the parties in the arbitral proceedings may also be considered to be contrary to the obligation to arbitrate in good faith.[2741]

1849. Thus, in ICC Case No 18769 (law of Kansas, New York (US)), the arbitral tribunal held that the respondent violated its obligation to arbitrate in good faith by withdrawing its active participation in the proceedings, and in particular, by informing the arbitral tribunal on the first day of the hearing that it would not be attending.[2742]

1850. It has also been submitted that improper conduct during the proceedings, for example, making unsubstantiated fraud allegations against the other party and acting aggressively or with a lack of professional courtesy could be considered contrary to the obligation to arbitrate in good faith.[2743]

I. Formulation and compliance with procedural rules

1851. According to PETROCHILOS, the obligation to arbitrate in good faith entails that the parties must cooperate with each other and the arbitral tribunal in order to formulate specific rules of conduct for the proceedings.[2744]

2740 *Liberian Eastern Timber Corporation (LETCO) v Liberia*, 31 March 1986, 2 ICSID Reports 354, 378.

2741 For further potential examples, see the unpublished ICC case 21 referred to by DARWAZEH/RIGAUDEAU, 392 in which the claimant had withdrawn its claim two years after commencing the arbitration in order to potentially pursue its claim elsewhere and then had recommenced the initial arbitration proceedings in spite of the respondent's ongoing liquidation and the unpublished ICC case 19 referred to by DARWAZEH/RIGAUDEAU, 391 in which the respondent failed to participate in the arbitral proceedings for one year and then reappeared requesting that the procedural timetable be modified and submitting a large number of additional documents thereby delaying the proceedings.

2742 *Cessna Finance Corporation v. Gulf Jet LLC* (Final Award), ICC Case No 18769/VRO/AGF, 17 January 2014, Arbitrator Intelligence Materials, §232.

2743 LAZOPOULOS, 613, §41 and 614, §42.

2744 GEORGIOS PETROCHILOS, Procedural Law in International Arbitration (Oxford Private International Law Series 2004) 216, §5.122.

1852. In this regard, it has been submitted that conduct which is designed to thwart agreement on an efficient, economic and fair process within the meaning of Article 2 IBA Rules on the Taking of Evidence in International Arbitration 2020 will be contrary to the obligation to arbitrate in good faith.[2745]

1853. In addition, a respondent's refusal to sign the Terms of Reference, despite the fact that the Terms of Reference had been modified in accordance with its comments and despite the fact that it had been given a detailed explanation of the meaning of its terms and its legal consequences was considered to amount to bad faith conduct.[2746]

1854. According to BORN, the obligation to arbitrate in good faith also includes a duty to obey the arbitral procedure.[2747] It was thus held by an arbitral tribunal that the obligation to arbitrate in good faith includes a duty to abide by the agreed rules for arbitration and the orders made by the arbitral tribunal.[2748]

1855. The obligation to arbitrate in good faith also includes a duty not to manipulate the procedural rules.[2749]

1856. It has further been submitted that frequently requesting unjustified extensions of deadlines set out in a procedural timetable may be contrary to the obligation to arbitrate in good faith.[2750] Moreover, it has been held that repeatedly ignoring deadlines set forth by the arbitral tribunal in procedural orders is contrary to the obligation to arbitrate in good faith.[2751]

1857. Finally, it is contended that submitting unsolicited briefs may be contrary to the obligation to arbitrate in good faith.[2752]

2745 KHODYKIN/MULCAHY/FLETCHER, 32 §2.72.

2746 *Manufacturer v Buyer*, ICC Case No 8486 of 1996, Final Award, (1999) 24 YB Comm Arb 162, 173, §26.

2747 BORN, 1353. See also LAZOPOULOS, 613, §41.

2748 *Cessna Finance Corporation v. Gulf Jet LLC* (Final Award), ICC Case No 18769/VRO/AGF, 17 January 2014, Arbitrator Intelligence Materials, §232: "this Tribunal finds that Gulf Jet, Al Meeza and Al Mulla were each under a duty to arbitrate in good faith. The scope of that duty would at the very least require a party to abide by the agreed rules for the arbitration and orders made in the arbitration."

2749 JARROSSON, *bonne foi*, 201.

2750 ESTAVILLO-CASTRO, 405; see also HENRIQUES, good faith, 531.

2751 *Cessna Finance Corporation v. Gulf Jet LLC* (Final Award), ICC Case No 18769/VRO/AGF, 17 January 2014, Arbitrator Intelligence Materials, §232.

2752 ESTAVILLO-CASTRO, 405–406.

J. Contact with the arbitral tribunal

1858. The obligation to arbitrate in good faith prevents the parties from secretly contacting the arbitral tribunal without the knowledge of the other party.

1859. This prohibition is now expressly contained in some soft law instruments. Hence paragraph 6 LCIA General Guidelines for the Authorised Representatives of the Parties 2020 prohibits counsel from making unilateral contacts with the arbitral tribunal.[2753] Guideline 7 IBA Guidelines on Party Representation in International Arbitration 2013 contains a similar provision.[2754]

1860. It goes without saying that it would also be contrary to the obligation to arbitrate in good faith to pressurize or attempt to influence the members of the arbitral tribunal.[2755] Again, this prohibition is expressly set out in some soft law instruments. Hence Section 3 AFA Ethical Charter 2013 imposes a duty on the parties and their counsel not to exert any pressure or influence on the arbitrators.[2756]

1861. A relevant case, in this regard, is that of *Himpurna California Energy Ltd (HCE) v Republic of Indonesia* in which the Indonesian arbitrator was (contrary to the

[2753] Paragraph 6 LCIA General Guidelines for the Authorised Representatives of the Parties 2020 provides as follows: "During the arbitration proceedings, an authorised representative should not deliberately initiate or attempt to initiate any unilateral contact relating to the arbitration or the parties' dispute with any member of the LCIA Court exercising any function in regard to the arbitration or, from the Arbitral Tribunal's formation onwards, any member of the Arbitral Tribunal or the tribunal secretary (if any), which has not been disclosed in writing prior to or shortly after the time of such contact to all other parties, all members of the Arbitral Tribunal and the Registrar in accordance with Article 13.4." Such Guidelines can be found here: <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx>, accessed 1 March 2023.

[2754] Guideline 7 IBA Guidelines on Party Representation in International Arbitration 2013 provides as follows: "Unless agreed otherwise by the Parties, and subject to the exceptions below, a Party Representative should not engage in any Ex Parte Communications with an Arbitrator concerning the arbitration." These Guidelines are available here: <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>, accessed 1 March 2023.

[2755] See in this regard, CREMADES, 787.

[2756] Section 3 AFA Ethical Charter 2013 provides in relevant part as follows: "*Les parties et leurs conseils s'engagent à n'exercer aucune pression ni influence, directe ou indirecte, sur l'arbitre ou sur le tribunal arbitral.*" ("The parties and their counsel commit to not exercise any pressure or influence, whether directly or indirectly, on the arbitrator or on the arbitral tribunal."). The AFA Ethical Charter is available here: <http://www.afa-arbitrage.com/ethical-arbitration-charter/?lang=en>, accessed 1 March 2023.

obligation to arbitrate in good faith) abducted by the State party prior to attending the hearing.[2757]

K. Evidence

1862. The obligation of the parties to arbitrate in good faith obliges the parties to cooperate in the taking of evidence.[2758]

1863. The preamble of the IBA Rules on the Taking of Evidence in International Arbitration 2020 explicitly requires that each party shall act in good faith in the taking of evidence.[2759] The express inclusion of the principle of good faith was thought to be required in order to guide inexperienced arbitration users and

[2757] *Himpurna California Energy Ltd v Republic of Indonesia*, Ad hoc arbitral award, 26 September 1999 25 YB Comm Arb 110–215 (2000). See in this regard BÉDARD/NELSON/RAYMOND KALANTIRSKY, 739 and BERNARD HANOTIAU, Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings in Albert van den Berg (ed), International Commercial Arbitration: Important Contemporary Questions (ICCA International Arbitration Congress), 2003, 261, 270–71.

[2758] JARVIN, 174–175; JARROSSON, *bonne foi*, 201; MORIN, 13; ORTSCHIEDT, 88. See also *ADF Group Inc v USA*, ICSID Case No Arb (AF/00/1) (FLORENTINO FELICIANO (Philippines) (President); CAROLYN LAMM (US); ARMAND DE MESTRAL (Canada)) Procedural Order No. 3 concerning the production of documents: "The appropriate assumption in every case is that, both parties having proceeded to international arbitration in good faith, neither would withhold documents for its own benefit and that good faith will render any practical problems of document production susceptible of prompt resolution without undue hardship or expense on either party."; ICC Case No 1434 (1975) JDI 978, 982: "*Les deux parties ont au surplus l'obligation de collaborer selon le principe de bonne foi, à l'administration de la preuve, tout particulièrement en matière arbitrale*." ("In addition, both parties have an obligation to cooperate in accordance with the principle of good faith in the taking of evidence, particularly in arbitration matters.") (informal English translation of the French original); *An African Construction Company v An African Co-operative Association*, CRCICA Case No 78/1996, 31 December 1996, M. E. I. Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I, 129, 131, in which the arbitral tribunal held that the respondent readily complied with the request to produce documents upon its order that both parties must cooperate for the effective settlement of the dispute and for requirements of good faith; ICC Case No 18033 (2016) 1 ICC Disp Res Bull 165 stating that "There is no question that a party can demand the production of certain documents from another party. This may therefore be regarded as a general procedural rule in international arbitrations in Switzerland deriving from the parties' obligation to cooperate in good faith."

[2759] The IBA Rules on the Taking of Evidence 2020 can be found here: <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>, accessed 1 March 2023.

"provid[e] the arbitral tribunal with a yardstick to conduct the evidentiary proceedings."[2760]

1864. Whether the obligation to conduct oneself in good faith in the taking of evidence is violated will obviously be determined on a case-by-case basis.[2761] In addition, the application of the obligation to arbitrate in good faith to the taking of evidence will depend on the views and practices of the relevant parties and arbitrators.[2762] However, it is possible to point to certain conduct which might be considered to be violations of the obligation to arbitrate in good faith with respect to documentary evidence (1.) and witness evidence (2.).

1. Documentary evidence

1865. With respect to documentary evidence, the following conduct may constitute a violation of the obligation to arbitrate in good faith:

- showing no willingness to cooperate in the exchange of information;[2763]
- introducing a document during settlement negotiations with the sole aim of ensuring that this document cannot be requested by the other side in an ensuing arbitration;[2764]
- requesting that a confidential document be disclosed on the ground that it is required for the fulfilment or protection of a legal right or the challenge of an award when the primary purpose is for disclosure;[2765]

2760 ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 6, §15.

2761 KLASENER, 160; ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 6, §16.

2762 KLASENER, 164.

2763 *Neurosigma, Inc. v. De Salles* (Final Award), AAA Case No. 72-20-1300-0792, 26 February 2016, Arbitrator Intelligence Materials, in which the claimant's lack of willingness to cooperate in the production of documents relating to the company was held to constitute a breach of the implied covenant of good faith and fair dealing. See also *Gran Colombia Gold Corp v Republic of Colombia* (Procedural Order No. 11; On the Parties' Requests for Documents), ICSID Case No Arb/18/23, 28 September 2021, in which the arbitral tribunal recalled that in Procedural Order No. 1, it had specifically emphasized that the parties' duty to act in good faith within the framework of the document production process required them "not only to formulate narrow and specific document production requests but also to cooperate in the process of achieving such formulations with respect to the other's requests."

2764 ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 214. §33. See in this regard the commentary to Article XII.5 TransLex Principles 'Settlement Privilege' which states that such privilege cannot be invoked if a party has introduced a statement or document during settlement negotiations solely for the sake of being able to shield this information from the other side in a subsequent arbitration. (<https://www.trans-lex.org/968500/_/settlement-privilege/>, accessed 1 March 2023).

2765 KHODYKIN/MULCAHY/FLETCHER, 34, §2.79; KLASENER, 163.

- disclosing confidential materials with the intent of pressuring or harming another participant in the arbitration;[2766]
- holding back documents on which a party relies with the intent to surprise parties or witnesses with such documents;[2767]
- making excessive document requests;[2768]
- raising objections (including the confidentiality exception) to document production requests without a reasonable and good-faith basis;[2769]
- failing to provide good faith answers and objections to a request for the production of documents;[2770]
- failing to comply with a document production order;[2771]
- burying responsive documents under unimportant ones;[2772]

2766 KLASENER, 162; ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 6, §16.

2767 KLASENER, 162; ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 6, §16.

2768 KHODYKIN/MULCAHY/FLETCHER, 33, §2.75 and 508, §12.399, who are of the view that the obligation to arbitrate in good faith would be breached "where a party, with the intention of causing delay or of increasing the other party's costs, submits document requests that are intentionally burdensome, or produces a significant volume of documents with only peripheral relevance to the matters in dispute but which an under-resourced receiving party will have to review in order to establish this fact."; KLASENER, 162; ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 6, §16.

2769 KHODYKIN/MULCAHY/FLETCHER, 32, §2.71 and 508, §12.399; KLASENER, 162; O'MALLEY, 233, §7.49; ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 6, §16; Guideline 13 IBA Guidelines on Party Representation in International Arbitration 2013 prohibits requests for or objections to the production of documents with the improper aim of harassing or causing unnecessary delay. In this respect, an ICC arbitral tribunal ordered a party to bear the arbitration and lawyer costs of the other party when it repeatedly refused to produce documents ordered by the arbitral tribunal and had improperly alleged that the documents were covered by professional secrecy (DARWAZEH/RIGAUDEAU, 392); see further *Gran Colombia Gold Corp v Republic of Colombia* (Procedural Order No. 11; On the Parties' Requests for Documents), ICSID Case No Arb/18/23, 28 September 2021, in which the arbitral tribunal declined to order either party to prepare a privilege log but stated that it expected counsel for both parties to proceed in good faith in identifying privileged material.

2770 O'MALLEY, 51–52, §3.59.

2771 ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 6, §16. See also KHODYKIN/MULCAHY/FLETCHER, 32, §2.71 and 508, §12.399; LAZOPOULOS, 614, §42; NORADÈLE RADJAI/CHRISTIAN OETIKER, Article 30 in Zuberbühler/Müller/Habegger (eds), Swiss Rules of International Arbitration: Commentary (3rd edn Schulthess 2023), 429–430, §53. See further *Zachariou v. Manios* (Final Award), ICDR Case No. 50 181 T 00107 09, 19 March 2014, Arbitrator Intelligence Materials, in which the arbitral tribunal held that it was contrary to good faith to refuse to give access to documents and ICC Case No 15583 (2016) ICC Disp Res Bull 139 in which the respondent failed to disclose contracts concluded with designated customers as ordered by the arbitral tribunal.

2772 KLASENER, 162; ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 6, §16.

- requesting that documents submitted by the other party be declared inadmissible while at the same time expressly referring to such documents in its own submissions;[2773]
- deliberately concealing or destroying evidence;[2774]
- submitting data in a non-agreed or non-default form with the intention of concealing information, preventing electronic searches or just burdening the other party;[2775]
- knowingly submitting improperly obtained evidence[2776]. Thus, in the *Libananco Holdings Co Ltd v Turkey* case, the Turkish Public Prosecutor had placed the claimant under surveillance and had intercepted privileged correspondence.[2777] The arbitral tribunal held that this was contrary to the obligation to arbitrate in good faith and, on this basis, the arbitral tribunal ordered, *inter alia*, the respondent not to intercept or record privileged correspondence and to produce a statement that all correspondence intercepted had been destroyed and further decided that such documents would be excluded from the record.[2778] Similarly, the arbitral tribunal in the *Methanex Corp v United States* case decided to exclude the evidence that Methanex had obtained by unlawfully trespassing onto the property of a third party.[2779] Finally, in the *EDF v Romania* case, the arbitral tribunal rejected the

[2773] ICC Case No 7047 of 1994 (Geneva (Switzerland)) (HILMAR RAESCHKE-KESSLER (President); JEAN PATRY; PROF. DR. DOBROSAV MITROVIC) (1995) ASA Bull 315: "The principle of good faith, as a governing concept of private law, also applies to procedural law […]. It naturally governs the entire arbitration procedure […]. Defendant 1) would misuse its procedural rights by rejecting as evidence such exhibits presented by Claimant to which it has referred itself to support its own position."

[2774] ESTAVILLO-CASTRO, 406; KLASENER, 162; O'MALLEY, 52–53, §3.60; ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 6, §16; see also paragraph 5 LCIA General Guidelines for the Authorised Representatives of the Parties 2020 which prohibits counsel from concealing or assisting in the concealment of any document ordered for production by the arbitral tribunal; see also *Gran Colombia Gold Corp v Republic of Colombia* (Procedural Order No. 11; On the Parties' Requests for Documents), ICSID Case No Arb/18/23, 28 September 2021, in which the arbitral tribunal stated that it relied on the counsel's good faith and appropriate due diligence when representing, with respect to particular categories of requested documents, that no responsive documents exist.

[2775] KLASENER, 162.

[2776] CREMADES, 787; KLASENER, 162.

[2777] *Libananco Holdings Co Ltd v Turkey*, ICSID No ARB/06/8, Decision on Preliminary Issues, 23 June 2008.

[2778] *Idem,* 40–42.

[2779] *Methanex Corporation v United States of America*, NAFTA Final Award, 3 August 2005, §54.

claimant's request to admit a recording of a conversation made without the recorded person's consent in breach of her right to privacy[2780];
- knowingly or negligently submitting forged or corrupted documents;[2781]
- submitting unsolicited documents;[2782]
- tampering with documents submitted or produced by, for example, cutting or pasting, abridging or excerpting from documents with the intent to mislead the arbitral tribunal;[2783] and
- submitting misleading translations[2784] or failing to take reasonable steps to ensure translations are correct[2785]. In this regard, good faith may also govern the agreement of the parties on the extent and preparation of translations of documents which are not in the language of the arbitration.[2786]

1866. However, the mere late production of evidence is not necessarily contrary to good faith.[2787]

2780 *EDF (Services) Ltd v Romania*, Procedural Order No. 3, 29 August 2008 (PIERO BERNARDINI (Italy) (President); ARTHUR ROVINE; YVES DERAINS (France)), §38.

2781 O'MALLEY, 233, §7.49; Paragraph 4 LCIA General Guidelines for the Authorised Representatives of the Parties 2020 prohibits counsel from knowingly obtaining, assisting in the preparation of or relying upon false evidence; Guideline 9 IBA Guidelines on Party Representation in International Arbitration 2013 prohibits the knowingly making of false submissions of fact.

2782 ESTAVILLO-CASTRO, 405–406.

2783 KLASENER, 162; ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 6, §16.

2784 *Ibid*.

2785 O'MALLEY, 233, §7.49.

2786 See in this regard Article 27.4 CIMA (Civil and Commercial Arbitration Court) Rules 2015, available at <http://arbitrajecima.com/wp-content/uploads/2015/12/Reglamento-CIMA-2015-ingles.pdf>, accessed 1 March 2023. Article 27.4 provides as follows: "Unless otherwise established by agreement, the parties shall provide a translation into the language of the proceeding of all documents submitted to the Arbitral Tribunal written in any language other than that determined to be used in the arbitration. The parties shall agree in good faith on the extent and preparation of the translations of these document."

2787 See *Trans Chemical Limited v China National Machinery Import and Export Corporation*, US District Court, Southern District of Texas, H-95-4114, 7 July 1997 (1998) 23 YB Comm Arb 995–1019, §35 (concerning a motion to vacate an award on the ground that the award was procured by fraud or undue means), in which it was held that the production of a report one day before the hearing was not contrary to good faith as the evidence showed that it was located accidentally after it was inadvertently misfiled and there was no evidence that the party intentionally or even recklessly delayed or otherwise attempted in any way to prevent production of the report or failed to undertake a good faith efforts to produce all documents responsive to the arbitrator's discovery order or CNMC's document requests.

1867. In addition, the mere withholding of important documents which are erroneously believed to be irrelevant is not contrary to good faith.[2788]

1868. Furthermore, it has been held that, as arbitration is based on the good faith of the parties, it is sufficient to submit a photocopy rather than the original of documents relied on as evidence.[2789]

1869. Finally, it has been submitted that the obligation to arbitrate in good faith does not – at least under the IBA Rules on the Taking of Evidence in International Arbitration 2020 – impose an affirmative duty on the parties to preserve evidence or prevent destruction of potentially relevant and material evidence.[2790] However, it may impose a duty on the parties to conduct a reasonably diligent search for documents ordered to be produced by the arbitral tribunal and for documents requested to which a party has not raised any objections.[2791] It is debated, however, whether the principle of good faith obliges a party to produce documents manifestly helpful to the opponent's case or even harmful to a party's own case.[2792]

2. Witness evidence

1870. Witnesses and experts are under a duty to act in good faith and therefore must act honestly.[2793]

1871. With respect to factual and expert witness evidence, the following conduct may constitute a violation of the obligation to arbitrate in good faith:

2788 *Fougerolle SA v Procofrance SA*, Cour de Cassation (France), 25 May 1992 (1994) 19 YB Comm Arb 205–208. This was a case in which Fougerolle challenged the award rendered by the arbitral tribunal on the grounds, *inter alia*, that Procofrance had fraudulently withheld decisive documents contrary to the requirement of good faith as a principle of international public policy. The *Cour de cassation* held that on the facts of the case, Procofrance could believe in good faith that these documents were irrelevant.

2789 ICC Case No 12923 (2013) 5 International Journal of Arab Arbitration 99, 119–120.

2790 KLASENER, 161; MARGHITOLA, 107; Cf KHODYKIN/MULCAHY/FLETCHER, 33, §2.74 stating that it is debated whether the obligation to arbitrate in good faith gives rise to such an affirmative duty.

2791 KLASENER, 162.

2792 See KHODYKIN/MULCAHY/FLETCHER, 33, §2.74. For those in favour of such an interpretation see, with respect to the position under Swiss law, PHILIPP HABEGGER, Document Production – An Overview of Swiss Court and Arbitration Practice, 2006 Special Supplement ICC Bull, 24, §18 and GEORG VON SEGESSER, The IBA Rules on the Taking of Evidence in International Arbitration: Revised version, adopted by the International Bar Association on 29 May 2010 (2010) 28 ASA Bull 735, 741. For those against such an interpretation see KLASENER, 161; MARGHITOLA, 112–113 and ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 5–6, §14.

2793 ESTAVILLO-CASTRO, 406.

- stonewalling and resisting in providing the testimony of the party's director or employees;[2794]
- not identifying witnesses on which a party relies until later on in the proceedings with the intent to surprise the other parties with such witnesses;[2795]
- unduly influencing the testimony of a witness by, for example, paying inappropriately high compensation in exchange for testimony;[2796]
- inciting false testimony or relying on witness testimony notwithstanding the fact that the testimony is known to be false;[2797]
- drafting testimony so as to hide content with the intent of surprising the other party with additional witness testimony;[2798]
- seeking to portray witnesses in a bad light;[2799]
- interfering with a witness;[2800] and
- deliberately asking confusing questions during cross-examination.[2801]

1872. It is submitted that the obligation to arbitrate in good faith does not, however, prevent counsel from drafting a witness statement.[2802]

[2794] *Neurosigma, Inc. v. De Salles* (Final Award), AAA Case No. 72-20-1300-0792, 26 February 2016, Arbitrator Intelligence Materials: "NeuroSigma stonewalled and resisted providing the testimony of its director, Loderick Cook in this matter, which required multiple orders and significant efforts to overcome a laundry list of excuses (such as unavailability, travel schedule conflicts, exaggerated medical issues, and alleged hostility of opposing counsel) in order to obtain Mr. Cook's deposition. Respondents produced evidence that Mr. Cook provided a radio interview, scheduled other business appointments, and was listed in its S-1 as the Chair of the Board of NeuroSigma, in addition to other significant ongoing business activity during the time he was alleged to be unavailable due to ill health. As one of two board members who made the decision to cancel the De Salles Parties' Shares, and the primary funder of the Company, his testimony was material." See also *Zachariou v. Manios* (Final Award), ICDR Case No. 50 181 T 00107 09, 19 March 2014, Arbitrator Intelligence Materials, 21, in which the arbitral tribunal held that it was contrary to good faith to refuse to give access to its employees.

[2795] KHODYKIN/MULCAHY/FLETCHER, 26, §2.55.and 508, §12.399; KLASENER, 162.

[2796] KLASENER, 162; ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 6, §16.

[2797] KHODYKIN/MULCAHY/FLETCHER, 34, §2.76; KLASENER, 162; LAZOPOULOS, 614, §42; ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 6, §16; see also paragraph 3 LCIA General Guidelines for the Authorised Representatives of the Parties 2020 which prohibit counsel from making false statements; Guideline 11 IBA Guidelines on Party Representation in International Arbitration 2013 also prohibits knowingly submitting false witness and expert evidence.

[2798] KLASENER, 162.

[2799] ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 7, §16.

[2800] SIPIORSKI, 208, §11.50.

[2801] ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 7, §16.

[2802] KLASENER, 162. See also KHODYKIN/MULCAHY/FLETCHER, 34, §2.76 stating that as long as the preparation of the witness does not involve distortion of the witness evidence, it should not be contrary to the obligation to arbitrate in good faith.

L. Hearing

1873. It has been submitted that the insistence that an oral hearing take place with the sole aim of delaying the proceedings is contrary to the obligation to arbitrate in good faith.[2803]

M. Procedural objections

1874. The obligation to arbitrate in good faith also imposes on a party the duty to raise any procedural objections in a timely manner in the arbitral proceedings.[2804]

1875. This rule can be found in many national arbitration laws[2805] and in many institutional arbitration rules.[2806]

2803 LAZOPOULOS, 609, §23.

2804 See e.g., DE FONTMICHEL, 107, LAZOPOULOS, 613, §41 and ORTSCHIEDT, 88.

2805 For example, Section 73(1) EAA provides in relevant part as follows: "(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection […] (b) that the proceedings have been improperly conducted, […] or (d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection." Article 1466 FrCCP provides that "[a] party which, knowingly and without a legitimate reason, fails to object to an irregularity before the arbitral tribunal in a timely manner shall be deemed to have waived its right to avail itself of such irregularity." ("*La partie qui, en connaissance de cause et sans motif légitime, s'abstient d'invoquer en temps utile une irrégularité devant le tribunal arbitral est réputée avoir renoncé à s'en prévaloir*.") (informal English translation of the French original). As held in the decision of the Swiss Federal Supreme Court 141 III 210 [216] of 9 April 2015: "According to the well-established case law of the Federal Supreme Court, it is contrary to Article 2 SwCC (or Art. 52 SwCCP, as the case may be) to bring formal grievances, which could have been raised at an earlier stage of the proceedings, at a later date if the outcome was unfavourable."

2806 Article 40 ICC Rules of Arbitration 2021, for example, provides that "[a] party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object." See also Rule 28 ICSID Arbitration Rules 2022; Article 43 DIS Arbitration Rules 2018; Article 28 International Arbitration Chamber of Paris Rules 2019; Article 31 VIAC Rules of Arbitration and Mediation 2018; Article 21 Liechtenstein Rules of Arbitration 2013; Article 32 Swiss Rules of International Arbitration 2021 and Article 32.1 LCIA Arbitration Rules 2020. With respect to the LCIA Rules, see Chapter 23 General Rules

1876. It is also submitted that it is an independent rule of the *lex mercatoria*.[2807]

N. Party conduct outside of the arbitral proceedings

1877. According to JARVIN, the obligation to cooperate in good faith during the arbitral proceedings entails that the parties should not do anything to aggravate the dispute.[2808]

1878. Indeed, in ICC Case No 14581 (Geneva (Switzerland)), the arbitral tribunal held that the parties to an arbitration agreement have to comply with the obligation to act in good faith throughout the proceedings which includes refraining from anything that could aggravate the dispute.[2809]

1879. In addition, in an ICSID arbitration, the arbitral tribunal recognized that "parties are bound by a good faith duty not to exacerbate the dispute or affect the integrity of the arbitration proceedings" and that "[u]nder certain circumstances, public statements uttered by a party to ICSID proceedings could violate this duty of good faith." However, the arbitral tribunal held that a party could contest the claim of another in public and could state its case in public in general terms without violating such an obligation.[2810]

1880. Further, in ICC Case No 3896 (Lausanne (Switzerland)), the respondent had called the bank guarantees that the claimants had issued in its favour after the initiation of the arbitral proceedings. The arbitral tribunal pointed out that it did not see why the respondent wished to call the guarantees during the arbitral proceedings when it did not deem it necessary to do so beforehand and also

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in RÉMY GERBAY/LISA RICHMAN ET AL., Arbitrating under the 2014 LCIA Rules: A User's Guide (Kluwer Law International 2015) 380, §2 stating that this rule flows from the principle of good faith.

2807 MUSTILL, 113. Hence, Article XIII.3.9 TransLex Principles provides that "A party who knows that any provision of the applicable arbitration law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object." (See <https://www.trans-lex.org/970012/_/waiver-of-right-to-object/>, accessed 1 March 2023 stating that: "This Principle is a direct consequence of the prohibition of inconsistent behavior which in turn is derived from the Principle of good faith and fair dealing.").

2808 JARVIN, 171 et seq.; see also CHENG, 140–141; KOTUBY/SOBOTA, 144.

2809 ICC Case No 14581, Procedural Order of June 2007 in Special Supplement 2014: procedural Decisions in ICC Arbitration, 86, §40.

2810 *Churchill Mining PLC v Republic of Indonesia*, ICSID Case No ARB/12/14 (GABRIELLE KAUFMANN-KOHLER (Switzerland) (President); MICHAEL HWANG (Singapore); ALBERT JAN VAN DEN BERG (Netherlands)), Procedural Order No.3, Provisional Measures, §§ 46–47.

noted that the call was not accompanied by any reasons relating to the contractual dispute between the parties. The arbitral tribunal held that "*l'esprit de bonne volonté*" (the spirit of good intentions) that the parties showed when they signed the Terms of Reference prevented the parties from taking any measures which would aggravate or escalate the dispute, complicate the task of the arbitral tribunal or make more difficult the enforcement of any award eventually rendered.[2811]

1881. Finally, in *Caratube v Kazakhstan*, the arbitral tribunal held that the "accepted duty of a party in an arbitration to act in good faith includes and covers a duty to avoid any unnecessary aggravation of the dispute and harassment of the other party."[2812] Indeed, in this case, the respondent State party had raided the claimant's offices and seized numerous documents and evidence which was held to be contrary to the obligation to arbitrate in good faith.[2813]

O. Recourse to other fora during the arbitration in relation to the same dispute

1882. According to JARVIN, the obligation to cooperate in good faith during the arbitral proceedings means that the parties should only have recourse to national courts to the extent necessary given that such recourse may delay the arbitral proceedings.[2814] Indeed, parallel proceedings give rise to increased costs, conflicting decisions and the potential for double remedies.[2815]

1883. Commencing parallel court proceedings after initiating arbitration proceedings has thus been held to constitute a violation of the obligation to arbitrate in good faith.[2816]

[2811] ICC Case No 3896 (1983) 110 JDI 914, 918. According to MAYER, *bonne foi*, 553, although the arbitral tribunal does not expressly cite the principle of good faith, the arbitrators had this principle in mind when they held that the spirit of good intentions prevented the parties from taking any measures which would aggravate or escalate the dispute, complicate the task of the arbitral tribunal or make more difficult the enforcement of any award eventually rendered.

[2812] *Caratube Int'l Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB 08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009 (KARL-HEINZ BÖCKSTIEGEL (Germany) (President); GAVAN GRIFFITH (Australia); KAMAL HOSSAIN (Bangladesh)).

[2813] *Idem*, §§118–119.

[2814] JARVIN, 174. See also LAZOPOULOS, 614, §42.

[2815] VOON/MITCHELL/MUNRO, 71.

[2816] See also in this regard SIPIORSKI, 134, §6.17 stating that parallel proceedings undermine the right to a fair trial and the integrity of the arbitration system. See further VOON/MITCHELL/MUNRO, 71 stating that a claimant will be acting contrary to good faith if it brings parallel proceedings in order to increase its chances of winning.

1884. Indeed, in ICC Case No 14581 (Geneva, (Switzerland)), the arbitral tribunal held that the parties to an arbitration agreement have to comply with the obligation to act in good faith throughout the proceedings which includes the duty not to initiate parallel actions relating to the same dispute after the inception of an arbitration.[2817]

1885. In addition, in an AAA arbitration, the arbitral tribunal held that the claimant's behaviour throughout the arbitral proceedings and, notably, the filing of a related action before the federal courts, constituted a violation of the implied covenant of good faith and fair dealing.[2818]

1886. Further, in *LETCO v Liberia*, the arbitral tribunal held that Liberia had acted in bad faith by subsequently instituting judicial proceedings in its own courts in order to nullify the results of the arbitral proceedings.[2819]

1887. It was also considered to be contrary to the obligation to arbitrate in good faith for a party to bring a motion to stay the arbitration in favour of court proceedings despite a clear and binding arbitration agreement.[2820]

1888. However, in *SPP v Egypt*, the arbitral tribunal held that a party did not act contrary to good faith or inconsistently by pursuing remedies in both ICC and ICSID arbitral proceedings as the party was trying to find a competent forum to hear its expropriation claim.[2821]

[2817] ICC Case No 14581, Procedural Order of June 2007 in Special Supplement 2014: procedural Decisions in ICC Arbitration, 86, §40. See also *Neurosigma, Inc. v. De Salles* (Final Award), AAA Case No. 72-20-1300-0792, 26 February 2016, Arbitrator Intelligence Materials in which a party filed a related action in court whilst the arbitration was pending.

[2818] *Neurosigma, Inc. v. De Salles* (Final Award), AAA Case No. 72-20-1300-0792, 26 February 2016, Arbitrator Intelligence Materials.

[2819] *Liberian Eastern Timber Corporation (LETCO) v Liberia* (31 March 1986), 2 ICSID Reports 356, 378: The Tribunal awards LETCO the costs incurred for carrying out this arbitration (Article 27 of the Arbitration Rules) as well as those costs incurred for legal representation by LETCO (Article 47 of the Arbitration Rules). This decision is based largely on Liberia's procedural bad faith. Not only did Liberia fail to partake in these arbitral proceedings, contrary to its contractual agreement, but it has also undertaken judicial proceedings in Liberia in order to nullify the results of this arbitration."

[2820] *Cessna Finance Corporation v. Gulf Jet LLC* (Final Award), ICC Case No. 18769/VRO/AGF, 17 January 2014, Arbitrator Intelligence Materials, §232.

[2821] *Southern Pacific Properties (Middle East) Limited, Southern Pacific Properties Limited v The Arab Republic of Egypt*, Decision on Jurisdiction, ICSID Case No ARB/84/3, 27 November 1985 (1991) YB Comm Arb 16, 22, §63. See further SIPIORSKI, 134, §6.17 stating that there can be legitimate situations in which parallel proceedings are brought e.g., where the first court should not have assumed jurisdiction or where the company's claims are divided between domestic claims and international claims based on the structure of the company.

1889. It has also been argued that a party will not necessarily be acting in bad faith if it is pursuing parallel litigation because it cannot bring all of its claims in one forum.[2822]

[2822] VOON/MITCHELL/MUNRO, 71.

IV. Measures Employed to Sanction the Violation of the Obligation to Arbitrate in Good Faith

1890. The arbitral tribunal's authority to sanction a violation of the obligation to arbitrate in good faith (A.) and the measures employed to sanction its violation (B.) will be discussed in turn.

A. Arbitral tribunal's authority to sanction the violation of the obligation to arbitrate in good faith

1891. This section will analyze the source of the arbitral tribunal's authority to sanction the violation of the obligation to arbitrate in good faith (1.) before turning to the possibility for the parties to limit or exclude the arbitral tribunal's power in this regard (2.).

1. Source

1892. The source of the arbitral tribunal's power to sanction bad faith conduct can arguably be found in the applicable *lex arbitri* (a.), institutional arbitration rules (b.), and transnational soft law (c.). It has also been held that arbitral tribunals have inherent jurisdiction to sanction bad faith conduct (d.).

a. *Lex arbitri*

1893. The arbitral tribunal's power to sanction bad faith conduct can be found in certain provisions of the applicable *lex arbitri*.

1894. For example, Section 41 EAA provides the arbitral tribunal with certain powers to sanction a party's default, as follows, which may be applied when a party has acted contrary to good faith:

> Powers of tribunal in case of party's default
>
> the tribunal may make an award dismissing the claim.
>
> the tribunal may continue the proceedings in the absence of that party or, as the case may be, without any written evidence or submissions on his behalf, and may make an award on the basis of the evidence before it.
>
> (a) direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order;
>
> (b) draw such adverse inferences from the act of non-compliance as the circumstances justify;

(c) proceed to an award on the basis of such materials as have been properly provided to it;

(d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.

b. Institutional arbitration rules

1895. The arbitral tribunal's power to sanction bad faith conduct may also be found in certain provisions of the applicable institutional arbitration rules.

1896. Hence, Article 18.6 LCIA Arbitration Rules 2020 expressly empowers the arbitral tribunal to order a written reprimand, a written caution as to future conduct or any other measure necessary.[2823]

1897. It is also considered that Article 40 Swiss Rules of International Arbitration 2021[2824] gives the arbitral tribunal power to sanction a violation of the obligation to arbitrate in good faith set out at Article 16(1) of the same Rules.[2825]

c. Transnational soft law

1898. The arbitral tribunal's power to sanction bad faith conduct may be found in certain transnational soft law instruments such as the IBA Rules on the Taking of Evidence in International Arbitration 2020.

1899. Article 9(8) of these Rules thus provides that "[i]f the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of

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[2823] Article 18.6 LCIA Arbitration Rules 2020 provides as follows: "In the event of a complaint by one party against another party's authorised representative appearing by name before the Arbitral Tribunal (or of such complaint by the Arbitral Tribunal upon its own initiative), the Arbitral Tribunal may decide, after consulting the parties and granting that authorised representative a reasonable opportunity to answer the complaint, whether or not the authorised representative has violated the general guidelines. If such violation is found by the Arbitral Tribunal, the Arbitral Tribunal may order any or all of the following sanctions against the authorised representative: (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.1(i) and (ii)."

[2824] Article 40 Swiss Rules of International Arbitration 2021 provides as follows: "The costs of the arbitration shall in principle be borne by the unsuccessful party. The arbitral tribunal may apportion any of the costs of the arbitration among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case, including the parties' contributions to the efficient conduct of the proceedings and the avoidance of unnecessary costs and delays."

[2825] LAZOPOULOS, 614, §42. With respect to Article 16(1) Swiss Rules of International Arbitration 2021, see para. 1763 above.

evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence."

d. Inherent jurisdiction

1900. It has been held that an arbitral tribunal has inherent jurisdiction to sanction a party's violation of its obligation to arbitrate in good faith.

1901. Thus, in *Libananco Holdings Co Ltd v Turkey,* the ICSID arbitral tribunal held that "like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process" and that it had "the inherent jurisdiction to ensure that [the obligation to arbitrate fairly and in good faith] is complied with."[2826]

1902. In addition, in *ReliaStar Life Ins Co of NY v Nat'l Travelers Life Co*, the US federal court held that "where an arbitration clause is broad, arbitrators have the discretion to order such remedies as they deem appropriate. […] This is because it is "not the role of the courts to undermine the comprehensive grant of authority to arbitrators by prohibiting" them from fashioning awards or remedies to "ensure […] a meaningful final award." The US federal court went on to hold that "a broad arbitration clause […] confers inherent authority on arbitrators to sanction a party that participates in the arbitration in bad faith and that such a sanction may include an award of attorney's or arbitrator's fees." [2827]

2. Possibility for parties to eliminate the arbitral tribunal's authority to sanction bad faith conduct

1903. An issue which was addressed in the case of *ReliaStar Life Ins Co of NY v Nat'l Travelers Life Co* was whether the parties may eliminate the arbitrators' power

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[2826] *Libananco Holdings Co Ltd v Republic of Turkey*, ICSID No ARB/06/8, Decision on Preliminary Issues, 23 June 2008, §78. This holding was confirmed in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, (Judge THOMAS BUERGENTHAL (US) (President); Mr. HENRI C. ALVAREZ QC (Canada); Dr. KAMAL HOSSAIN (Bangladesh)), Decision on Provisional Measures, 8 April 2016, §186. See further ANDREW NEWCOMBE, The Obligation to Arbitrate Fairly and in Good Faith in Investment Arbitration, Kluwer Arbitration Blog, 19 April 2010, available at <http://arbitrationblog.kluwerarbitration.com/2010/04/19/the-obligation-to-arbitrate-fairly-and-in-good-faith-in-investment-treaty-arbitration/?doing_wp_cron=1596179713.6505138874053955078125>, accessed 1 March 2023.

[2827] *ReliaStar Life Ins Co of NY v Nat'l Travelers Life Co*, 564 F 3d 81 (2d Cir 2009).

to sanction bad faith conduct by awarding costs. The US federal court held that the parties could explicitly eliminate this power.[2828]

1904. Given that the award of costs is the most common sanction of bad faith behaviour in arbitral proceedings,[2829] it has been rightly argued that allowing the parties to explicitly exclude the arbitral tribunal's power to award costs to sanction bad faith conduct would be "a back-door way of defeating the requirement to act in good faith."[2830]

1905. However, such an issue is largely academic, as it is unlikely that parties would encourage bad faith conduct in this way in their contract.[2831]

B. Measures employed

1906. In the event that a party has violated its obligation to arbitrate in good faith, an arbitral tribunal may order such party to bear some or all of the costs of the arbitration (1.). However, arbitral tribunals have also awarded other specific measures when a party acts in bad faith with respect to the taking of evidence such as, drawing adverse inferences and excluding or refusing to admit evidence (2.). In some cases, arbitral tribunals have issued orders or injunctions in order to ensure the respect of the obligation to arbitrate in good faith (3.). An arbitral tribunal may also dismiss claims or defences due to a parties' bad faith conduct in the arbitral proceedings (4.) or issue an oral or written reprimand in order to sanction the violation of the obligation to arbitrate in good faith (5.). Finally, contractual remedies employed in order to sanction the violation of the obligation to arbitrate in good faith are explored (6.).

1. Bearing the costs of the arbitration

1907. The most common measure employed by arbitral tribunals in order to sanction the violation of the obligation to arbitrate in good faith is the bearing of the costs of the arbitration.[2832]

2828 *Ibid*.

2829 See below, para. 1907.

2830 MOSES, 6.

2831 *Ibid*.

2832 BÉDARD/NELSON/RAYMOND KALANTIRSKY, 755; MOSES, 5. See also, JARVIN, 179; KLEIMAN/SALEH, 127, §85; LAZOPOULOS, 614, §42; REYMOND, 502–503, §§12–13. See further *Cessna Finance Corporation v Gulf Jet LLC* (Final Award), ICC Case No. 18769/VRO/AGF, 17 January 2014, Arbitrator Intelligence Materials, §232–233 in which the arbitral tribunal

1908. Indeed, it has been noted that in ICC arbitrations, a party who fails to participate in the arbitration is often sanctioned with bearing the full amount of the costs.[2833]

1909. In this regard, in ICC Case No 8486, the party acting in bad faith was held liable for all costs of the arbitration despite prevailing on the merits.[2834]

1910. In addition, in an LCIA case, the arbitral tribunal increased the percentage of costs that the respondent had to pay by 50% in order to take into account its bad faith conduct with respect to the production of documents.[2835]

1911. Further, in ICC Case No 14061, the sole arbitrator referred to the respect of the requirement of good faith when deciding that the respondent was to bear all of the arbitration costs and to reimburse the claimant 60% of its legal costs incurred in the arbitration.[2836]

1912. Interestingly, it has been held that even in a case where the parties' contract provides that each party will bear its own costs of arbitration, an arbitral tribunal is not precluded from ordering one party to bear all of the costs of arbitration due to its bad faith conduct.[2837]

1913. The award of the costs of the arbitration is also the main measure foreseen by Article 9(8) IBA Rules on the Taking of Evidence in International Arbitration 2020 to sanction a party who fails to conduct itself in good faith in the taking of

held that the respondent was liable for all costs due to its violation of the obligation to arbitrate in good faith; *Enron Nigeria Power Holding, Ltd. v Lagos State Government* (Nigeria) (Award), ICC Case No. 14417/EBS/VRO/AGF, 19 November 2012, Arbitrator Intelligence Materials, at §165 in which the arbitral tribunal held that good faith is a factor in deciding on the decision on costs.

2833 DARWAZEH/RIGAUDEAU, 391.

2834 *Manufacturer v Buyer*, ICC Case No 8486 of 1996, Final Award, (1999) 24 YB Comm Arb 162 §§25 et seq. See also ICC Case No 12827 of 2005 and ICC Case No 13308 of 2006, *Chronique de jurisprudence arbitrale de la CCI in Cahiers de l'arbitrage, Gazette du Palais* (2009) in which respectively, the sole arbitrator and the arbitral tribunal, expressly referred to the good faith of the parties during the arbitral proceedings as one of the factors they considered in deciding the apportionment of costs.

2835 Case referred to in KHODYKIN/MULCAHY/FLETCHER, 507, §12.396.

2836 ICC Case No 14061 of 2009 (2015) JDI 161–172, Obs ANDREA CARLEVARIS noting that the sole arbitrator refers to the requirement to respect good faith without specifying the specific role of this notion in the case and its influence on the decision. He further notes that this notion is not referred to in the context of the procedural conduct of the parties but in the context of their conduct during the performance of the contract.

2837 *Reliastar Life Ins Co of NY v Nat'l Travelers Life Co*. 564 F 3d 81 (2d Cir 2009).

evidence.[2838] Article 9(8) is considered to be a specific implementation of the good faith principle found in the preamble of these Rules[2839].[2840] It was hoped that its explicit inclusion would heighten awareness of the arbitral tribunal's power to sanction bad faith behaviour and thereby increase the number of party requests for costs on this basis.[2841] On the one hand, it has been argued that this provision attributes a public policy objective to the arbitration process that it does not have.[2842] Conversely, it has been rightly argued that such a power is necessary in order to enforce the arbitral tribunal's duty to ensure a fair and efficient process.[2843]

1914. In addition to ordering a party to bear the costs of the arbitral proceedings at the end of such proceedings, an arbitral tribunal may also issue a monetary penalty during the proceedings and hence make an order for immediate payment by one party of the interim costs or order that a party underwrite the costs of the future steps of the proceedings.[2844]

2. Specific measures to sanction bad faith conduct in relation to evidence

1915. Specific measures employed by arbitral tribunals in order to sanction the violation of the obligation to arbitrate in good faith in relation to evidence include the drawing of adverse inferences (a.), as well as the exclusion of, or a refusal to admit, evidence (b.). There are also other proposed measures that may be employed by arbitral tribunals in order to sanction bad faith conduct in relation to evidence (c.).

2838 Article 9(8) IBA Rules on the Taking of Evidence in International Arbitration 2020 provides that "[i]f the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence."

2839 See above at para. 1775.

2840 ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 229, §76.

2841 *Ibid*.

2842 PEDRO J MARTINEZ-FRAGO, King or Arbitrator: Exploring the Inherent Authority of Arbitrators to Impose Sanctions within the Framework of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (2011) 12 Spain Arbitration Review, 57, 58–59 and 62.

2843 KHODYKIN/MULCAHY/FLETCHER, 506, §12.393.

2844 *Idem*, 39, §2.98.

a. Drawing adverse inferences

1916. Articles 9(6)-(7) IBA Rules on the Taking of Evidence in International Arbitration 2020[2845] allow the arbitral tribunal to draw adverse inferences in the event that a party has acted contrary to good faith by failing to produce documents or other evidence, including testimony, without satisfactory explanation or timely objection.[2846]

1917. According to some commentators, the drawing of adverse inferences is a simple presumption of proof drawn from the objective fact that a party refuses to produce documents. According to these commentators, there is therefore no need for an arbitral tribunal to ascertain whether this was due to a lack of good faith or not.[2847]

1918. An arbitral tribunal may also take a party's failure to act in accordance with good faith into account when assessing the evidence.[2848] Hence, in ICC Case No 15583 of 2010, the arbitral tribunal held that the respondent had failed to cooperate in good faith by failing to comply with the disclosure order. As a result, the arbitral tribunal held that it would decide on the claimant's claims for commission fees on the basis of the available evidence but taking into account the respondent's failure to disclose relevant evidence.[2849]

[2845] Article 9(6) IBA Rules on the Taking of Evidence in International Arbitration 2020 provides that "[i]f a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party. Article 9(7) IBA Rules on Evidence in International Arbitration 2020 provides that "[i]f a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party. The IBA Rules on Evidence are available at < www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>, accessed 1 March 2023. See also MENALCO SOLIS, Adverse Inferences in Defense of Good Faith, Kluwer Arbitration Blog, 23 April 2018, available at < http://arbitrationblog.kluwerarbitration.com/2018/04/23/adverse-inferences-defense-good-faith/>, accessed 1 March 2023.

[2846] KHODYKIN/MULCAHY/FLETCHER, 38, §2.94; ZUBERBÜHLER/HOFMANN/OETIKER/ROHNER, 5, §14.

[2847] DASSER/GAUTHEY, 272.

[2848] KHODYKIN/MULCAHY/FLETCHER, 38, §2.94.

[2849] ICC Case No 15583 (2016) ICC Disp Res Bull 139, §321.

b. Excluding or refusing to admit evidence

1919. Arbitral tribunals have excluded evidence in the event that a party has violated its obligation to arbitrate in good faith.

1920. Hence, in the *Methanex v United States* case, the arbitral tribunal excluded the evidence that Methanex had obtained through unlawful trespass.[2850] Similarly, in the *Libananco v Turkey* case, the arbitral tribunal excluded the evidence which had been obtained through the illegal interceptions between the claimant and its counsel.[2851]

1921. Arbitral tribunals have also refused to admit new evidence in the event that a party has violated its obligation to arbitrate in good faith.

1922. Indeed, in the *EDF v Romania* case, the arbitral tribunal rejected the claimant's request to admit new evidence, namely an audio recording of a conversation. The arbitral tribunal held that the audio recording of a conversation without the recorded person's consent in breach of her right of privacy, was contrary to the principles of good faith and fair dealing required in international arbitration.[2852]

2850 *Methanex Corp. v United States of America*, NAFTA Final Award, 3 August 2005, Pt II, Ch I, §§58–59.

2851 *Libananco Holdings Co. Ltd. v Turkey*, ICSID Case No ARB/06/8, Decision on Preliminary Issues, 23 June 2008. The decision of the arbitral tribunal in this respect provides in relevant part as follows: "1.1.3) The Respondent must within 30 days of this order obtain a statement from the Public Prosecutor of Sisli that (subject to paragraph 1.2 below) all emails (including attachments) and communications intercepted by or under the direction of the Public Prosecutor which in any way relate to this arbitration have been or will within a period of 30 days be destroyed. 1.1.4) The Respondent must take steps to ensure that its criminal investigators and others having access to or knowledge of intercepted emails and other communications falling within paragraph 1.1.1 above do not provide copies or communicate the contents of (or information deriving from) such documents to any persons having any role in the defence of this arbitration. 1.1.5) To facilitate the application of Articles 21 and 22 of the ICSID Convention, the Claimant may provide the Respondent (and copied to the Tribunal) with a list of persons to whom the Claimant considers that Article 22 (read with Article 21) applies in this arbitration. 1.1.6) All privileged documents and information which have been tendered or disclosed to the Tribunal in connection with the Claimant's application of February, 29, 2008 will be excluded from the evidence to be received in this arbitration. 1.1.7) Any privileged documents or information which may be introduced into evidence in future proceedings of this arbitration will be excluded as well as any evidence derived from possession of privileged documents or information."

2852 *EDF (Services) Ltd v Romania*, Procedural Order No. 3, 29 August 2008, §38.

c. Other measures

1923. It has also been suggested that an arbitral tribunal may: (i.) order the production of documents; (ii.) order the appearance of a person to give testimony; or (iii.) order the appointment of a tribunal-appointed expert in a case where a party has attempted to suppress evidence or has presented a case which is suspected of being inconsistent with evidence not available to the opposing party.[2853]

3. Issuing orders/injunctions

1924. In some cases, arbitral tribunals have issued injunctions preventing a party from continuing to violate its obligation to arbitrate in good faith as well as orders imposing duties on a party in order to ensure the respect of this obligation.

1925. Hence in the *Libananco v Turkey* case, the arbitral tribunal issued an injunction requiring the respondent to stop intercepting communications between the claimant and its counsel and ordered the respondent to take certain steps towards ensuring unobstructed communications between the same.[2854]

1926. In this regard, it has been suggested that an arbitral tribunal may make a peremptory order, namely an order requiring a party to comply with an earlier order, failing which specific consequences will ensue. For example, if a party fails to file expert evidence within a set timeframe, it will be prevented from adducing such evidence. An arbitral tribunal may also make a non-escalation order, namely an order by which the arbitral tribunal directs the parties not to do anything which may aggravate the dispute.[2855]

1927. An arbitral tribunal may also grant an anti-suit injunction when a party has acted in bad faith in filing a suit in a foreign country.[2856]

1928. In this regard, it has been held that the right to request an anti-suit injunction is only limited by the abuse of that right. Indeed, in ICC Case No 18563 (Lausanne (Switzerland)), the claimants requested the arbitral tribunal to enjoin the

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2853 KHODYKIN/MULCAHY/FLETCHER, 37, §2.90.

2854 *Libananco Holdings Co. Ltd. v Turkey*, ICSID Case No ARB/06/8, Decision on Preliminary Issues, 23 June 2008: "Subject to paragraph 1.2 below, the Respondent must not intercept or record communications between legal counsel for the Claimant on the one hand and representatives of the Claimant and other persons in Turkey on the other hand. The Respondent must permit legal counsel for the Claimant to have access, free from surveillance, to any person within Turkey for the purposes of preparing or conducting Claimant's case in this arbitration."

2855 KHODYKIN/MULCAHY/FLETCHER, 39, §2.98.

2856 BÉDARD/NELSON/RAYMOND KALANTIRSKY, 741. See in general, EMMANUEL GAILLARD, Anti-Suit Injunctions in International Arbitration (Juris 2005). See above, para. 1882 et seq.

respondent from continuing the State court proceedings or commencing new State court proceedings in breach of the arbitration agreement. The arbitral tribunal held that although it is a general rule that parties should act in good faith and invoke their rights in a timely fashion, this was not a requirement for an anti-suit injunction. It held that a party has a right to request an anti-suit injunction unless there is an abuse of right. There was no abuse of rights on the facts of the case as the claimants had expressed their intention to file the request as soon as the arbitral proceedings started.[2857]

4. Dismissing claims/defences

1929. Parties often ask an arbitral tribunal to sanction a party's violation of its obligation to arbitrate in good faith with the dismissal of that party's claims. However, such a request is often rejected.[2858]

1930. Notwithstanding, in ICC Case No 13384 (French law, Paris (France)), the arbitral tribunal dismissed the respondent's objection that the consultancy agreement was null and void *ab initio* because it involved the corruption of public officials. In addition to holding that the respondent had not established that there had been corruption, the arbitral tribunal noted that the respondent did not raise this argument during the performance of the agreement, in its termination notice, in its Answer to the Request for Arbitration or in the presentation of its argument in the Terms of Reference. The arbitral tribunal also noted that the respondent did not file a criminal complaint before the relevant court. The arbitral tribunal concluded by holding that: "These longstanding omissions give the impression that the argument has been fabricated by Respondent in a last minute, and maybe desperate, way of defence rather than in entirely good faith."[2859]

1931. It has also been submitted that an arbitral tribunal may decline to exercise jurisdiction in a case where a party brings parallel proceedings in bad faith. However, it has been argued that there would need to be positive evidence of a

[2857] ICC Case No 18563, ICC Special Supplement 2014: Procedural Decisions in ICC Arbitration, 89.

[2858] In *Waste Management v Mexico*, ICSID Case No ARB/00/3, Decision on Preliminary Objections, 26 June 2002, the arbitral tribunal refused to dismiss the claimant's claim on the ground of an abuse of process as requested by the respondent State (§§48–50) and in *Libananco Holdings Co. Ltd. v Turkey*, ICSID Case No ARB/06/8, Decision on Preliminary Issues, 23 June 2008, the arbitral tribunal refused to dismiss the Respondent's defense and issue a final award in the Claimant's favour as requested by the Claimant (§19, §53, §§72–82). See also, in this regard, BÉDARD/NELSON/RAYMOND KALANTIRSKY, 753–754.

[2859] ICC Case No 13384 of December 2005 in ICC Special Supplement 2013: Tackling Corruption in Arbitration, 62, §77 and §85.

vexatious litigation strategy, such as the possibility to obtain double remedies, to drain the respondent's resources or to unduly maximize chances of success and that arbitral tribunals would likely set a high threshold of proof for such a finding.[2860]

5. Oral or written reprimand

1932. An arbitral tribunal may issue an oral or written reprimand in response to a failure of a party to act in accordance with its obligation to arbitrate in good faith.

1933. Hence, Article 18.6 LCIA Arbitration Rules 2020 expressly empowers the arbitral tribunal to order a written reprimand, a written caution as to future conduct or any other measure necessary.[2861] Similarly, Guideline 26(a) IBA Guidelines on Party Representation in International Arbitration 2013 provides that an arbitral tribunal may admonish a party representative in case of misconduct.[2862]

6. Contractual remedies

1934. One could argue that traditional contractual remedies for breach of contract should also be available. However, the remedy of specific performance is of limited practical application as it would be very difficult to enforce an order that a party comply with its obligation of good faith. With respect to the remedy of damages, it would be difficult to prove the loss sustained as a result of a party's failure to act in accordance with good faith. Finally, it is debatable whether a

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2860 VOON/MITCHELL/MUNRO, 83.

2861 Article 18.6 LCIA Arbitration Rules 2020 provides as follows: "In the event of a complaint by one party against another party's authorised representative appearing by name before the Arbitral Tribunal (or of such complaint by the Arbitral Tribunal upon its own initiative), the Arbitral Tribunal may decide, after consulting the parties and granting that authorised representative a reasonable opportunity to answer the complaint, whether or not the legal representative has violated the general guidelines. If such violation is found by the Arbitral Tribunal, the Arbitral Tribunal may order any or all of the following sanctions against the legal representative: (i) a written reprimand; (ii) a written caution as to future conduct in the arbitration; and (iii) any other measure necessary to fulfil within the arbitration the general duties required of the Arbitral Tribunal under Articles 14.4(i) and (ii)."

2862 Guideline 26(a) IBA Guidelines on Party Representation in International Arbitration 2013 provides as follows: "If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may: (a) admonish the Party Representative." The IBA Guidelines on Party Representation in International Arbitration can be found here: <https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx>, accessed 1 March 2023.

failure to act in accordance with good faith could constitute a breach which would entitle a party to terminate the arbitration agreement.[2863]

[2863] KHODYKIN/MULCAHY/FLETCHER, 40, §2.99.

V. Conclusion

1935. Most commentators agree that good faith should be employed in order to ensure ethical conduct in arbitral proceedings (A.). Due to the abundant possible sources of the obligation to arbitrate in good faith, it is submitted that there will rarely be any debate over the existence of such an obligation (B.). Through a review of the case law and doctrine, it is apparent that good faith has a supplementing function in this context (C.) and that it is composed of ten main general duties (D.).

1936. If the obligation to arbitrate is violated, it is uncontroversial that arbitral tribunals have the power to sanction a violation of such an obligation (E.) and that the most common measure employed by arbitral tribunals in order to sanction a violation of the obligation to arbitrate in good faith is the awarding of some, or all, of the costs of the arbitration (F.). It is noteworthy that the obligation to arbitrate in good faith is raised in cases involving State parties in order to curb the abuse of their sovereign powers (G.). It is further noteworthy that an arbitrator's legal background appears to have less of an influence with respect to the application of good faith to the performance of the arbitration agreement than to the parties' contract (H.).

A. Good faith as a means of ensuring ethical conduct

1937. As we have seen,[2864] the majority of commentators agree that the principle of good faith should be applied in arbitral proceedings in order to ensure ethical conduct and should be employed as a weapon in the war against so-called guerilla tactics.

B. Rare debate over the existence of the obligation to arbitrate in good faith given the abundant potential sources

1938. It is submitted that there will rarely be any debate over the existence of the obligation to arbitrate in good faith due to the abundant number of sources of this obligation.

[2864] See above para. 1749 et seq.

1939. Indeed, in *Caratube v Kazakhstan*, the arbitral tribunal noted that the parties and the arbitral tribunal all agreed that the parties had an obligation to conduct the procedure in good faith.[2865]

1940. Further, in *Gavrilović and Gavrilović d.o.o. v Republic of Croatia*, the arbitral tribunal held, in connection with the production of documents, that the parties had an obligation to arbitrate in good faith without, however, referring to any source for such an obligation.[2866]

1941. Such an obligation may be expressly incorporated into the arbitration agreement or arguably flows from the principle of *pacta sunt servanda*. The source of this obligation may also lie in the law or rules applicable to the arbitration agreement, the institutional arbitration rules which the parties have agreed to or the transnational soft law rules which either the parties have agreed to, or the arbitral tribunal has decided to apply. This obligation may further be imposed by the *lex arbitri*. It is moreover argued that the arbitral process itself may impose such an obligation on the parties.[2867]

C. Good faith as a supplementing tool

1942. According to SIPIORSKI, good faith is used to fill due process gaps. She argues that arbitral tribunals rely on good faith to give them some structure for their decisions on evidence.[2868]

1943. Indeed, one can see that, with respect to the application of good faith to the performance of the arbitration agreement, the supplementing function of good faith has been employed. In this context, good faith is thus a supplementing tool imposing additional duties on the parties to arbitral proceedings.

D. Identification of ten general duties

1944. From the review of the content of the obligation to arbitrate in good faith, ten general duties have emerged.

1945. The first is the duty to participate in the arbitral proceedings.

[2865] *Caratube Int'l Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB 08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009, §117.

[2866] *Gavrilović and Gavrilović d.o.o. v Republic of Croatia*, ICSID Case No. ARB/12/39, Procedural Order No. 3, Decision on Parties' requests for document production, 6 May 2015, §10.

[2867] See above, para. 1756 et seq.

[2868] SIPIORSKI, 164, §§7.60–7.61.

1946. This duty to participate in the arbitral proceedings is violated by failing to participate at all in the arbitration proceedings[2869] as well as erratically participating in the arbitral proceedings.[2870] In the author's view, this duty to participate in the arbitral proceedings may also include a duty to advance the costs of the arbitration[2871] and to appoint an arbitrator.[2872]

1947. The second general duty is the duty to comply with procedural orders and rules. This duty may be violated by failing to abide by the agreed arbitration rules and orders of the arbitral tribunal,[2873] including a document production order[2874] as well as by manipulating the procedural rules[2875] and repeatedly ignoring the deadlines set forth by the arbitral tribunal.[2876]

1948. The third general duty is the duty to cooperate in the proceedings.

1949. According to BORN, the obligation to arbitrate in good faith "requires a substantial degree of cooperation".[2877] In addition, as held in ICC Case No 6149, "arbitration proceedings require the bona fide cooperation of both parties."[2878]

1950. This duty may be breached by the following conduct:

– failing to cooperate with the other party and the arbitral tribunal to formulate specific rules of conduct for the proceedings;[2879]

2869 See above, para. 1847.

2870 See above, paras. 1848–1849.

2871 See above, paras. 1791–1794.

2872 See above, paras. 1811–1815.

2873 See above, para. 1854.

2874 See above, para. 1865.

2875 See above, para. 1855.

2876 See above, para. 1865.

2877 BORN, 1353. Such a duty to cooperate may be even more required in expedited arbitral proceedings, see CHRISTOPHE SERAGLINI/PATRICK BAETEN, Expedited Rules and the Possibility of Immediate Measures once a Tribunal is Constituted in Laurent Lévy/Michael Polkinghorne (eds), Expedited Procedures in International Arbitration, Dossiers of the ICC Institute of World Business Law, Vol 16 (Kluwer Law International; International Chamber of Commerce (ICC) 2017), 34–69, 48, §77 and MOHAMED S. ABDEL WAHAB, Expedited Institutional Arbitral Proceedings Between Autonomy and Regulation, in Laurent Lévy/Michael Polkinghorne (eds), Expedited Procedures in International Arbitration, Dossiers of the ICC Institute of World Business Law, Vol 16 (Kluwer Law International; International Chamber of Commerce (ICC) 2017) 133–157, 151.

2878 ICC Case No 6149 of 1990 (1995) 20 YB Comm Arb 41–57, §21. See also ICC Case No 2020-001 (2020) ICC Disp Res Bull 126–127. See further Guideline II.A of the ICCA Standards of Practice in International Arbitration which provides that "Party representatives shall act cooperatively with one another and the arbitral tribunal. In doing so, party representatives shall use all reasonable efforts to comply with the arbitral tribunal's directions."

2879 See above, para. 1851.

- showing no willingness to cooperate in the exchange of information;[2880] and
- stonewalling and resisting in providing the testimony of the party's director.[2881]

1951. The fourth general duty is the duty to respect the arbitral proceedings. This duty may be violated by the following conduct:

- commencing parallel court proceedings after initiating arbitral proceedings in certain circumstances;[2882] and
- bringing a motion to stay the arbitration in favour of court proceedings when the arbitration agreement is clear and binding.[2883]

1952. The fifth general duty is the duty not to act dishonestly. In this regard, one commentator has suggested that the "transparency" requirements of the IBA Rules on the Taking of Evidence in International Arbitration 2020, such as Articles 3(3)(c)(i), 3(12)(a), 5(2)(a) contain an indication of what is meant by good faith conduct.[2884]

1953. This duty not to act dishonestly may be violated by the following conduct:

- having secret *ex parte* contact with the arbitral tribunal;[2885]
- knowingly raising unfounded jurisdictional objections;[2886]
- transferring one's claim to an impecunious party;[2887]
- introducing a document during settlement negotiations with the sole aim of ensuring that this document cannot be requested by the other side in an ensuing arbitration;[2888]

2880 See above, para. 1865.

2881 See above, para. 1871.

2882 See above, para. 1883.

2883 See above, para. 1883.

2884 PEDRO J MARTINEZ-FRAGA, King or Arbitrator: Exploring the Inherent Authority of Arbitrators to Impose Sanctions within the Framework of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (2011) 12 Spain Arbitration Review 57. He states that: "[w]hile transparency as a criteria is hardly a substitute for a substantive definition of the term "good faith" within the context of the Rules, it does provide for some uniformity and universality concerning the affirmative exercise of good faith as well as acts and omissions that may only be construed as wanting in good faith to the extent that such conduct obstructs or hampers the disclosure and exchange of information. The emergence of the principle of transparency as a conceptual rubric towards a substantive understanding of good faith is but a modest point of departure."

2885 See above, paras. 1858 et seq.

2886 See above, para. 1830.

2887 See above, para. 1797.

2888 See above, para. 1865.

- tampering with documents submitted or produced by e.g., cutting or pasting, abridging or excerpting from documents with the intent to mislead the arbitral tribunal;[2889]
- submitting misleading translations or failing to take reasonable steps to ensure translations are correct;[2890]
- requesting that a confidential document be disclosed on the ground that it is required for the fulfilment or protection of a legal right or the challenge of an award when the primary purpose is for disclosure;[2891]
- burying responsive documents under unimportant ones;[2892]
- deliberately concealing or destroying evidence;[2893]
- knowingly or negligently submitting forged or corrupted documents;[2894]
- knowingly submitting improperly obtained evidence;[2895]
- holding back documents on which a party relies with the intent to surprise parties or witnesses with such documents;[2896]
- inciting false testimony or relying on witness testimony notwithstanding the fact that the testimony is known to be false;[2897]
- unduly influencing the testimony of a witness by, for example, paying inappropriately high compensation in exchange for testimony;[2898]
- drafting witness testimony so as to hide the content with the intent of surprising the other party with additional witness testimony;[2899]
- not identifying witnesses on which a party relies until later on in the proceedings with the intent to surprise the other parties with such witnesses;[2900] and
- failing to disclose third party funding in certain circumstances.[2901]

1954. The sixth general duty is the duty not to act in a contradictory manner.[2902] The following conduct may violate this duty:

[2889] See above, para. 1865.
[2890] See above, para. 1865.
[2891] See above, para. 1865.
[2892] See above, para. 1865.
[2893] See above, para. 1865.
[2894] See above, para. 1865.
[2895] See above, para. 1865.
[2896] See above, para. 1865.
[2897] See above, para. 1871.
[2898] See above, para. 1871.
[2899] See above, para. 1871.
[2900] See above, para. 1871.
[2901] See above, paras. 1801 et seq.
[2902] See e.g. KLEIMAN/SALEH, 113, §41.

- a party requesting the appointment of different arbitrators for parallel proceedings on the ground of bias when such party has previously argued that the disputes are separate and should not therefore be consolidated;[2903]
- challenging an arbitrator for reasons which one was aware of prior to the appointment of the arbitrator;[2904]
- leading the other party to believe that it would not bring a claim;[2905]
- failing to timely raise a jurisdictional or procedural objection or an objection with respect to the constitution of the arbitral tribunal;[2906] and
- requesting that documents submitted by the other party be declared inadmissible while at the same time expressly referring to such documents in its own submissions.[2907]

1955. The seventh general duty is the duty not to act unreasonably and disrespectfully. This duty is violated by the following behaviour:

- refusing to constitute a single arbitral tribunal where all parties are involved in the same commercial transaction, with interrelated contractual obligations and performance and identical dispute resolution provisions.[2908]
- requesting excessive compensation;[2909]
- a party refusing to sign the Terms of Reference, despite the fact that the Terms of Reference had been modified in accordance with its comments and despite the fact that it had been given a detailed explanation of the meaning of its terms and its legal consequences;[2910]
- submitting unfounded challenges against an arbitrator with the sole aim of preventing the other party from appointing an arbitrator;[2911]
- making excessive document production requests;[2912]
- raising objections (including the confidentiality exception) to document production requests without a reasonable basis; [2913]

[2903] See above, para. 1809.
[2904] See above, paras. 1825–1826.
[2905] See above, para. 1843.
[2906] See above, paras. 1831 et seq. and paras. 1874 et seq.
[2907] See above, para. 1865.
[2908] See above, para. 1807.
[2909] See above, para. 1841.
[2910] See above, para. 1853.
[2911] See above, para. 1819.
[2912] See above, para. 1865.
[2913] See above, para. 1865.

- submitting data in a non-agreed or non-default form with the intention of preventing electronic searches or just burdening the other party;[2914]
- making unsubstantiated fraud allegations against the other party;[2915]
- acting aggressively or with a lack of professional courtesy;[2916]
- seeking to portray witnesses in a bad light;[2917] and
- deliberately asking confusing questions during cross-examination.[2918]

1956. The eighth general duty is the duty not to unnecessarily delay the proceedings (or the prohibition of dilatory tactics).[2919]

1957. Examples of violations of this duty include:

- filing claims or defences late in certain circumstances;[2920]
- delaying in the appointment of an arbitrator;[2921]
- increasing the amount claimed leading to a consequent increase in the number of arbitrators and thereby delay due to the time needed to select and appoint further arbitrators;[2922]
- submitting unfounded challenges against an arbitrator with the sole aim of delaying the proceedings;[2923]
- submitting numerous unfounded challenges both before the arbitral tribunal and before the relevant national court;[2924]
- arranging to be represented by counsel who has a conflict of interest with a member of the arbitral tribunal;[2925]
- appointing counsel at the last minute;[2926]
- changing legal counsel numerous times;[2927]
- frequently requesting unjustified extensions of deadlines set out in a procedural timetable;[2928]

2914 See above, para. 1865.

2915 See above, para. 1850.

2916 See above, para. 1850.

2917 See above, para. 1871.

2918 See above, para. 1871.

2919 See for example, CREMADES, 787 stating that when a proceeding is delayed due to a failure to pay the advance on costs, this is contrary to the obligation to arbitrate in good faith; LAZOPOULOS, 613, §41; LEW, 245; O'MALLEY, 233, §7.49.

2920 See above, para. 1835 et seq.

2921 See above, paras. 1815 et seq.

2922 See above, para. 1818.

2923 See above, para. 1819.

2924 See above, para. 1820.

2925 See above, para. 1828.

2926 See above, para. 1829.

2927 See above, para. 1829.

2928 See above, para. 1856.

- submitting unsolicited documents and briefs;[2929]
- insisting that an oral hearing take place with the sole aim of delaying the proceedings; [2930] and
- submitting a substantial number of documents at a late stage of the proceedings.[2931]

1958. Indeed, according to the Swiss Federal Supreme Court, "one of the goals of arbitration is to enable disputes to be settled quickly. Accordingly, good faith imposes on the parties a general obligation to abstain from anything which could, without being an absolute necessity, delay the normal course of the arbitral proceedings."[2932]

1959. Some institutional arbitration rules and guidelines provide that the parties should act in good faith and specifically provide that the parties therefore should not act in a way which would delay the proceedings:

- Thus, Article 24(1) CEPANI Rules 2023 provides that: "[i]n the conduct of the proceedings the Arbitral Tribunal and the parties shall act in a rapid manner and in good faith. In particular, the parties shall abstain from any dilatory acts as well as from any other action having the object or effect of delaying the proceedings";[2933] and
- Section 3 AFA Ethical Charter 2013 imposes a duty on the parties and their counsel to act in good faith, specifically by not acting in an abusive or dilatory way so as to delay or disrupt the proceedings.[2934]

1960. The spirit of this duty not to delay the proceedings can be found in national arbitration legislation and institutional arbitration rules obliging the parties to do all things necessary for the proper and expeditious conduct of the arbitral proceedings:

- Hence Section 40 EAA provides that:"(1) The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings. (2) This includes (a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any

[2929] See above, para. 1857.
[2930] See above, para. 1873.
[2931] See above, para. 1865.
[2932] SFSCD 111 Ia 259 [262] of 8 November 1985; SFSCD 111 Ia 72 [75] of 14 March 1985; SFSCD 109 Ia 81 [83] of 18 February 1983; and SFSCD 108 Ia 197 [201] of 10 May 1982.
[2933] The CEPANI Rules 2023 can be found at < https://www.cepani.be/rules/>, accessed 1 March 2023.
[2934] The AFA Ethical Charter 2013 can be found at <https://www.afa-arbitrage.com/ethical-arbitration-charter/?lang=en>, accessed 1 March 2023.

order or directions of the tribunal, and (b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law";[2935] and
– Article 22(1) ICC Rules of Arbitration 2021 provides that: "[t]he arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute."[2936]

1961. The nineth general duty is the duty not to harass or harm another participant in the arbitration. This duty is violated by the following behaviour:

– commencing arbitral proceedings in order to harass the other party or to prevent it from being able to bring court proceedings;[2937]
– making frivolous or vexatious claims;[2938]
– pressurizing or attempting to influence the members of the arbitral tribunal;[2939]
– disclosing confidential materials with the intent of pressuring or harming another participant in the arbitration;[2940]
– interfering with a witness;[2941] and
– raiding the other party's offices and seizing numerous documents and evidence.[2942]

1962. The tenth general duty is the duty not to aggravate the dispute.[2943] This duty is violated by the following behaviour:

– making public statements in certain circumstances;[2944] and
– calling bank guarantees after the initiation of the arbitral proceedings.[2945]

[2935] The EAA can be found at https://www.legislation.gov.uk/ukpga/1996/23/contents, accessed 1 March 2023.
[2936] The ICC Rules of Arbitration 2021 can be found at https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/, accessed 1 March 2023.
[2937] See above, para. 1788.
[2938] See above, para. 1838.
[2939] See above, para. 1860.
[2940] See above, para. 1865.
[2941] See above, para. 1871.
[2942] See above, para. 1881.
[2943] See e.g., LAZOPOULOS, 614, §42 stating that parties should not employ guerilla tactics that affect the ability of the parties to resolve the dispute.
[2944] See above, para. 1879.
[2945] See above, para. 1880.

E. Uncontroversial power to sanction a violation of the obligation to arbitrate in good faith

1963. As bad faith conduct becomes more and more prevalent in international arbitration, arbitral tribunals need to be able to sanction and thus deter such conduct.[2946]

1964. In this regard, it appears to be uncontroversial that arbitrators have the power to sanction a breach of the obligation to arbitrate in good faith. The source of the arbitral tribunal's power to sanction bad faith conduct can arguably be found in the *lex arbitri*, transnational soft law, or institutional arbitration rules. It is also argued that the arbitral tribunal has inherent jurisdiction to sanction bad faith conduct in order to uphold the integrity of the arbitral proceedings.[2947]

F. Costs of the arbitration as the most common measure to sanction the violation of the obligation to arbitrate in good faith

1965. With respect to the measures employed by arbitral tribunals in order to sanction the violation of the obligation to arbitrate in good faith, the most common measure is the awarding of some or all of the costs of the arbitration.[2948] Arbitral tribunals have also excluded evidence or drawn adverse inferences in cases where parties have acted in bad faith with respect to the taking of evidence.[2949] Furthermore, arbitral tribunals have, in certain cases, issued orders or injunctions in order to ensure compliance with the obligation to arbitrate in good faith or to prevent further breaches of this obligation.[2950] Only rarely has an arbitral tribunal dismissed a claim or defence on this basis [2951] Moreover, arbitral tribunals have the possibility of issuing an oral or written reprimand in cases of less egregious violations of the obligation to arbitrate in good faith.[2952]

[2946] MOSES, 4.
[2947] See above, paras. 1892 et seq.
[2948] See above, paras. 1907 et seq.
[2949] See above, paras. 1915 et seq.
[2950] See above, paras. 1924 et seq.
[2951] See above, paras. 1929 et seq.
[2952] See above, paras. 1932 et seq.

G. Invocation of the State party's obligation to arbitrate in good faith in order to curb abuses of sovereign powers

1966. It is noteworthy that the obligation to arbitrate in good faith has been invoked in cases involving State parties in order to act as a check on the State party's use (or abuse) of its sovereign powers.

1967. Indeed, in *Caratube v Kazakhstan*,[2953] the arbitral tribunal held that the respondent State party had acted contrary to the obligation to arbitrate in good faith by raiding the claimant's offices and seizing numerous documents and evidence.[2954]

1968. In addition, in *Letco v Liberia*, the arbitral tribunal held that the State party had acted contrary to the obligation to arbitrate in good faith by bringing proceedings before its own courts in order to nullify the effects of the arbitral proceedings.[2955]

1969. Moreover, in *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, the arbitral tribunal held that the State party's exercise of its right to conduct criminal investigations and prosecutions relating to conduct within its territory must be exercised in good faith.[2956]

1970. Finally, in *Himpurna California Energy Ltd (HCE) v Republic of Indonesia,* the Indonesian co-arbitrator was (contrary to the obligation to arbitrate in good faith) abducted by the State party prior to attending the hearing.[2957]

[2953] *Caratube Int'l Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB 08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009.

[2954] *Idem*, §§118–119.

[2955] *Liberian Eastern Timber Corporation (LETCO) v Liberia* (31 March 1986) 2 ICSID Reports 356, 378.

[2956] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures, 8 April 2016, §185. See also *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kalpún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures, 26 February 2010, §123.

[2957] *Himpurna California Energy Ltd v Republic of Indonesia*, Ad hoc arbitral award, 26 September 1999 25 YB Comm Arb 110–215 (2000). See in this regard BÉDARD/NELSON/RAYMOND KALANTIRSKY, 739 and BERNARD HANOTIAU, Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings in van den Berg (ed), International Commercial Arbitration: Important Contemporary Questions (ICCA International Arbitration Congress), 2003, 261, 270–71.

H. Less apparent influence of arbitrator's legal background on the application of good faith

1971. The identity of the arbitral tribunal in the cases in which good faith was applied to the performance of the arbitration agreement was known in twelve cases.[2958]

1972. It is surprising that in all but two of these cases, one or more of the arbitrators had a Common law background. This suggests that there is more of a universal consensus – and thus less of a Common law/Civil law divide – with respect to the application of good faith to the performance of the arbitration agreement.[2959] This may be due to the fact, that traditionally, party conduct in adversarial proceedings in many Common law legal systems has been strictly regulated due to the active role played by the parties in such proceedings.[2960] Indeed, although

[2958] *LETCO v Liberia (Liberian Eastern Timber Corporation (LETCO) v Liberia*, Final Award, 31 March 1986) (BERNARDO CREMADES (Spain), ALAN REDFERN (UK), JORGE GONCALVES PEREIRA (Portugal); *Caratube Int'l Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB 08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009 (KARL-HEINZ BÖCKSTIEGEL (Germany) (President); JORGE GONCALVES PEREIRA (Portugal); KAMAL HOSSAIN (Bangladesh)); *Churchill Mining PLC v Republic of Indonesia*, ICSID Case No ARB/12/14 (GABRIELLE KAUFMANN-KOHLER (Switzerland) (President); MICHAEL HWANG (Singapore); ALBERT JAN VAN DEN BERG (Netherlands)); *ADF Group Inc v USA*, ICSID Case No Arb (AF/00/1) (FLORENTINO FELICIANO (Philippines) (President); CAROLYN LAMM (US); ARMAND DE MESTRAL (Canada)); *Cessna Finance Corporation v. Gulf Jet LLC*, ICC Case No. 18769/VRO/AGF (JOHN A JUDGE (Canada); *Zachariou v. Manios* (LOUIS CRACO (President) (US); MICHAEL CHALOS (US); HERBERT STERN (US), (Final Award), ICDR Case No. 50 181 T 00107 09, 19 March 2014, Arbitrator Intelligence Materials; *Libananco Holdings Co Ltd v Turkey*, ICSID Case No ARB/06/8 (MICHAEL HWANG (President) (Singapore); HENRI ALVAREZ (Canada); FRANKLIN BERMAN (United Kingdom)), Decision on Preliminary Issues, 23 June 2008, §78; *EDF (Services) Ltd v Romania*, Procedural Order No. 3, 29 August 2008 (PIERO BERNARDINI (Italy) (President); ARTHUR ROVINE (US); YVES DERAINS (France)); *Methanex Corporation v United States of America* (V VEEDER (President) (United Kingdom); WILLIAM F ROWLEY (Canada); MICHAEL REISMAN (US)) NAFTA Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, §54; ICC Case No 7047 of 1994 (Geneva (Switzerland)) (HILMAR RAESCHKE-KESSLER (Germany) (President); JEAN PATRY (Switzerland); DOBROSAV MITROVIC (Serbia)); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, (THOMAS BUERGENTHAL (US) (President); HENRI C. ALVAREZ QC (Canada); KAMAL HOSSAIN (Bangladesh)), Decision on Provisional Measures, 8 April 2016; *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kalpún v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 (GABRIELLE KAUFMANN-KOHLER (Switzerland); MARC LALONDE (Canada); BRIGITTE STERN (France).

[2959] See para. 1972.

[2960] STEPHAN LANDSMAN, A Brief Survey of the Development of the Adversary System, (1983) 44 Ohio State Law Journal, 713, 716–717 stating that "[b]ecause the highly competitive nature

there is no principle of good faith that applies to civil procedure in England and Wales, the Civil Procedure Rules 1998 contain rules regulating the conduct of the parties. Such rules refer to the court's duty to encourage the parties to cooperate with each other in the conduct of the proceedings (Art. 1.4(2)(a)), and the court's power to strike out a statement of case if there are no reasonable grounds for bringing or defending the claim, the statement of case is an abuse of the court's process or there has been a failure to comply with a rule, practice direction or court order (Art. 3.4(2)).[2961] The acceptance of the application of good faith to the arbitral proceedings in the Common law world is exemplified by the LCIA Arbitration Rules 2020, which impose a duty of good faith on the parties to the arbitral proceedings.[2962]

of adversary procedure may tend to promote a win-at-any-cost attitude, the adversary system employs a set of ethical rules to control the behavior of counsel. To ensure the integrity of the process, tactics designed to harass or intimidate an opponent, as well as those intended to mislead or prejudice the trier of fact, are forbidden."

[2961] The Civil Procedure Rules of 1998 are available at https://www.legislation.gov.uk/uksi/1998/3132/contents, accessed 1 March 2023. See also, in this regard, DASSER/GAUTHEY, 256–257.

[2962] See above, para. 1763.

VI. Proposed Rationalization and Guidelines

1973. With respect to the proposed guidelines for the application of good faith by arbitral tribunals to the performance of the arbitration agreement, it is submitted that arbitral tribunals should first identify the source of the obligation to arbitrate in good faith (A.) before applying a specific rule implementing the obligation to arbitrate in good faith (B.). In this respect, it is proposed that the specific rules comprising the obligation to arbitrate in good faith can be rationalized using the *fallgruppen* methodology (C.).

1974. Thereafter, arbitral tribunals should identify the basis of their power to sanction the violation of the obligation to arbitrate in good faith (D.) and, in general, give preference to the award of the costs of the arbitration in order to sanction a violation of the obligation to arbitrate in good faith (E.).

A. Identification of the source of the obligation to arbitrate in good faith

1975. Although it will rarely be denied that a party is obliged to arbitrate *in good faith* given the abundant potential sources of this obligation,[2963] and although it is advocated that the content of the obligation to arbitrate in good faith should not vary depending on the source of the good faith component,[2964] it is submitted that – primarily for dogmatic reasons – arbitral tribunals should identify the source of the obligation to arbitrate *in good faith*.

1976. Arbitral tribunals should first look to see if there is a contractual source of good faith i.e., an express contractual provision obliging the parties to arbitrate in good faith, or a specific legal source of good faith, i.e., an obligation to arbitrate in good faith found in the applicable institutional arbitration rules, in the applicable *lex arbitri,* or in transnational soft law rules (when these have become hard law by virtue of the parties' agreement). If there is no contractual or specific legal source, arbitral tribunals should then turn to the general legal source of the law applicable to the arbitration agreement which may impose a duty on parties to perform contractual obligations in good faith which may also, by extension, be applied to the contractual obligation to arbitrate. In the absence of a general legal source imposing the obligation to arbitrate in good faith, arbitral tribunals may rely on the submission that the obligation to arbitrate in good faith flows from the arbitral process itself.

[2963] See para. 1938 et seq.

[2964] See below, para. 1990.

B. Application of specific rules implementing the obligation to arbitrate in good faith

1977. According to RHODYKIN, MULCAHY and FLETCHER:

> participants need a workable understanding of what the obligation [of good faith] entails and how far it extends. A lack of definition may lead to a level of uncertainty that participants in the arbitral process find unsatisfactory."[2965]

1978. Conversely, they note that:

> a fixed definition might make the concept of good faith conduct less adaptable to developing practices and party tactics. Once defined, parties may become more confident engaging in conduct that they feel can demonstrate falls outside of the definition. Tribunals will have less discretion to decide whether a breach of the requirement of good faith has occurred on the basis of the individual facts and circumstances of the particular arbitration.[2966]

1979. In this regard, they suggest that it may be appropriate for an arbitral tribunal to set out at the beginning of the proceedings, what sort of conduct it would consider to be contrary to good faith. However, the danger of such an approach is that the parties may view such examples as an exhaustive list and it may also be difficult for parties to agree on what would constitute bad faith conduct as each participant will have their own understanding of what good faith means.[2967]

1980. DASSER and GAUTHEY set out two different approaches with respect to the application of good faith to the arbitral proceedings. The first approach is to directly apply the general principle of good faith. The second approach is to set out specific rules implementing the principle of good faith prescribing what the parties can and cannot do.[2968]

1981. VEEDER argued that whilst "[t]he general contractual duty of good faith can provide the legal umbrella for both civilian and common law lawyers, […] by itself the doctrine is too general to provide an effective practical guide for parties' lawyers practicing in the field of international arbitration."[2969]

1982. Conversely, DASSER and GAUTHEY argue that the principle of good faith, rather than a series of rules, could better serve as a guide for arbitral proceedings.[2970] According to DASSER and GAUTHEY, the direct application of the principle of good faith would mean that gaps would be avoided as the principle of good faith

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[2965] RHODYKIN/MULCAHY/FLETCHER, 26, §2.54.
[2966] *Idem*, 26, §2.55.
[2967] *Idem*, 31, §2.68.
[2968] DASSER/GAUTHEY, 266.
[2969] V V VEEDER, The 2001 Goff Lecture – The Lawyer's Duty to Arbitrate in Good Faith (2002) 18 Arb Intl 431, 448.
[2970] DASSER/GAUTHEY, 270

is so broad that it can cover all possible scenarios. There would be no need to modify the principle as its generality would mean that it can evolve with time. The notion itself is flexible which allows it to be interpreted in line with the varying cultural and geographical standards of arbitration participants. This principle offers a tailored solution, its content differing depending on the circumstances of a given case. It is a simple rule which should not frighten anyone which is important given that arbitration is becoming more and more complicated. It avoids the excessive formalism that comes with a set of specific rules and avoids lawyers trying to find loopholes in such rules.[2971]

1983. On the other hand, DASSER and GAUTHEY argue that legal certainty is not best served by the various different interpretations that will inevitably be given to the general principle of good faith. In addition, they submit that it is much easier to sanction a violation of a specific rule rather than a violation of a general principle.[2972]

1984. On balance, however, DASSER and GAUTHEY advocate for the direct application of the general principle of good faith most notably due to its simplicity and in order to avoid drowning in an excess of specific rules.[2973] Indeed, in this area, there has been a recent growth in the codification of rules of conduct to govern the arbitral proceedings such as the LCIA General Guidelines for the Authorised Representatives of the Parties 2020 and the IBA Rules on Party Representation in International Arbitration 2013.

1985. According to MAYER, it would be a step backwards to replace a specific set of rules by a general principle of good faith. He submits that highly specific rules are necessary given the complexity of international commerce and are also necessary in order to ensure predictability for the parties. He accordingly advocates that one should have recourse to more specific rules that are accepted by the majority of national legal systems rather than have recourse to the general principle of good faith.[2974]

1986. It is submitted that the general principle of good faith should be the guiding principle governing the arbitral proceedings. However, the general principle of good faith should not be applied directly but through its specific manifestations. Notwithstanding, an arbitral tribunal may have recourse to the general principle of good faith in order to create a new specific rule when an existing specific rule

2971 *Idem*, 267–268.

2972 DASSER/GAUTHEY, 268.

2973 DASSER/GAUTHEY, 270.

2974 MAYER, *bonne foi*, 555–556. See also JAN PAULSSON, The Unruly Notion of Abuse of Rights (CUP 2022), 1, 5 who similarly argues that : "We all know that "abuse of process" is not to be tolerated, but the phrase itself leads nowhere until it is given some specificity".

does not cover the case in point. When doing so, the arbitral tribunal should aim to craft the new rule as specifically and precisely as possible.

1987. Notwithstanding the above, where the applicable *lex arbitri,* institutional arbitration rules or transnational soft law rules explicitly stipulate a duty, which also flows from the obligation to arbitrate in good faith, arbitral tribunals should give preference to this explicit source of the duty rather than the general obligation to arbitrate in good faith. This may be the case, for example, with respect to the duty to nominate an arbitrator,[2975] the duty to not make repeated arbitrator challenges,[2976] the duty to raise a challenge as soon as possible in the arbitral proceedings,[2977] the duty to not challenge an arbitrator for reasons that a party was aware of prior to the appointment of such arbitrator,[2978] the duty not to knowingly raise unfounded jurisdictional objections,[2979] the duty not to raise jurisdictional objections when one could have done so earlier,[2980] the duty not to make frivolous or vexatious claims or defenses that are not reasonably arguable in law or fact,[2981] the duty not to make unilateral contact with the members of the arbitral tribunal,[2982] the duty not to exert any pressure or influence on the arbitral tribunal,[2983] and the duty to raise any procedural objections in a timely manner in the arbitral proceedings.[2984] This does not prevent the arbitral tribunal from additionally noting that the failure to comply with these duties also constitutes a violation of the obligation to arbitrate in good faith and to sanction this violation accordingly.

C. Proposed rationalization of the content of the obligation to arbitrate in good faith employing the *fallgruppen* methodology

1988. As seen above,[2985] it is argued that there is a danger of drowning in an excess of specific rules implementing the obligation to arbitrate in good faith.

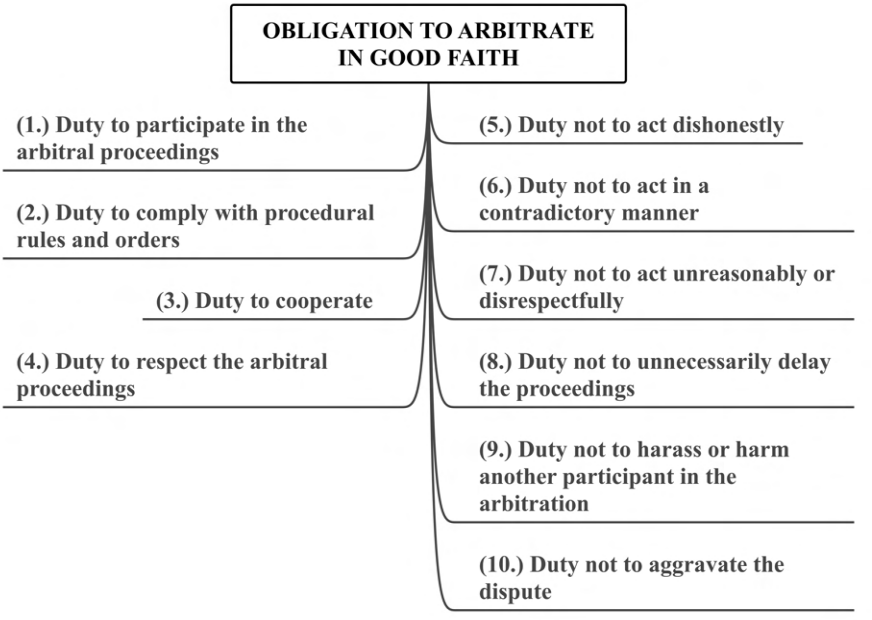
[2975] See paras. 1812–1814.
[2976] See para. 1821.
[2977] See paras. 1822–1823.
[2978] See para. 1826.
[2979] See para. 1830.
[2980] See paras. 1831–1833.
[2981] See para. 1838.
[2982] See para. 1859.
[2983] See para. 1860.
[2984] See paras. 1874–1876.
[2985] See above, para. 1984.

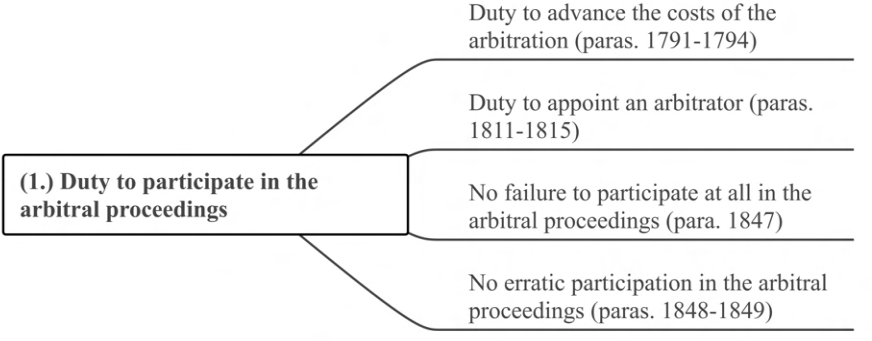
1989. In this regard, it is proposed that the *fallgruppen* methodology[2986] should be employed in order to rationalize the content of the obligation to arbitrate in good faith as depicted in the diagram below. By employing the *fallgruppen* methodology, it is hoped that the application of good faith to the arbitration agreement will become more objective, rational and predictable. However, this "inner system" of the content of the obligation to arbitrate in good faith should not become a straitjacket. Indeed, it should retain a certain flexibility so that further specific applications of the obligation to arbitrate in good faith may be added and that existing specific applications can be modified where necessary.

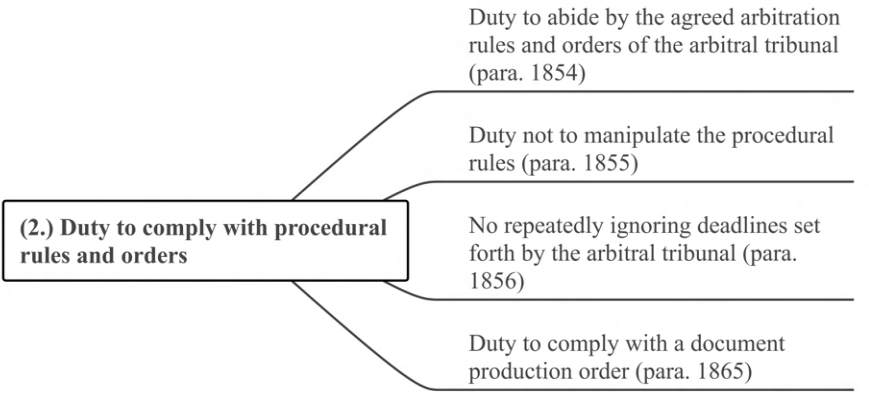
1990. It is advocated that a harmonized stance with respect to the content of the obligation to arbitrate in good faith should be applied in international commercial arbitrations and that the content of this obligation should not vary according to the source of good faith. Such a harmonized content would give valuable guidance to international commercial arbitration users on how they should conduct themselves in international arbitral proceedings and would lead to increased certainty and predictability. Furthermore, a harmonized view of the content of the obligation to arbitrate in good faith would be in line with the increasing harmonization of procedures in international commercial arbitrations as reflected by the adoption in most arbitrations of internationally accepted procedural guidelines, such as the IBA Rules on the Taking of Evidence.[2987]

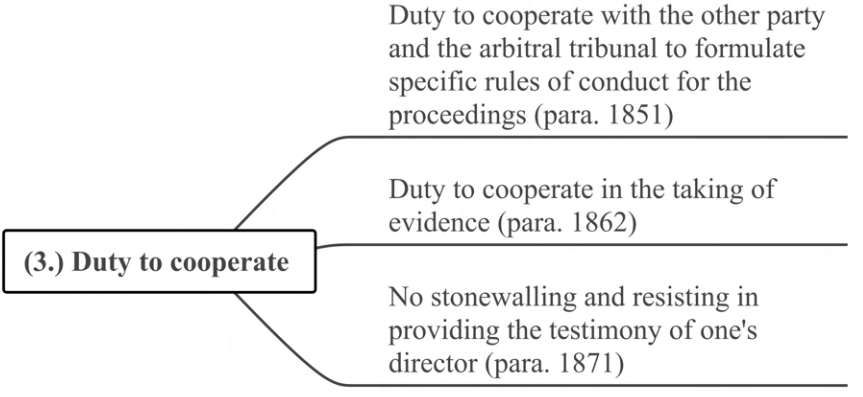
[2986] See above, paras. 598 et seq. The *fallgruppen* methodology involves organizing the decisions concerning the obligation to arbitrate in good faith into different groups in order to develop an inner system of good faith.

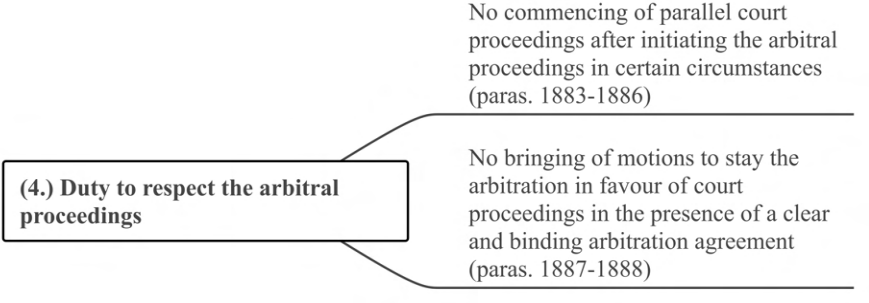
[2987] BORN, 2372.

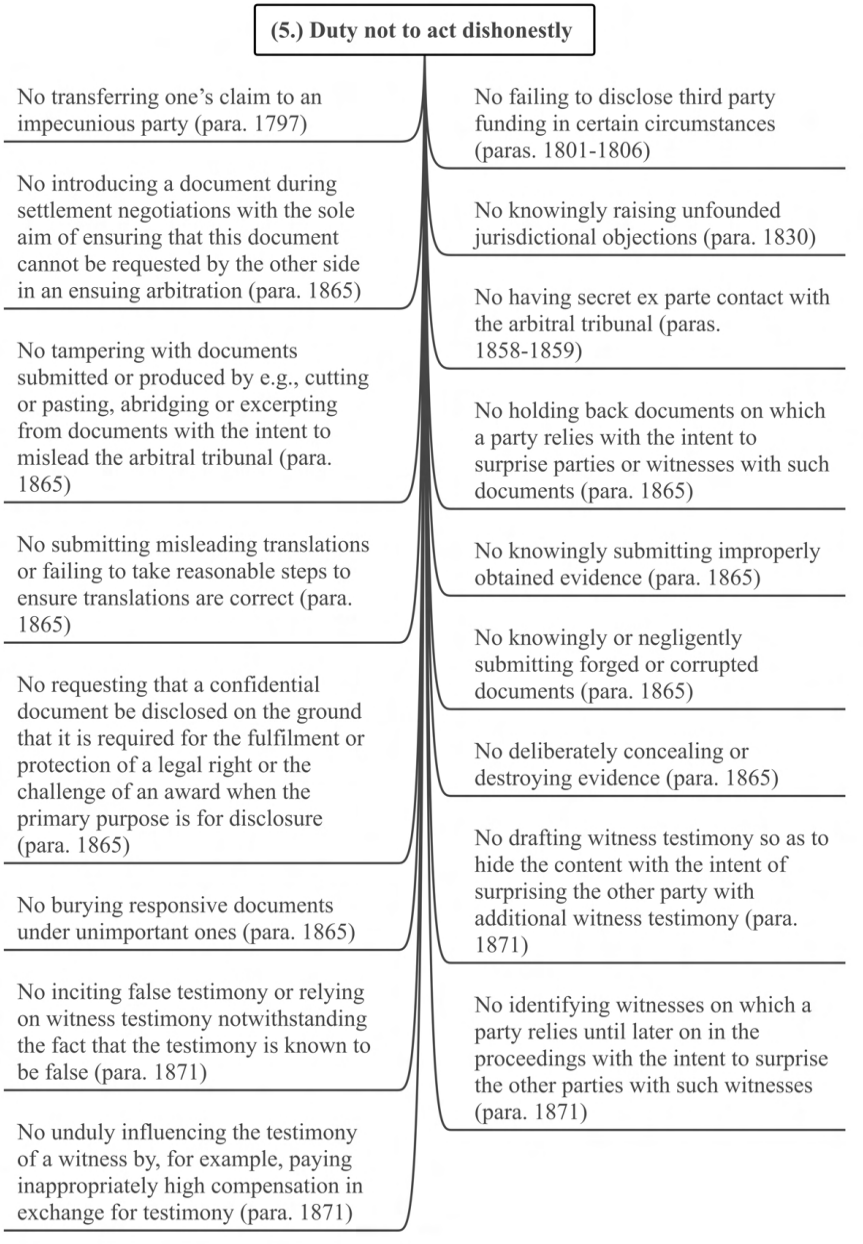

OBLIGATION TO ARBITRATE IN GOOD FAITH
(1.) Duty to participate in the arbitral proceedings
(2.) Duty to comply with procedural rules and orders
(3.) Duty to cooperate
(4.) Duty to respect the arbitral proceedings
(5.) Duty not to act dishonestly
(6.) Duty not to act in a contradictory manner
(7.) Duty not to act unreasonably or disrespectfully
(8.) Duty not to unnecessarily delay the proceedings
(9.) Duty not to harass or harm another participant in the arbitration
(10.) Duty not to aggravate the dispute

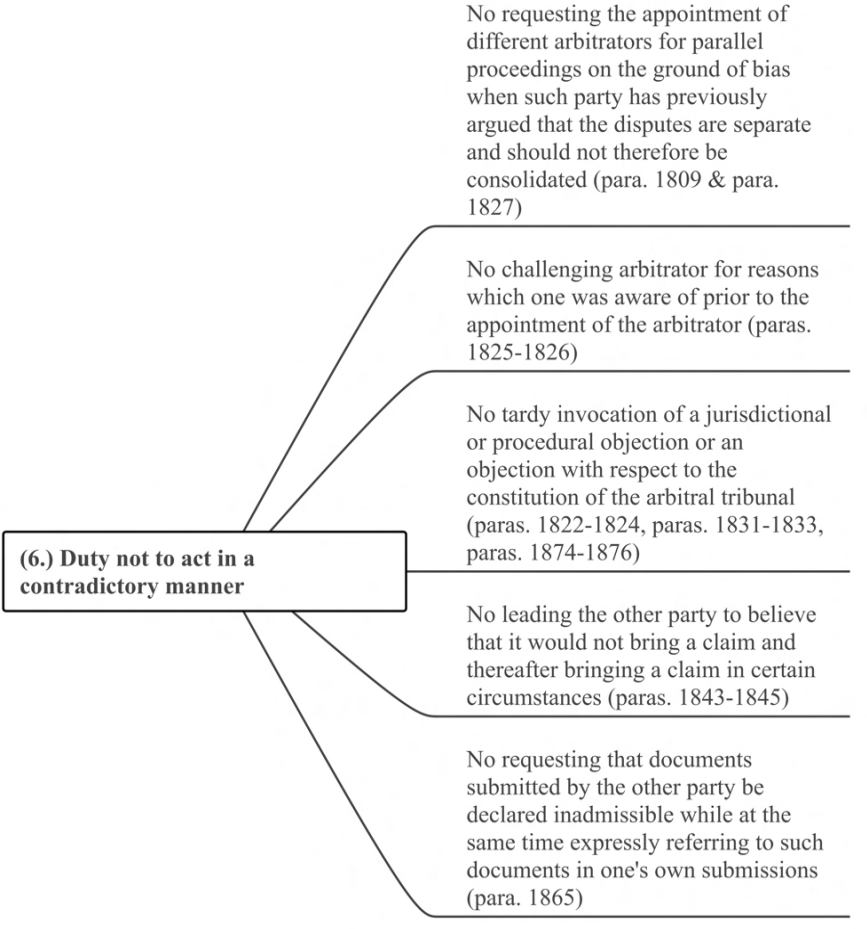

(1.) Duty to participate in the arbitral proceedings
Duty to advance the costs of the arbitration (paras. 1791-1794)
Duty to appoint an arbitrator (paras. 1811-1815)
No failure to participate at all in the arbitral proceedings (para. 1847)
No erratic participation in the arbitral proceedings (paras. 1848-1849)

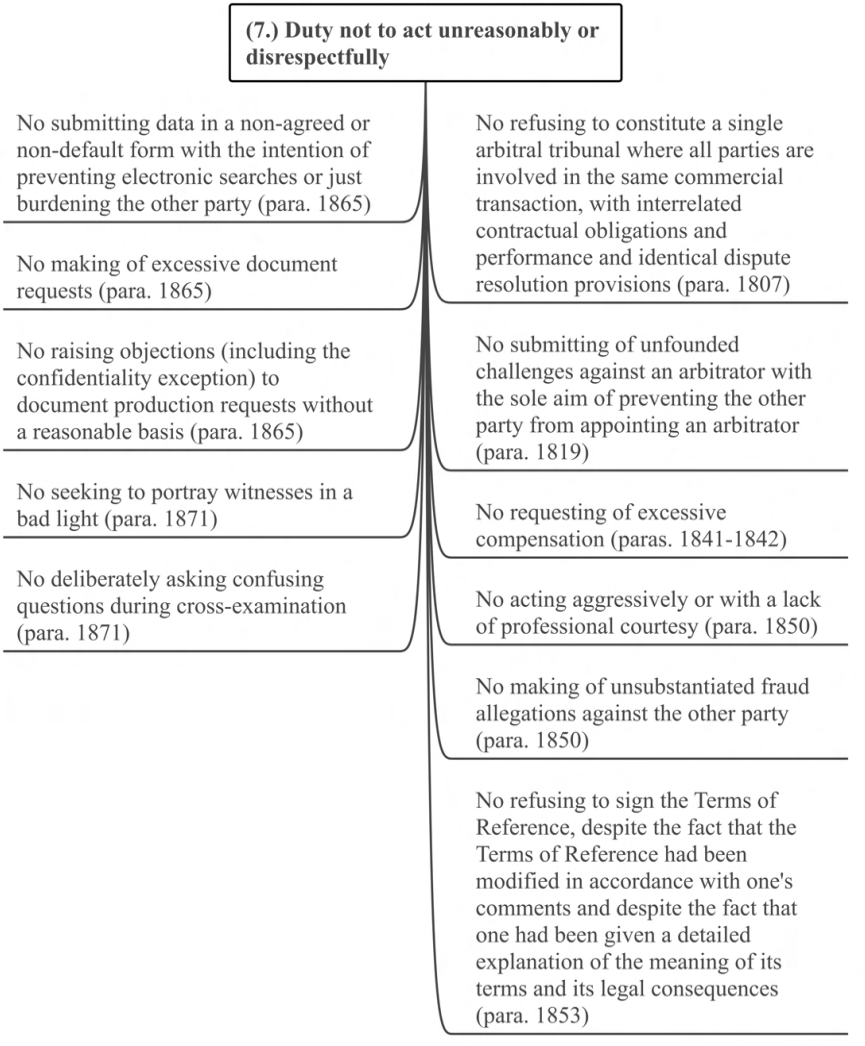

(2.) Duty to comply with procedural rules and orders
Duty to abide by the agreed arbitration rules and orders of the arbitral tribunal (para. 1854)
Duty not to manipulate the procedural rules (para. 1855)
No repeatedly ignoring deadlines set forth by the arbitral tribunal (para. 1856)
Duty to comply with a document production order (para. 1865)


(3.) Duty to cooperate
Duty to cooperate with the other party and the arbitral tribunal to formulate specific rules of conduct for the proceedings (para. 1851)
Duty to cooperate in the taking of evidence (para. 1862)
No stonewalling and resisting in providing the testimony of one's director (para. 1871)


(4.) Duty to respect the arbitral proceedings
No commencing of parallel court proceedings after initiating the arbitral proceedings in certain circumstances (paras. 1883-1886)
No bringing of motions to stay the arbitration in favour of court proceedings in the presence of a clear and binding arbitration agreement (paras. 1887-1888)

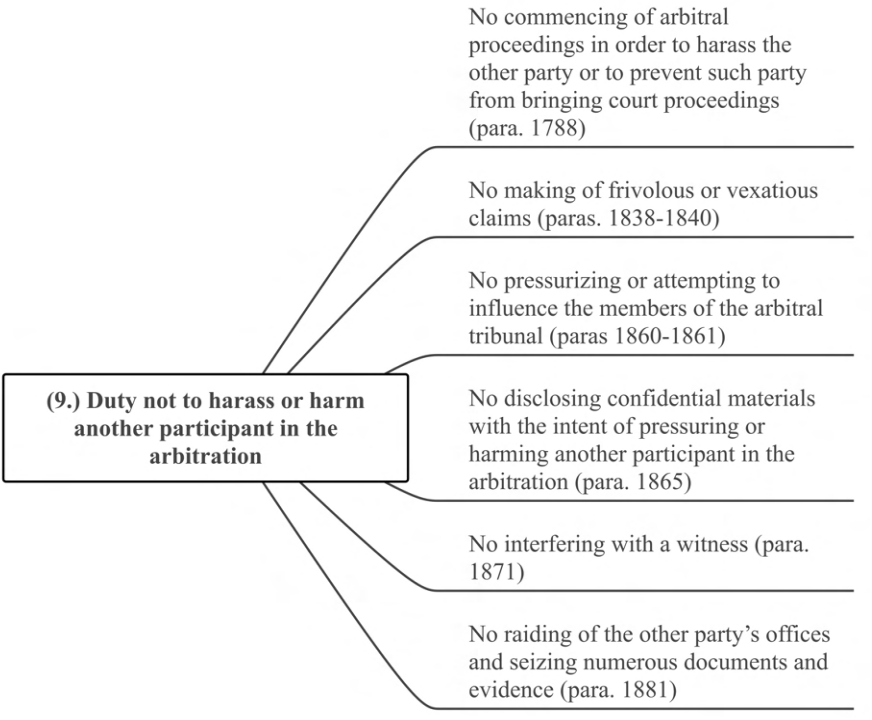

(5.) Duty not to act dishonestly
No transferring one's claim to an impecunious party (para. 1797)
No introducing a document during settlement negotiations with the sole aim of ensuring that this document cannot be requested by the other side in an ensuing arbitration (para. 1865)
No tampering with documents submitted or produced by e.g., cutting or pasting, abridging or excerpting from documents with the intent to mislead the arbitral tribunal (para. 1865)
No submitting misleading translations or failing to take reasonable steps to ensure translations are correct (para. 1865)
No requesting that a confidential document be disclosed on the ground that it is required for the fulfilment or protection of a legal right or the challenge of an award when the primary purpose is for disclosure (para. 1865)
No burying responsive documents under unimportant ones (para. 1865)
No inciting false testimony or relying on witness testimony notwithstanding the fact that the testimony is known to be false (para. 1871)
No unduly influencing the testimony of a witness by, for example, paying inappropriately high compensation in exchange for testimony (para. 1871)
No failing to disclose third party funding in certain circumstances (paras. 1801-1806)
No knowingly raising unfounded jurisdictional objections (para. 1830)
No having secret ex parte contact with the arbitral tribunal (paras. 1858-1859)
No holding back documents on which a party relies with the intent to surprise parties or witnesses with such documents (para. 1865)
No knowingly submitting improperly obtained evidence (para. 1865)
No knowingly or negligently submitting forged or corrupted documents (para. 1865)
No deliberately concealing or destroying evidence (para. 1865)
No drafting witness testimony so as to hide the content with the intent of surprising the other party with additional witness testimony (para. 1871)
No identifying witnesses on which a party relies until later on in the proceedings with the intent to surprise the other parties with such witnesses (para. 1871)

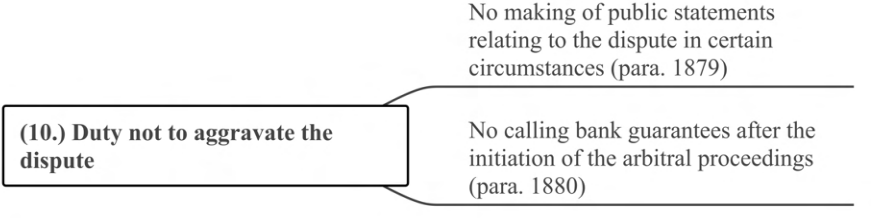

(6.) Duty not to act in a contradictory manner
No requesting the appointment of different arbitrators for parallel proceedings on the ground of bias when such party has previously argued that the disputes are separate and should not therefore be consolidated (para. 1809 & para. 1827)
No challenging arbitrator for reasons which one was aware of prior to the appointment of the arbitrator (paras. 1825-1826)
No tardy invocation of a jurisdictional or procedural objection or an objection with respect to the constitution of the arbitral tribunal (paras. 1822-1824, paras. 1831-1833, paras. 1874-1876)
No leading the other party to believe that it would not bring a claim and thereafter bringing a claim in certain circumstances (paras. 1843-1845)
No requesting that documents submitted by the other party be declared inadmissible while at the same time expressly referring to such documents in one's own submissions (para. 1865)


(7.) Duty not to act unreasonably or disrespectfully
No submitting data in a non-agreed or non-default form with the intention of preventing electronic searches or just burdening the other party (para. 1865)
No making of excessive document requests (para. 1865)
No raising objections (including the confidentiality exception) to document production requests without a reasonable basis (para. 1865)
No seeking to portray witnesses in a bad light (para. 1871)
No deliberately asking confusing questions during cross-examination (para. 1871)
No refusing to constitute a single arbitral tribunal where all parties are involved in the same commercial transaction, with interrelated contractual obligations and performance and identical dispute resolution provisions (para. 1807)
No submitting of unfounded challenges against an arbitrator with the sole aim of preventing the other party from appointing an arbitrator (para. 1819)
No requesting of excessive compensation (paras. 1841-1842)
No acting aggressively or with a lack of professional courtesy (para. 1850)
No making of unsubstantiated fraud allegations against the other party (para. 1850)
No refusing to sign the Terms of Reference, despite the fact that the Terms of Reference had been modified in accordance with one's comments and despite the fact that one had been given a detailed explanation of the meaning of its terms and its legal consequences (para. 1853)

(8.) Duty not to unnecessarily delay the proceedings

- No delaying in the appointment of an arbitrator (paras. 1815-1816)
- No deliberately taking a long time to appoint an arbitrator knowing full well that the arbitrator does not fulfill the requirements to act as arbitrator and then using this as a reason to request the appointment of another arbitrator (para. 1817)
- No increasing the amount claimed leading to a consequent increase in the number of arbitrators and thereby delay due to the time needed to select and appoint further arbitrators (para. 1818)
- No submitting of unfounded challenges against an arbitrator with the sole aim of delaying the proceedings (para. 1819)
- No submitting of numerous unfounded challenges (para. 1820)
- No submitting of unsolicited documents and briefs (para. 1857)
- No arranging to be represented by counsel who has a conflict of interest with a member of the arbitral tribunal (para. 1828)
- No appointing counsel at the last minute (para. 1829)
- No changing of legal counsel numerous times (para. 1829)
- No tardy filing of claims or defences in certain circumstances (para. 1835-1837)
- No frequently requesting unjustified extensions of deadlines set out in a procedural timetable (para. 1856)
- Submitting a substantial number of documents at a late stage of the proceedings (para. 1865)
- No insisting that an oral hearing take place with the sole aim of delaying the proceedings (para. 1873)


(9.) Duty not to harass or harm another participant in the arbitration
No commencing of arbitral proceedings in order to harass the other party or to prevent such party from bringing court proceedings (para. 1788)
No making of frivolous or vexatious claims (paras. 1838-1840)
No pressurizing or attempting to influence the members of the arbitral tribunal (paras 1860-1861)
No disclosing confidential materials with the intent of pressuring or harming another participant in the arbitration (para. 1865)
No interfering with a witness (para. 1871)
No raiding of the other party's offices and seizing numerous documents and evidence (para. 1881)


(10.) Duty not to aggravate the dispute
No making of public statements relating to the dispute in certain circumstances (para. 1879)
No calling bank guarantees after the initiation of the arbitral proceedings (para. 1880)

D. Identification of the basis of the power to sanction a violation of the obligation to arbitrate in good faith

1991. Before sanctioning a violation of the obligation to arbitrate in good faith, arbitral tribunals should identify the basis of their power to issue such a measure, giving preference to the legal norms foreseeing the specific measure in question as well as binding and applicable legal norms, such as the *lex arbitri*, institutional arbitration rules and transnational soft law (which has become hard law by virtue of the parties' agreement). The purported inherent jurisdiction to sanction a violation of the obligation to arbitrate in good faith should only be referred to in the absence of another basis.

E. Preference to be given to the award of the costs of the arbitration

1992. In the author's view – except in the case of a violation of the obligation to arbitrate in good faith with respect to the taking of evidence, in which case preference should be given to the specific measures of drawing adverse inferences or refusing to admit/excluding evidence – arbitral tribunals should give preference to the measure of imposing the costs of the arbitration on the breaching party in order to sanction the violation of the obligation to arbitrate in good faith.

1993. This should hopefully act as an effective deterrent for international commercial actors and go some way in combating the perceived increasing number of "guerilla tactics" in international arbitration. In addition, monetary awards are much easier to enforce than an order enjoining further violations of, or ensuring compliance with, the obligation to arbitrate in good faith.[2988] In this regard, international commercial parties will be more disincentivized by effective economic sanctions.

[2988] See in this regard TROY ELDER, The Case Against Arbitral Awards of Specific Performance in Transnational Commercial Disputes (1997) Arb Intl 1–32, 21.

Part VI:
General Conclusion

1994. As we have seen, in international commercial arbitration, arbitral tribunals often resort to good faith due to its inherent flexibility which allow them to do justice in a given case.[2989] However, such frequent recourse has met with the objection that arbitrators are employing good faith at the expense of the applicable law and the objection that there is a risk of arbitrariness associated with the application of this notion.[2990]

1995. In addition to these objections, there are also uncertainties surrounding the application of good faith by arbitral tribunals. Uncertainty with respect to the application of good faith firstly arises due to the varying legal backgrounds of the members of the arbitral tribunal.[2991] Additional uncertainty arises when a State party is involved in the arbitration.[2992] Finally, certain specific uncertainties arise when good faith is applied by arbitral tribunals to the substantive contract between the parties[2993] and to the arbitration agreement[2994].

1996. This Part VI sets out the general conclusions of the present thesis with respect to the influence of an arbitrator's legal background on his or her application of good faith (Chapter 1), the role of good faith in arbitrations involving State Parties (Chapter 2), the specific uncertainties which arise when good faith is applied by arbitral tribunals to the substantive contract between the parties (Chapter 3) and the specific uncertainties which arise when good faith is applied by arbitral tribunals to the arbitration agreement (Chapter 4).

[2989] See para. 33 et seq.
[2990] See para. 41 et seq.
[2991] See para. 56 et seq.
[2992] See para. 66 et seq.
[2993] See para. 70 et seq.
[2994] See para. 82 et seq.

Chapter 1: Influence of an Arbitrator's Legal Background

1997. As pointed out at the beginning of the present thesis, the first uncertainty which arises when good faith is applied by an arbitral tribunal is whether an arbitrator is influenced by his or her legal background when applying good faith.[2995]

1998. This general conclusion summarizes the main findings (I.) and the proposed guidelines (II.) with respect to the influence of an arbitrator's legal background on his or her application of good faith.

[2995] See para. 56 et seq.

I. Main Findings

1999. In some cases, it was clear that the arbitrator's legal background had an influence on his or her application of good faith.[2996]

2000. In other cases, there were indications that the arbitrator's legal background had an influence on his or her application of good faith.[2997]

2001. In the author's view, arbitrators are more likely to be influenced by their legal background in the following situations.

2002. First, arbitrators are more likely to be influenced by their legal background when applying good faith if they fail to set out the exact role and scope of good faith under the applicable law.

2003. Second, given the uncertain contours of good faith as a general principle of law, it is highly likely, that an arbitrator will be influenced by his or her legal background when applying good faith as a general principle of law.[2998]

2004. Third, it is inevitable that an arbitrator, endowed with the power to rule *ex aequo et bono* or as an *amiable compositeur,* will be influenced by his or her legal background when applying good faith given that such arbitrator is not bound to apply good faith as interpreted and applied by the courts in a given national legal system.[2999]

2005. Any influence of an arbitrator's legal background will be more pronounced in situations where a significantly different role and scope is attributed to good faith under the law of the arbitrator's legal background as compared to the role and scope attributed to good faith under the applicable law.

2006. This may be the case, for example, when: (i.) an arbitrator with a Common law background (in particular, from England, Hong Kong or Singapore where good faith has a more limited role and scope) is applying good faith under a law which attributes an extensive role and scope to good faith, such as Swiss or German law; (ii.) an arbitrator with a Civil law background is applying good faith under the CISG which attributes a limited role to good faith; and (iii.) an arbitrator with a Common law background is applying good faith under a law which

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[2996] See, for example, the case of *Abbott Laboratories v Baxter International* discussed at para. 1151 and the case of *Dallah v Pakistan* discussed at para. 1572.

[2997] See paras. 1148–1150 and para. 1237.

[2998] See paras. 1236–1237.

[2999] See paras. 1339–1340.

permits the extension of an arbitration agreement to a non-signatory on this basis.[3000]

2007. Conversely, any influence of an arbitrator's legal background will be less apparent when the role and scope which is attributed to good faith under the law of the arbitrator's legal background is similar to the role and scope attributed to good faith under the applicable law.

2008. In this regard, one can surmise that any influence of an arbitrator's legal background will be less evident with respect to the application of good faith to the performance of the arbitration agreement. Indeed, there appears to be more of a universal consensus – and thus less of a Common law/Civil law divide – with respect to the application of good faith to the performance of the arbitration agreement.[3001]

[3000] See para. 1588 and the *Dallah v Pakistan* case in which the two arbitrators with a Common law background were of the view that the principle of good faith could not be employed to make someone a party to an arbitration who on other grounds could not be regarded as such, whereas the arbitrator with a Civil law background was of the contrary view.

[3001] See para. 1972.

II. Proposed Guidelines

2009. In light of the above main findings, it is firstly suggested that parties should consider the legal culture and training of an arbitrator before appointing them given that this may have an impact on how they apply good faith.[3002]

2010. Second, in order to reduce the risk that an arbitral tribunal is influenced by its own legal background when applying good faith, arbitral tribunals should take a rigorous approach and set out the role and scope of good faith under the applicable law as espoused by the relevant legal provisions, case law and legal doctrine.

2011. More specifically, when applying good faith on the basis of an express contractual provision, it is advocated that arbitral tribunals should – in the event that the parties' intention is not ascertainable – construe such provisions in line with the applicable law to the contract, be it a national law or non-national law.[3003] When doing so, arbitral tribunals should set out the role and scope of good faith under the applicable law in order to reduce the risk that they are influenced by their legal background when applying good faith on this basis.

2012. Similarly, when applying good faith to the parties' contract on the basis of a national or non-national law (including the general principles of law), the arbitral tribunal should, before applying this notion, set out the role and scope of good faith under the relevant national legislation or non-national legal instrument, case law and legal doctrine.[3004]

2013. It should be underlined that in the case where an arbitral tribunal has the power to rule *ex aequo et bono* or as an *amiable compositeur*, the arbitral tribunal is not even obliged to apply legal rules, and therefore is not bound, for example, to apply good faith as interpreted and applied by the courts in a given national legal system. The arbitral tribunal may therefore apply its own notions of the concept of good faith, even though such notions may inevitably be influenced by the arbitrator's legal background.[3005]

3002 CREMADES, 788. See also above, para. 63.

3003 See paras. 1094–1095.

3004 See para. 1169 et seq and paras. 1305, 1312 and 1321.

3005 See in this regard, MAYER, *règle morale*, 397, §28: "*Lorsque l'arbitre est amiable compositeur, il est pas là invité à faire primer le sentiment du juste sur l'application stricte du droit. Ce sentiment du juste, qui possède une composante morale, est nécessairement le sien: il ne peut l'emprunter à un autre système que celui dans lequel il s'est formé*." ("When the arbitrator is an amiable compositeur, he or she is not asked to give precedence to the idea of justice

2014. Finally, when applying good faith to the substantive issues surrounding the arbitration agreement (i.e., the formal validity of the arbitration agreement, the incorporation of an arbitration agreement by reference, the interpretation of the arbitration agreement, the capacity to arbitrate, the power or authority to enter into an arbitration agreement and the extension of an arbitration agreement to a non-signatory), it is advocated that arbitral tribunals should identify the source of good faith and set out the role and content of good faith under the relevant source in order to reduce the risk that they are influenced by their own legal background when applying good faith to these issues.[3006]

over the strict application of the law. This sense of justice, which has a moral component, is necessarily his own: he cannot borrow it from any system other than the one in which he was formed.") (informal English translation of the French original).

[3006] See, in this regard, paras. 1408–1409 (formal validity of the arbitration agreement); para. 1438 (incorporation of an arbitration agreement by reference); paras. 1469–1471 (interpretation of the arbitration agreement); paras. 1510–1511 (capacity to arbitrate); paras. 1541–1542 (power/authority to arbitrate); and paras. 1590–1591 (extension of the arbitration agreement to a non-signatory).

Chapter 2: Role of Good Faith in Arbitrations involving State Parties

2015. The second uncertainty concerns the role that good faith will play in arbitrations involving State parties.[3007]

2016. The present thesis has shown that good faith plays an increased role in cases involving State parties in order to redress the imbalance in the relationship between the commercial party and State party.[3008]

2017. With respect to arbitrations involving State parties, it is good faith in the form of the prohibition of contradictory behaviour which arises most often and thus, the corrective function of good faith which is employed most frequently. Hence, good faith has been invoked to prevent a State party from raising the defence of *force majeure* when, because of its position as a State, it had (or should have had) knowledge of the circumstances leading to the *force majeure* event and/or was in a position to influence, and thus prevent such circumstances from occurring.[3009] In addition, good faith has also been invoked to prevent a State party from relying on its own law in order to allege that a contract was not binding on it.[3010] Similarly, good faith has been relied on in order to prevent a State party from invoking a prohibition or restriction under its own internal law preventing it from arbitrating when this party has previously entered into an arbitration agreement.[3011] Moreover, good faith appears to have been raised in order to prevent a State party from relying on the Parliament's refusal to extend the Production Sharing Agreement when it had led its contracting party to believe that Parliamentary approval was not required for the renewal of the Agreement even though it must have known that such approval was required.[3012]

3007 See para. 66 et seq.

3008 See para. 1062 et seq and para. 1288 et seq. With respect to the goal of equality pursued by the application of good faith, see para. 14 and para. 292.

3009 See para. 1162.

3010 *Commissions Import Export S.A. v Republic of Congo* (Final Award), ICC Case No. 16257/EC/ND/MCP of 2013, Arbitrator intelligence materials, §254.

3011 See para. 1485.

3012 ICC Case No 14108 (2011) 36 YB Comm Arb 135–201, §§101–131.

2018. Good faith was further invoked in order to impose a duty to inform on a State party. Hence in *Company Z and others v State Organization ABC* (unknown national law), the arbitral tribunal referred to the notion of good faith to support its argument that the State party was under a duty to inform the other party that the contract was not valid due to a lack of authorization.[3013]

2019. It is noteworthy that the obligation to arbitrate in good faith has been invoked in cases involving State parties to act as a check on the State party's use (or abuse) of its sovereign powers. Examples of such bad faith conduct of the State party include the raiding of the opposing party's offices and the seizure of numerous documents and evidence,[3014] the bringing of proceedings before the State party's own courts in order to nullify the effects of the arbitral proceedings,[3015] and the abduction of a co-arbitrator from the same State.[3016]

[3013] *Company Z and others v State Organization ABC* (1983) 8 YB Comm Arb 94–117, 110.

[3014] *Caratube Int'l Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB 08/12, Decision Regarding Claimant's Application for Provisional Measures, 31 July 2009.

[3015] *Liberian Eastern Timber Corporation (LETCO) v Liberia* (31 March 1986) 2 ICSID Reports 356, 378.

[3016] *Himpurna California Energy Ltd v Republic of Indonesia*, Ad hoc arbitral award, 26 September 1999 25 YB Comm Arb 110–215 (2000). See in this regard BÉDARD/NELSON/RAYMOND KALANTIRSKY, 739 and BERNARD HANOTIAU, Misdeeds, Wrongful Conduct and Illegality in Arbitral Proceedings in van den Berg (ed), International Commercial Arbitration: Important Contemporary Questions (ICCA International Arbitration Congress), 2003, 261, 270–71.

Chapter 3: Specific Uncertainties Arising in Connection with the Application of Good Faith to the Parties' Contract

2020. As discussed at the beginning of the present thesis, specific uncertainties arise in connection with the application of good faith to the parties' contract.[3017]

2021. This general conclusion summarizes the main findings (I.) and the proposed guidelines (II.) with respect to the application of good faith to the parties' contract by arbitral tribunals.

[3017] See para. 70 et seq.

I. Main Findings

2022. The main findings of the present thesis are that arbitral tribunals frequently apply good faith *sua sponte* (A.), that the recourse to good faith by arbitral tribunals is often superfluous (B.) and that there is a high probability that arbitral tribunals do not apply good faith in accordance with the applicable law (C.).

A. Frequent application of good faith *sua sponte* by arbitral tribunals

2023. It is noteworthy that in the majority of awards, good faith was invoked by arbitral tribunals *sua sponte*.[3018]

2024. This conclusion is in line with the noted frequent recourse to good faith by arbitral tribunals[3019] and may be explained by the discretion with which good faith endows the arbitral tribunal allowing them to depart from the strict rigours of the applicable law or contract and to "do justice" in a given case.[3020]

B. Frequent superfluous application of good faith by arbitral tribunals

2025. A common thread which appears throughout the arbitral awards in which arbitral tribunals applied good faith is the (frequent) superfluous application of this notion.

2026. For example, in the cases where a national law was applicable, the references to good faith by the arbitral tribunal in question were often superfluous because good faith was an alternative or additional ground for the decision reached, good faith was mere *dictum*, or a more specific manifestation of good faith could have been employed instead.[3021] In cases where a non-national law was applicable, the recourse to good faith was again superfluous in many awards for the same reasons.[3022]

2027. Such superfluous references to good faith may be explained by a certain desire of the arbitral tribunals to morally sanction or express disapproval of a party's

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[3018] See para. 1107 et seq and para. 1201 et seq.
[3019] See para. 33 et seq.
[3020] *Ibid*.
[3021] See para. 1116 et seq.
[3022] See para. 1206 et seq.

conduct. It may also be explained by the arbitral tribunal's desire to show that their decision, which is primarily based on an application of the contract or other legal provisions, also accords with values of fairness and justice.[3023]

2028. When endowed with a mandate to rule *ex aequo et bono* or as an *amiable compositeur*, arbitrators frequently had recourse to good faith even though such recourse is, in many cases, superfluous. Such a superfluous application may be prompted by the arbitral tribunal's desire to show that the solution reached is just, fair and equitable which – contrary to the cases where the arbitral tribunal is not endowed with the power to rule *ex aequo et bono* or as an *amiable compositeur* – it is obliged to do by the terms of its mandate.[3024]

C. High probability that good faith not applied in accordance with the applicable law

2029. Through a review of the arbitral awards in which arbitral tribunals applied good faith to the parties' contract, it was noted that there was a high probability that good faith was not applied in accordance with the applicable law.

2030. Indeed, with respect to the cases in which good faith was applied by arbitral tribunals on the basis of a national law, this submission is supported by: (i.) the noted lack of precision employed by arbitral tribunals when applying good faith to the parties' contract; (ii.) the fact that, in some cases, arbitrators have explicitly or implicitly taken a more extensive approach when applying good faith; (iii.) the indications that arbitrators may have been influenced by their own legal background when applying good faith; and (iv.) the (impertinent) references to good faith under other national or non-national laws than the one applicable suggesting that the arbitral tribunals may not have fully comprehended the nuances and specificities of good faith under the applicable law.[3025]

2031. Concerning the cases in which good faith was applied by arbitral tribunals on the basis of a non-national law, this submission is supported by: (i.) the noted lack of precision when invoking good faith; (ii.) the lack of references to relevant legal doctrine or case law; (iii.) the (impertinent) references made to good faith under other national or non-national laws; and (iv.) the indications that arbitrators may have been influenced by their legal background when applying good faith.[3026]

[3023] See paras. 1130–1131 and paras. 1216–1217.
[3024] See para. 1334 et seq.
[3025] See para. 1133 et seq.
[3026] See para. 1218 et seq.

II. Proposed Guidelines

2032. The proposed general (A.) and specific (B.) guidelines with respect to the application of good faith by arbitral tribunals to the parties' contract are set out below.

A. General guidelines

2033. It is recommended that, in general, arbitral tribunals should invite the parties to comment on the application of good faith prior to applying good faith of their own accord (1.) and should use more exact reasoning when grounding their decision on good faith (2.).

1. Invite parties to comment on the application of good faith

2034. In light of the above finding that arbitral tribunals often apply good faith *sua sponte*,[3027] it is proposed that arbitral tribunals should, wherever possible – and in order to ensure compliance with the parties' right to be heard – invite the parties to comment on the application of good faith under the applicable law to the case in question, prior to applying such principle of its own accord.[3028]

2. Use more exact reasoning when grounding decision on good faith

2035. It is submitted that when an arbitral tribunal grounds its decision on good faith (rather than invoking good faith as an alternative or addition ground or as *obiter dicta*), it should include more exact reasoning in its decision.[3029]

2036. As stated by CREMADES in this regard:

> there is no doubt that arguments based on good faith are of a more precarious nature than others and thus, the need for a greater conviction at first and the need for a more exact reasoning by the arbitrator in his decision-making process afterwards.[3030]

[3027] See paras. 2023–2024.

[3028] See para. 1166 and para. 1291.

[3029] See paras. 1167–1168 and para. 1292.

[3030] CREMADES, 786.

B. Specific guidelines

2037. In light of the above observation that there is a high probability that arbitral tribunals do not apply good faith in accordance with the applicable law,[3031] it is suggested that arbitral tribunals should follow the proposed specific guidelines set out below when applying good faith to the parties' contract. It is hoped that the following of such guidelines will ensure less of a divergence in the application of good faith and thus more certainty and predictability in its application.

2038. The specific guidelines with respect to the application of good faith on the basis of an express contractual provision (1.), a national law (2.), the CISG (3.), the PICC (4.) and, as a general principle of law (5.), are set out below.

1. Application of good faith on the basis of an express contractual provision

2039. In cases where the parties' contract expressly provides that one or both parties are obliged to act in good faith, either in general or with respect to a specific obligation, and a party alleges that this provision has been breached, an arbitral tribunal should first elaborate on the meaning of good faith in this provision.[3032]

2040. Such provisions should be construed in line with the parties' intentions, in so far as such an intention is ascertainable and, to the extent that it is not, in line with the applicable law.[3033]

2. Application of good faith on the basis of a national law

2041. In the event that a national law is applicable to the parties' contract, an arbitral tribunal should, in general, follow the approach of the leading case law and legal doctrine as applied by the relevant national courts.[3034]

2042. In this regard, an arbitral tribunal should set out the exact role and scope of good faith as espoused by the relevant national legislation, case law and legal doctrine.[3035]

2043. However, it is proposed that arbitrators, after careful consideration, may choose not to follow the established and leading national case law and legal doctrine on

[3031] See para. 2029 et seq.
[3032] See para. 1093.
[3033] See para. 1094.
[3034] See paras. 1169–1172.
[3035] See para. 1173.

good faith. When doing so, the arbitral tribunal should set out its reasons for departing from the established case law and legal doctrine on good faith and should support its stance, wherever possible, by referring to legal doctrine or other case law in the relevant country.[3036]

2044. Arbitral tribunals should not make reference to good faith under other laws than the one applicable.[3037]

3. Application of good faith on the basis of the CISG

2045. In the event that the CISG is applicable to the parties' contract, good faith should solely be invoked when interpreting the provisions of the CISG pursuant to Article 7(1) CISG or filling an internal gap within the CISG pursuant to Article 7(2) CISG.[3038]

2046. If an arbitral tribunal is invoking good faith in relation to the interpretation of a provision of the CISG (Article 7(1) CISG), the arbitral tribunal should firstly specify that it is applying good faith on this basis and should thereafter identify the provision that it is interpreting with the aim of promoting the observance of good faith in international trade.[3039]

2047. When interpreting a provision in line with the goal of promoting good faith in international trade pursuant to Article 7(1) CISG, arbitral tribunals should bear in mind the following: First, arbitral tribunals should only strive to promote a minimum standard of good faith. Second, arbitral tribunals should take into account the specificities of international trade, namely that the latter entails intense competition and arm's length dealings. The fact that international trade entails intense competition means that an arbitral tribunal should respect the party's bargain (which will usually be extensively negotiated and minutely drafted) and not attempt to rewrite their contract by interpreting a provision of the CISG in accordance with good faith. Conversely, the fact that international trade involves arm's length dealings may mean that good faith should play a greater role in certain cases in order to protect the parties, who – because of the fact that they concluded their contract *à distance* – have placed greater trust in the other contracting party. Third, arbitral tribunals should take into account the aim in the preamble of the CISG of promoting equality and mutual benefit in international trade. Thus the interpretation of a provision in line with the goal of

[3036] See para. 1174.
[3037] See para. 1177.
[3038] See paras. 1295 and 1296.
[3039] See para. 1297.

promoting good faith should lead to the promotion of equality as well as mutual benefit between the parties.[3040]

2048. When employed as an interpretative tool of the CISG, the application of good faith may lead to the usual remedies set out in the relevant provision, or those found in the general provisions, of the CISG being awarded. It may even lead to the non-application of the relevant provision in cases where its application would be contrary to the goal of promoting good faith in international trade.[3041]

2049. If an arbitral tribunal is applying the general principle of good faith in order to fill a gap in the CISG (Article 7(2) CISG), it should specify that it is applying good faith on this basis and it should identify the relevant internal gap.[3042]

2050. The arbitral tribunal should thereafter identify the relevant specific manifestation of good faith that it is applying to fill the gap. Such specific manifestations include, *inter alia*, the prohibition of contradictory conduct (Articles 16(2)(b), 29(2) CISG), the prohibition of an abuse of right (Articles 21(2), 40 CISG), the prohibition of unfair conduct which would cause economic harm to the other party (Articles 49(2), 64(2), 82 CISG), the duty to mitigate one's loss (Articles 85–88 CISG) as well as a duty to be tolerant (i.e., allowing the seller to remedy non-conformity before the date for delivery as long as the buyer is not unreasonably burdened thereby) (Article 37 CISG).[3043]

2051. No reference should be made to good faith under other national or non-national laws.[3044]

2052. Reference should be made to case law and legal doctrine relating to good faith under the CISG.[3045]

4. Application of good faith on the basis of the PICC

2053. In the event that the PICC is applicable to the parties' contract, arbitral tribunals should first verify whether there is a specific manifestation of the general duty to act in accordance with good faith and fair dealing which may apply before having recourse to Article 1.7 PICC, in particular, the duty to cooperate (Article

[3040] See para. 1299.
[3041] See para. 1300.
[3042] See para. 1298.
[3043] See paras. 1301–1302.
[3044] See para. 1304.
[3045] See para. 1305–1306.

5.1.3 PICC) or the prohibition of contradictory behaviour (Article 1.8 PICC), or one of the many specific manifestations of this prohibition.[3046]

2054. Recourse should only be made to Article 1.7 PICC in exceptional circumstances, namely cases requiring the non-application of a contractual provision or the PICC on the grounds of fairness, justice or equity or in cases requiring a more flexible and less technical application of the contract or the PICC (*de minimis non curat lex*). It may also be invoked to deal with new circumstances which were not foreseen by the drafters of the PICC or parties to future contracts.[3047]

2055. Given the limited role of the general duty to act in accordance with good faith and fair dealing found under Article 1.7 PICC, its application may usually only lead to a more flexible or restrictive application, or the non-application, of the parties' contract or the PICC.[3048]

2056. No reference should be made to good faith under other national or non-national laws.[3049]

2057. Reference should be made to case law and legal doctrine relating to Article 1.7 PICC when applying good faith on this basis.[3050]

5. Application of good faith as a general principle of law

2058. Arbitral tribunals should, wherever possible, apply good faith on the basis of a codified non-national law text, such as the PICC rather than as a general principle of law.[3051]

2059. If an arbitral tribunal decides, or is bound to apply, good faith as a general principle of law, it should give priority to the application of the specific manifestations of the general principle of good faith.[3052]

2060. If there is no applicable specific manifestation of the general principle of good faith, then an arbitral tribunal may formulate a new rule, as specifically and precisely as possible, on the basis of the general principle of good faith.[3053]

[3046] See para. 1308.
[3047] See para. 1309.
[3048] See para. 1310.
[3049] See para. 1311.
[3050] See para. 1312.
[3051] See para. 1313.
[3052] See paras. 1315–1318.
[3053] See para. 1319.

2061. When applying the specific manifestations of the general principle of good faith, arbitral tribunals should refer to case law and legal doctrine.[3054]

2062. References may be made to the role, scope and content of good faith under other national and non-national laws in order to establish the role, scope and content of good faith as a general principle of law.[3055]

2063. If an arbitral tribunal is directed to consider trade usages by the applicable substantive law, *lex arbitri* or institutional arbitration rules, it should not apply the general principle of good faith on this basis.[3056]

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[3054] See paras. 1320–1321.
[3055] See paras. 1322–1323.
[3056] See paras. 1324–1325.

Chapter 4: Specific Uncertainties Arising in Connection with the Application of Good Faith to the Arbitration Agreement

2064. As discussed at the beginning of the present thesis, specific uncertainties arise in connection with the application of good faith to the arbitration agreement.[3057] This general conclusion summarizes the main findings (I.) and the proposed guidelines (II.) with respect to the application of good faith by arbitral tribunals to the arbitration agreement.

[3057] See para. 82 et seq.

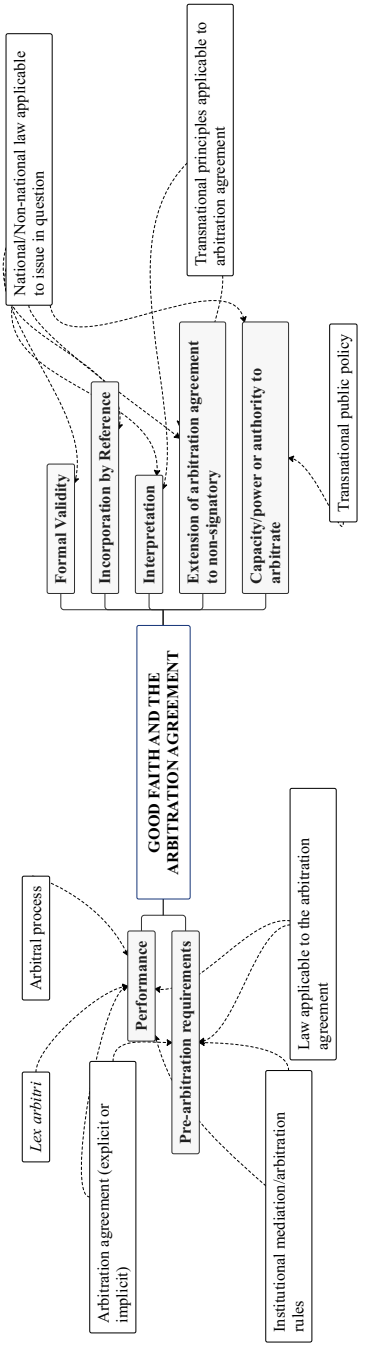
I. Main Findings

2065. The findings of the present thesis with respect to the potential sources of good faith when applied to the arbitration agreement (A.) and the content of good faith when applied to the substantive good faith issues (B.) are set out below. The findings concerning the content of the obligation to negotiate/mediate in good faith prior to resorting to arbitration and the obligation to arbitrate in good faith as well as the measures employed to sanction their violation are also discussed below (C.). This section concludes with the function of good faith when applied to all of the issues surrounding the arbitration agreement (D.) and also notes that, in many cases, the recourse to good faith by arbitral tribunals was superfluous (E.).

A. Potential sources of good faith

2066. With respect to the application of good faith to the arbitration agreement, the first uncertainty concerns the unclear potential source of good faith.[3058] The diagram below summarizes the various potential sources of good faith with respect to all of the issues surrounding the arbitration agreement.

[3058] See para. 85 et seq.


National/Non-national law applicable to issue in question
Transnational principles applicable to arbitration agreement
Formal Validity
Incorporation by Reference
Interpretation
Extension of arbitration agreement to non-signatory
Capacity/power or authority to arbitrate
Transnational public policy
GOOD FAITH AND THE ARBITRATION AGREEMENT
Arbitral process
Performance
Pre-arbitration requirements
Law applicable to the arbitration agreement
Lex arbitri
Arbitration agreement (explicit or implicit)
Institutional mediation/arbitration rules

2067. With respect to the so-called substantive good faith issues (namely, the formal validity of the arbitration agreement, the capacity or power/authority to arbitrate, the extension of an arbitration agreement to a non-signatory as well as the interpretation of the arbitration agreement and incorporation of an arbitration agreement by reference), good faith is applied primarily on the basis of the national or non-national law deemed applicable to the issue in question.[3059]

2068. Good faith has also been applied to the issues of the interpretation of the arbitration agreement and to the extension of the arbitration agreement to a non-signatory as part of the transnational principles which are deemed – in certain cases – to be directly applicable to the arbitration agreement.[3060]

2069. With respect to a State party's capacity to arbitrate, good faith has been directly applied to this issue due to its inclusion in transnational public policy.[3061]

2070. With respect to the so-called procedural good faith issues (namely pre-arbitration requirements and the performance of the arbitration agreement), there are many different sources of good faith. The source of good faith can be express or implicit in the arbitration agreement. The source of good faith may also be found in the applicable institutional mediation/arbitration rules, the applicable national arbitration law or the law applicable to the arbitration agreement. With respect to the performance of the arbitration agreement, the source of good faith is also said to flow from the arbitral process itself.[3062]

B. Content of the substantive good faith issues

2071. The second uncertainty concerns the content of good faith with respect to the so-called substantive good faith issues, namely, the formal validity of the arbitration agreement, the incorporation by reference of the arbitration agreement, the interpretation of the arbitration agreement, the capacity or power/authority to arbitrate, and the extension of the arbitration agreement to a non-signatory.[3063]

[3059] See paras. 1372 et seq. (formal validity), para. 1427 (incorporation by reference), paras. 1449 et seq., (interpretation), paras. 1480 et seq., paras. 1520 et seq. (authority), and paras. 1552 et seq. (extension to a non-signatory).

[3060] See paras. 1455–1464 (interpretation) and paras. 1555–1557 (extension to a non-signatory).

[3061] See para. 1484.

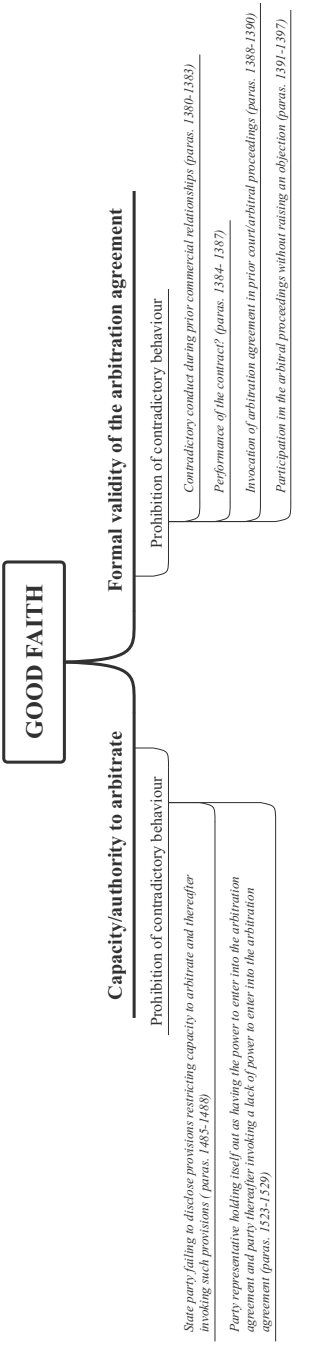
[3062] See paras. 1602 et seq. (obligation to negotiate/mediate in good faith) and paras. 1756 et seq. (obligation to arbitrate in good faith).

[3063] See above, paras. 90–91.

2072. With respect to the issues of the formal validity of the arbitration agreement and the capacity or power/authority of a party to arbitrate, good faith means the prohibition of contradictory behaviour.[3064]

2073. Thus, in certain cases, a party will be prevented from invoking the formal invalidity of the arbitration agreement or its lack of capacity or power/authority to arbitrate if it has previously acted in a contradictory manner. Examples of such contradictory behaviour in relation to these two issues are set out in the diagram below.

[3064] See paras. 1379 et seq. (formal validity), paras. 1485 et seq. (capacity) and paras. 1523 et seq. (authority).


GOOD FAITH
Capacity/authority to arbitrate
Prohibition of contradictory behaviour
State party failing to disclose provisions restricting capacity to arbitrate and thereafter invoking such provisions (paras. 1485-1488)
Party representative holding itself out as having the power to enter into the arbitration agreement and party thereafter invoking a lack of power to enter into the arbitration agreement (paras. 1523-1529)
Formal validity of the arbitration agreement
Prohibition of contradictory behaviour
Contradictory conduct during prior commercial relationships (paras. 1380-1383)
Performance of the contract? (paras. 1384- 1387)
Invocation of arbitration agreement in prior court/arbitral proceedings (paras. 1388-1390)
Participation im the arbitral proceedings without raising an objection (paras. 1391-1397)

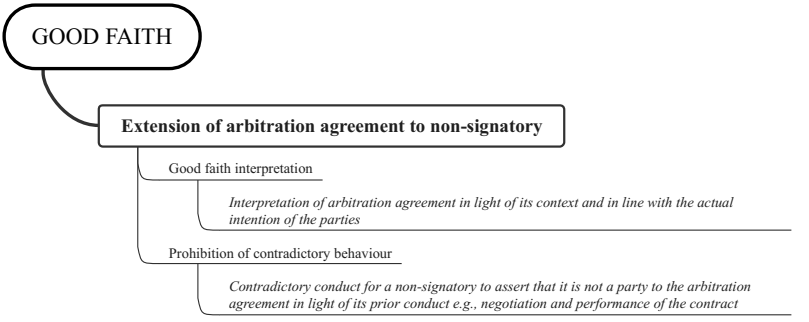
2074. With respect to the incorporation of the arbitration agreement by reference, the content of good faith will depend on the content of the good faith interpretation rule under the applicable law.[3065]

2075. With respect to the interpretation of the arbitration agreement, the content of the rule of good faith interpretation, will depend on whether such rule is applied as a general contractual rule of a national or non-national law deemed applicable to the interpretation of the arbitration agreement or whether it is applied as a general canon of contract interpretation.[3066]

2076. As a general rule of contractual interpretation existing under a national or non-national law, the content of the good faith rule will be established by the case law and legal doctrine of the relevant law. As a general canon of contract interpretation, the rule of good faith means that the parties true and common intention, as distinct from their declared intention, should be ascertained without being limited to a literal interpretation of the arbitration agreement. One should look at the context in which the arbitration agreement was concluded in order to ascertain the consequences that the parties reasonably and legitimately envisaged. One should also look at the conduct of the parties following the signature of the arbitration agreement as a reflection of how the parties actually perceived the agreement and the arbitration agreement should be interpreted as a whole.[3067]

2077. With respect to the extension of the arbitration agreement to a non-signatory, good faith has two possible meanings as set out in the diagram below. In some cases, good faith means the prohibition of contradictory conduct. Thus, in certain cases, a non-signatory party was prevented from arguing that it was not bound by the arbitration agreement in light of its prior contradictory conduct. In other cases, good faith meant that the arbitration agreement should be interpreted in light of its context and in line with the real intention of the parties in order to ascertain whether the non-signatory was bound by the arbitration agreement.[3068]

[3065] See paras. 1426–1434.
[3066] See paras. 1449 et seq.
[3067] See paras. 1455 et seq.
[3068] See paras. 1585–1586.



C. Content of the procedural good faith issues

2078. The third uncertainty concerns the content of the procedural good faith issues, namely the content of the obligation to negotiate or mediate in good faith prior to resorting to arbitration and the obligation to arbitrate in good faith as well as the measures employed to sanction their violation.[3069]

2079. From a review of the relevant case law and legal doctrine, the present thesis has traced the contours of the obligation to negotiate or mediate in good faith.[3070]

2080. Depending on the characterization of the obligation to negotiate or mediate in good faith, a failure to comply with such an obligation, may lead to the substantive solution of the contractual liability of the party that has failed to comply with this obligation. However, such a solution is rare. The most common (procedural) solution is the inadmissibility of said party's claims and the suspension of the arbitral proceedings until compliance with this obligation. It is also possible in some cases that any eventual arbitral award rendered may be set aside for lack of jurisdiction due to the failure of a party to comply with its obligation to negotiate or mediate in good faith.[3071]

2081. With respect to the measures employed by arbitral tribunals in order to sanction a violation of the obligation to arbitrate in good faith, the most common measure is the awarding of the costs of the arbitration. Arbitral tribunals have also excluded evidence or drawn adverse inferences in cases where parties have acted in bad faith with respect to the taking of evidence. Furthermore, arbitral tribunals have, in certain cases, issued orders or injunctions in order to ensure

[3069] See para. 90 et seq.

[3070] See paras. 1623 et seq. (obligation to negotiate in good faith), paras. 1641 et seq. (obligation to mediate in good faith) and paras. 1782 et seq. (obligation to arbitrate in good faith).

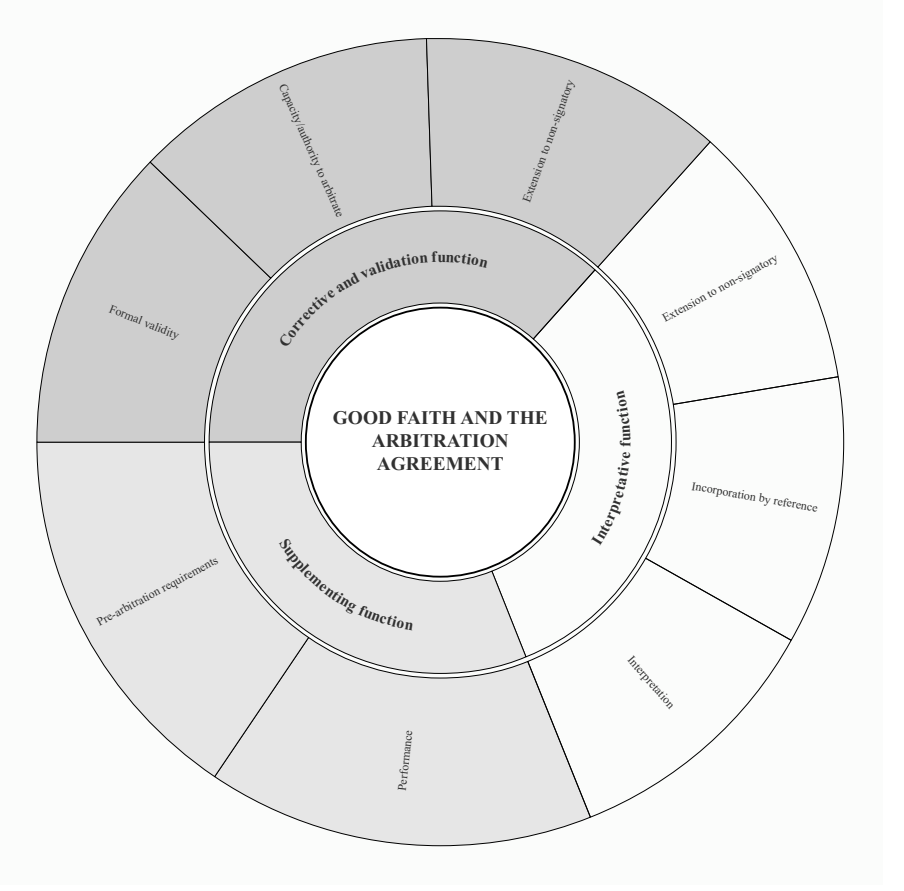
[3071] See paras. 1687 et seq.

compliance with the obligation to arbitrate in good faith or to prevent further breaches of this obligation. Only rarely has an arbitral tribunal dismissed a claim or defence on this basis. Moreover, arbitral tribunals have the possibility of issuing an oral or written reprimand in cases of less egregious violations of the obligation to arbitrate in good faith.[3072]

D. Functions of good faith

2082. The diagram below summarizes the findings of the present thesis with respect to the functions played by good faith when applied to the issues surrounding the arbitration agreement.

[3072] See paras. 1906 et seq.



2083. With respect to the interpretation of the arbitration agreement and the incorporation of an arbitration agreement by reference, good faith has an interpretative function.[3073]

2084. With respect to the capacity or power/authority to arbitrate and the formal validity of the arbitration agreement, good faith has a corrective function. Thus good faith prevents a party from relying on the lack of capacity or power/authority to arbitrate as well as the formal invalidity of the arbitration agreement. In this context, good faith also has a validation function as its application leads to the validity of the arbitration agreement.[3074]

[3073] See para. 1436 (incorporation of an arbitration agreement by reference).

[3074] See paras. 1404–1405 (formal validity), para. 1506 (capacity) and para. 1538 (power/authority).

2085. With respect to pre-arbitration requirements and the performance of the arbitration agreement (the so-called procedural good faith issues), good faith has a supplementing function. Thus, with respect to these two issues, good faith imposes additional duties on the parties.[3075]

2086. Interestingly, with respect to the extension of the arbitration agreement to a non-signatory, good faith has played both an interpretative and corrective function. In some cases, arbitral tribunals, by an interpretation in good faith of the arbitration agreement, have concluded that the non-signatory is in fact a party to the arbitration agreement (interpretative function of good faith). In other cases, arbitral tribunals have held that it would be contrary to good faith for a non-signatory to deny being bound by the arbitration agreement (corrective function of good faith).[3076]

E. Superfluous application of good faith in certain cases

2087. It is noteworthy that in some cases, the recourse to good faith by an arbitral tribunal was superfluous. More specifically, such a superfluous recourse to good faith was noted in cases where an arbitral tribunal: (i.) rejected a party's objection that the arbitration agreement did not comply with the relevant formal requirements;[3077] (ii.) rejected a party's allegation that it lacked the capacity to arbitrate;[3078] (iii.) rejected a party's allegation that it lacked the power/authority to enter into an arbitration agreement;[3079] and (iv.) decided to extend an arbitration agreement to a non-signatory.[3080]

2088. This superfluous recourse to good faith may be explained by a certain desire of the arbitral tribunal to show that their decision is not only in accordance with the law but also accords with values of fairness and justice as well as a desire of the arbitral tribunal to highlight and express their disapproval of the bad faith conduct of one of the parties.

[3075] See para. 1719 (pre-arbitration requirements), paras. 1942–1943 (obligation to arbitrate in good faith).
[3076] See paras. 1585–1586.
[3077] See para. 1406.
[3078] See para. 1504.
[3079] See para. 1536.
[3080] See para. 1587.

II. Proposed Guidelines

2089. The proposed general (A.) and specific (B.) guidelines with respect to the application of good faith to the arbitration agreement are set out below.

A. General guidelines

2090. It is advocated that, in general, arbitral tribunals should identify the source of good faith before applying this notion to the various issues surrounding the arbitration agreement (1.). In addition, it is submitted that good faith should be employed as a fallback concept only with respect to certain issues (2.). Finally, it is proposed that the *fallgruppen* methodology should be employed to rationalize the obligations to negotiate/mediate in good faith prior to resorting to arbitration as well as the obligation to arbitrate in good faith (3.).

1. Identify the source of good faith

2091. In the author's view, for reasons of enhanced certainty and predictability, it is important to identify the source of good faith before applying it to the various issues surrounding the arbitration agreement.

2092. With respect to the formal validity of the arbitration agreement, it is important to identify the source of good faith in order to determine whether good faith may override, under this law, the applicable formal requirements.[3081]

2093. With respect to the incorporation of an arbitration agreement by reference, it is important to identify the source of good faith in order to determine whether under this law, good faith is employed when ascertaining whether terms or clauses (and, in particular, arbitration agreements) from other documents may be incorporated into a contract.[3082]

2094. Concerning the interpretation of the arbitration agreement, it is important to identify the source of good faith in order to be able to apply the rule of good faith interpretation in accordance with the case law and legal doctrine of the applicable law.[3083]

2095. Concerning the capacity or power/authority to arbitrate as well as the extension of the arbitration agreement to a non-signatory, it is similarly important to

[3081] See para. 1408.
[3082] See para. 1438.
[3083] See paras. 1469–1470.

identify the source of good faith in order to determine whether good faith may prevent a party from alleging a lack of capacity or power/authority to arbitrate under the applicable law and also whether good faith is employed under the applicable law to ascertain whether an arbitration agreement can be extended to a non-signatory.[3084]

2096. Identifying the source of good faith and thereafter setting out the role and scope of good faith under the applicable law will further go some way in ensuring that arbitral tribunals are less influenced by their own legal background when applying good faith to these issues.[3085]

2097. Finally, although there will rarely be any debate over the existence of the obligation to negotiate or mediate *in good faith* prior to resorting to arbitration as well as the obligation to arbitrate *in good faith* given the abundant potential sources of good faith, it is still advocated that arbitral tribunals should follow a rigorous approach and identify the source of the good faith component.[3086]

2. Good faith employed as a fallback concept only with respect to certain issues

2098. With respect to certain issues surrounding the arbitration agreement, it is submitted that good faith should only be used as a fallback concept. Indeed, as set out in more detail below, it is advocated that good faith should not be employed in cases where the application of an explicit provision or other doctrine (based on consent rather than equity) as well as a more specific manifestation of good faith, would lead to the same result.

2099. Indeed, good faith should not be applied where there is an existing specific rule that has been violated given that this may lead to every equitable solution being imposed on the basis of good faith.[3087] In addition, where there is a more specific

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[3084] See, in this regard, paras. 1510–1511 (capacity to arbitrate); paras. 1541–1542 (power/authority to arbitrate); paras. 1590–1591 (extension to a non-signatory).

[3085] See above, paras. 1997 et seq.

[3086] See para. 1730 et seq. (obligation to negotiate/mediate in good faith) and para. 1975 (obligation to arbitrate).

[3087] See, in this regard the view of Pierre Mayer with respect to the application of good faith as a general principle of law : MAYER, bonne foi, 554: "*Il n'y a en fait guère de règles de la théorie générale des obligations qu'on ne puisse justifier par un recours similaire à la notion de bonne foi.* […] *Toute solution équitable - et le droit, le plus souvent, n'est pas contraire à l'équité - serait imposée au nom de la bonne foi*."; see also JARROSSON, *bonne foi*, §35, 204 : "*La bonne foi ne doit pas venir la seule règle dont dépend la solution*." ("good faith should not become the only rule on which the solution depends.") (informal English translation of the French original). The author is of the view that this reasoning also applies to the application of good faith by arbitral tribunals to the various issues surrounding the arbitration agreement.

manifestation of good faith, such manifestation should be applied instead of the general principle of good faith. To paraphrase WIGHTMAN, arbitrators should not "jump to the very high level of generality of good faith […] [and] leave behind 'middle range' arguments which capture better the reason for intervention."[3088] Furthermore, doctrines based on equity and good faith (as compared to those based on consent) should only be employed in extraordinary circumstances given that their objective is to correct the strict application of the law.[3089]

2100. First, in the case where a party participates in the arbitral proceedings without raising an objection with respect to the formal validity of the arbitration agreement, it is proposed that an arbitral tribunal should give preference to the application of any applicable provisions on waiver or formation of a new arbitration agreement rather than employing the general principle of good faith to prevent such a party from invoking the formal invalidity of the arbitration agreement.[3090]

2101. Second, with respect to the issue of a State party's alleged lack of capacity to arbitrate, it is proposed that arbitral tribunals should first verify whether the prohibition or restriction is in fact applicable and – if so – whether there is an international or national legal provision which prevents this State party from relying on its own national law to contest that it has the capacity to arbitrate. In the absence of such a provision, arbitral tribunals should give preference to the doctrine of legitimate expectations (if available under the applicable law), rather than good faith, to override the requirement of the capacity to arbitrate, given that this doctrine takes into account that the other party may be aware, or should be aware, of the prohibition or restrictions on the State party's ability to enter into arbitration agreements.[3091]

2102. Third, with respect to the issue of a party's alleged lack of power or authority to arbitrate, it is proposed that arbitral tribunals should first give preference to legal theories based on consent (if available under the applicable law) before giving preference secondly to the specific legal doctrine of apparent authority (if available under the applicable law) which is deemed to be derived from the principle of good faith, in order to override the lack of power or authority to arbitrate.[3092]

2103. Fourth, with respect to the issue of whether an arbitration agreement should be extended to a non-signatory, it is submitted that arbitral tribunals should give

[3088] JOHN WIGHTMAN, Good Faith and Pluralism in the Law of Contract in Good Faith in Roger Brownsword/Norma Hird/Geraint Howells (eds) Good Faith in Contract, Concept and Context (Dartmouth 1999), 41, 60 at fn 56.

[3089] BREKOULAKIS, 624.

[3090] See above, para. 1413.

[3091] See paras. 1509–1511.

[3092] See paras. 1541–1542.

preference to any consent-based theories over the application of theories grounded on equitable considerations. Such consent-based theories include the application of the interpretative function of good faith. In the absence of any applicable consent-based theories, an arbitral tribunal may apply good faith – and more specifically the corrective function of good faith – to the issue of the extension of an arbitration agreement to a non-signatory if such principle forms part of the applicable law. However, arbitral tribunals should give preference to the specific doctrines derived from good faith such as the doctrines of apparent authority, piercing of the corporate veil and estoppel rather than directly applying good faith to the issue of the extension of the arbitration agreement.[3093]

2104. Finally, it is advocated that where the applicable institutional mediation rules, *lex arbitri,* institutional arbitration rules or transnational soft law rules explicitly stipulate a duty, which also flows from the obligation to mediate/arbitrate in good faith, arbitral tribunals should give preference to this explicit source of the duty rather than the general obligation to mediate/arbitrate in good faith.[3094]

3. Employ *fallgruppen* methodology to rationalize obligations to negotiate, mediate and arbitrate in good faith

2105. As seen above, the main difficulty with pre-arbitration requirements to negotiate or mediate in good faith (aside from their validity and enforceability and the consequences of their violation) is the identification of the content of these requirements. In this regard, it is proposed that the *fallgruppen* methodology should be employed in order to rationalize the content of the obligation to negotiate or mediate in good faith prior to resorting to arbitration.[3095]

2106. With respect to the obligation to arbitrate in good faith, it has been argued that there is a danger of drowning in an excess of specific rules implementing the obligation to arbitrate in good faith. In this regard, it is again proposed that the *fallgruppen* methodology should be employed in order to rationalize the content of the obligation to arbitrate in good faith.[3096] In the author's view, the increased predictability and certainty of rationalizing and applying these specific rules outweighs the increased efficiency of directly applying a general principle of good faith.[3097]

[3093] See paras. 1589–1591.
[3094] See above, para. 1738 and para. 1990.
[3095] See para. 1737.
[3096] See paras. 1988–1989.
[3097] See para. 1977 et seq.

2107. By employing the *fallgruppen* methodology, it is hoped that the content of the obligations to negotiate or mediate in good faith prior to resorting to arbitration, as well as the content of the obligation to arbitrate in good faith will become more objective, rational and predictable. However, this "inner system" of the content of the obligations to negotiate, mediate or arbitrate in good faith should not become a straitjacket. Indeed, it should retain a certain flexibility so that further specific applications of the obligations to negotiate, mediate or arbitrate in good faith may be added and that existing specific applications can be modified where necessary.[3098]

2108. It is advocated that a harmonized stance with respect to the content of the obligations to negotiate, mediate or arbitrate in good faith should be applied in international commercial arbitrations and that the content of these obligations should not vary according to the source of good faith. Such a harmonized content will give valuable guidance to international commercial arbitration users on how they should conduct themselves in pre-arbitral negotiations or mediations as well as international arbitral proceedings and would lead to increased certainty and predictability.[3099]

B. Specific guidelines

2109. The specific guidelines with respect to the application of good faith to the formal validity of the arbitration agreement (1.), the incorporation of the arbitration agreement by reference (2.), the interpretation of the arbitration agreement (3.), the capacity of a party to arbitrate (4.), the power or authority of a party to arbitrate (5.), the extension of an arbitration agreement to a non-signatory (6.), the pre-arbitration requirements to negotiate or mediate (7.) and the performance of the arbitration agreement (8.) are set out below.

1. Application of good faith to the formal validity of the arbitration agreement

2110. Before applying good faith to the issue of the formal validity of the arbitration agreement, an arbitral tribunal should first set out the relevant formal requirements of the national arbitration law at the seat of the arbitration.[3100]

[3098] See para. 1737 and para. 1989.
[3099] See para. 1738 and para. 1990.
[3100] See para. 1407.

2111. In the event that the arbitration agreement does not comply with the applicable formal requirements, an arbitral tribunal should then determine whether or not good faith can override such formal requirements under the applicable law.[3101]

2112. If good faith may, in principle, override the relevant formal requirements under the applicable law, it is submitted that in the presence of certain contradictory conduct (as set out in more detail below), the relevant formal requirements can be disregarded. It should, however, be borne in mind that whether certain conduct is contrary to good faith will always ultimately depend on the facts of the case in question.[3102]

2113. First, if a party acts in a manner during the parties' prior commercial relationship which shows that it approved of the arbitration agreement, good faith may prevent this party from thereafter invoking the formal invalidity of the same. This may be the case, for example, where there were similar or related prior contracts containing arbitration agreements between the parties which did not suffer from any formal defects or which the party invoking the formal defect had previous relied on.[3103]

2114. Second, in the author's view, good faith should not be applied to override formal validity requirements when a party has not objected to the arbitration agreement and has merely performed the contract (in spite of the view of part of the legal doctrine to the contrary). In the author's view, this would be going too far as it would be equivalent to eliminating the formal requirements for the validity of an arbitration agreement and instead imposing a positive obligation on the parties to object immediately to a formally invalid arbitration clause included in a contract.[3104]

2115. Third, if a party, prior to the arbitral proceedings, relies on the arbitration agreement either before a national court or another arbitral tribunal or assures the other party that it will not rely on the agreement's lack of compliance with the relevant formal requirements, good faith can be applied to prevent that party from thereafter invoking the formal invalidity of the arbitration agreement.[3105]

2116. Fourth, if a party participates in the arbitral proceedings without objection, good faith may prevent that party from invoking thereafter a lack of compliance of the arbitration agreement with formal requirements. Good faith, however, has a limited role to play in this context. This is because many national arbitration laws and institutional arbitration rules expressly provide that in such a case: (i.)

[3101] See para. 1408.
[3102] See para. 1409.
[3103] See para. 1410.
[3104] See para. 1411.
[3105] See para. 1412.

a party is deemed to have waived its right to invoke the lack of compliance with formal validity requirements; or that (ii.) a new formally valid arbitration agreement has been concluded. In this case, an arbitral tribunal should give preference to the application of the relevant specific provisions on waiver or formation of a new arbitration agreement rather than the general principle of good faith.[3106]

2. Application of good faith to the incorporation of the arbitration agreement by reference

2117. With respect to the incorporation of an arbitration agreement by reference, good faith should only be applied by an arbitral tribunal to this issue if the applicable law to this issue directs that good faith may be applied in order to determine whether terms or clauses (and, in particular, arbitration agreements) from other documents may be incorporated into a contract.[3107]

2118. If the applicable law directs that good faith may be employed in determining whether an arbitration agreement is incorporated by reference, the following examples may aid in determining whether, on the facts of that particular case, good faith may support, or mitigate against, the incorporation of the arbitration agreement by reference. It should, however, be borne in mind that whether good faith supports the incorporation of the arbitration agreement by reference or not will always ultimately depend on the facts of the case in question.[3108]

2119. In accordance with good faith, an arbitration agreement may be deemed to be validly incorporated in the following circumstances: (i.) where an arbitration agreement is contained in general conditions which are referred to and are attached to an order confirmation; (ii.) where an arbitration agreement is contained in general terms and conditions referred to in the order confirmation in circumstances where the party has accepted performance under the contract, has contested other points in the order confirmation and did not object to the arbitration agreement therein; (iii.) where a specific reference is made to the arbitration agreement in the other document and the document referred to is either attached to the contract, or is known to the other party, for example, through previous commercial dealings between the same parties; (iv.) where a specific reference is made in a contract between experienced business users to the arbitration agreement in the other document even though such document is not attached and is not known to the parties (unless the arbitration agreement contains unusual terms for that trade sector); and (v.) where there is a global reference to

[3106] See para. 1413.
[3107] See para. 1438.
[3108] See para. 1439.

a document containing an arbitration agreement if the party agrees to the global reference without objecting and is aware of the arbitration agreement.[3109]

2120. In accordance with good faith, an arbitration agreement may not be deemed to be validly incorporated in a case where there is a global reference to a document containing an arbitration agreement and the party relying on the arbitration agreement knows or should have known that the other party was not ready to submit to arbitration or only under different conditions.[3110]

3. Application of good faith to the interpretation of the arbitration agreement

2121. In cases where an arbitral tribunal is directed to apply the general contractual interpretation rules of a certain national law to the interpretation of the arbitration agreement, then such arbitral tribunal may apply the rule of good faith interpretation if such rule forms part of these general contractual rules.[3111]

2122. When applying the rule of good faith interpretation under the applicable law to the arbitration agreement, the arbitral tribunal should, in general, determine the content of the rule of good faith interpretation in accordance with the case law and legal doctrine of the applicable law.[3112]

2123. In cases where an arbitral tribunal is directed to apply non-national rules to the interpretation of the arbitration agreement (in line, for example, with the approach taken by the French courts), then this arbitral tribunal may directly apply the rule of good faith interpretation to the arbitration agreement. The general canon of contractual interpretation in good faith has the following content: the parties' true and common intention, as distinct from their declared intention, should be ascertained without being limited to a literal interpretation of the arbitration agreement. Accordingly, one should look at the context in which the arbitration agreement was concluded in order to ascertain the consequences that the parties reasonably and legitimately envisaged. One should also look at the conduct of the parties following the signature of the arbitration agreement as a reflection of how the parties actually perceived the agreement. Finally, the arbitration agreement should be interpreted as a whole.[3113]

[3109] See para. 1440.
[3110] See para. 1441.
[3111] See para. 1469.
[3112] See para. 1470.
[3113] See para. 1471.

4. Application of good faith to the capacity of a party to arbitrate

2124. In the event that a State party alleges that it lacks capacity to arbitrate under its internal law, arbitral tribunals should first verify whether the prohibition or restriction is in fact applicable and – if so – whether there is an international or national legal provision which prevents this State party from relying on its own national law to contest that it has the capacity to arbitrate.[3114]

2125. In the absence of such a provision, arbitral tribunals should give preference to the doctrine of legitimate expectations (if available under the applicable law), rather than good faith, to potentially override the requirement of the capacity to arbitrate, given that this doctrine takes into account that the other party may be aware, or should have been aware, of the prohibition or restrictions on the State party's ability to enter into arbitration agreements.[3115]

2126. If the doctrine of legitimate expectations is not available under the applicable law, the arbitral tribunal may potentially have recourse to good faith (or its specific manifestation in the form of the prohibition of contradictory behaviour) in order to prevent a State party from alleging a lack of capacity to arbitrate if: (i.) good faith and the prohibition of contradictory behaviour derived therefrom forms part of the applicable law; and (ii.) there is contradictory conduct, namely, the State party who is alleging a lack of capacity to arbitrate has previously held itself out as having the capacity to arbitrate.[3116]

5. Application of good faith to the power or authority of a party to arbitrate

2127. In the event that a party lacks the power or authority to arbitrate under the applicable law, arbitral tribunals should first give preference to legal theories based on consent (if available under the applicable law) before giving preference to the specific legal doctrine of apparent authority (if available under the applicable law), which is deemed to be derived from the principle of good faith, in order to potentially override the lack of power or authority to arbitrate.[3117]

2128. In the absence of a doctrine of apparent authority under the applicable law, good faith (or the prohibition of contradictory conduct derived therefrom) may potentially be applied to cure a lack of power or authority to arbitrate if: (i.) good faith and the prohibition of contradictory behaviour derived therefrom form part

[3114] See para. 1509.
[3115] See para. 1510.
[3116] See para. 1511.
[3117] See para. 1541.

of the applicable law; and (ii.) there is contradictory conduct, namely, the party who is alleging a lack of power or authority to arbitrate has previously held itself out as having the power or authority to arbitrate.[3118]

6. Application of good faith to the extension of the arbitration agreement to a non-signatory

2129. When extending an arbitration agreement to a non-signatory, arbitral tribunals should give preference to any consent-based theories over the application of theories grounded on equitable considerations. As it has been stated, doctrines based on equity and good faith (such as estoppel, apparent authority, piercing of the corporate veil) should only be employed in extraordinary circumstances as their objective is to correct the strict application of the law.[3119]

2130. Such consent-based theories include the application of the interpretative function of good faith.[3120]

2131. In the absence of any applicable consent-based theories, an arbitral tribunal may apply good faith – and more specifically the corrective function of good faith – to the issue of the extension of an arbitration agreement to a non-signatory if such principle forms part of the applicable law. Arbitral tribunals should give preference to the specific doctrines derived from good faith such as the doctrines of apparent authority, piercing of the corporate veil and estoppel rather than directly applying good faith to the issue of the extension of the arbitration agreement.[3121]

7. Application of good faith to pre-arbitration requirements

2132. With respect to the proposed guidelines for the application of good faith by arbitral tribunals to pre-arbitration requirements, it is submitted that arbitral tribunals should first determine whether the relevant pre-arbitration requirement is valid and enforceable under the applicable law.[3122]

2133. If such pre-arbitration requirement is valid and enforceable, arbitral tribunals should firstly, before having recourse to good faith in connection with any pre-arbitration requirements to negotiate or mediate, proceed to identify the source of the obligation to negotiate or mediate in good faith. In case of a pre-arbitral

[3118] See para. 1542.
[3119] See para. 1589.
[3120] See para. 1590.
[3121] See para. 1591.
[3122] See para. 1729.

obligation to negotiate, arbitral tribunals should first look to see if there is a contractual source of good faith, i.e., an express or implied contractual provision obliging the parties to negotiate in good faith. If there is no contractual source, arbitral tribunals should turn to the general legal source of the law applicable to the arbitration agreement which may impose a duty on parties to perform contractual obligations in good faith which may also, by extension, be applied to the contractual obligation to negotiate prior to resorting to arbitration. In case of a pre-arbitral obligation to mediate, arbitral tribunals should first ascertain whether there is a contractual source of good faith, i.e., an express or implied contractual provision obliging the parties to mediate in good faith or a specific legal source, i.e., such as an obligation to mediate in good faith found in the applicable mediation rules. If there is no contractual or specific legal source, arbitral tribunals should then turn to the general legal source of the law applicable to the arbitration agreement which may impose a duty on parties to perform contractual obligations in good faith which may also, by extension, be applied to the contractual obligation to mediate prior to resorting to arbitration.[3123]

2134. Arbitral tribunals should ascertain the established specific rule derived from the obligation to negotiate or mediate in good faith prior to resorting to arbitration (such as the duty to invite all relevant participants or the duty to send a representative with appropriate authority) which is applicable to the case before them. If there is no established specific rule, an arbitral tribunal may create a new specific rule implementing the obligation to negotiate or mediate in good faith. In the latter case, the arbitral tribunal should aim to craft the new rule as specifically and precisely as possible.[3124]

2135. Notwithstanding the above, where the applicable institutional mediation rules explicitly stipulate a duty, which also flows from the obligation to mediate in good faith, arbitral tribunals should give preference to this explicit source of the duty rather than the general obligation to mediate in good faith. This may be the case with respect to the duty to send an appropriate representative with requisite authority, the duty to cooperate with the mediator, the duty to facilitate visits to and inquiries at, any place connected with the dispute, as well as to use the means at their disposal to enable the mediator to hear the witness, and the duty to maintain the confidentiality of the mediation. This does not prevent the arbitral tribunal from additionally noting that the failure to comply with the duty set out in the specific provision in question also constitutes a violation of the obligation to mediate in good faith and to sanction this violation accordingly.[3125]

[3123] See paras. 1730–1733.
[3124] See para. 1734.
[3125] See para. 1735.

2136. The content of the obligations to negotiate or mediate prior to resorting to arbitration should be rationalized using the *fallgruppen* methodology. As already stated however,[3126] this "inner system" of the content of the obligation to negotiate or mediate in good faith should not become a straitjacket. Indeed, it should retain a certain flexibility so that further specific applications of the obligation to negotiate or mediate in good faith may be added and that existing specific applications can be modified where necessary. As already stated above,[3127] it is advocated that a harmonized stance with respect to the content of the pre-arbitration requirements to negotiate or mediate in good faith should be applied in international commercial arbitrations and that the content of these requirements should not vary according to the source of the obligation to negotiate or mediate *in good faith*.[3128]

2137. If it is alleged that evidence of bad faith conduct is covered by privilege or confidentiality, the arbitral tribunal should proceed to determine whether this is the case and whether any exceptions apply. If it is alleged that evidence of the violation of the obligation to negotiate/mediate in good faith is covered by privilege or is confidential, arbitral tribunals should set out the scope of the settlement/mediation privilege or confidentiality doctrine under the applicable law and determine whether the evidence of the violation of the obligation to arbitrate/mediate in good faith is covered by privilege/confidentiality and, if so, determine whether any legally recognized exceptions may apply or if the parties can be deemed to have waived the privilege/confidentiality. If there are no legally recognized exceptions, and if the parties cannot be deemed to have waived the privilege/confidentiality, then the arbitral tribunal should weigh the need for the evidence of the violation of the obligation to negotiate/mediate in good faith against the policy behind the asserted settlement/mediation privilege/confidentiality. The arbitral tribunal should lean towards admitting the evidence, in particular, if such evidence does not include information about the substantive claims, in particular, the various offers and proposals made.[3129]

2138. In case of a violation of the pre-arbitration requirements to negotiate or mediate in good faith, arbitral tribunals should ascertain the relevant consequence based on the applicable law.[3130]

[3126] See para. 2107.
[3127] See para. 2108.
[3128] See paras. 1737–1738.
[3129] See paras. 1739–1740.
[3130] See para. 1741.

8. Application of good faith to the performance of the arbitration agreement

2139. With respect to the proposed guidelines for the application of good faith by arbitral tribunals to the performance of the arbitration agreement, it is submitted that arbitral tribunals should first identify the source of the obligation to arbitrate in good faith.[3131] Arbitral tribunals should first look to see if there is a contractual source of good faith i.e., an express contractual provision obliging the parties to arbitrate in good faith, or a specific legal source of good faith, i.e., an obligation to arbitrate in good faith found in the applicable institutional arbitration rules, in the applicable *lex arbitri,* or in transnational soft law rules (when these have become hard law by virtue of the parties' agreement). If there is no contractual or specific legal source, arbitral tribunals should then turn to the general legal source of the law applicable to the arbitration agreement which may impose a duty on parties to perform contractual obligations in good faith which may also, by extension, be applied to the contractual obligation to arbitrate. In the absence of a general legal source imposing the obligation to arbitrate in good faith, arbitral tribunals may rely on the submission that the obligation to arbitrate in good faith flows from the arbitral process itself.[3132]

2140. Arbitral tribunals should apply a specific rule implementing the obligation to arbitrate in good faith. It is submitted that the general principle of good faith should be the guiding principle governing the arbitral proceedings. However, the general principle of good faith should not be applied directly but through its specific manifestations. Notwithstanding, an arbitral tribunal may have recourse to the general principle of good faith in order to create a new specific rule when an existing specific rule does not cover the case in point. When doing so, the arbitral tribunal should aim to craft the new rule as specifically and precisely as possible.[3133]

2141. Notwithstanding the above, where the applicable *lex arbitri,* institutional arbitration rules or transnational soft law rules explicitly stipulate a duty, which also flows from the obligation to arbitrate in good faith, arbitral tribunals should give preference to this explicit source of the duty rather than the general obligation to arbitrate in good faith. This may be the case, for example, with respect to the duty to nominate an arbitrator, the duty to not make repeated arbitrator challenges, the duty to raise a challenge as soon as possible in the arbitral proceedings, the duty to not challenge an arbitrator for reasons that a party was aware of prior to the appointment of such arbitrator, the duty not to knowingly raise

[3131] See para. 1975.
[3132] See para. 1976.
[3133] See para. 1986.

unfounded jurisdictional objections, the duty not to raise jurisdictional objections when one could have done so earlier, the duty not to make frivolous or vexatious claims or defenses that are not reasonably arguable in law or fact, the duty not to make unilateral contact with the members of the arbitral tribunal, the duty not to exert any pressure or influence on the arbitral tribunal, and the duty to raise any procedural objections in a timely manner in the arbitral proceedings. This does not prevent the arbitral tribunal from additionally noting that the failure to comply with these duties also constitutes a violation of the obligation to arbitrate in good faith and to sanction this violation accordingly.[3134]

2142. In this respect, it is proposed that the specific rules comprising the obligation to arbitrate in good faith can be rationalized using the *fallgruppen* methodology. As already stated however, [3135] this "inner system" of the content of the obligation to arbitrate in good faith should not become a straitjacket. Indeed, it should retain a certain flexibility so that further specific applications of the obligation to arbitrate in good faith may be added and that existing specific applications can be modified where necessary.[3136]

2143. As already stated above,[3137] a harmonized stance with respect to the content of the obligation to arbitrate in good faith should be applied in international commercial arbitrations and the content of this obligation should not vary according to the source of good faith. [3138]

2144. Thereafter, arbitral tribunals should identify the basis of their power to sanction the violation of the obligation to arbitrate in good faith.[3139]

2145. In general, arbitral tribunals should give preference to the award of the costs of the arbitration in order to sanction a violation of the obligation to arbitrate in good faith.[3140]

[3134] See para. 1987.
[3135] See para. 2107.
[3136] See para. 1989.
[3137] See para. 2108.
[3138] See para. 1990.
[3139] See para. 1991.
[3140] See para. 1992.

* * *

2146. In order to secure the continued success and popularity of international commercial arbitration in the future as a dispute resolution mechanism between members of the international business community, the objections and uncertainties outlined above with respect to the application of good faith[3141] should be addressed.

2147. The present thesis proposes guidelines for the application of good faith by arbitral tribunals to both the parties' contract and the arbitration agreement.[3142] As an inherently uncertain concept, the uncertainty surrounding the application of good faith cannot be completely eliminated. However, it is advocated that the uncertainty surrounding its application can be decreased to a great extent if such a rigorous and consistent approach is adopted when applying this notion.

[3141] See paras. 41–90.

[3142] See para. 1093 et seq. (application of good faith to the parties' contract on the basis of an express good faith provision; para. 1165 et seq. (application of good faith to the parties' contract on the basis of a national law); para. 1291 et seq. (application of good faith to the parties' contract on the basis of a non-national law); para. 1349 et seq. (application of good faith to the parties' contract when the arbitral tribunal is endowed with the power to rule ex aequo et bono); para. 1407 et seq. (application of good faith to the formal validity of the arbitration agreement); para. 1438 et seq. (application of good faith to the incorporation of the arbitration agreement); para. 1469 et seq. (application of good faith to the interpretation of the arbitration agreement), para. 1509 et seq. (application of good faith to the capacity to arbitrate); para. 1541 et seq. (application of good faith to the power to arbitrate); para. 1589 et seq. (application of good faith to the extension of the arbitration agreement to a non-signatory); para. 1727 et seq. (application of good faith to the obligations to negotiate/mediate); para. 1973 et seq. (application of good faith to the obligation to arbitrate).

Appendix A: Arbitral awards in which good faith was applied to the parties' contract on the basis of a national law (chronological order)

	Date	Case	Applicable law	Reference	Abbreviation
			1964-1971		
1.	05.01.1964	ICC Case No 1250 Lebanese distributor v Western European car manufacturer	Lebanese law	(1980) 5 YB Comm Arb 168–169	ICC Case No 1250 of 1964
			1972-1976		
2.	01.01.1972	ICC Case No 2114 Meiki Co Ltd (Japanese) v Bucher-Guyer SA (Swiss)	Swiss law	(1980) 5 YB Comm Arb 189–192	ICC Case No 2114 of 1972
			1977-1978		
3.	18.10.1977	Hamburg Friendly Arbitration Parties not indicated	German law	(1979) 4 YB Comm Arb 203–205	HFA Case dated 18 October 1977
			1979-1980		
4.	01.01.1979	ICC Case Nos 3099/3100 Algerian state enterprise, seller v African state enterprise, buyer	Algerian law	(1982) 7 YB Comm Arb 87–95	ICC Case Nos 3099/3100 of 1979
5.	01.01.1979	ICC Case No 3316 Mexican Construction Company v Belgian bank	Belgian law	(1982) 7 YB Comm Arb 106–115	ICC Case No 3316 of 1979
			1981		
6.	08.03.1981	SMA Case No 1569 Pollux Marine Agencies Inc, agent for owners v Louis Dreyfus Corp, Charterer	New York law	(1983) 8 YB Comm Arb 171–180	SMA Case No 1569 of 1981
			1982		
7.	01.04.1982	Ad hoc arbitration Company Z and others v State Organization ABC	Utopian law (Iranian law)	(1983) 8 YB Comm Arb 94–117	Company Z and others v State Organization ABC (April 1982)
			1983-1984		
8.	09.09.1983	Ad hoc arbitration FR Germany engineering company v Polish buyer	Swiss law	(1987) 12 YB Comm Arb 63–81	Ad hoc arbitration of 9 September 1983

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		1985			
9.	01.01.1985	ICC Case No 5080 US Company v Spanish company	Swiss law	(1987) 12 YB Comm Arb 124–128	ICC Case No 5080 of 1985
		1986			
10.	01.01.1986	ICC Case No 5073 US exporter v Argentine distributor	Law of California	(1988) 8 YB Comm Arb 53–68	ICC Case No 5073 of 1986
11.	09.12.1986	Ad hoc arbitration Société d'Economie Mixte Guineo-Norvégienne de Transport Maritime-Guinomar v MMA	New York law	(1990) 15 YB Comm Arb 11–29	*Société d'Economie Mixte Guineo-Norvégienne de Transport Maritime-Guinomar v MMA, ad hoc* arbitration, 9 December 1986
		1987			
12.	01.01.1987	ICC Case No 4761 Italian consortium v. Libyan company	law of Libya / lex mercatoria or general principles of law if Libyan law contrary to to international public policy or good faith, not proved or contains a gap	(1987) JDI 1012–1018	ICC Case No 4761 of 1987
		1988			
13.	01.01.1988	ICC Case No 5294 Danish firm v Egyptian firm	Swiss law	(1989) 14 YB Comm Arb 137–145	ICC Case No 5294 of 1988
14.	01.01.1988	ICC Case No 5477 Italian company v American company	New Hampshire law	(1988) JDI 1204–1206	ICC Case No 5477 of 1988
		1989			
15.	31.12.1989	CRCICA Case No 14/1989 European company v African Government authority	Egyptian law	M. E. I. Alam Eldin (ed) Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I (Kluwer Law International 2000) 17–22	CRCICA Case No 14/1989

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1990					
16.	01.01.1990	ICC Case No 5946	New York law	(1991) 16 YB Comm Arb 97–118	ICC Case No 5946 of 1990
17.	01.01.1990	ICC Case No 6283 Representative v Principal	Belgian law	(1992) 17 YB Comm Arb 178–185	ICC Case No 6283 of 1990
18.	27.05.1991	Ad hoc arbitration Association of service industry firms v Service industry firm	Swiss law	(1992) 17 YB Comm Arb 11–41	*ad hoc* arbitration of 27 May 1991
1992					
19.	01.01.1992	ICC Case No 6673	French law	(1992) JDI 992–998	ICC Case No 6673 of 1992
20.	01.01.1992	ICC Case No 7006 Supplier v First Distributor	French law	(1993) 18 YB Comm Arb 58–67	ICC Case No 7006 of 1992
1993					
21.	01.01.1993	ICC Case No 6490 Netherlands Antilles company v Venzuelan company	Law of Netherlands Antilles	(1999) YB Comm Arb 71 et seq. 2011 ICC Dispute Resolution Library	ICC Case No 6490 of 1993
22.	01.01.1993	ICC Case No 6955 Trading Company v Manufacturer	Law of Illinois / UCC	(1999) 24 YB Comm Arb 107–140	ICC Case No 6955 of 1993
23.	05.03.1993	CRCICA Case No 37/1992 An Asian company v An African Agricultural Bank	Egyptian law	M. E. I. Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I (Kluwer Law International 2000) 69–72	CRCICA Case No 37/1992 (5 March 1993)
24.	15.05.1993	CRCICA Case No 27/1992 A European Company v An African public sector company	Egyptian law	M. E. I. Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I (Kluwer Law International 2000) 193–196	CRCICA Case No 27/1992 (15 May 1993)
25.	30.06.1993	CRCICA Case No 32/1992 An International Company v An African Holding Company	Egyptian law	M. E. I. Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I (Kluwer Law International 2000) 51–52	CRCICA Case No 32/1992 (30 June 1993)
26.	30.06.1993	CRCICA Case No 34/1992 An International Company v An African Holding Company	Egyptian law	M. E. I. Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I (Kluwer Law International 2000) 53–56	CRCICA Case No 34/1992 (30 June 1993)

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27.	06.08.1993	CRCICA Case No 21/1990 European company v African Public Sector company	Egyptian law	M. E. I. Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I (Kluwer Law International 2000) 147–150	CRCICA Case No 21/1990 (6 August 1993)
28.	30.09.1993	CCIR Case No 33 Agent v Seller	Romanian law	(1998) 23 YB Comm Arb 113–127	CCIR Case No 33 (30 September 1993)
			1994		
29.	01.01.1994	ICC Case No 6998 Hotel Monaco; Hotel Inc v Joint Venture Monaco; Joint Venture Switzerland	German law	(1996) 21 YB Comm Arb 54–78	ICC Case No 6998 of 1994
30.	01.01.1994	ICC Case No 7047 Consultant v State agency	Swiss law	(1996) 21 YB Comm Arb 79–98	ICC Case No 7047 of 1994
31.	01.01.1994	ICC Case No 7639 Qatari Sponsor v Italian Contractor	Qatari law	(1998) 23 YB Comm Arb 66–79	ICC Case No 7639 of 1994
32.	01.01.1994	ICC Case No 8423 Portuguese Company v French parent company, French subsidiary	Law of Portugal	(2001) 26 YB Comm Arb 153–166	ICC Case No 8423 of 1994
			1995		
33.	01.01.1995	ICC Case No 6197 Plant operator v Plant engineer	Swiss law	(1998) 23 YB Comm Arb 13–29	ICC Case No 6197 of 1995
34.	01.01.1995	ICC Case No 7314 Manufacturer v Licensor	Greek law	(1998) 23 YB Comm Arb 49–65	ICC Case No 7314 of 1995
35.	01.01.1995	ICC Case No 7539 French company v Greek company	French law	(1996) JDI 1030–1037	ICC Case No 7539 of 1995
36.	01.01.1995	ICC Case No 8032 Supplier v Buyer	French law	(1996) 21 YB Comm Arb 113–122	ICC Case No 8032 of 1995
37.	01.01.1995	ICC Case No 8035 Claimant v State	Libyan law	(1997) JDI 1040–1046	ICC Case No 8035 of 1995
38.	01.01.1995	ICC Case No 8362 Distributor v Manufacturer	New York law	(1997) 22 YB Comm Arb 164–177	ICC Case No 8362 of 1995
39.	15.11.1995	CRCICA Case No 43/1995	Egyptian law	M. E. I. Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial	CRCICA Case No 43/1995 (15

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		A European Company v An African Tourist Company		Arbitration I (Kluwer Law International 2000) 161–172	November 1995)
40.	15.12.1995	CRCICA Case No 40/1992 African company v European company	Egyptian law	M. E. I. Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I (Kluwer Law International 2000) 95–102	CRCICA Case No 40/1992 (15 December 1995)
41.	21.12.1995	CRCICA Case No 24/1995 African government body v A European Poultry Company	Egyptian law	M. E. I. Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I (Kluwer Law International 2000) 45–50; (1997) 22 YB Comm Arb 13–27	CRCICA Case No 24/1995 (21 December 1995)
1996					
42.	01.01.1996	ICC Case No 8147 Panama company v French company	French law	(2001) 12 ICC Bull 76	ICC Case No 8147 of 1996
43.	01.01.1996	ICC Case No 8548 US agent v German & Belgian manufacturers	Law of Holland	E JOLIVET, *La jurisprudence arbitrale de la CCI et la lex mercatoria* in (2001) Gazette du Palais no.119, 6–44	ICC Case No 8548 of 1996
44.	21.03.1996	HFA Arbitration dated 21 March 1996 (Chinese Goods case)	German law	https://cisg-online.org/search-for-cases?caseId=6162	HFA Arbitration dated 21 March 1996 (Chinese Goods case)
45.	04.12.1996	Ad hoc arbitration	Italian law	http://www.unilex.info/case.cfm?id=631	Ad hoc arbitration of 4 December 1996
1997					
46.	01.01.1997	ICC Case No 7365	Iranian law / general principles of law	(2004) 15 ICC Bull 117	ICC Case No 7365 of 1997
1998					
47.	01.01.1998	ICC Case No 8908 Italian manufacturer v Liechtenstein distributor	Italian law	http://www.unilex.info/case.cfm?id=663	ICC Case No 8908 of 1998
48.	01.01.1998	ICC Case No 9029 Parties not indicated	Italian law	(1999) 10 ICC Bull 88	ICC Case No 9029 of 1998
49.	01.01.1998	ICC Case No 9593 Distributor (Ivory Coast) v British & Japanese JV	Law of the Republic of the Ivory Coast	(1999) 10 ICC Bull 110	ICC Case No 9593 of 1998

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50.	26.01.1998	ICAC at the RFCCI arbitration 76/1997 Russian buyer v Algerian seller	Algerian law	https://iicl.law.pace.edu/cisg/search/cases	ICAC at the RFCCI arbitration 76/1997 (26 January 1998)
1999					
51.	01.01.1999	ICC Case No 7722 Contractor (France) v Client (country X)	Law of country X	(2007) 32 YB Comm Arb13–41	ICC Case No 7722 of 1999
52.	01.01.1999	ICC Case No 9613 Investment company v Mining company	Italian law	(2007) 32 YB Comm Arb 42–59	ICC Case No 9613 of 1999
53.	01.01.1999	ICC Case No 9753	Czech law	(2001) 12 ICC Bull 86	ICC Case No 9753 of 1999
54.	01.01.1999	ICC Case No 9839 Mergers and acquisitions firm Q Inc. (US), Mergers and acquisitions firm Q-Spain, S.L. (Spain) v Mergers and acquisitions firm Q-Z Ltd. (US)	Law of New York	(2004) 29 YB Comm Arb 66–88	ICC Case No 9839 of 1999
55.	01.01.1999	ICC Case No 10074 German bank v Turkish bank	German law	(2006) 17 ICC Bull 107	ICC Case No 10074 of 1999
56.	01.01.1999	ICC Case No 10188 Software distributor M v Software developer E	German law	(2003) 28 YB Comm Arb 68–92	ICC Case No 10188 of 1999
57.	01.01.1999	CEPANI Case No 2106 Bermuda company v Delaware company	Belgian law	GUY KEUTGEN (ed) Collection of CEPANI Arbitral Awards 1996-2001 (Bruylant 2008)	CEPANI Case No 2106 of 1999
58.	24.11.1999	AIA Case No 76/98 Exclusive Distributor v Principal	Italian law	(2000) 25 YB Comm Arb 368–381	AIA Case No 76/98 (24 November 1999)
2000					
59.	01.01.2000	ICC Case No 10335 2 Greek companies v French company	Greek law	(2001) 12 ICC Bull 107	ICC Case No 10335 of 2000
60.	01.01.2000	ICC Case No 10346	Columbian law	http://www.unilex.info/case.cfm?pid=2&do=case&id=700&step=FullText	ICC Case No 10346 of 2000
61.	08.03.2000	CRCICA Case No 154/2000 Two African printing companies v An African printing authority	Egyptian law	M. E. I. Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration II 1997-2000 (Kluwer Law International 2003) 45–50	CRCICA Case No 154/2000 (8 March 2000)

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62.	04.04.2000	CRCICA Case No 145/1999 African maritime navigation company v The Minstry of Defence of an African State	Egyptian law	M. E. I. Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I (Kluwer Law International 2000) 141–146	CRCICA Case No 145/1999 (4 April 2000)
63.	14.12.2000	CRCICA Case No 173/2000 African Consulting Company v Union of public sector construction companies	Egyptian law	M. E. I. Alam Eldin (ed), Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration I (Kluwer Law International 2000) 57–62	CRCICA Case No 173/2000 (14 December 2000)
2001					
64.	01.01.2001	ICC Case No 10341 Belgian charterer v Belgian shipowner	Belgian law	Special Supplement 2011: Interim, Conservatory and Emergency Measures in ICC Arbitration, 50	ICC Case No 10341 of 2001
65.	01.01.2001	ICC Case No 10351 Parties not indicated	French law	(2009) 20 ICC Bull 76	ICC Case No 10351 of 2001
2002					
66.	01.01.2002	ICC Case No 10377 Buyer (Italy) v Seller (Germany)	German law	(2006) 31 YB Comm Arb 72–94	ICC Case No 10377 of 2002
67.	01.01.2002	ICC Case No 11045, Partial Award	French law	(2006) 17 ICC Bull 86	ICC Case No 11045 of 2002
68.	01.01.2002	ICC Case No 11375	Law of State X	http://www.unilex.info/case.cfm?pid=2&do=case&id=1071&step=FullText	ICC Case No 11375 of 2002
69.	01.01.2002	ICC Case No 11651	Egyptian law	(2006) ICC Bull 115	ICC Case No 11651 of 2002
70.	01.01.2002	ICC Case No 13504 Parties not indicated	Unknown national law	(2009) 20 ICC Bull 103	ICC Case No 13504 of 2002
71.	08.11.2002	China 8 November 2002 CIETAC Arbitration proceeding (Canned asparagus case) Chinese seller v German buyer	Chinese law	https://cisg-online.org/search-for-cases?caseId=7384	China 8 November 2002 CIETAC Arbitration proceeding (Canned asparagus case)
2003					
72.	01.01.2003	ICC Case No 11462 Parties not indicated	French law	(2006) 17 ICC Bull 103	ICC Case No 11462 of 2003
73.	01.01.2003	ICC Case No 11539 Caribbean company v US company	Swiss law	(2013) 24 ICC Bull 65	ICC Case No 11539 of 2003

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74.	01.01.2003	ICC Case No 11562 Parties not indicated	Swiss law	Available on the ICC Dispute Resolution Library	ICC Case No 11562 of 2003
75.	01.01.2003	ICC Case No 11789 European companies v European consortium	Unknown law	(2013) 24 ICC Bull 105	ICC Case No 11789 of 2003
76.	01.01.2003	ICC Case No 11976 US company v 2 Brazilian companies	Brazilian law	(2012) 23 ICC Bull 51	ICC Case No 11976 of 2003
77.	01.01.2003	ICC Case No 12127 Licensor (France) v Licensee (US)	French law	(2008) 33 YB Comm Arb 82–101	ICC Case No 12127 of 2003
78.	01.06.2003	Award of Arbitration Centre of the Costa Rican Chamber of Commerce	Law of Costa Rica	http://www.unilex.info/case.cfm?pid=2&id=1101&do=case	Costa Rica arbitration of 1 June 2003
79.	01.08.2003	NAI Arbitration Shareholder A (Netherlands), Shareholder B (Belgium) and others v Company A (Germany)	New York law	(2004) 24 YB Comm Arb 133–157	NAI arbitration dated 1 August 2003
		2004			
80.	01.01.2004	ICC Case No 11934 African distributor v Swiss commercial company	French law/ex aequo et bono	(2007) 18 ICC Bull 108	ICC Case No 11934 of 2004
81.	01.01.2004	ICC Case No 12198 Parties not indicated	Law of New Jersey	2014 ICC Dispute Resolution Library	ICC Case No 12198 of 2004
82.	01.01.2004	ICC Case No 12456 Italian construction company v State B	Law of State B (close to French law)	JEAN-JACQUES ARNALDEZ/ YVES DERAINS/DOMINIQUE HASCHER (eds) Collection of ICC Arbitral Awards 2008-2011, Vol. VI (Kluwer Law International 2013) 811 et seq	ICC Case No 12456 of 2004
83.	04.03.2004	Ad hoc arbitration Central European company v Western European Firm	French law	http://www.unilex.info/case.cfm?id=973	*Ad hoc* arbitration of 4 March 2004
		2005			
84.	01.01.2005	ICC Case No 12827 Company B (French) v Group C (French)	French law	(2009) JDI 1376–1392	ICC Case No 12827 of 2005
85.	01.01.2005	ICC Case No 13355 Brazilian company v Brazilian company	Brazilian law	(2012) 23 ICC Bull 69	ICC Case No 13355 of 2005

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86.	30.08.2005	NAI arbitration Insurance company (Netherlands) v Insurance company (Germany)	Dutch law	(2007) 32 YB Comm Arb 107–116	NAI arbitration of 30 August 2005
87.	07.12.2005	China 7 December 2005 CIETAC Arbitration proceeding (Heaters case) Chinese buyer v German seller	Chinese law	https://cisg-online.org/search-for-cases?caseId=8040	China 7 December 2005 CIETAC Arbitration proceeding (Heaters case)
2006					
88.	01.01.2006	ICC Case No 10671 Greek company X v company Y	Swiss law	(2006) 133 JDI 1417	ICC Case No 10671 of 2006
89.	24.02.2006	X v. Y and Z, Award, CAM Case No. 8803	Italian law	A contribution by the ITA Board of Reporters, Kluwer Law International (available on Kluwer Arbitration)	CAM Case No. 8803 of 2006
2007					
90.	01.01.2007	ICC Case No 13646 Nigerian buyer v Swiss seller	Swiss law	(2010) JDI 1434–1447	ICC Case No 13646 of 2007
91.	01.01.2007	ICC Case No 13954 Commodity trader (The Netherlands) v Service company (France)	French law	(2010) 35 YB Comm Arb 218–240	ICC Case No 13954 of 2007
2008					
92.	01.01.2008	ICC-PA-2020-001	Laws of the State of Washington, USA	(2020) ICC Disp Res Bull 123–127	ICC Case No 2020-001 of 2008
93.	01.01.2008	ICC Case No 13615 Parties not indicated	Unknown national law	(2014) 25 ICC Bull 49	ICC Case No 13615 of 2008
94.	01.01.2008	ICC Case No 14637 Brazilian licensee v French licensor	French law	(2011) JDI 1244–1257	ICC Case No 14637 of 2008
2009					
95.	01.01.2009	ICC-FA-2020-002	Law of the State of Missouri, USA	(2020) ICC Disp Res Bull 127–130	ICC Case No 2020-002 of 2009
96.	01.01.2009	ICC Case No 11961 Buyer from Non-European country v sellers	Luxembourg law	(2009) 34 YB Comm Arb 32–76	ICC Case No 11961 of 2009

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97.	01.01.2009	ICC Case No 12112 First investor in liquidation (EU country), Second Investor (EU country) v Ministry of Agriculture (Non-EU country)	Law of State Y	(2009) 34 YB Comm Arb 77–110	ICC Case No 12112 of 2009
98.	01.01.2009	ICC Case No 12502 French corporation v 2 Danish corporations	French law	(2009) YB Comm Arb 130–211	ICC Case No 12502 of 2009
99.	01.01.2009	ICC Case No 13790 Parties not indicated	Swiss law	(2014) 25 ICC Bull 55	ICC Case No 13790 of 2009
100.	01.01.2009	ICC Case No 14500	French law	(2016) ICC Disp Res Bull 95	ICC Case No 14500 of 2009
101.	01.01.2009	ICC Case No 14841 Bavarian company v businessman	German law	(2015) JDI 180–198	ICC Case No 14841 of 2009
102.	01.01.2009	ICC Case No 15709 French company v Italian company	French law	(2015) JDI 206–215	ICC Case No 15709 of 2009
103.	07.06.2009	ICAC at the RFCCI arbitration 119/2008 Russian company v English company	Law of the Russian Federation	http://www.unilex.info/case.cfm?id=1804	ICAC at the RFCCI arbitration 119/2008 (7 June 2009)
2010					
104.	01.01.2010	ICC Case No 14046 Company A (Italy) v 6 Respondents (Italy)	Italian law	(2010) 35 YB Comm Arb 241–271	ICC Case No 14046 of 2010
105.	01.01.2010	ICC Case No 15583	UAE law	(2016) ICC Disp Res Bull	ICC Case No 15583 of 2010
106.	10.04.2010	ICAC at the RFCCI arbitration no 220/2009 Cypriot company v company from the Marshall Islands	English law	http://www.unilex.info/case.cfm?id=1809	ICAC at the RFCCI arbitration no 220/2009 (10 April 2010)
107.	12.10.2010	Borregaard Indus., Ltd. v. AMRI Rensselaer, Inc. (Final Award), ICDR Case No. 50 122 T 00481 09	New York law	Arbitrator intelligence materials	ICDR Case No. 50 122 T 00481 09 (12 October 2010)
2011					
108.	01.01.2011	ICC-FA-2020-003	Romanian law	(2020) ICC Disp Res Bull 130–131	ICC Case No 2020-003 of 2011
109.	01.01.2011	ICC Case No 15913	Algerian law	(2015) JDI 216–224	ICC Case No 15913 of 2011

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		British company v Algerian company			
110.	01.01.2011	ICC Case No 16198 Parties not indicated	law of State A	(2014) 25 ICC Bull 78	ICC Case No 16198 of 2011
111.	01.01.2011	Salini Costruttori S.p.A. v. Kingdom of Morocco (Final Award), ICC Case No. 16550/ND	Laws of Morocco	Arbitrator intelligence materials	ICC Case No 16550 of 2011
112.	01.01.2011	Robert Bosch GmbH v. Honeywell International Inc. (Final Award), ICC Case No. 17521/VRO	New York Law	Arbitrator intelligence materials	ICC Case No 17521 of 2011
113.	01.04.2011	Rose Hall Resort, L.P. v. Ritz-Carlton Hotel Co. of Jamaica, Ltd. (Final Award), ICDR Case No. 50 517 T 00339 09	Laws of Georgia	Arbitrator intelligence materials	ICDR Case No. 50 517 T 00339 09 (April 2011)
114.	02.06.2011	Mainland Ventures Corp. v. Peninsula Real Estate Fund I GP, LLC (Partial Final Award), ICDR Case No. 50 421 T 00325 09	Delaware law	Arbitrator intelligence materials	ICDR Case No. 50 421 T 00325 09 (2 June 2011)
115.	14.10.2011	Abu Dhabi Investment Authority v. Citigroup Inc. (Award), ICDR Case No. 50 148 T 00650 09	New York law	Arbitrator intelligence materials	ICDR Case No. 50 148 T 00650 09 (14 October 2011)
116.	30.12.2011	ICAC at the RFCCI arbitration 100/2011 Russian company v Cypriot company	Law of Russian Federation	http://www.unilex.info/case.cfm?id=1732	ICAC at the RFCCI arbitration (case no 100/2011) (30 December 2011)
2012					
117.	01.01.2012	ICC Case No 15949	French law	(2016) ICC Disp Res Bull 47	ICC Case No 15949 of 2012
118.	01.01.2012	Hoechst GmbH v. Genentech, Inc. (Third Partial Award), ICC Case No. 15900/JHN/GFG	German law	Arbitrator intelligence materials	ICC Case No 15900 (Third Partial Award) of 2012
119.	01.01.2012	Ciments Francais v. Sibirskiy Cement (Final Award), ICC Case No. 16240/GZ/MHM/GFG	Turkish law	Arbitrator intelligence materials	ICC Case No 16240 of 2012
120.	01.01.2012	ICC Case No 16958	Law of State X	(2016) ICC Disp Res Bull 69	ICC Case No 16958 of 2012
121.	01.01.2012	Mont Blanc Trading Ltd v. Khan (Final Award), LCIA Case No. 101571	English law	Arbitrator intelligence materials	LCIA Case No. 101571 of 2012

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122.	16.07.2012	Aperture Software Gmbh v. Avocent Huntsville Corp (Partial Award), VIAC Case No. SCH-5196	Austrian law	Arbitrator intelligence materials	VIAC Case No. SCH-5196 of 16 July 2012
2013					
123.	01.01.2013	ICC-FA-2020-005	Moroccan law	(2020) ICC Disp Res Bull 133–134	ICC Case No 2020-005 of 2013
124.	01.01.2013	ICC Case No 13730 Distributor (Poland) and Daughter Company of Distributor (Isle of Man) v Manufacturer (Japan) and Manufacturer Europe (European country)	Japanese law	(2013) 38 YB Comm Arb 80–110	ICC Case No 13730 of 2013
125.	01.01.2013	Hoechst GmbH v. Genentech, Inc. (Second Partial Award), ICC Case No. 15900/JHN/GFG	German law	Arbitrator intelligence materials	ICC Case No 15900 (Second Partial Award) of 2013
126.	01.01.2013	Commissions Import Export S.A. v. Republic of Congo (Final Award), ICC Case No. 16257/EC/ND/MCP	French law	Arbitrator intelligence materials	ICC Case No 16257 of 2013
127.	01.01.2013	Science Applications International Corp. v. Greece (Final Decision), ICC Case No. 16394/GZ/MHM,	Greek law	Arbitrator intelligence materials	ICC Case No 16394 of 2013
128.	01.01.2013	ICC Case No 16765 Parties not indicated	Unknown national law	(2015) 1 ICC Disp Res Bull 101	ICC Case No 16765 of 2013
129.	01.01.2013	ICC Case No 17768 Contractor (Malaysia) v Owner (Saudi Arabia)	Law of Saudi Arabia	(2017) 42 YB Comm Arb 100–171	ICC Case No 17768 of 2013
130.	01.01.2013	ICC Case No 18489 Service Provider (Xanadu) vs State Entity (Xanadu)	Law of Xanadu	(2017) 42 YB Comm Arb 172–203	ICC Case No 18489 of 2013
131.	01.01.2013	Landmark Ventures, Inc. v. Insightec, Ltd. (Award), ICC Case No. 18807/VRO/AGF	New York law	Arbitrator intelligence materials	ICC Case No 18807 of 2013
132.	10.07.2013	Starlight Inv., LLC v. Oceanfresh Seafoods (PTY) Ltd. (Final Award), ICDR Case No. 50 148 T 00299 11,	Nevada Law	Arbitrator intelligence materials	ICDR Case No. 50 148 T 00299 11 (10 July 2013)
133.	17.07.2013	CAP Case No 3203 Seller (Switzerland) v Buyer (Cape Verde)	French law	(2015) 40 YB Comm Arb 30–50	CAP Case No 3203 of 17 July 2013

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134.	29.07.2013	Unger v. Ding (Final Award), ICDR Case No. 50-180 T 00871 11	Law of Iowa	Arbitrator intelligence materials	ICDR Case No. 50-180 T 00871 11 (29 July 2013)
135.	11.11.2013	Jansheshki v. Pasha (Final Award), JAMS Case No. 1425012160,	New York law	Arbitrator intelligence materials	JAMS Case No. 1425012160 (11 November 2013)
136.	09.12.2013	First National Petroleum Corporation (FNP) v. OAO Tyumenneftegaz (TNGZ) (Award), SCC Case No. 196/2011	Swedish law	A contribution by the ITA Board of Reporters, Kluwer Law International (available on Kluwer Arbitration)	SCC Case No. 196/2011 (9 December 2013)
137.	18.12.2013	CRCICA Case No 730/2011 Contractor v Employer	Egyptian law	(2013) 38 YB Comm Arb 32–50	CRCICA Case No 730/2011 (18 December 2013)
			2014		
138.	01.01.2014	PDV Sweeny, Inc. v. ConocoPhillios Co. (Partial Award), ICC Case No. 16982/JRF/CA/ASM (C-17336/JRF)	New York law	Arbitrator intelligence materials	ICC Case No 16982 of 2014
139.	01.01.2014	Berkeley Heart Europe AS v. Berkeley Heartlab, Inc. (Final Award), ICC Case No. 18701/VRO/AGF	Law of Massachusetts	Arbitrator intelligence materials	ICC Case No 18701 of 2014
140.	01.01.2014	Ridge C.C. at Reynosa Beneficiary, LLC v. Banco J.P. Morgan S.A. (Partial Award), ICC Case No. 19134/CA/ASM	New York law	Arbitrator intelligence materials	ICC Case No 19134 of 2014
141.	06.02.2014	Lexington Logistics, LLC v. Schoeller Arca Systems, Inc. (Final Award), ICDR Case No. 50 1S4 TOOQ07 11	New York law	Arbitrator intelligence materials	ICDR Case No. 50 1S4 TOOQ07 11 (6 February 2014)
142.	28.02.2014	Samwhan Corp. v. Louis Berger Group Inc. Black & Veatch Special Projects Corp. Joint Venture (Final Award), ICDR Case No. 50 110 T 00731 11	Law of New Jersey	Arbitrator intelligence materials	ICDR Case No. 50 110 T 00731 11 (28 February 2014)
143.	21.03.2014	Anytime International, Ltd v. Anytime Fitness LLC (Final Award), ICDR Case No. 50 114 T 00267 12	Minnesota law	Arbitrator intelligence materials	ICDR Case No. 50 114 T 00267 12 (21 March 2014)

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144.	04.04.2014	Scantop Enterprises Co. v. Winplus Co. (Interim Award), ICDR Case No. 50 155 T 00530 11	Law of California	Arbitrator intelligence materials	ICDR Case No. 50 155 T 00530 11 (4 April 2014)
145.	18.04.2014	T-Jat Sys. 2006 Ltd. v. Amdocs Software Sys. Ltd. (Final Award), ICDR Case No. 50 117 T 00845	New York law?	Arbitrator intelligence materials	ICDR Case No. 50 117 T 00845 13 (18 April 2014)
146.	24.04.2014	Maruman & Co. v. Maruman Global, Inc. (Final Award), JCAA Case No. 13-03	Law of Japan	Arbitrator intelligence materials	JCAA Case No. 13-03 (24 April 2014)
147.	29.07.2014	Privacy Assured, Inc. v. Accessdata Corp. (Final Award), ICDR Case No. 50 117 T 00199 13	New York law	Arbitrator intelligence materials	ICDR Case No. 50 117 T 00199 13 (29 July 2014)
148.	10.10.2014	CAM Case No 7813 Italian company v German company	Italian law	http://www.camera-arbitrale.it/Documenti/lodo_10ottobre2014.pdf	CAM Case No 7813 (10 October 2014)
149.	18.12.2014	Arkwright Advanced Coating, Inc. v. MJ Solutions GmbH (Final Award), ICDR Case No. 50 133 T 00751 13	Connecticut law	Arbitrator intelligence materials	ICDR Case No. 50 133 T 00751 13 (18 December 2014)
2015					
150.	01.01.2015	ICC-FA-2020-007	Italian law	(2020) ICC Disp Res Bull 137–139	ICC Case No 2020-007 of 2015
151.	23.01.2015	NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc. (Final Award)	New York law	Arbitrator intelligence materials	*NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc* (23 January 2015)
152.	29.07.2015	Toyota Tsusho America, Inc. v. Vollero (Final Award), ICDR Case No. 50-20-1300-1142	Law of California	Arbitrator intelligence materials	ICDR Case No. 50-20-1300-1142 (29 July 2015)
153.	06.08.2015	Principal (Russian Federation) v. 1. commissioner (Russian Federation), 2. surety (Germany) (Award), ICAC Case No. 244/2014	Law of the Russian Federation	(2015) International Commercial Arbitration Review	ICAC Case No 244/2014 (6 August 2015)
2016					
154.	01.01.2016	ICC-FA-2020-008	Romanian law	(2020) ICC Disp Res Bull 139–140	ICC Case No 2020-008 of 2016
155.	01.01.2016	ICC Case No 16920	Dutch law	(2016) ICC Disp Res Bull 136	ICC Case No 16920 of 2016
156.	01.01.2016	General Dynamics United Kingdom Ltd. v. State of Libya (Final Award), ICC Case No. 19222/EMT	Swiss law	Arbitrator intelligence materials	ICC Case No 19222 of 2016

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157.	22.03.2016	A retail foreign exchange investor, physical person (Czech Republic) v. A financial services provider (Russian Federation) (Award), ICAC Case No. 89/2015	Law of the Russian Federation	(2017) International Commercial Arbitration Review 223–225	ICAC Case No 89/2015 (22 March 2016)
158.	14.11.2016	CAM Case No 10915	Italian law	(2017) 42 YB Comm Arb 280–303	CAM Case No 10915 (14 November 2016)
Undated					
159.	Undated	ICDR Case No 152-04 US companies v Indian company	New York law	GRANT HANESSIAN (ed), ICDR Awards and Commentaries (Juris 2012) 99–136	ICDR Case No 152-04
160.	Undated	ICDR Case No 367-04 Company v Company	Law of California	GRANT HANESSIAN (ed), ICDR Awards and Commentaries (Juris 2012) 183–207	ICDR Case No 367-04
161.	Undated	F89 International Incorporated v. Abbott Laboratories	Law of Illinois	Referred to in (2003) 28 YB Comm Arb 1154	*Baxter v Abbott*
162.	Undated	Buyer (India) v. Seller (Turkey), Final Award, ICC Case No. 18981	Swiss Law	(2018) 43 YB Comm Arb 184–234	ICC Case No 18981
163.	Undated	ICC Case No. 19114 Designer (France) v. Manufacturer (Germany), Final Award	French Law	(2018) 43 YB Comm Arb 235–291	ICC Case No 19114
164.	Undated	ICC Case No 20065, Distributor v Manufacturer	Italian law	(2019) 44 YB Comm Arb 250–333	ICC Case No 20065
165.	Undated	ICC-FA-2020-224 Seller; Warrantor A; Warrantor B v Yellow Holding Company	Portuguese law	(2020) 45 YB Comm Arb 1–68	ICC Case No FA-2020-224
166.	Undated	ICC-FA-2020-226 Buyer v Supplier (Final Award),	Law of European Country	(2020) 45 YB Comm Arb 1–24	ICC Case No FA-2020-226
167.	Undated	SCC Case No 2017/164 Distributor (US) v Supplier (Germany) (Final Award)	New York law	(2020) 45 YB Comm Arb 1–69	SCC Case No 2017/164

Appendix B: Arbitral awards in which good faith was applied to the parties' contract on the basis of the CISG (chronological order)

	Case	Reference	Abbreviation
1.	ICC Case No 7331 of 1994	https://cisg-online.org/search-for-cases?caseId=6086	*Cowhides* case
2.	Austria 15 June 1994 Vienna Arbitration proceeding SCH-4318	https://cisg-online.org/search-for-cases?caseId=6099	Vienna arbitration Case No SCH-4318
3.	ICC Case No 7645 of 1995	https://cisg-online.org/search-for-cases?caseId=6770	*Crude metal* case
4.	Hungary 17 November 1995 Budapest Arbitration proceeding Vb 94124	https://cisg-online.org/search-for-cases?caseId=6224	*Mushrooms* case
5.	ICC Case No 8611 of 1997	https://cisg-online.org/search-for-cases?caseId=6210	*Industrial equipment* case
6.	ICC Case No 8786 of 1997	https://cisg-online.org/search-for-cases?caseId=6679	*Clothing* case
7.	Russia 24 November 1998 Arbitration proceeding 96/1998	https://cisg-online.org/search-for-cases?caseId=7445	ICAC at the RFCCI arbitration (Case No 96/1998)
8.	*Dulces Luisi SA de CV v Seoul International Co Ltd & Seoul Confectionary Co*, Mexico Commission for the Protection of Foreign Trade M/115/97 of 30 November 1998	https://cisg-online.org/search-for-cases?caseId=6472	*Candies and sweets* case
9.	Russia 18 December 1998 Arbitration proceeding 288/1997	https://iicl.law.pace.edu/cisg/search/cases	ICAC at the RFCCI arbitration (Case No 288/1997)
10.	Russia 10 June 1999 Arbitration proceeding 55/1998	https://iicl.law.pace.edu/cisg/search/cases	ICAC at the RFCCI arbitration (Case No 55/1998)
11.	Russia 27 July 1999 Arbitration proceeding 302/1996	https://cisg-online.org/search-for-cases?caseId=6707	ICAC at the RFCCI arbitration (Case No 302/1996)
12.	CIETAC Arbitration 13 January 1999	https://cisg-online.org/search-for-cases?caseId=7128	*Latex glove* case
13.	CIETAC Arbitration 4 June 1999	https://cisg-online.org/search-for-cases?caseId=7724	*Industrial raw material* case
14.	CIETAC Arbitration 11 February 2000	https://cisg-online.org/search-for-cases?caseId=7449	*Silicon Metal* case
15.	CIETAC Arbitration, 6 November 2000	https://cisg-online.org/search-for-cases?caseId=7361	*Marble building* case
16.	Milan Arbitration, 28 September 2001	https://cisg-online.org/search-for-cases?caseId=7501	*Steel wire* case
17.	SCC Case 71/2002	SCC Case 71/2002 in Linn Bergman/Stephen Bond (eds), SCC Arbitral Awards 2004-2009 (Juris) 203–226.	SCC Case No 71/2002
18.	ICC Case No 11849 of 2003	https://cisg-online.org/search-for-cases?caseId=7343	*Fashion products* case
19.	Russia 22 October 2003 Arbitration proceeding 134/2001	https://iicl.law.pace.edu/cisg/search/cases	ICAC at the RFCCI arbitration (Case No 134/2001)
20.	NAI arbitration award, 10 February 2005	https://cisg-online.org/search-for-cases?caseId=7540	NAI arbitration of 10 February 2005
21.	CIETAC Arbitration, 24 February 2005	https://cisg-online.org/search-for-cases?caseId=7742	*Second pork* case
22.	Russia 27 May 2005 Arbitration proceeding 95/2004	https://cisg-online.org/search-for-cases?caseId=7376	ICAC at the RFCCI arbitration (Case No 95/2004)

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23.	Russia 2 June 2005 Arbitration proceeding 131/2004	https://cisg-online.org/search-for-cases?caseId=7421	ICAC at the RFCCI arbitration (Case No 131/2004)
24.	Russia 13 April 2006 Arbitration proceeding 105/2005	https://cisg-online.org/search-for-cases?caseId=7861	ICAC at the RFCCI arbitration (Case No 105/2005)
25.	ICC Case No 14005	(2015) ICC Disp Res Bull 133–141	ICC Case No 14005
26.	Serbia 23 January 2008 Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce	https://cisg-online.org/search-for-cases?caseId=7863	*White crystal sugar* case
27.	Serbia 28 January 2008 Foreign Trade Court attached to the Serbian Chamber of Commerce	https://cisg-online.org/search-for-cases?caseId=8148	*Siemens Telephone Booths* case
28.	Serbia 31 May 2010 Foreign Trade Court attached to the Serbian Chamber of Commerce	https://cisg-online.org/search-for-cases?caseId=8178	*Mobile Sheer Baler* case
29.	ICC Case No 13184	(2011) 36 YB Comm Arb 96–118	ICC Case No 13184
30.	Adamus HT Sp. Z.o.o v International Inventory Management (Final Award), 14 November 2012	Arbitrator intelligence materials	Adamus HT Sp. Z.o.o v International Inventory Management
31.	ICC Case No 18643 Buyer SA v Seller Co Ltd.	(2019) YB Comm Arb 145–180	ICC Case No 18643
32.	ICC-FA-2020-006	(2020) ICC Disp Res Bull 135–136	ICC Case No 2020-006

Appendix C: Arbitral awards in which good faith was applied to the parties' contract on the basis of the PICC (chronological order)

	Case	Reference	Abbreviation
1.	ICC Case No 7365 of 5 May 1997	http://www.unilex.info/case.cfm?pid=2&do=case&id=653&step=Abstract	ICC Case No 7365
2.	ICC Case No 7110 of April 1998	http://www.unilex.info/case.cfm?id=650	ICC Case No 7110
3.	ICC Case No 9797 of 28 July 2000	http://www.unilex.info/case.cfm?id=668	ICC Case No 9797
4.	ICC Case No 9875 of March 2000	http://www.unilex.info/case.cfm?id=697; (2001) 12 ICC Bull 97	ICC Case No 9875
5.	*Ad hoc* arbitration of 30 April 2001	http://www.unilex.info/case.cfm?id=1100	*Ad hoc* arbitration of 30 April 2001
6.	Lausanne CCI 25 January 2002	http://www.unilex.info/case.cfm?id=863	Lausanne CCI 25 January 2002
7.	Lausanne CCI 17 May 2002	http://www.unilex.info/case.cfm?id=861	Lausanne CCI 17 May 2002
8.	ICC Case No 13009 of 2006	http://www.unilex.info/case.cfm?id=1661; (2011) 36 YB Comm Arb 70–95	ICC Case No 13009
9	Russia 30 October 2009 Arbitration proceeding 100	http://www.unilex.info/principles/case/1550	ICAC at the RFCCI arbitration (Case No 100)
10	ICC Case No 14633	http://www.unilex.info/case.cfm?pid=2&do=case&id=2114&step=Abstract	ICC Case No 14633
11	ICC Case No 14988 of 2010	JOLIVET/MARCHISIO/GÉLINAS, 217–218	ICC Case No 14988
12.	ICC Case No 14108	(2011) 36 YB Comm Arb 135–201	ICC Case No 14108
13.	Customer (Russian Federation) v contractor (USA) (Award), ICAC Case No. 173/2011, 23 August 2012	(2014) International Commercial Arbitration Law Review	ICAC at the RFCCI arbitration (Case No 173/2011)
14.	ICC Case No 16816	(2015) 40 YB Comm Arb 236–293	ICC Case No 16816

Appendix D: Arbitral awards in which good faith was applied to the parties' contract as a general principle of law/trade usage (chronological order)

	Parties	Case	Reference	Abbreviation
1.		ICC Case No 2291 of 1975	(1976) JDI 989–992	ICC Case No 2291
2.	Pabalk Ticaret Limited Sirketi v Norsolor	ICC Case No 3131 of 26 October 1979	(1984) 9 YB Comm Arb 109–110	ICC Case No 3131
3.	Mexican Construction Company v Belgian Company	ICC Case No 3267 of 14 June 1979	SIGVARD JARVIN/YVES DERAINS (eds) Collection of ICC Awards 1974-1985 (Kluwer Law International 1990) 76–87	ICC Case No 3267
4.	US company v Spanish company	ICC Case No 5953 of 1989	SIGVARD JARVIN/YVES DERAINS/DOMINIQUE HASCHER (eds) Collection of ICC Awards 1986-1990 (Kluwer Law International 1994) 437–444	ICC Case No 5953
5.	French company v Spanish company	ICC Case No 6317 of 1989	JEAN-JACQUES ARNALDEZ/YVES DERAINS/ DOMINIQUE HASCHER (eds) Collection of ICC Awards 2001-2007 (Kluwer Law International 2009) 623–629	ICC Case No 6317
6.		ICC Case No 6219 of 1990	SIGVARD JARVIN/YVES DERAINS/DOMINIQUE HASCHER (eds) Collection of ICC Awards 1986-1990 (Kluwer Law International 1994) 428–437	ICC Case No 6219
7.		ad hoc award dated 4 December 1996	See Appendix A	ad hoc award of 4 December 1996
8.		ICC Case No 9593	See Appendix A	ICC Case No 9593 of 1998
9.		ICC Case No 11976	See Appendix A	ICC Case No 11976 of 2003
10.	African company v European company & African company	ICC Case No 14427 of 2008	(2013) JDI 217–227	ICC Case No 14427
11.		ICC Case No 18009	JOLIVET/MARCHISIO/GÉLINAS, 214–215, 223–224	ICC Case No 18009