Oxford University Comparative Law Forum

Cooperation as Philosophical Foundation of Good Faith in International Business-Contracting - A View Through the Prism of Transnational Law

By Lorena Carvajal-Arenas[*] and A F M Maniruzzaman[**]

(2012) Oxford U Comparative L Forum 1 at ouclf.iuscomp.org | How to cite this article | Discuss this article

Table of contents

ABSTRACT

Nowadays traders are very frequently conducting their businesses in accordance with principles and usages forged in the practice of commerce. This has given rise to an ongoing discussion on the existence of an autonomous third legal order called transnational commercial law or the lex mercatoria. This article looks at the role of good faith in that legal system.

As a consequence of the evolution of the law of contracts, the rise of transnational law and of the influence of its prevalent actors - multinational corporations - a cooperative view of contracts has been developed in international trade.

This article argues that the rationale of cooperation, as the underlying current of transnational commercial contracts, has prompted a new way of interpreting the principle of good faith: it is understood as cooperation between the parties to a contract. This interpretation of good faith requires the party to take various steps to fulfil the legitimate expectations of the other party. Rather than being imposed by a central authority, such a predominantly voluntary cooperation is assumed by the parties for the common good of everyone involved in the contractual relationship. This notion fits the experience of global trade today to the point that - it will be submitted - good faith is the fulcrum of cooperation in cross-border trade.

This proposition will be supported through the analysis of: philosophical doctrines; principles embracing transnational law and international arbitral awards. Furthermore, the development of good faith in some municipal legal systems will be considered; as well as the latest developments of good faith in EU law.

1. Introduction

The cooperative movement in international business-contracting is the outcome of contemporary developments, in particular the globalization of the economy and of the law. On the other hand, this is also the result of a series of other historical developments, and can be linked to philosophical and political developments over the last two centuries. The purpose of this article is to explain the cooperative movement and to analyse how it has affected the relevance, and shaped the current meaning of good faith in transnational law.[1] The 1995 UNCTAD World Investment Report provides a first approach to the cooperative movement:

> [Firms] undertake and organize international production employing a wide variety of modalities of international transactions, including FDI (foreign direct investment); cross-border intra-firm trade; cooperative inter-firm agreements (such as strategic alliances); non-equity forms of TNC (Transnational Corporations) involvement (e.g. licensing, turnkey contracts, franchising, management contracts); and subcontracting ... The important thing is that, in their totality, these various modalities are not only used (sic) to access international markets for outputs, but also to access international markets for inputs for the production process, i.e., tangible and intangible factors of production, such as technology and technological know-how, skills, natural resources and other natural and created assets that are important for international production.[2]

The common goal to join objectives and standards[3] in the way of doing business in international trade has given rise to a new contractual order which has been called 'rematerialization of contract law'.[4] This consists of an anti-formal tendency that gives greater weight to fairness in modern legal development.[5] Two examples of this tendency should suffice.

The first concerns the field of arbitration. Arbitral awards demonstrate that traders are assuming spontaneously a position of cooperation.[6] Such is, at least, the expected conduct.[7] This is not a 'morality of abnegation',[8] but a new approach to contract law, which sees the contract as a legal framework for the parties' commitment to cooperate during their business relationship. For example, in an ICC award of the International Court of Arbitration in Barranquilla (Colombia),[9] two Colombian companies entered into a contract for the sale of electricity. The contract was never performed, and the seller sued the defendant for breach of contract and damages. The defendant (buyer) objected that the contract was null and void for lack of registration in a Public Registry.[10] Naturally, the discussion was centred first on the validity.

The tribunal considered the contract as valid in spite of the lack of registration.[11] More interestingly in the present context, this award cites a judgement by the Consejo de Estado (Council of State) Chamber for Administrative Disputes, which made the following comments on duty of responsibility: 'It must be remembered that in state contracts the duties imposed on the parties have to be observed. They include the duty to act with sagacity which means with reasonable diligence'.[12] The need to act with sagacity implies that a positive behaviour is required from the contractual parties, including the duty to cooperate with the other party's fulfilment. The following part of the award places good faith as the tendency in international commerce nowadays:

> It remains only to repeat for the sake of greater clarity in relation to the duty of collaboration, which is central to various parts of this Award, that academic opinion, case law and even legislation itself are paying increasing attention to the duties of correction and fair dealing or, to put it in another way, to the duty to act in accordance with the standards of good faith at all times.[13]

The second example of the aforementioned new contractual order is the new German law of obligations, which came into force on 1 January 2002. This massive reform incorporated into the BGB theories already accepted praeter legem in German scholarly writing and jurisprudence. In addition to the general requirement to fulfil obligations in good faith enshrined in the original version of § 242 BGB, the following - newly incorporated - legal instruments are a clear expression of the increased sensitivity towards good faith:

- Culpa in contrahendo, §311 II BGB (a provision on pre-contractual liability);[14]
- Change of circumstances (Störung der Geschaftsgrundlage), §313 BGB;[15]
- The possibility of terminating, for a compelling reason, contracts for performance of a recurring obligation, §314 BGB;
- The duty to have regard to the other party's rights and interests which may result from the content of the obligation, §241 (2) BGB; or the existence of such duties on the part of third parties.[16]

This legislative activity mirrors a new relevance of good faith in business-contracting. For example, multinational corporations (MNCs) and their foreign direct investment (FDI) in host countries will frequently require coordination of economic activities. These collaborative businesses consist of coordinated social systems that encourage longer-term commitments which are based on good faith. This principle is perceived in transnational law as a powerful tool for overcoming rigid structures, allowing e.g. an arbitrator to adapt the contract according to the complex circumstances of international trade.[17] Hence, good faith is not seen as a restriction to freedom of contracts but as a result of a partnering approach in contracts.[18]

In dispute resolution this means that the parties are required to move forward in order to achieve common goals and the sharing of benefits from the business. Carbonneau observes that, 'ICC arbitrators consider the good faith obligation as part of international commercial usages ... The view that good faith is a central element of cohesion in the operation of international commerce is supported by the generality of international awards and the accompanying scholarly commentary'.[19]

This article explores the cooperative movement in international business-contracting and its effect upon the interpretation given to good faith in transnational commercial law, using the following structure:

Section Two explains the concept of good faith. Section Three analyses the factors that prompted the cooperative movement in business. Section Four explains why cooperation is the philosophical foundation of the current understanding of good faith in transnational law. Section Five describes and explains the embracement of good faith cooperation in the UNIDROIT Principles and in the Principles of European Contract Law. Section Six analyses the latest developments of good faith in the harmonisation of European contract law. Section Seven looks at the stance of international arbitral jurisprudence on good faith. The final section concludes that good faith cooperation reflects a major phenomenon in the current contractual arena. This means that globalization of commerce and the standardization of production and technological progress have made the contract a legal instrument of collaboration between the parties and, therefore, the embracement of good faith in the contract has become the source of cooperation in international trade.

2. Good Faith - The Conceptual Paradigm

The concept of good faith has been a subject of perennial controversy. Juristic views on and the legal conceptualization of the idea of good faith may often vary across the cultural divides and legal traditions.[20] At a higher level of abstraction, there may be a semblance of understanding that it is a moral principle and is reflective of all good senses such as honesty, good conscience, fairness, equity, reasonableness, equitable dealing or fair dealing. However, its application may cause the divergence of opinions. This has given rise to uncertainty about the nature of the concept and the consequent unpredictability of the outcome of its application. Here, for example, in the common law tradition, especially in contract law, the notion of good faith has not been entertained as it is in its civil law counterpart. Goode notes in this regard:

> We are, in my view, right to be cautious about adopting a general requirement of good faith in contracts, even though this is enshrined not only in the civil law but in the American Uniform Commercial Code and jurisprudence and has powerful supporters in England. Very often one finds that recourse to the concept of good faith is used to bolster a conclusion that can easily be arrived at through the application of other, more specific, principles. Where this is not the case it can prove very difficult to give a definable content to the good faith standard and to predict the outcome of commercial disputes in which one party has sought to do no more than enforce the terms of a contract freely negotiated.[21]

It is worth mentioning - in order to complete this quotation as regards 'powerful supporters (of good faith) in England' - that Hector MacQueen reports leading voices in England calling for the acknowledgement of the principle.[22]

Regarding the criticism levelled against the use of good faith in contract law, there is an extreme position that rejects good faith in commercial matters because it views good faith as 'repugnant' to the classical model of contract as self-interested exchange. The classic example in this respect is the judgment of the House of Lords in *Walford v Miles*[23] whereby a contractual obligation to negotiate in good faith was held to be unenforceable.[24] This opinion has a moderate version that accepts good faith as an exception. According to this perspective, the requirement of good faith is introduced by a number of prohibitions against bad faith; such prohibitions serve to restrain the otherwise generally permissible pursuit of economic self-interest in contract.[25]

When focussed on the content of good faith, the courts in different countries[26] as well as academic commentators[27] seem to be often baffled. Cordero-Moss concluded in a comparative legal survey:

> There is no uniform notion of good faith and fair dealing that might be valid for all types of contracts on an international level, and there is hardly a notion that is generally recognised for one single type of contract either. There is no evidence of trade usages in respect of how the standard of good faith (if any) is applied in practice ... (T)here are few principles in respect of good faith and fair dealing that may be considered common to Civil Law and Common Law systems, and, even among Civil Law systems, there are considerable differences.[28]

Cordero-Moss believes that in the sources of the lex mercatoria such as the UNIDROIT Principles, the Principles of European Contract Law (PECL) and the Convention on Contracts for the International Sales of Goods (CISG) the content of the notion of good faith and fair dealing 'is too vague to permit an independent application'.[29]

The present article takes the opposite view, namely that there is a clear trend in the interpretation of good faith in the lex mercatoria, and also that in practice it is feasible to establish what the concept is meant to accomplish and what it requires of the parties.

In order to rationalise good faith jurists have proffered various legal theories ranging from efficiency arguments to formal entitlements in the spirit of solidarity.[30] The purpose here is not to engage in examining those theories, but to provide a fresh look at the concept of good faith in order to understand its scope and function in a contractual relationship. It is well recognised in case law and juristic writings that good faith on its own is an empty or 'open concept'.[31] In the view of some, good faith signifies in a more specific sense 'a true behavioural standard'.[32] Virally notes that,

> Even apart from its function in helping measure the extent of the obligation undertaken, which is far from negligible, good faith plays, mutatis mutandis, a role in international law comparable to that of a catalyst in a chemical reaction. Alone, the catalyst is completely passive. It must be added to other elements for a reaction to occur; without it, nothing will happen, even if all the necessary components are present in sufficient quantities. It is a bit the same with good faith.[33]

This paper advocates that good faith should be considered a framework of relationship between the parties to a contract and cooperation is the vehicle to maintain it. In that sense good faith is a framework concept based on co-operation as its philosophical foundation. As far as the content of good faith is concerned the focus has to be specific in a particular context. Therefore, the content is more of a contextual nature than the concept itself understood in the abstract sense. Thus, good faith may be understood in two senses, viz., 'macro good faith' and 'micro good faith'. In respect of the former the abstract notion of good faith in the sense of honesty, fairness, reasonableness signifying its subjectivity may be meant. 'Macro good faith' in that respect is a horizontal approach, a layer of idea which is generic (i.e., an idea at a higher level of abstraction) and may not be understood the same in different factual patterns. For example, what is good faith in one context may not be the same in another context with a different pattern of facts. Thus, the notion of good faith focussing on the particular context concerned - i.e., the vertical approach - may be understood as 'micro good faith' which brings with it the sense of objectivity rather than subjectivity understood in the horizontal sense, i.e., 'macro good faith'. As will be appreciated, the pacta sunt servanda principle,[34] being the foundation of all contracts, is the manifestation of 'macro good faith'. However, 'micro good faith', being applied in specific factual contexts, may limit the application of the pacta sunt servanda principle in

order to conform to it - even in changed circumstances.[35]Therefore, the pacta sunt servanda principle in a contractual relationship may not be applied as an incantation or in an abstract sense; rather it should be assessed in light of 'micro good faith'.

It would be advisable then to look at the notion of 'micro good faith', a context-based one with the objectivity that underscores the framework of relationship -cooperation being its philosophical foundation. It is thus proposed that good faith should be understood not as an abstract concept but as a functional one, i.e., in the micro sense covering all stages of a contract. This will be demonstrated below.

3. Cooperative Movement

It has been said in the introduction that cooperation in international business is the outcome of contemporary events. Two of those events are analysed in this section: the rise of transnational law and the role of multinational corporations.

3.1 The Rise of Transnational Law

The great impulse that international commerce has had in the last decades is evident. Numerous factors have influenced this dynamism: inter alia, the development of quicker and safer transport systems for goods, the development of technology that allows producers to offer services far away from the final recipient[36] and the establishment of economic and political systems that welcome international commercial exchange.[37] Commerce today is international by definition.

The globalization of commerce has determined a process of global law creation.[38] Differences between national legal systems - which were made for internal purposes - hinder the negotiation and the solution of disputes related to transnational commercial operations. Many attempts have been made by states to solve this through conventions that seek to harmonise the law in particular areas, e.g. international sales of goods or bills of exchange.[39] However, these kinds of regulations are always insufficient and do not reach the goal of uniform criteria due to the unwillingness of states to concede on the many aspects that they consider as representing their legal culture or national interests. The commissions usually come across with compromising formulae - as the one contained in article 7 of the Vienna Sales Convention regarding good faith - which did not solve concrete issues of trade.[40]

As a result, the 'practical law' of economic operators - made by practices, usages and standard contracts - has started to regulate trading relationships, thus giving rise to a transnational commercial law.[41]

Further to the international exchange of goods and services as the economic foundations of transnational commercial law, H-J Schmidt-Trenz holds that international trade is something similar to the original state described by Hobbes, that is, a chaos because of the absence of a centralized state power. Such a situation can be overcome by private agreements that allow the equilibrium and confidence in the fulfilment of assumed obligations. The author calls this 'cooperation in the absence of government'.[42]

The rise of transnational commercial law responds not only to the needs and common problems of merchants of all countries nowadays; it is also due to the fact that the international community of merchants has had a continuous history for centuries.[43]

In modern times, practitioners have developed their own 'third legal order' because certain areas during the process of industrialization (nineteenth and early twentieth centuries) and globalization (second half of the twentieth century) were simply not covered by national or international law. Under the dynamics of rapid and fundamental changes, national law and economic needs drifted apart. Thus, the international community started to regulate itself by standard contract forms and regulations of self-governing associations of traders. The first areas of commercial activity to begin systematically developing their own rules of contract were the insurance and the transport industries. Röder calls this phenomenon 'the "colonization" of contract law by businessmen and companies'.[44] Following this trend, arbitral awards referred to international principles accepted by traders around the world in order to substitute for the paucity of regulation.

In practice, arbitrators sometimes apply a national law and, additionally, in order to corroborate their findings, they also refer to a particular norm of the lex mercatoria.[45] This denotes the level of approval that the lex mercatoria currently enjoys among traders, as it is considered by arbitrators in order to validate their decisions.[46]

Legal experts insist unanimously on the difficulty of finding out reliable data about the applicability of the lex mercatoria. Based on limited data only, such as the publication of awards by the ICC, some authors have been able to form conclusions. Dalhuisen, for instance, holds, 'The empirical evidence suggests that parties do not specifically apply the general principles of the lex mercatoria as proper law in their arbitration agreement or, if so, do it to supplement rather than displace national law'.[47]

In fact, practitioners and arbitrators usually apply the lex mercatoria without taking into consideration that they are doing so. Lowenfeld, who is an experienced arbitrator, states: 'I think in fact many arbitral decisions make use of this approach, often without fully articulating it, and without an express discussion about whether an international law merchant really exists'.[48] In this context, it is worth considering the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit.[49] This Convention regulates instruments which have long been used in international trade and finance for securing payment and performance in international commercial contracts.[50] The international practice generated concepts and principles in this area which have been widely used and commonly accepted; therefore, they can be characterized as elements of the lex mercatoria.[51] The Convention barely changes the existing self-regulation and it is hardly innovative.[52] For that reason, the proper Convention has been characterized as an expression of the lex mercatoria.[53] In this case the arbitrator who applies the Convention applies elements of the lex mercatoria, which had existed as such before the Convention was enacted.[54]

A concrete example that reflects that businesses are not averse to the lex mercatoria is the choice of law clause contained in the Channel Tunnel contract, one of the most important infrastructures of modern times. Clause 68 of this contract provides:

> '[t]he construction, validity and performance of the contract shall in all respects be governed and interpreted in accordance with the principles common to both, English and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals. Subject in all cases, with respect to the works to be respectively performed in the French and in the English part of site, to the respective French or English public policy provisions.[55]

The lex mercatoria, as a spontaneous system of law relating to international trade, has embraced the cooperative trend in business-contracting through one of its essential principles: the principle of good faith[56] - as will be seen in the next sections.

3.2 New preponderant actors: The role of multinational corporations (MNCS)

MNCs are a key element in the global economy as they surpass in importance any other actors in international trade. In fact, cross-border production by multinational companies far exceeds international trade.[57] Additionally, international trade itself is increasingly dominated by the operations of multinational corporations. Here are some statistics:

> UNCTAD estimates that TNCs (transnational corporations) worldwide, in their operations both at home and abroad, generated value added of approximately $16 trillion in 2010, accounting for more than a quarter of global GDP. In 2010, foreign affiliates accounted for more than one-tenth of global GDP and one-third of world exports.[58]

Though the statistics may differ from one year to another, the certain datum is the unprecedented surge in FDI in the last 25 years. According to Graham, 'The result of this is an increase in the spread of corporate activities that profoundly changes the world economic landscape, with implications that are not yet fully understood'.[59] It is proposed here that this increase of corporate activities has implied in the field of law a new meaning for good faith in international business-contracting. This is a consequence of the fact that FDI is made in a cooperative manner: it generally takes the form of investment in a joint venture or strategic alliance with a local firm with attendant input of technology or licensing of intellectual property.[60] Furthermore, usually the success of MNCs is based on partnerships. Even competitors have developed branding strategies to boost their products.[61]

The concept of cooperation in today's commerce frequently surpasses the arena of economic exchange and enters into a field of long-term strategic considerations regarding relationships between companies. The concrete motives that lead companies to cooperative efforts can vary widely. For example in technology partnering, the motives go from reducing the cost of research in high-tech industries and the cost of advanced-system design, such as in telecom and aerospace, to the possibility of capturing some of the capabilities, knowledge or technologies of partners or the possibility to create new markets and products.[62] In R&D joint venture partners pursue collaborative research.[63] Furthermore, in strategic alliance (which is a relationship between two or more parties agreed upon to pursue a set of goals or to meet a critical business need while remaining independent organizations) the cooperation aims for a synergy where each partner hopes that the benefits from the alliance will be greater than those from individual efforts. The alliance often involves technology transfer (access to knowledge and expertise), economic specialization, shared expenses and shared risk.[64] Cooperation is the underlying current of all these joint ventures. Buckley and Casson dedicate an entire chapter of their book to analyse them. The authors entitled the chapter: 'A Theory of Cooperation in International Business'. There, they also point out the 'cooperative ethic' that permeates these contracts.[65]

The following section examines how this new way of dealing in international business has influenced the interpretation of the principle of good faith in transnational law in order to become its current philosophy.

4. Good Faith Cooperation

The law of contract has evolved from a laissez faire view in the nineteenth century to a more cooperative view in modern times,[66] with good faith in international trade contracts being interpreted as reflecting this cooperation between the parties.

In the 1980s, Mestre envisaged this evolution. He pointed out that, '[t]his (the equilibrium of the contract) could be substituted tomorrow by a spirit of collaboration more rich because naturally bilateral'.[67] The same author pondered whether the contract will become the legal instrument for cooperation between the parties.[68] This view, in fact, is currently embraced by arbitrators applying the lex mercatoria, as will be seen below.[69]

The cooperative nature of good faith has been emphasized by several legal scholars from civil and common law traditions. For instance, two legal experts - one scholar from the civil law world and a judge of the common law jurisdiction - agree, in fact, on these terms. Diez-Picazo considers good faith, not just as hindering acts that harm others but also, as imposing a positive behaviour of cooperation.[70] An Australian judge, Paul Finn, however, accepts that contracts are about the pursuit of self-interest but argues that good faith also requires a contracting party to take the other party's interest into account.[71]

This theory of good faith cooperation is deeply entrenched in what has been called by Atiyah 'the decline of contract' and its consequences: the avoidance of litigation and the smooth solution of conflicts.[72] A hypothetical example can illustrate this assertion:

> Two companies which have a long standing commercial arrangement by which one provides supplies to another may end up by merging into a single corporate entity or group... The parties often proceed as though they were engaged on a joint venture, and not in a bargain in which they have mutually irreconcilable interests. In the event of default, an adjustment of the terms of the relationship for the future is far more likely than litigation.[73]

Zimmermann speaks about the 'rematerialization of contract law' in the sense that there is an emphasis on loyalty, protection of trust, cooperation and concern about the interest of the other party and substantial justice.[74] This is far from an exaggerated positivism and the predominance of will of the contracting parties which dominated during the nineteenth century. It implies a renaissance of the ethical foundations of the theory of contract.[75] The 1980 Vienna Convention on Contracts for the International Sales of Goods (CISG)[76] which encapsulates universal principles applicable in international contracts, marks a first shift towards the recognition of good faith.[77]

The only express mention of good faith in CISG occurs in Article 7 (1), which reads 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 and the observance of good faith in international trade.[78]

This rule refers to the interpretation of the Convention, but not to the interpretation of sale contracts governed by it. The article is ambiguous because it is the result of a formal commitment between countries which wanted a general norm about good faith and those that did not accept such a norm. However, in this respect Tetley states, 'Clearly, art. 7 (1) must be read more broadly, as imposing an obligation of good faith conduct in international trade. Generally there is support for the broad reading of article 7 (1)'.[79]

Although there is not an express reference to contractual good faith in the CISG, it is now understood as an underlying principle of many of its norms.[80] For example, the statements and conducts of the parties are to be 'interpreted according to the understanding of the reasonable person'.[81] Moreover, article 77 illustrates the possibility to incur liability in cases of not using good faith in the mitigation of damages.[82]

To sum up: in spite of the absence in the CISG of an explicit provision which would impose a requirement of good faith on the parties, the principle as such finds recognition.[83] The articles of the Convention provide ample opportunity for an arbitral panel to exercise flexibility in the interpretation of the contract.[84] This is in complete harmony with the current trend in international commerce, consisting of a shift from the strict enforcement of contract to an emphasis of fairness in the exchange and good faith norms.

Part 7 below will present evidence from international arbitration which suggests that nowadays good faith cooperation provides the optimum conditions for international commercial contracts. The philosophical foundation of this theory will be explored in the following sub-section.

4.1 The Philosophical Foundation of Good Faith Cooperation

The current state of good faith in transnational commercial law is closely related to the globalization of trade in the second half of the twentieth century and the early years of the twenty-first.[85] In previous times, during the nineteenth century, contractual individualism was the theory in vogue in the 'civilized world'.[86]

Individualism has its antecedents in the eighteenth century[87] doctrine of rationalism, described by Pope Leo XIII as 'the supremacy of the human reason, which, refusing due submission to the divine and eternal reason, proclaims its own independence, and constitutes itself the supreme principle and source and judge of truth'.[88]

Rationalism[89] raised the doctrine of volonté générale or social contract as the basis for legal norms. Here, it has been said: 'Rationalism which had begun by raising human reason to the throne of God, ended by abdicating unconditionally in favour of will, whether it is the will of the State, of the dictator, of the bourgeois individual or of the proletarian class'.[90]

However, things were destined to change under the new conditions that the economy would present at the beginning of the twentieth century: the growth of the population and the growing scarcity of resources. Business profit as dominant motive was increasingly challenged by a search for economic and social equality. This search became first visible in the United Kingdom, where the Industrial Revolution started in the second half of the eighteenth century before spreading (from around 1830 to the early twentieth century) throughout Europe and the US, and to Japan and the various colonial countries).[91] Hence, Britain had more time to assimilate the transition from a hierarchical society to industrialism (where classical liberalism reigned) and then to collectivism.[92] Collectivism, in the sense of creation of a partial welfare state and a circumscription of liberties, took place in America, according to Carson, only during the twentieth century.[93]

By contrast, collectivism has been ingrained in Eastern culture for millennia. For example, Confucian ethics is basically humanistic and collectivistic in nature.[94] It is humanistic since its primary concern is the human condition. It is collectivistic because it places the importance of collective values and

interests above individual ones. According to this theory, a Confucian person is essentially a social being.

The core of Confucian ethics is constituted of three elements - ren, yi and li define what is morally acceptable in human society. Ren is the capacity of compassion or benevolence for fellow humans. It is essentially expressed in social relationships. Yi can be defined as righteousness and, according to Mencius (372-289 BC), it is inseparable from human nature.[95] Li represents the norms and protocols in personal and institutional lives. The legitimacy of li is based on ren and yi, and only under this condition are people obligated to follow it. Traditional Chinese culture and modern Chinese communities deem ren, yi, li, wisdom and trustworthiness as the five cardinal virtues of humanity. For this reason, Roebuck and Wai-Ip assert that the current law of China accepts the principle of good faith, not only because of the influence of German and Soviet law but, mainly because good faith fits Chinese traditional thinking.[96] For example, China's current Foreign Economic Contract Law provides in article 3 that, 'Contracts shall be concluded in accordance with the principles of mutual benefit and equality, and reached by unanimity by consultation'. However, Keung Ip points out:

> Since the founding of the People's Republic in 1949, the communist authorities have tried hard to replace the old feudalistic tradition with the new socialist culture. Being perceived as the crown jewel of feudalism, Confucianism had been systematically demonized, suppressed and purged. Despite this harsh and brutal treatment, Confucianism recently finds a comeback, thanks to the endorsement by many top government officials ... On the academic side, local and overseas scholars have been promoting the values of Confucianism in the building of a business moral order in China.[97]

To return to Western culture: during the aforementioned period of collectivism in the Western world, Spencer, a defender of liberal principles, argued against what he called 'compulsory cooperation',[98] a form of cooperation imposed from above. Instead, he proclaimed a 'voluntary cooperation', as a consequence of the evolution of society. In short, he stated that, since liberal society evolved from a hierarchical society prior to the industrial revolution, to come back to collectivism would mean a regression. Collectivism is, of course, where the state imposes rules for the good of the general population.[99]

Prima facie these theories about the role of the state could seem far from a theory of good faith in international contracts. However, the foundation of a more or less restrictive conception of contractual freedom and, as a result, the way to interpret good faith, both derive from the historical reality and the schools of thought in a particular time and place. It must be remembered that law is essentially an ordinance of reason directed to the common good. It is a teleological, not a mechanical, science.[100] Consequently, the determination of what is good faith differs according to differing times.

Generally, good faith in international contracts was present from 1880 onwards, the period known as 'collectivism',[101] as a 'compulsory cooperation' (in the way denounced by Spencer),[102] since it was applied under the aegis of international private law. Good faith fulfilled its role in cross-border agreements guided by the strictness of municipal systems of law. By contrast, nowadays good faith in the lex mercatoria represents the 'voluntary cooperation' to which Spencer aspired. The societas mercatorum is - in fact and spontaneously - applying or understanding good faith as cooperation for the common good of everyone involved in the contract and affected by it. In this sense good faith could be considered as a moral principle,[103] without fearing to introduce subjective parameters. Here, Max Nordau comments on Hegel's ideas: 'To act morally is to act so as to ensure the well-being of the community. The real categorical imperative is a social conscience'.[104]

The understanding of good faith as cooperation in our particular time in the history of humankind implies that the society is in evolution as the individual is in constant evolution - in an ontological sense:

> The industrial social type is made possible by an improvement in individual moral character which is the work of many generations. As individuals become more socialized, and develop 'higher' moral sentiments, like a love of liberty and a respect for the rights of others, so the social order comes to be produced spontaneously by their voluntary contractual agreements.[105]

Cooperation, as a particularity of the behaviour of parties in an international contract, is the product of the development of the contract theory, which is, at the same time, influenced by the changes in society. English law is a good illustration in this sense, since it has evolved from an initial liberal approach[106] to the promotion of fairness.[107]

4.2 Some Expressions in Case Law

Collins offers the case of *Schroeder Music Publishing Co Ltd v Macaulay*,[108] where the House of Lords annulled a contract on the basis of unfairness of the agreement, as an example of the new trend of English courts to punish unjustifiable domination, to procure the equivalence of exchange and to ensure cooperation between contractual parties. The author justifies the enshrinement of these values with a new understanding of the market order, which implies a revised notion of liberty and autonomy where 'the ability to enter into binding commitments is interpreted, not as a general licence but, as a power to be exercised for worthwhile purposes'.[109]Collins considers this as the underlying philosophy of his book: 'These three elements - the concern about unjustifiable domination, the equivalence of the exchange, and the need to ensure co-operation - which seem to me motivate the decision in *Schroeder Music Publishing Co Ltd v Macaulay*, form the core of the interpretation of law of contract presented in this book'.[110]

When two or more parties meet to agree on a commercial contract their purpose is to profit from the business, not to assist others or to be charitable. This leads to the question what makes traders effectively cooperate. The following is an attempt to condense the many aspects which can lead to such cooperation:

Traders effectively cooperate if the behaviour of the parties is directed towards the fulfilment of their reciprocal expectations when contracting. What a party can expect during the different phases of the contract is that the other party will do whatever is required to accomplish the aim of the contract. Even if the purpose of the contract cannot be fulfilled, cooperation will be expected and required in order to limit the losses resulting from the frustration of such aim.

During the performance phase, cooperation between the parties will focus on achieving that aim. In this sense, the concept of 'cooperation' must not be confused with the idea of 'collaboration'. As regards these notions, Williams suggests:

> Collaboration can refer to group activity within any corporate conglomerate or subsidiary activity and can easily be little more than assent to authority according to a feudalistic, hierarchical organizational system. Cooperation, on the other hand, is rooted in a highly democratic, participatory, and group-directed process. Cooperation demands a move away from a mere collaborative attitude within a typical corporate command chain.[111]

In short, cooperation in contracts means a move beyond, in the sense that it requires effective steps to fulfil the legitimate expectations of the other party, rather than just the proscription of undesirable conduct.[112]

This movement beyond can be well appreciated in the trend of new forms of contracting that enshrine cooperation: partnering, strategic alliances, joint venture, franchising, construction,[113] agreements to form groups of companies and technology cooperation, among others. Consider here, for instance, partnering in the construction industry. It appears to be almost universally accepted that partnering requires, 'changing traditional relationships to a shared culture ... based upon trust, dedication to common goals, and an understanding of each other's individual expectations and values'.[114] Partnering documents contain the language of 'good faith' and pose to judges the challenge of interpreting it in a manner that complies with the expectations of the parties:

> Under the JCT [Joint Contracts Tribunal] Non-Binding Partnering Charter the parties agree to act in good faith; in an open and trusting manner; in a co-operative way; in a way to avoid disputes by adopting a 'no blame' culture; fairly towards each other; and valuing the skills and respecting the responsibilities of each other. In the ACA [Association of Consultant Architects] Standard Form of Contract for Project Partnering PPC 2000, the parties agree to work together and individually in the spirit of trust, fairness and mutual co-operation (clause 1.3).[115]

In some specific contexts, such as the maintenance of stability of contractual relationship between the parties to international energy and natural resources development contracts, cooperation between the parties is required to such a degree that arbitrators are frequently allowed to adapt the contract according to the particular circumstances.[116]

An interesting aspect of interpreting good faith as requiring cooperation is that contractual duties to cooperate have been used in English jurisprudence to develop the law and to arrive at a result which could not be achieved with a literal interpretation of contracts. A good example is *Bournemouth and Boscombe Athletic Football Club v Manchester United Football Club*.[117]

The dispute involved a contract for the transfer of a football player from Bournemouth Football Club to Manchester United. The transfer fee was GBP200,000. GBP175,000 was to be paid as initial fee with the remaining GBP25,000 to be paid if and when the player had scored twenty goals in first-class football. Before the player had scored this number of goals he was sold to another club, West Ham United, for GBP170,000. Bournemouth argued that Manchester United were in breach of an implied term, effectively requiring Manchester to give the player a fair opportunity to score the goals that would trigger the GBP25,000 payment. The trial judge ruled in Bournemouth's favour and a split Court of Appeal dismissed Manchester United's appeal. If the management at Manchester United had transferred the player simply in order to avoid the bonus payment, then the Court would have certainly been unanimous, not only in treating this as bad faith but also, in agreeing that it was necessary to imply a term. However, the evidence was that the transfer was not motivated by any such reason but occurred simply because the player did not fit in with the new manager's team plans. For the dissenting judge, Lord Justice Brightman, this was a perfectly legitimate reason for the transfer and he did not see how an implied term could restrict the manager's discretion in relation to matters of team building. For the majority, however, even a legitimate transfer of this kind defeated the legitimate expectation of Bournemouth to be paid. In other words, even though there was no dishonesty on Manchester United's part, a duty of cooperation was necessarily implied.[118]

A number of observations can be made. First of all, was this a case of bad contract drafting? The drafters - linking the remaining payment to the score of a number of goals - limited the absolute freedom of the manager to choose the team which he should always have retained. The most important deduction is that, since the contract was drafted in this form, the judges recognized the implied covenant of co-operation that such a contract embodied; therefore without mentioning the general principle of good faith,[119] they recognized what the principle was meant to accomplish.[120]

It is this new paradigm in the theory of contract - the cooperative view - which is essentially embraced in the notion of good faith as used in transnational law. Therefore, good faith as principle is not a mere instrument but is inseparably linked to the lex mercatoria, and is often the decisive factor which underlies arbitrators' decisions. This link between good faith and the lex mercatoria is clearly shown in the arbitral case *Sapphire International Petroleums Ltd. v National Iranian Oil Co (NIOC)*.[121]

In 1958 the parties entered into a contract to expand the production and exportation of Iranian oil. The parties set up the Iranian Oil Company (IRCAN) to carry out the terms of the contract on behalf of the parties.

Sapphire International, Sapphire's subsidiary to which the claimant assigned the contract shortly after its conclusion, started work in the concession area and subsequently claimed the reimbursement of its expenses through IRCAN, as agreed in the contract. However, NIOC refused to reimburse the expenses, arguing that Sapphire International had not consulted NIOC before carrying out its operations. As a result, Sapphire International did not start drilling in the concession area as planned, and NIOC subsequently repudiated the contract on the basis that Sapphire International had not fulfilled its drilling obligations.

In September 1960, Sapphire initiated arbitration proceedings pursuant to the contract, claiming breach of contract and requesting compensation for expenses incurred before and after the conclusion of the contract; loss of profit and the refund of an US$350,000 indemnity, provided by Sapphire as a guarantee at the time of the contract conclusion and subsequently relied on by NIOC.

The core of this case, for the purpose of this article, stems from article 38 of the Concession Agreement, which reads:

> Under article 38 para.1 of the agreement the parties undertake to carry out the provisions of the contract in accordance with the principles of good faith and good will and to respect the spirit as well as the letter of the agreement.

Taking into account this clause, the arbitrator decided not to apply national law, particularly not to apply Iranian law, which prima facie appeared to apply to the contract. The arbitrator stated that, 'Such a clause is scarcely compatible with the internal law of a particular country. It much more often calls for the application of general principles of law, based upon reason and upon the common practice of civilized countries'.[122]

In summary, the lex mercatoria was applied because the parties had agreed to perform the contract in good faith. More commonly, the reverse can be observed, i.e., because the parties agree that the lex mercatoria governs their contract, the arbitrator applies the principle of good faith.

The application of the lex mercatoria in Sapphire was decisive for the outcome: since good faith was contextualized in the lex mercatoria, the arbitrator granted in favour of the claimant on the basis of a lack of

cooperation on the defendant's side.[123] The arbitrator found that the defendant deliberately refused to carry out certain of its obligations and that this failure amounted to a breach of the contract. The arbitrator observed that there was a general rule of private law that states that the failure of one party to a synallagmatic contract to perform its obligations releases the other party from its obligations and gives rise to a right to pecuniary compensation in the form of damages. He also ordered compensation for the expenses incurred by the plaintiff only after the conclusion of the contract and the refund of the indemnity.

5. Good Faith Cooperation in the UNIDROIT Principles of International Commercial Contracts and in the Principles of European Contract Law

The UNIDROIT Principles of International Commercial Contracts (PICC) and the Principles of European Contract Law (PECL) reflect a new sagacious approach to the subject of commercial contracts. They were formulated as a result of the international community's awareness of the changing role of contracts in international business. From 'discrete' transactions, transnational contracts have gradually developed into a genuine source of transnational commercial law. They stand for this dramatic change in one of the most important areas of transnational law.

As is well known, these sets of Principles are 'soft law'. That is, they are not binding upon the parties or the states, unless 'the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like'.[124]

In practice these Principles are invoked by national judges and arbitrators as support for their perceptions of international commercial law. Actually, this can imply that good faith is seen as an overarching principle which can underpin solutions provided by international arbitrators. An example might help to illustrate this point. In an ICC case, the award was based on Greek law, among other norms, under article 200 of the Greek Civil Code which states: 'Contracts shall be interpreted according to the requirement of good faith taking into account business usages'. In addition, the arbitral tribunal mentioned other norms of European civil codes and, in order to demonstrate that 'modern international law is evolving in the same direction', expressly referred to articles 1.7, 1.8, 4.1 and 4.3 of the UNIDROIT Principles.[125]

Since the UNIDROIT Principles have exercised and will continue to exercise a considerable influence on the harmonisation of the business law of regional entities such as African and American States,[126] the way in which these Principles embrace good faith is also reflected in those projects of the unification, harmonisation or reform of national business laws.[127] This has an enormous impact on the system of commercial law as a whole, in the sense that there is a transposition of the concept of good faith from transnational law towards national systems and vice versa. This last aspect means that national legal systems have also influenced the transnational concept of good faith fundamentally through the 'subjective element', i.e., through practitioners and arbitrators acting in national and international environments.[128]

5.1 Provisions on Good Faith and on Cooperation

Good faith is explicitly mentioned in article 1.7 of the PICC, which states that, 'Each party must act in accordance with good faith and fair dealing in

international trade' and they 'may not exclude or limit this duty'. This norm is reproduced in article 1:201 of the PECL 'Good Faith and Fair Dealing'.

Good faith is qualified by 'fair dealing in international trade'. The reference to international trade forbids the interpreter to give a domestic connotation to good faith.[129]That is, anyway, the common practice in international arbitration.

It is also opportune to reflect on the mention of fair dealing in this article. This is not a novelty in commercial matters. There is an antecedent in the experience of the US in the Uniform Commercial Code (UCC). On the one hand, Section 1-304 (formerly 1-203) states:

> Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.

Good faith in this case is mentioned singularly, i.e., no reference to fair dealing is made. On the other hand, Section 1-201 defines good faith as:

> Honesty in fact and the observance of reasonable commercial standards of fair dealing.

That means that fair dealing is part of the concept of good faith in this legal system.[130] By including fair dealing in the definition, the legislator wanted to offer an objective criterion of good faith which is measurable according to the particularized settings in which it is applied.[131] Similarly, the Dutch legislature uses the term good faith in an objective manner and, accordingly, characterizes the term in the sense of reasonableness and fairness.[132] The same approach seems to be adopted in the PICC. Besides the fact that they are consistent in their coupling of good faith and fair dealing throughout the articles, according to Farnsworth (who was part of the drafting group for the Principles), 'one may assume ... that the inclusion of fair dealing imposes an objective standard as established by relevant trade practices'.[133]

The second part of this norm, which forbids excluding or limiting the duty of good faith could seem out of step in instruments containing 'soft law' such as these. Nevertheless, the comment on article 1:102 of the PECL contains an interesting assuagement to this mandatory rule: 'What is good faith will, however, to some extent depend upon what was agreed upon by the parties in their contracts'. Similarly, Section 1-302 of the UCC provides that standards of good faith can be fixed by the parties.[134] This is a great tool in the parties' hands. The content of good faith may diverge widely according to the economic sector and to the particular circumstances of the contract; therefore, it is important for the parties to have an alternative to establish with clarity the idea of good faith embraced in their agreement. In addition, this is an excellent guidance for judges and arbitrators.

Apart from the central article 1.7, good faith is embraced in an explicit and also in an implicit way in other articles of the PICC.[135]

Among the explicit norms, article 4.8 'Supplying an Omitted Term' states that,

> (1) Where the parties to a contract have not agreed with respect to a term which is important for determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied. (2) In determining what is an appropriate term regard shall be had, among other factors, to: (a) the intention of the parties; (b) the nature and purpose of the contract; (c) good faith and fair dealing; (d) reasonableness'.

Undeniably, there is a similarity between this article and article 1135 of the French Civil Code that states: 'Agreements are binding not only to what is

expressed therein, but also to all the consequences which equity, usage or statute give to the obligation according to its nature'.

Article 4.8 is related to 5.1.2 'Implied obligations': implied obligations stem from (a) the nature and purpose of the contract; (b) practices established between the parties and usages; (c) good faith and fair dealing; (d) reasonableness.

It has been said that article 5.1.2 is a nod towards the common law. However, it is expressly stated in the official comment of article 5.1[136] that implied obligations are a corollary to good faith enshrined in art. 1.7 PICC.[137]

In its role of essential principle, good faith is also offered as an instrument for interpretation in article 1:106 PECL, which states:

> (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.

To use good faith as an element of interpretation of the PECL it is important to understand the meaning of good faith. The official comment states that 'good faith' means honesty and fairness in mind (i.e., good faith in the subjective sense), whereas 'fair dealing' means the observance of fairness in fact, which is an objective test.[138]

There are other provisions that stress good faith's role in the interpretation and integration of the contract in the PECL. Among them is article 5:102 'Relevant Circumstances'. In paragraph g) this article states that good faith and fair dealing are to be taken into account in the interpretation of the contract.

In the task of integration of the contract the arbitrator is guided by article 6:102 Implied Terms: 'In addition to the express terms, a contract may contain implied terms which stem from: (c) good faith and fair dealing'.

In accordance with the main argument of the present article, the synthesis of good faith and cooperation in these Principles deserves special analysis.

Article 5.1.3 PICC 'Cooperation between Parties' reads as follows:

> Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations.

The official comment on the PICC qualified the contract as, 'not merely a meeting point for conflicting interests' but also as a common project in which each party must cooperate. This view is related by the same comment to the good faith principle.

Similarly, article 1:202 PECL 'Duty to Co-operate' states:

> Each party owes to the other a duty to co-operate in order to give full effect to the contract.

In the PECL cooperation is presented as an autonomous duty. However, the general nature of the terms used to define the duty of cooperation and the illustrations provided in the official comment on the Principles allow the equating of cooperation with good faith.[139] For example, illustration 1 of the official comment reports a fictitious case in which a party in Hamburg agrees to sell goods to other party in London at a stated price f.o.b. Hamburg. However, the buyer fails to nominate a vessel to carry the goods, preventing the fulfilment of the other party's obligation. From this illustration, it is possible to state that, according to good faith, the creditor ought to have

nominated the vessel in order to secure full performance of the contract - though this was not an express obligation of the agreement.[140]

Illustration 3 of the official comment is even clearer that the required cooperation implies that bona fides obligat, as it reads: 'A party has to inform the other party if the other party in performing the contract may not know that there is a risk of harm to person or properties'.[141]

In addition, article 16:102 of the PECL puts on the same stand good faith, fair dealing and cooperation. The following is the text of this article:

> Interference with Conditions 1) If fulfilment of a condition is prevented by a party, contrary to duties of good faith and fair dealing or co-operation, and if fulfilment would have operated to that party's disadvantage, the condition is deemed to be fulfilled. 2) If fulfilment of a condition is brought about by a party, contrary to duties of good faith and fair dealing or co-operation, and if fulfilment operates to that party's advantage, the condition is deemed not to be fulfilled.

Danny Bush[142] compares article 16:102 of the PECL with the corresponding norm in the Dutch Civil Code. This reads as follows:

> Article 6:23 BW 1. If reasonableness and fairness so require, the condition is deemed fulfilled in the event that the party who has an interest in the non-fulfilment of the condition prevents its fulfilment. 2. If reasonableness and fairness so require, the condition is deemed not fulfilled in the event that the party who has an interest in the fulfilment of the condition brings about its fulfilment.

What is interesting is the beginning of this norm, 'If reasonableness and fairness so require', because these terms are the objective way chosen by the 1992's legislator to nominate good faith.[143]

The synthesis of good faith and cooperation is also expressed in the following statement contained in the preparatory work on the UNIDROIT Principles 2004: 'It may be argued that since the UNIDROIT Principles expressly state the duty of the parties "[to] act in accordance with good faith and fair dealing in international trade" (art. 1.7(1)) and to co-operate with each other in the course of performance (art. 5.3), no further provision(s) on waiver are needed'.[144] Furthermore, an ICC award expressly states that, 'Parties must cooperate in good faith in the course of performance in order to achieve their contractual purposes'.[145]

Federica Rongeat-Oudin and Martin Oudin accept - in light of the positions taken in arbitral awards - that cooperation has been acknowledged as a duty derived from good faith and also that article 5.1.3 of the UNIDROIT Principles appears as a real restatement of international practice.[146]

The importance given to good faith cooperation in these sets of Principles is such that article 1:301 (4) of the PECL states that the failure to co-operate amounts to non-performance. Besides, according to the comment on article 1:201 PECL, good faith is required during the formation, performance and enforcement of the parties' duties under the contract.

5.2 Good Faith as a Fundamental Idea

Good faith is the main idea which underlies both the PECL and the UNIDROIT Principles.[147] It is postulated here that good faith and other underlying notions such as flexibility and fairness[148] are harmoniously and consistently applied by arbitral tribunals in international contract disputes.

By contrast, Hyland sees an internal inconsistency within the UNIDROIT Principles. According to him, the Principles are inspired by contrasting

conceptions: natural law (pacta sunt servanda) and risk allocation. Because of such incoherence, uniform interpretation according to the ideas underlying the Principles, as provided by article 1.6, is difficult; the courts might construe the norms in different ways.[149]

It is generally known that the maxim of pacta sunt servanda binds individuals to their promises; in consequence, the sanction for breach of contract can be more severe when the breach is intentional. Pacta sunt servanda can likewise call for the enforcement of penalty clauses, because they seek to ensure adherence to the contract.

By contrast, a view which sees the contract predominantly as a tool for risk allocation does not consider the promisor bound by law to perform the promise. The promisor remains free to breach.

Hyland believes that the UNIDROIT Principles, influenced by the common law, tend more toward the conception of risk allocation and place less emphasis on pacta sunt servanda.[150]

Risk allocation is an idea borrowed from Oliver Wendell Holmes, who proposed that contract law's only aim was to guarantee the boundaries of the field of promising without involving moral judgements of conduct.[151] Holmes argued:

> In the case of a binding promise that it shall rain tomorrow, the immediate legal effect of what the promisor does is, that he takes the risk of the event, within certain defined limits, as between himself and the promisee. He does no more when he promises to deliver a bale of cotton. If it be proper to state the common-law meaning of promise and contract in this way, it has the advantage of freeing the subject from the superfluous theory that contract is a qualified subjection of one will to another, a kind of limited slavery. It might be so regarded if the law compelled men to perform their contracts, or if it allows promisees to exercise such compulsion. If, when a man promised to labor for another, the law made him do it, his relation to his promisee might be called a servitude ad hoc with some truth. But that is what the law never does... The only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfilment has gone by, and therefore free to break his contract if he chooses.[152]

Holmes's position is not convincing. Law is based on the idea of justice which utterly embraces morals. An essential connection between law and morals emerges from an examination of how laws are interpreted and applied in concrete cases. Consider, for example, the case of protection of 'expectation interests', by which the plaintiff is compensated to put it in the financial position it would have if the contract had been performed.[153] The defendant is, of course, free to perform but the system provides in such a way that the promisor is given a strong incentive to fulfil the promise. There is a morality of promise-keeping at the base.[154] Without aiming to penetrate the depths of philosophy of law, a brief explanation appears appropriate.

Legal positivism postulates the separation between law and morals, or, in other words, the distinction between law as it is from law as it ought to be.[155] Other authors conclude that moral notions of justice must be necessarily involved in the analysis of any legal structure.[156] The view held in this article is evidently with those who acknowledge that there is an interconnection of law and morals.[157] As Burrows remarks:

> The common law is best regarded as a coherent system of principles, reflecting a complex mix of 'moral rights' reasoning, modified and tempered by the desire to pursue certain long-term social policies. One important social policy is efficiency; but its place is alongside, not as a replacement for, moral rights reasoning, and this is how it is used in this book.[158]

This statement, taken from a book on the 'Breach of Contract', the cornerstone of Holmes's theory, gives one illustration for the general trend that Holmes's positivistic attitude is not shared by contemporary contract lawyers - although the strict application of pacta sunt servanda is not shared by them either.

The need for equilibrium between risk allocation and pacta sunt servanda explains the drafters' option for such a meaningful involvement with good faith in the Principles.

Contrary to what would appear to be the common belief, this Latin maxim was not formulated in Roman law, but by Samuel Pufendorf (1632-1694) who conceived the principle in the context of natural law and modern scientific method. Its immediate precedent is canon law, where the non-performance of a contractual obligation was considered a moral wrong.[159]

At the time the maxim was formulated, it meant that agreements must be faithfully observed.[160] Grotius (1583-1645) earlier also expressed this view in his famous De Iure Belli ac Pacis, 'Nothing is so in harmony with the good faith of mankind as that persons should keep the agreements which they have made with one another'.[161]

Pacta sunt servanda became such a recognized principle, especially in civil law systems, that its inclusion in civil codes has been regarded as unnecessary.[162] The establishment of pacta sunt servanda determined the importance given to good faith in the Principles. In plainer words, according to pacta sunt servanda agreements must be performed but, according to the Principles, they must be performed in good faith and fair dealing in international trade, i.e., the parties are required to perform according to the particular circumstances and practices of the trade sector and the socio-economic environment of the contract. Therefore, good faith is a kind of restraint to the pacta principle today.[163]

The philosophy of pacta sunt servanda is adopted in the UNIDROIT Principles.[164] The logic that agreements must be performed allows the flow of commerce.[165] The less obvious part is that they must be fulfilled according to good faith.[166] Therefore, what the UNIDROIT Principles' drafters made in article 1.7 was to state their commitment to good faith as a concept that allows judges and arbitrators to ensure that the parties' duties will be carried out and their mutual legitimate expectations will be met according to the special conditions of the contract in international trade.[167]

In addition, according to M J Bonell[168] the UNIDROIT Principles attempt through good faith to bring about conditions of equilibrium and correctness in international relations.[169]

Could this instrumental-corrective character be considered as a feature of good faith in the Principles?

Good faith in this context would be part of a number of other protective norms in the UNIDROIT Principles, inter alia: articles 1.9; 2.1.20; 3.8; 3.9; 3.10; 4.6; 7.1.6 and 7.4.13. The absolutist view on the essentiality of protective norms is that of Galgano, who describes the Principles as an 'illuminated work of techno-democracy in the research for the equilibrium between opposite interests, between the reasons of the company and the need to protect the weak party'.[170]

As an explanation for the approach assumed in the PICC, Bonell states that the reality presents professionals with different levels of education and expert

knowledge and 'there are those who surrender to the temptation of taking advantage of the weaknesses and needs of others'.[171]

It is likely that, in fact, such is the role that drafters wanted to give to good faith in the Principles, since Bonell writes authoritatively from his role in the working group in the preparation of the PICC. In addition, the official comment of article 1.7 states that, 'A typical example of behaviour contrary to the principle of good faith and fair dealing is what in some legal systems is known as "abuse of rights". It is characterised by a party's malicious behaviour'.

However, the present article argues that good faith is not only a safeguard against malicious behaviour but also that it elicits cooperation in international business. Reputation is vital for this role of good faith.

In the societas mercatorum a merchant who behaves in bad faith will lose his reputation. According to Berger:

> This requires a basic consensus of common values and convictions and the readiness of every member of that community to comply with the relevant rules and principles even at risk of losing and doing damage to individual interests ... This is also true in international trade where the business persons' consciousness of the validity of trade usages, customs, contract practices, and similar rules is guaranteed through 'black lists', withdrawal of membership rights, forfeiture of bonds, and similar dangers to the commercial reputation.[172]

This aspect of reputation is key in the theory of good faith cooperation in global business, since the continuing interaction among traders - which implies the likelihood that the same merchants will deal again; the ability to recognize each other from the past; and to recall how the other has behaved until now - makes it possible for cooperation to be based on reciprocity and, therefore, to be stable.

One important aspect of reputation is to elicit good faith cooperation. If one party has 'historically' behaved in good faith, there is a credible possibility that this party will not continue trading with a party who has not been in good faith in a particular contract. Of course, this has substantial consequences only in an ambit of durable or frequent interaction between traders - which is the actual situation of commerce in the 'global village'[173] where long-term contracts proliferate. Here, Axelroad's observation is instructive:

> Ordinary business transactions are also based upon the idea that a continuing relationship allows cooperation to develop without the assistance of a central authority. Even though the courts do provide a central authority for the resolution of business disputes, this authority is usually not invoked ... The fairness of the transaction is guaranteed not by the threat of a legal suit, but rather by the anticipation of mutually rewarding transactions in the future.[174]

There is a link between long-term contracts and reputation, since as Buckley and Casson explain, 'forbearance appeals most to those agents who take a long-term view of the situation'.[175]

These authors enumerate, among the aspects most conducive to investment in reputation, the following:

> 1. The prospect of many future ventures in which the party expects to have an opportunity to be involved; 2. The conspicuous demonstration of forbearance in a public domain; 3. A propensity for observers to predict the future behaviour of a party by extrapolating from its past pattern of behaviour.

A party with a reputation for never being first to abandon forbearance gives the partner a greater incentive to follow suit.[176] Furthermore, '[a]n arrangement that calls for a considerable input of cooperation and then turns out successfully enhances the reputation of the parties. First and foremost, it

enhances their reputations with each other, but, if there are spectators to the arrangement, then it enhances their reputations with them too'.[177] This can be called 'reputation building'.

Beyond these sets of Principles, it is postulated in this article that the notion of good faith is inherent in modern cross-border trade. The incorporation of good faith into the latest developments of harmonised law in Europe demonstrates such a reality, as will be seen in the following section.

6. Latest Developments of Good Faith in the Harmonisation of European Contract Law

6.1 Draft Common Frame of Reference

The Draft Common Frame of Reference (DCFR) is the result of a process initiated in 2001 with the Communication on European Contract Law.[178] In 2005 several groups of academic researchers were commissioned by the European Commission to contribute to the DCFR.[179] The research work finished in 2008 and led to the publication of the academic Draft of the Common Frame of Reference (DCFR),[180] which includes principles, definitions and model rules of European private law, including contract and tort law. It contains provisions for both commercial and consumer contracts.[181]

Due to the intention of the drafters to incorporate the current and/or the best rules for every case, the DCFR contains many solutions taken from the lex mercatoria based on good faith. In fact, the Draft includes 24 references to good faith and fair dealing.[182] Some see these frequent references to good faith and fair dealing as the Achilles' heel of the Draft, making it difficult to accept especially for lawyers in England. Here, Vogenauer points out the lack of precision of the Draft due to a great number of open-textured provisions; he adds that it has been much attacked for its lack of determinacy and guidance which is said to lead to a massive expansion of judicial power.[183]

According to a document published by the House of Lords Select Committee on the European Union Committee 2008-2009,[184] there are serious concerns on the English side, namely:

- The broad scope of the DCFR, which covers, not only matters considered as falling within the general law of contract by practitioners of English law but also, contracts for the sale of goods, financial securities, intellectual property rights and software, and unjustified enrichment. - The most rigorous observations point out the differences between the common law and other national laws. The solutions adopted are regarded as differing significantly from the current law of contracts in England and Wales. It is considered that the DCFR raises major philosophical problems. Regarding specific areas of difference the big issue is good faith. In the Report this theme falls under the heading 'Party autonomy and contractual certainty'. It is considered that the DCFR involves too much discretion, and so uncertainty, by the use of 'an astonishing number of vague and ambiguous terms, concepts such as "reasonableness" and "good faith"'. It is said, 'In contrast to English contract law, the DCFR contains an overarching principle of good faith and fair dealing, which applies to the process by which a contract is brought into being as well as to the performance of contractual obligations'.[185]

The analysis of how to overcome the deficiencies detected by the English position is offered below when examining good faith within the CESL.

6.2 The European Commission's Green Paper on Policy Options for Progress Towards a European Contract Law for Consumers and Businesses

Currently, the European Commission is working on policy options for progress towards a European Contract Law for consumers and businesses. With this objective, a Green Paper was launched on the 1st July 2010,[186] proposing a consultation to gather views from relevant stakeholders on the options in the area of unification of European contract law.[187] Depending on the results, the Commission would propose further action by 2012.[188]

The Green Paper proposes several alternatives about the instrument of European contract law:

Option 1: Publication of the results of the Expert Group; Option 2: An official 'toolbox' for the legislator; Option 3: Commission Recommendation on European Contract Law; Option 4: Regulation setting up an optional instrument of European Contract Law; Option 5: Directive on European Contract Law; Option 6: Regulation establishing a European Contract Law; Option 7: Regulation establishing a European Civil Code.

In order to carry out its mandate, the Commission set up an Expert Group[189] to study the feasibility of a user-friendly instrument of European contract law. The Group was to assist the Commission in selecting those parts of the DCFR related to contract law and in improving the selected provisions. It was also taking into account other relevant sources in the area and, of course, the results of this consultation.

On 3 May 2011 the feasibility study on a potential European contract law instrument was published.[190] All interested parties were entitled to send their feedback on the individual articles in the study until 1 July 2011. The reactions can be summarized as follows:

- There is a lot of scepticism amongst stakeholders, especially those representing big companies; - The support for this initiative varies according to the industrial sector. For example, the insurance sector is broadly supportive; - Options 6 and 7 have been ruled out as a possibility due to absolute lack of support, that is to say, real harmonisation is excluded. The most possible alternatives are option two, i.e., 'toolbox' and option four, i.e., an optional instrument.[191]

6.3 The European Commission Proposal for a Regulation on the Common European Sales Law

While the principle of good faith has hitherto been used in individual commercial contexts, such as the Directive on the coordination of the laws of the Member States relating to self-employed commercial agents,[192] a bolder approach has been taken by a recent Commission Proposal for a Regulation on a Common European Sales Law.[193] This proposal could extend the control of not individually negotiated contract terms on the basis of good faith (as embodied in the Directive on Unfair Terms in Consumer Contracts[194]) to business to business contracts.

The Directive on Unfair Terms in Consumer Contracts has been in force in English law since 1995. The Directive contains norms as article 3, which states:

> A contractual term which has not been individually negotiated shall be regarded as unfair if contrary to the requirement of good faith.

Prima facie, this could be considered a revolution in the traditional approach to good faith in English law.[195] Steyn, however, thinks differently. He mentions the Unfair Consumer Terms Act of 1977 as an example of how the English legislature has set statutory standards of fair dealing before the Directive.[196] Beatson and Friedmann agree, in fact, with Steyn:

> Even before the European Community Directive on Unfair Terms in Consumer Contracts of 1993, which imposes obligations of good faith, there were signs that the influence of other legal systems and the European environment were leading to a gradual recognition of the doctrine or at least to parallel solutions by other means' (in English law).[197]

The Directive of 1993 provides that a term which has not been individually negotiated is unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the rights and obligations of the parties to the detriment of the consumer - taking into account the nature of the goods or services and the circumstances attending the making of the contract.

These requirements to assess good faith, especially the first three factors, were already included in the test of reasonableness under the 1977 Act, as they appear in the Schedule 2 "Guidelines" for Application of Reasonableness Test.

Contrary to initial plans which saw the Directive on Unfair Terms in Consumer Contracts to be replaced by the European Commission proposal for a Directive on Consumer Rights (which was intended to merge four existing Community directives[198] in a single legal instrument), the Directive on Unfair Terms in Consumer Contracts will remain in force. Moreover, if the above-mentioned Commission Proposal is accepted by the legislature, it will be supplemented by an optional Common European Sales Law which - as previously stated -, if chosen by the parties, will also submit non-negotiated contract terms in business contracts to an unfairness test.

6.3.1 Generalities

On 11 October 2011, the European Commission published a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL).[199] It covers the sale of goods, the supply of digital content and some related services.

The rationale of this Proposal is that, according to the Commission, different national contract laws are a barrier to the functioning and continuing establishment of the internal market. The contract-law-related barriers which prevent traders from fully exploiting the potential of the internal market also work to the detriment of consumers. The legal basis under the Treaties to create the CESL is article 114 of the Treaty on the Functioning on the European Union.

The CESL operates on a voluntary basis, i.e., it becomes the basis of a contractual relationship only where parties jointly decide to use it.

The proposed Regulation would create within each Member State's national law a second contract law regime for contracts within its scope. This second regime would be identical throughout the Union and exist alongside the pre-existing rules of national contract law.

Under Article 4, the proposed CESL is applicable only to cross-border transactions. The use of the CESL is not limited to cross-border situations within Member States, but it is also available to facilitate trade between Member States and third countries. Where consumers from third countries

are involved, the agreement to use the CESL, which would imply the choice of a foreign law for them, would need to be subjected to the applicable conflict-of-law rules. It is also available for use in an entirely domestic setting where Member States decide to make the CESL available to parties dealing within the national territory (Article 13).

It can be chosen for all business-to consumer transactions, and for contracts between traders where at least one of the parties is an SME drawing upon Commission Recommendation 2003/361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.[200] This is, however, without prejudice to the possibility for Member States to enact legislation which makes the CESL available for contracts between traders, neither of which is an SME (Article 13).

Where the CISG would otherwise apply to the contract in question, the choice of the Common European Sales Law should imply an agreement of the contractual parties to exclude that Convention.

In order to enhance legal certainty, it is foreseen to make the case law of the Court of Justice of the European Union and of national courts on the interpretation of the CESL accessible to the public. For this purpose, the Commission will set up a database comprising the final relevant decisions. With a view to making that task possible, the Member States should ensure that such national judgments are quickly communicated to the Commission (both Article 14).

6.3.2 Good faith within the CESL

Article 2, which contains a list of definitions for terms used in the Regulation, defines good faith in b) using the same words which were used in Art. I.-1:103 DCFR:

> 'Good faith and fair dealing' means a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.

Other norms of the Annex I also refer to good faith:

> Article 2 Good Faith and Fair Dealing 1. Each party has a duty to act in accordance with good faith and fair dealing. 2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party. 3. The parties may not exclude the application of this Article or derogate from or vary its effects. Article 3 Co-operation The parties are obliged to co-operate with each other to the extent that this can be expected for the performance of their contractual obligations.

CESL presents cooperation as a separate general principle (similar to articles III.-1:103 and III.-1:104 DCFR).[201] Does this mean that cooperation and good faith are not related in these instruments?

Such a view is untenable. Cooperation and good faith are related in the DCFR and in the CESL.

Firstly, the Introduction to the outline edition of the DCFR states, 'One party's contractual security is increased by the fact that the other is expected to co-operate and act in accordance with the requirements of good faith and fair dealing'.[202]

Secondly, H Eidenmüller, F Faust, H Grigoleit, N Jansen, G Wagner and R Zimmermann, consider the obligation to cooperate in the DCFR as a limitation

on party autonomy and standards such as good faith as additional overlapping limitations:

> Moreover, the DCFR provides for further mechanisms - in the form of general standards - interfering with the obligations specified in the contract and overlapping with the duties of co-operation. Examples of such mechanisms are the duty to act in good faith when performing a contract (Art III.-1:103).[203]

Although their opinion is arguable,[204] ultimately, what these authors are recognizing is that good faith and cooperation are fulfilling similar functions: 'providing judges with an opportunity to achieve "just results" by arbitrarily complementing the contractual provisions of the parties".[205]

A further argument for the assimilation of good faith and cooperation is the wording of Recital 31 to the Regulation of the CESL:

> The principle of good faith and fair dealing should provide guidance on the way parties have to cooperate. As some rules constitute specific manifestations of the general principle of good faith and fair dealing, they should take precedent over the general principle. The general principle should therefore not be used as a tool to amend the specific rights and obligations of parties as set out in the specific rules.

This confirms the position advanced in this article that good faith is linked to cooperation in modern international trade.

Other articles in the Regulation of the CESL contain the language of good faith, such as: article 23 'Duty to disclose information about goods and related services'; article 48 'Mistake'; article 49 'Fraud'; article 59 'Relevant Matters'; article 68 'Contract Terms which may be Implied'; article 83 'Meaning of "Unfair" in Contracts between a Trader and a Consumer'; article 86 'Meaning of "Unfair" in Contracts between Traders'; article 170 'Unfair Contract Terms relating to Interest for Late Payment'.

These norms have been assessed by the Law Society of England and Wales and the Law Commissions of England and Wales and of Scotland. The former in the revised briefing on the CESL states:

> Practitioners are particularly concerned by the inclusion of a mandatory principle of 'good faith and fair dealing' in B2B contracts, which they think would create uncertainty for businesses. While this concept is understood in civil law jurisdictions, it will need a significant change of culture for businesses in England and Wales if they were to adjust to this.

The following is the opinion of the Law Commissions:

> All systems of commercial contract law must grapple with the tension between certainty and fairness. English and Scots law have a reputation for leaning towards the certainty end of the scale. By contrast, the CESL is firmly towards the fairness end. It sets high standards of good faith and fair dealing and provides many discretionary remedies to a party who has suffered from a lack of good faith. This may protect a weaker party in negotiations - though this is less helpful in an optional regime, where a weaker party may have a choice of law imposed on them. The open ended nature of the discretion may also disadvantage the party least able to litigate.[206]

The ambitious timetable set by the Commission for the implementation of the proposed Regulation, i.e., the end of 2012[207] underlies the need for stakeholders, practitioners and academics to form conclusions quickly. The much needed reflections and discussion in the academic world are just taking place.[208] However, some comments regarding the criticisms formulated by the Law Society of England and Wales and the Law Commissions of England and Wales and of Scotland can be made at this stage.

Recital 31 to the Commission's proposal for the CESL clearly states that:

> The concrete requirements resulting from the principle of good faith and fair dealing should depend, amongst others, on the relative level of expertise of the parties and should therefore be different in business-to-consumer transactions and in business-to-business transactions. In transactions between traders, **good commercial practice** in the specific situation concerned should be a relevant factor in this context.

This implies a caveat to interpret good faith in different ways depending on the type of transactions.[209] The Recital states for B2B transactions that the practice of trade shall guide the judge in the interpretation of good faith. The present article postulates that, in practice, cooperation is the essence of good faith in international contracts; therefore, the interpreter in the search for the aforementioned 'good commercial practice' should emphasize cooperation between traders.

Furthermore, in the CESL good faith is consistently coupled with fair dealing. Hence, an objective standard is offered to measure good faith according to relevant trade practices.[210] In other words, international practice can provide a means to overcome the uncertainty associated with good faith.

Finally, since cooperation between traders is the underlying current of international commerce and good faith is the principle that ensures such cooperation in the relationship between traders;[211] English law cannot remain apart from the reality of cross-border trade. Moreover, it is destined to be incorporated with international commercial practice in higher syntheses.[212]

It is considered essential at this point to complement the foregoing philosophical disquisition and the recent analysis of the development of European law with the stance of arbitrators, which is offered in the following section.

7. The Arbitral Jurisprudence on Good Faith

There is ample evidence from arbitral awards that the concept of good faith in international trade is understood as cooperation between parties. It implies refraining from acts which would be hurtful to the other party's expectations and also 'a move beyond',[213] i.e., a party must undertake certain steps in order to fulfil the legitimate expectations of the other party.

In modern arbitral practice abstaining from hurtful acts, as reflect of good faith, is often cited.[214] For instance, in an ICC award rendered in a case between a US exporter and an Argentinian distributor, it was stated:

> The arbitral tribunal has already stated that California law recognizes an implied covenant of good faith and fair dealing which requires that neither party do anything to injure the right of the other to receive the benefits of the agreement.[215]

In addition, the 'positive conduct' required by good faith cooperation will be explored particularly in this section.[216]

The Vienna Convention embodies the collaborative view that permeates contract law today. As stated in article 7 (2) CISG, the provision is to look first at the interpretation of the provision within the Convention, and secondly (if a gap exists) 'the general principles on which it is based'. The last resort is national law, identified by the norms of international private law.

What are the 'general principles' referred to in CISG? Reiley identifies the following:

> - Uniformity; - Good faith; - Full compensation; - Equality between buyer and seller; - Respect for different backgrounds; - Contractual commitment; - Forthright communication and; - Forgiveness of human error[217]

All these principles reflect the recognition of the end of antagonism - to put it in a striking way.[218] Numerous arbitral awards show that good faith enshrines this philosophy.

In an ICC case[219]a clause in the contract provided for an increase of the price - which was actually the claim of the plaintiff. The clause was interpreted in different ways by the French and the English parties. Due to different views, the parties did not succeed in renegotiating an adjustment of the contract.[220]

The decision was based on the lex mercatoria, because - in the absence of a contract in due and good form - the arbitrator decided to apply 'the general principles of law and equity, which must rule international commercial transactions'. The award expressed three principles of the lex mercatoria:

> 1. The obligations must remain balanced, that is, generally obtained through the insertion of 'hardship' clauses; 2. Pacta sunt servanda;[221] 3. The agreements must be interpreted according to good faith.

The arbitrator in this case appositely declared,

> This obligation of cooperation, which modern doctrine rightly finds in the good faith principle which must govern the performance of any convention, is necessary.[222]

The arbiter decided the case in favour of the claimant who asked for an increase of the price, because 'Contracts must be interpreted in good faith, therefore each party must refrain from adopting a conduct that may harm the other and (to undertake) the reasonable renegotiation customary in international economic contacts'.[223]

In a second arbitral case[224] the arbitrator applied the lex mercatoria on the grounds of the parties' agreement. However, in doing so legal categories pertaining to national systems were recalled. In this case, the general conditions of the contract insisted on the importance of avoiding delay in the dispatch. Nonetheless, it was stated that, 'it would be inconceivable that the provider assumes a total warranty for this reason. Such an interpretation would render those clauses as "léonine" (unfair)'. The award was finally granted to the claimant, in spite of the fact that this party had not dispatched on time, because: 'The principle pacta sunt servanda is subject to the concept of abus de droit, and to a rule that unfair and unconscionable contracts and clauses should not be enforced'. The parties should, therefore, cooperate in the stability of the relation and fulfilment of the contract.[225]

Similarly, the ICC award n. 5485 stated (sic):

> Whereas the rule pacta sunt servanda implies that the contract is the law of the parties, agreed to by them for the regulation of their legal relationship, and generates not only the obligation of each party to a contract to fulfil its promises, but also the obligation to perform them in good faith, to compensate for the damage caused to the other party by their non-fulfilment and to not terminate the contract unilaterally except as provided for in the contract.[226]

Good faith cooperation requires the debtor and creditor to work as partners rather than as adversaries. This position is effectively embraced in arbitral decisions and also - as has been seen - in restatements of principles; e.g. in arbitral award given by the Arbitration Centre of the Costa Rican Chamber of Commerce, 1st June 2003, it was stated (sic):

> Each party must act in a way that does not damage the other party and that the parties must comply with this obligation of cooperation that modern doctrine derives from the principle of good faith that must govern the execution of every contract. Additionally, it has recently been provided by ICC International Court of Arbitration that according to the UNIDROIT Principles of International Commercial Contracts, the usages of international trade require good faith in the fulfilment of contractual obligations (ICC, Award 9593, 1998).[227]

In two more examples the arbitral tribunal required of both parties a cooperative attitude in the termination of the contract:

- In the *Wintershall v Qatar*[228] the concessionaire was deprived of the benefits of its investments because, by the time the gas discovery was made, the contractual period had expired and the government, on the basis of a contractual provision, had elected to terminate the contract.

This is one of the rare instances in which specific performance was ordered. Strictly speaking, under the classical theory, the government was not in breach of any contractual duty, but it merely exercised a contractual option as a result of which the contract came to its natural end. However, opting in this particular way, and at this time, was both inconvenient and disadvantageous to the other party and the contractual project.

The decision of the tribunal recognized the existence of a duty to cooperate in order to allow the concessionaire to obtain his contractual benefits.

- A similar example is provided by *Mechema Ltd. (England) v S.A. Mines, Minérais et Métaux (MMM) (Belgium)*, an award rendered by an ad hoc tribunal on 3 November 1977, where the arbitrators applied the lex mercatoria in the exercise of their power as amiable compositeurs.[229] The final decision shows how cooperation based reasoning can influence the outcome even where the arbiters rely on the notion of 'equity', rather than on those of 'good faith' or 'cooperation'.[230] The facts of this case were as follows:

MMM was the exclusive world distributor for the products of company E. By a contract of 1 November 1966, MMM granted part of this exclusive distributorship, namely for the UK and Ireland, to Mechema.

By a letter of 19 September 1973, MMM terminated the contract with Mechema as of 31 December 1973. Thereupon, on 7 August 1974, Mechema informed MMM that it would resort to arbitration.

Mechema structured its claim on the basis of a number of the defendant's actions in terminating the contract that would amount to conduct against good faith. The arbitral tribunal came to the following conclusion:

> Indeed, one cannot deny MMM the right to terminate the contract in accordance with the stipulated notice of three months in advance. But to exercise this right in these for Mechema particularly difficult circumstances, which became even more problematic by the termination of the contract, should be considered as a violation of the notion of equity. This entitled Mechema to damages. In fact, an action may be criticized (even when devoid of any intention of causing damage) when there is disparity between the advantage that a certain way of exercising its rights procures to the owner of these rights and the damage which results therefrom for the other party.[231]

Finally, the emphasis on mutual cooperation was also highlighted in a case before the Cairo Regional Centre for International Commercial Arbitration.[232] In March 1983 Egypt issued a tender for the supply of 5,000/10,000 tons of frozen chicken. Later in April 1983 it issued another tender. Both of them were awarded to a French seller. The contracts were concluded according to the Egyptian General Conditions, which, in the main,

provides for an inspection of the goods prior to departure and again upon arrival in Egypt.

The French seller made four shipments under the contract but the Egyptian party withheld part of the payment for three shipments and rejected the fourth, alleging that the frozen meat was not in good condition. No inspection was conducted in Egypt.

The seller went to the French courts to obtain payment. After an order from the president of the Paris Commercial Court and two appeals to the Supreme Court, the buyer was required to pay US$1,311,063,27 to the French seller.

The Egyptian party commenced arbitration in Cairo. The French seller filled a counter-claim.

In the decision the arbitral tribunal explicitly declared that contractual obligations must be performed in good faith. The tribunal supported its position with reference to article 184 of the Egyptian Civil Code.

The tribunal emphasized that both parties must implement their contractual obligations in good faith. Consequently, the arbitral tribunal dismissed the claim on the grounds of the failure of the Egyptian claimant to abide by its duty to check the goods upon arrival in the harbour.

8. Conclusion: Good Faith - Consistency and Source of Cooperation

The substance of the present article can be summed up in this simple affirmation: good faith is interpreted in international trade as cooperation between the parties to a contract. This idea has been developed as a consequence of the needs of trade in general, and of international trade in particular.

The laissez faire and individualism of the nineteenth century gave way to the emergence of collectivism during the twentieth century. A 'curvature of the mind'[233]occurred in the world consisting in an increasing role of government in what were previously private affairs of citizens. This shift could be noticed in the UK before it spread to other nations.[234] This trend - which has been called in this article 'compulsory cooperation' or 'cooperation from above'[235] - continues today at the national level. Moreover, it calls for no great experience in European law to see that this tendency - which also emphasizes the protection of the weaker party - is particularly prominent today in EU Regulations and Directives.

However, a different type of cooperation is evident in international trade: Carson's denunciation, in the sense that social planning reduces the area of individual decision,[236] has no place in transnational commercial law because of the absence of a central authority and the fact that those governed by this law are providing the rules. Hence, businesses have voluntarily incorporated good faith in the sense of cooperation between the parties to a contract, 'limiting' their absolute liberty in favour of the aim of the agreement and, consequently, of the legitimate expectations of the other party. This is explained by the fact that, due to economic interests and strategic considerations, traders are engaging in long-term contracts, avoiding litigation[237] and entering into joint ventures and partnership contracts whose aim is to maximize their own capacities with the capacities of the other party. The philosophy behind these contracts in international trade is cooperation. The above has shown how this has lead to cooperation having become the essence of good faith in modern international commercial contracts. If the

matter is understood in this way, good faith ceases to be a discontinuous element in commercial contracts and becomes the fabric from which cooperation in transnational law is woven, since 'a contract becomes an essential part of the trading relationship'[238] and a genuine source of transnational commercial law today.

BIBLIOGRAPHY

- J N Adams and R Brownsword, Key Issues in Contract (London, 1995) - L Antoniolli and F Fiorentini (eds), A Factual Assessment of the Draft Common Frame of Reference (Sellier, Berlin 2010) - P S Atiyah, The Rise and Fall of Freedom of Contract (Clarendon Press, Oxford 1979) - P S Atiyah, Freedom of Contract and the New Right (Juridiska Fakulteten i Stockholm 1988) - R Axelrod, The Evolution of Co-operation (Penguin, London 1990) - J Basedow, 'Lex Mercatoria e Diritto Internazionale Privato dei Contratti: Una prospettiva Economica' in G Venturini and S Bariatti (eds), New Instruments of Private International Law. Liber Fausto Pocar, vol 2 (Giuffrè, Milano 2009) - J Beatson and D Friedmann (eds), Good Faith and Fault in Contract Law (Clarendon Press, Oxford 1995) - K P Berger, The Creeping Codification of the New Lex Mercatoria (2nd edn Kluwer Law International, Alphen aan den Rijn 2010) - D Beyleveld and R Brownsword, 'The Practical Difference Between Natural-Law Theory and Legal Positivism' (1985) 5 Oxford J Legal Stud 1 - A Boggiano, 'La Convention Interaméricaine sur la Loi Applicable aux Contrats Internationaux et les Principes d'UNIDROIT' (1996) 1 Unif L Rev 219 - M J Bonell (ed), The UNIDROIT Principles in Practice (Transnational Publishers, New York 2002) - M J Bonell, Un "Codice" Internazionale del Diritto dei Contratti. I Principi UNIDROIT dei Contratti Commerciali Internazionali (Giuffrè, Milano 2006) - Britannica Guide to the Ideas that Made the Modern World (Constable and Robinson, 2008) - R Brownsword, 'Two Concepts of Good Faith' (1994) 7 JCL 197 - P Buckley and M Casson, The Multinational Enterprise Revisited (Palgrave Macmillan, Basingstoke 2010) - A Burrows, Remedies for Torts and Breach of Contracts (2nd edn Butterworths, London 1994) - S Burton, 'Symposium: The Revision of Article 2 of the Uniform Commercial Code Good Faith in Articles 1 and 2 of the U.C.C: The Practice View' (1994) 35 William & Mary L Rev 1533 - D Bush and others, Principles of European Contract Law (Part III) and Dutch Law. A Commentary II (Kluwer Law International, The Hague 2006) - T Carbonneau, 'A Definition of and Perspective upon the Lex Mercatoria Debate' in T Carbonneau (ed), Lex Mercatoria and Arbitration. A Discussion of the New Law Merchant (Kluwer Law International, London 1998) - R Carneiro, The Evolution of Society. Selections from Herbert Spencer's "Principles of Sociology" (The University of Chicago, Chicago 1967) - C Carson, The Fateful Turn. From Individual Liberty to Collectivism 1880-1960 (The Foundation for Economic Education, New York 1963) - L Carvajal-Arenas, 'Good Faith in the Lex Mercatoria: An Analysis of Arbitral Practice and Major Western Legal Systems' (PhD thesis, University of Portsmouth 2011) - L Casanova, Global Latinas (Palgrave Macmillan, Basingstoke 2009) - Giuseppe Lorenzo Maria Casaregis, Discursus Legales de Commercio ed de Avariis (Genova 1707) - H Collins, The Law of Contract (4th edn LexisNexis, London 2003) - H Collins, 'Good Faith in European Contract Law' (1994) 14 OJLS 229 - G Cordero-Moss, 'International Contracts between Common Law and Civil Law: is Non-state Law to be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith' (2007) 7 Global Jurist (Advances) 30 - D Corradini, Il Criterio della Buona Fede e la Scienza del Diritto Privato (Giuffrè, Milano 1970) - J H Dalhuisen, Dalhuisen on International Commercial, Financial and Trade Law (2nd edn Hart Publishing, Oxford 2004) - J Delbrück, 'The Changing Role of the State in the Globalising World Economy' in P Bekker, R Dolzer and M Waibel, Making Transnational

Law Work in the Global Economy. Essays in Honour of Detlev Vagts (CUP, Cambridge 2010) - R Demogue, Traité des Obligations en Général T.6 (Rosseau, Paris 1931) - L Diez-Picazo, La Doctrina de los Actos Propios (Bosch, Barcelona 1963) - R Domingo, The New Global Law (CUP, Cambridge 2010) - E Durkheim, Sociologie et Philosophie (Librairie Félix Alcan, Paris 1924) - E A Farnsworth, 'Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws' (1996) 3 Tul J Int'l & Comp L 47 - B Fauvarque-Cosson and D Mazeaud in European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules (Sellier, Munich 2008) - H Feng, Chinese Strategic Culture and Foreign Policy Decision-Making. Confucianism, Leadership and War (Routledge, London 2007) - P D Finn, 'The Fiduciary Principle' in T G Youdan (ed), Equity, Fiduciaries and Trusts (Carswell, Toronto 1989) - M Fontaine, 'The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts' (2004) 9 Unif L Rev 573 - A D M Forte (ed), Good Faith in Contract and Property (Hart Publishing, Oxford 1999) - L Fuller, The Morality of Law (Yale University Press, London 1964) - F Galgano, La Globalizzazione nello Specchio del Diritto (Il Mulino, Bologna 2005) - V Gautrais and others in 'Droit du Commerce électronique et Normes Applicables: La Notion de Lex Mercatoria' (1997) Revue de Droit des Affaires Internationales 547 - R Goode, The Concept of "Good Faith" in English Law (Centro di Studi e Ricerche di Diritto Comparato e Straniero, Roma 1992) - R Goode, Commercial Law in the Next Millennium (Sweet & Maxwell, London 1998) - R Goode, Commercial Law (3rd edn Penguin, London 2004) - E Graham, Global Corporations and National Governments (Institute for International Economics, Washington 1996) - H Grotius, De Jure Belli ac Pacis Libri Tres (F Kelsey tr, Carnegie Institution Washington 1925) - F Haldemann, 'Gustav Radbruch v. Hans Kelsen: A Debate on Nazi Law' (2005) 18 Ratio Juris 162 - K R Harrigan, 'Strategic Alliances and Partner Asymmetries' in F Contractor and P Lorange, Cooperative Strategies in International Business (Lexington Books 1988) - J W Harris, Legal Philosophies (2nd edn Butterworths, London 1997) - H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv L Rev 593 - O Hart and B Holmstrom, 'The Theory of Contracts' in T Bewley, Advances in Economic Theory: Fifth World Congress (CUP, Cambridge 1987) - A Hartkamp, 'Judicial Discretion under the New Civil Code of the Netherlands' (1992) 40 Am J Comp L 551 - W O Henderson, The Industrialization of Europe: 1780-1914 (Thames and Hudson 1969) - W O Henderson, The Industrial Revolution on the Continent: Germany, France, Rusia 1800-1914 (Frank Cass & Co. 1961) - W O Henderson, Britain and Industrial Europe (Liverpool University Press 1954) - K Hladik, 'R&D and International Joint Ventures' in F Contractor and P Lorange, Cooperative Strategies in International Business (Lexington Books 1988) - Oliver Wendell Holmes, The Common Law (first published in 1881, Macmillan, London 1968) - N Horn and J Norton (eds), Non-Judicial Dispute Settlement in International Financial Transactions (Kluwer Law International, London 2000) - R Hyland, 'On Setting Forth the Law of Contract: A Foreword' (1992) 40 Am J Comp Law 541 - R Hyland, 'Pacta Sunt Servanda: Meditation' (1994) 34 Va J Int'l L 405 - N Jefford, '"Soft Obligations" in Construction Law: Duties of Good Faith and Co-operation' (Speech at the Seminar organized by Keating Chambers Barristers 12 May 2005)
<http://www.keatingchambers.co.uk/resources/publications/2005/nj_soft_obligations_construction_law.aspx> accessed 9 October 2011 - N Jensen, Nation-States and the Multinational Corporation (Princeton University Press, Princeton 2006) - D J Jeremy, Transatlantic Industrial Revolution: the Diffusion of Textile Technologies between Britain and America, 1790-1830s (Blackwell 1981) - Po Keung Ip, 'Is Confucianism Good for Business Ethics in

China?' (2009) 88 Journal of Business Ethics 463 - O Lando and H Beale (eds), The Principles of European Contract Law. Parts I and II Combined and Revised (Kluwer Law International, The Hague 2000) - O Lando, 'Good Faith in the Legal Systems of the European Union and in the Principles of European Contract Law' in A Mordechai Rabello (ed), Equity in Civil Law and Mixed Jurisdictions. Papers presented at the Second International Conference on Aequitas and Equity (The Faculty of Law, The Hebrew University of Jerusalem 1993) - P Le Goff, 'Global Law: A Legal Phenomenon Emerging from the Process of Globalization' (2007) 14 Ind J Global Legal Stud 119 - A Lowenfeld, 'The Two-Way Mirror: International Arbitration as Comparative Procedure' (1985) 7 Mich YBI Legal Stud 163 - B Malinowski, Crime and Custom in Savage Society (8th edn Routledge, London 1966) - A F M Maniruzzaman, 'State Contracts with Aliens - The Question of Unilateral Change by the State in Contemporary International Law' (1992) 9 J Int'l Arb 141 - A F M Maniruzzaman, 'The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?' (1999) 14 Am U Int'l L Rev 657 - A F M Maniruzzaman, 'The Arbitrator's Prudence in Lex Mercatoria: Amiable Composition and Ex Aequo et Bono in Decision Making' (2003) 18 Mealey's International Arbitration Report 1 - A F M Maniruzzaman, 'The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends' (2008) 1 Journal of World Energy Law and Business 121 - P Mayer, 'Le Principe de Bonne Foi devant les Arbitres du Commerce International' in C Dominicé, R Patry and C Reymond (eds), études de Droit International en l' Honneur de Pierre Lalive (Helbing & Lichtenhahn, Bâle/Francfort-sur-le Main 1993) - H Mazeaud, Leçons de Droit Civil Obligations: Théorie Générale (10th edn Montchrestien, Paris 1991) - D Mazeaud, 'Solidarisme Contractuel et Réalisation du Contrat' in L Grynbaum and M Nicod (eds), Le Solidarisme Contractuel (Economica, Paris 2004) - W McKibbin (eds), Globalisation, Regionalism and Economic Interdependence (CUP, Cambridge 2008) - M McLuhan, The Gutenberg Galaxy: The Making of Typographic Man (Routledge, London 1962) - J Mestre, 'D'une Exigence de Bonne Foi à un Esprit de Collaboration' [1986] RTD Civ 100 - L Mistelis, 'ADR in England and Wales: a Successful Case of Public Private Partnership' (2003) 6 ADR Bulletin 53 - C Molineaux, 'Moving Towards a Construction Lex Mercatoria, A Lex Constructionis' (1997) 14 J Int'l Arb 55 - G Morgan, 'The Development of Transnational Standards and Regulations and their Impacts on Firms' in G Morgan, P Hull Kristensen and R Whitley, The Multinational Firm (OUP, Oxford 2001) - G Morin, 'Le Devoir de Coopération dans les Contrats Internationaux. Droit et Pratique' (1980) 6 Droit et Pratique du Commerce International March 9 - D Morris & M Hergert, 'Trends in International Collaborative Agreements' (1987) 22 Columbia Journal of World Business 15 - N Nassar, Sanctity of Contracts Revisited. A Study in the Legal Theory and Practice of Long-Term International Commercial Transactions (Martinus Nijhoff Publishers, London 1995) - M Nordau, Morals and the Evolution of Man (Cassell and Co., London 1922) - J F O'Connor, Good Faith in English Law (Aldershot, 1990) - J E Penner, McCoubrey & White's Textbook on Jurisprudence (4th edn OUP, 2008) - R Phillips, 'Good Faith and Fair Dealing under the Revised Uniform Partnership Act' (1993) 64 U Colo L Rev 1193 - R Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8 J Legal Stud 103 - R Pound, 'The Scope and Purpose of Sociological Jurisprudence I' (1911) 24 Harv L Rev 591 - R Pound, 'The Scope and Purpose of Sociological Jurisprudence II' (1911-1912) 25 Harv L Rev 140 - R Powell, 'Good Faith in Contracts' (1956) 9 CLP 16 - E Rayner, The Theory of Contracts in Islamic Law: A Comparative Analysis with Particular Reference to the Modern Legislation in Kuwait, Bahrain and the United Arab Emirates (Graham & Trotman, London 1991) - E Reiley, International Sales Contracts. The UN Convention and Related Transnational Law (Carolina Academic Press,

Durham-North Carolina 2008) - T Röder, 'The Roots of the "New Law Merchant": How the International Standardization of Contracts and Clauses Changed Business Law' <http://www.forhistiur.de/zitat/0610roeder.htm> accessed 4 October 2011 - D Roebuck and W Wai-Ip, 'A Step Away from the Market? The Autonomy of Negotiable Instruments and the New Negotiable Instruments Law of the PRC' in W Guiguo and W Zhenying (eds) Legal Developments in China: Market Economy and Law (Sweet and Maxwell, London 1996) - F Rongeat-Oudin and M Oudin, 'The Reception of the UNIDROIT Principles by the Lex Mercatoria: The Example of Good Faith' (2009) 6 IBLJ 697 - S Saintier, 'A Remarkable Understanding and Application of the Protective Stance of the Agency Regulations by the English Courts' [2001] JBL 540 - S Saintier, Commercial Agency Law. A Comparative Analysis (Ashgate, Aldershot 2002) - H-J Schmidt-Trenz, Außenhandel und Territorialität des Rechts. Grundlegung einer neuen Institutionenökonomik des Außenhandels (Nomos 1990) - B Simonin, 'Ambiguity and the Process of Knowledge Transfer in Strategic Analysis' (1999) 20 Strategic Management Journal 595 - M Snyderman, 'What's So Good about Good Faith? The Good Faith Performance Obligation in Commercial Lending' (1988) 55 U Chi L Rev 1335 - J Stankiewicz, 'Good Faith Obligation in the Uniform Commercial Code: Problems in Determining its Meaning and Evaluating its Effect' (1972-1973) 7 Val U L Rev 389 - J Steyn, 'The Role of Good Faith and Fair Dealing in Contract Law: Hair-Shirt Philosophy?' (1991) 6 Denning L J 131 - P Stoffel-Munck, L'Abus dans le Contrat. Essai d'une Théorie (LGDJ, Paris 2000) - G Stuart Monteith, R&D Administration (Hiffe Books, London 1969) - R Summers, 'Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54 Va L Rev 195 - R Summers, 'The General Duty of Good Faith - Its Recognition and Conceptualization' (1982) 67 Cornell L Rev 810 - Koji Taira, 'Factory Labour and the Industrial Revolution in Japan' in P Mathias and M Postan (eds), The Cambridge Economic History of Europe, vol 7 (CUP, 1978) - D Tallon, Le Concept de Bonne Foi en Droit Français du Contrat (Centro di Studi e Ricerche di Diritto Comparato e Straniero, Roma 1994) - M Taylor (ed), Herbert Spencer and the Limits of the State (Thoemmes Press, Bristol 1996) - G Teubner, 'Substantive and Reflexive Elements in Modern Law' (1982) 17 Law & Soc'y Rev 239 - D Vagts, 'Rebus Revisited: Changed Circumstances in Treaty Law. Essays in Honor of Oscar Schachter' (2005) 43 Columbia J Trans L 459 - M Virally, 'Review Essay: Good Faith in Public International Law' (1983) 77 Am J Int'l L 130 - M Weber, Max Weber on Law in Economy and Society (Harvard University Press, Cambridge 1954) - F Wieacker, 'The Importance of Roman Law for Western Civilization and Western Legal Thought' (1981) 4 B C Int'l & Comp L Rev 257 - F Wieacker, El Principio General de la Buena Fe (J L Carro tr, Editorial Civitas, Madrid 1982) - R C Williams, Cooperative Movement: Globalization from Below (Ashgate Publishing, Aldershot 2007) - John Wu, Fountain of Justice (Sheed and Ward, London 1959) - R Zimmermann and S Whittaker (eds), Good faith in European Contract Law (CUP, Cambridge 2000) - R Zimmermann, Roman Law, Contemporary Law, European Law. The Civilian Tradition Today (OUP, Oxford 2001) - R Zimmermann, The New German Law of Obligations. Historical and Comparative Perspective (OUP, Oxford 2005)

---

* PhD University of Portsmouth; LLM Università di Roma La Sapienza; LLM Università di Roma Tor Vergata; LLB Pontificia Universidad Católica de Valparaíso. Email: lorenacarvajalarenas@gmail.com. The present article is partially based on this author's PhD thesis (Portsmouth, 2011) on Good faith in the lex mercatoria: an analysis of arbitral practice and major western legal systems, http://eprints.port.ac.uk/6040/ (last accessed 4 May 2012).

** LLB (Honours), LLM (Dhaka), M.Int'l. Law (ANU), PhD (Cambridge), FRSA, MCIArb, Chair in International Law and International Business Law, School of Law, University of Portsmouth. Further details are available at: http://www.port.ac.uk/departments/academic/law/staff/title,23599,en.html Email: munir.maniruzzaman@port.ac.uk

*** The authors are very grateful to the General Editor, Prof. Gerhard Dannemann, for his comments and advice; and to Tom McCarthy for his invaluable assistance.

**** The quotations from books, articles, judicial decisions and arbitral awards in Dutch, French, German, Italian, Latin, Portuguese and Spanish languages have been translated into English by Lorena Carvajal-Arenas, unless indicated otherwise.

1 In this article 'transnational law', 'transnational commercial law' and 'lex mercatoria' are used interchangeably; yet, it is acknowledged, scholarship attaches different connotations to them. See A F M Maniruzzaman, 'The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?' (1999) 14 Am U Int'l L Rev 657, 660 ff. <http://digitalcommons.wcl.american.edu/auilr/vol14/iss3/2/>.

2 UNCTAD World Investment Report 1995. Transnational Corporations and Competitiveness 36-7.

3 G Morgan, 'The Development of Transnational Standards and Regulations and their Impacts on Firms' in G Morgan, P Hull Kristensen and R Whitley, The Multinational Firm (OUP, Oxford 2001) 225, holds that, 'Economic transactions require an element of share values and norms which are enforceable within and beyond the transaction itself. Without these shared standards, it is difficult to build and sustain economic relationships. These shared standards are embedded in formal and informal institutions which govern transactions and act as the rule of the game'.

4 R Zimmermann, Roman Law, Contemporary Law, European Law. The Civilian Tradition Today (OUP, Oxford 2001) 174.

5 This tendency is called 'solidarisme contractuel' in France. One of its supporters, Denis Mazeaud, states that, '[it] consists essentially in an exigency of contractual civic conduct (civisme contractuel), which means that each contractual party must take into consideration and respect the legitimate interests of the other party' (parentheses added). D Mazeaud, 'Solidarisme Contractuel et Réalisation du Contrat' in L Grynbaum and M Nicod (eds), Le Solidarisme Contractuel (Economica, Paris 2004) 58-9.

6 See Section Seven.

7 Justice of Appeal Priestley in *Renard Constructions (ME) Pty v Minister for Public Works* [1992] 26 NSWLR 234, stated that, 'People generally including judges and other lawyers from all strands of the community have grown used to the Courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations'. See n 79.

8 cf R Hyland, 'On Setting Forth the Law of Contract: A Foreword' (1992) 40 Am J Comp Law 541, 545.

9 ICC award n. 10346 (2001) 12 ICC Int'l Ct of Arb Bull 106.

10 Called Sistema de Información Comercial (Commercial Information System).

11 It was stated that there is a difference between substantive requirement for the validity of contract and administrative steps to be followed for its enforceability. Furthermore, the registration was regarded as a joint task of both parties, mainly based in the wording of the same agreement (clause 16.5). The underlying norms recalled for this purpose were: article 871 of the Commercial Code of Colombia and article 5.3 of the UNIDROIT Principles (in the 2004 version this is article 5.3.1).

12 (2001) 12 ICC Int'l Ct.Arb.Bull.106, 108.

13 ibid 111.

14 Section 311 Obligations Created by Legal Transaction and Obligations Similar to Legal Transactions (2) An obligation with duties under section 241 (2) also comes into existence by 1. the commencement of contract negotiations 2. the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or 3. similar business contacts. See N Cohen, 'Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate' in J Beatson and D Friedmann (eds), Good Faith and Fault in Contract Law (Clarendon Press, Oxford 1995).

15 Section 313: Interference with the Basis of the Transaction (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 withdraw from the contract. In the case of continuing obligations, the right to terminate takes the place of the right to withdraw. The translation into English of relevant sections of the BGB is taken from the German Federal Ministry of Justice's site: <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p1005> accessed 13 January 2012.

16 See R Zimmermann, The New German Law of Obligations. Historical and Comparative Perspective (OUP, Oxford 2005) 3. According to Sections 280 (3), 282 and 241 (2) BGB, the creditor is entitled not only to receive performance (pacta sunt servanda is enshrined in Section 241 (1) BGB). Each party must also be considerate with regard to each other's rights and legal interests. These norms refer to supplementary obligations that do not directly affect the performance of the main duty. The infringement of ancillary duties directly affecting the performance is covered by sections 280 (3) and 281 BGB.

17 See D Corradini, Il Criterio della Buona Fede e la Scienza del Diritto Privato (Giuffrè, Milano 1970).

18 See P S Atiyah, The Rise and Fall of Freedom of Contract (Clarendon Press, Oxford 1979) 724.

19 T Carbonneau, 'A Definition of and Perspective upon the Lex Mercatoria Debate' in T Carbonneau (ed), Lex Mercatoria and Arbitration. A Discussion of the New Law Merchant (Kluwer Law International, London 1998) 17. This opinion is corroborated in Section Seven.

20 A modern classic in this area of good faith in Europe is the book edited by R Zimmermann and S Whittaker, Good Faith in European Contract Law (CUP, Cambridge 2000). The main scope of this book is to offer the perspective of different European legislations - by the analysis of scholars from different European legal systems - over thirty hypothetical cases related to good faith. The results revealed that, despite quite different points of departure, there is convergence in the solutions offered by national laws. Such an approach allows the contours of the concept to be identified through practical cases. The introductory article by the editors gives an excellent account of the current change in perspective regarding the re-emergence of a European (as opposed to merely national) private law. The same perspective - good faith considered in different European national laws - has been subject of commentary in a number of books and legal journals: See O Lando, 'Good Faith in the Legal Systems of the European Union and in the Principles of European Contract Law' in A Mordechai Rabello (ed), Equity in Civil Law and Mixed Jurisdictions. Papers presented at the Second International Conference on Aequitas and Equity (The Faculty of Law, The Hebrew University of Jerusalem 1993); and G Morin, 'Le Devoir de Coopération dans les Contrats Internationaux. Droit et Pratique' (1980) 6 Droit et Pratique du Commerce International March 9.

21 R Goode, Commercial Law in the Next Millennium (Sweet & Maxwell, London 1998) 19. A similar position against good faith can be found in R Goode, The Concept of "Good Faith" in English Law (Centro di Studi e Ricerche di Diritto Comparato e Straniero, Roma 1992). The author has since modified his views. In 2004, Goode recognizes that, 'Commercial law is rooted in principles of good faith, the sanctity of the agreement, the recognition of trade usage as a source of contractual rights, and the maintenance of a fair balance between vested rights and the interests of third parties'. He advocates for a code similar to the UCC, restating, simplifying and modernizing the law in a small number of selected areas in order to make it more responsive to the practices and needs of modern commerce and finance while containing built-in mechanisms to allow for future development. R Goode, Commercial Law (3rd edn Penguin, London 2004) 1203 and 1208.

22 H MacQueen, 'Good Faith in the Scots Law of Contract' in A D M Forte (ed), Good Faith in Contract and Property (Hart Publishing, Oxford 1999) 11 n 25 cites, inter alia, an early proponent: R Powell, 'Good Faith in Contracts' (1956) 9 CLP 16. More recently: J F O'Connor, Good Faith in English Law (Aldershot, 1990); and J N Adams and R Brownsword, Key Issues in Contract (Butterworths, London 1995).

23 (1992) 2 WLR 174; [1992] 2 AC 128.

24 This dictum has resonated in the case law of other common law jurisdictions. Recently, in 2009, it came to a head in a case before the New South Wales Court of Appeal (Australia) [*United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177], where it was held that an obligation to negotiate in good faith was enforceable, as the Court observed that the terms requiring parties to negotiate in good faith were not vague, illusory or uncertain and that the good faith clause concerned had 'identifiable' content.

25 R Brownsword, 'Two Concepts of Good Faith' (1994) 7 JCL 197, 212. This view also fits with Summers's analysis of good faith as an 'excluder' notion in R Summers, 'Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54 Va L Rev 195.

26 See, for example, U.S. cases: *Empire Gas Corp. v Am. Bakeries Co.*, 840 F2d 1333 (7th Cir. 1988); *Corenswet v Amana Refrigeration Inc.*, 594 F.2d 129 (5th Cir. 1979); Australian Cases: *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228; *Laing O'Rourke v Transport Infrastructure*, 17 July 2007 [2007] NSWSC 723.

27 See R Summers, 'The General Duty of Good Faith - Its Recognition and Conceptualization' (1982) 67 Cornell L Rev 810; M Snyderman, 'What's So Good about Good Faith? The Good Faith Performance Obligation in Commercial Lending' (1988) 55 U Chi L Rev 1335; S Burton, 'Symposium: The Revision of Article 2 of the Uniform Commercial Code Good Faith in Articles 1 and 2 of the UCC: The Practice View' (1994) 35 William & Mary L Rev 1533.

28 G Cordero-Moss, 'International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith' (2007) 7 Global Jurist (Advances) 30.

29 ibid 35-36.

30 See Burton (n 27) 1535.

31 P Mayer, 'Le Principe de Bonne Foi devant les Arbitres du Commerce International' in C Dominicé, R Patry and C Reymond (eds), études de Droit International en l' Honneur de Pierre Lalive (Helbing & Lichtenhahn, Bâle/Francfort-sur-le Main 1993) 542 and, especially, 556.

32 P Stoffel-Munck, L'Abus dans le Contrat. Essai d'une Théorie (LGDJ, Paris 2000) 65.

33 M Virally, 'Review Essay: Good Faith in Public International Law' (1983) 77 Am J Int'l L 130.

34 See text to n 160 in Section 5.

35 See A F M Maniruzzaman, 'State Contracts with Aliens - The Question of Unilateral Change by the State in Contemporary International Law' (1992) 9 J Int'l Arb 141; D Vagts, 'Rebus Revisited: Changed Circumstances in Treaty Law. Essays in Honor of Oscar Schachter' (2005) 43 Columbia J Trans L 459.

36 On the important role of the internet as a technology which has driven this change, see Gautrais and others in 'Droit du Commerce électronique et Normes Applicables: La Notion de Lex Mercatoria' (1997) Revue de Droit des Affaires Internationales 547.

37 Countries with governments from the entire political spectrum form part of major regional economic organizations such as EU, MERCOSUR and NAFTA. See F Di Mauro, S Dees and W McKibbin (eds), Globalisation, Regionalism and Economic Interdependence (CUP, Cambridge 2008).

38 P Le Goff in 'Global Law: A Legal Phenomenon Emerging from the Process of Globalization' (2007) 14 Ind J Global Legal Studies 119, distinguishes lex mercatoria from the global law, regarding the former as one of the key elements of the latter. On the need for global law, see R Domingo, The New Global Law (CUP, Cambridge 2010) 98.

39 1980 United Nations Convention on Contracts for the International Sales of Goods CISG; and 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes.

40 See text to n 78.

41 See n 1.

42 H-J Schmidt-Trenz, Außenhandel und Territorialität des Rechts. Grundlegung einer neuen Institutionenökonomik des Außenhandels (Nomos 1990) 242. Cf J Basedow, 'Lex Mercatoria e Diritto Internazionale Privato dei Contratti: una Prospettiva Economica' in G Venturini and S Bariatti (eds), New Instruments of Private International Law. Liber Fausto Pocar, vol 2 (Giufffrè 2009) 56.

43 F Wieacker, 'The Importance of Roman Law for Western Civilization and Western Legal Thought' (1981) 4 BC Int'l & Comp L Rev 257, 271, establishes the difference between continuity or survival and rebirth, revival or renaissance. The latter means an encounter between a new culture and an older one which 'may in fact lead to a real spiritual initiation or initial "ignition" through which productive structures or ideologies may catch fire through the contact with the remaining civilization'. Against the medieval origin of the lex mercatoria: O Volckart and A Mangels, 'Are the Roots of the Modern Lex Mercatoria Really Medieval? (1999) 65 Southern Economic Journal 427, postulate the non-universal feature of the medieval lex mercatoria. Furthermore, S Sachs, 'From St Ives to Cyberspace: The Modern Distortion of the Medieval "Law Merchant"' (2006) 21 Am U Int'l L Rev 685, returning to the original sources - especially the court rolls of the fair of St. Ives, the most extensive surviving records of the period - demonstrates that merchants in medieval England were substantially subject to local control. For a critical view, see A Cordes, 'The Search for a Medieval Lex Mercatoria' (2003) Oxford U Comparative L Forum <http://ouclf.iuscomp.org/articles/cordes.shtml> text after n 26, accessed 24 May 2011.

44 T Röder, 'The Roots of the "New Law Merchant": How the International Standardization of Contracts and Clauses Changed Business Law' <http://www.forhistiur.de/zitat/0610roeder.htm> accessed 4 October 2011.

45 See Y Derains, 'New Trends in the Practical Application of the ICC Rules of Arbitration' (1981) 3 Nw J Int'l L & Bus 40; see also 'Cours d'Arbitrage de la Chambre de Commerce Internationale. Chronique des Sentences Arbitrales' (1982) 109 JDI (Clunet) 968.

46 See in www.unilex.info the following awards: ad hoc arbitration held in Helsinki at 28.01.1998 where the arbitrator based the decision on article 36 of the Nordic Contract Law and, in addition, referred to article 7.4.13 (2) of the UNIDROIT Principles. Another interesting case is the ICC arbitral award n. 8540 of 04.09.1996 where the UNIDROIT Principles were used to confirm the conclusion reached by applying the law of the State of New York.

47 J H Dalhuisen, Dalhuisen on Transnational and Comparative, Commercial, Financial and Trade Law (3rd edn Hart Publishing, Oxford 2007) 604.

48 A Lowenfeld, 'The Two-Way Mirror: International Arbitration as Comparative Procedure' (1985) 7 Mich YBI Legal Stud 163, 182.

49 The Convention was adopted by the General Assembly of the United Nations on 11 December 1995 and entered into force on 1 January 2000.

50 The UNCITRAL's website states that, 'The Convention also solidifies recognition of common basic principles and characteristics shared by the independent guarantee and the stand-by letter of credit: <http://www.uncitral.org/uncitral/en/uncitral_texts/payments/1995Convention_guarantees_credit.html> accessed 26 April 2011.

51 Attempts at self-regulation by the international trading community in this area include: 1) in 1978 the ICC published Uniform Rules for Contract Guarantees (UCG); 2) in 1983 as a result of the revision of the Uniform Customs and Practice for Documentary Credits (UCP), it was decided to include stand-by letters of credit under the scope of UCP; 3) in 1992 the ICC published the Uniform Rules on Demand Guarantees (URDG); 4) in 1998 the US Council of International Banking (USCIB, now the International Services Association) embarked in a project to formulate self regulatory rules for the US stand-by letter of credit market. These International Stand-by Practices (ISP Project) led to International Stand-by Practices (ISP98) which were adopted by USCIB. See F De Ly, 'The UN Convention on Independent Guarantees and Stand-by Letters of Credit' (1999) 33 Int'l L 831. See also N Horn (ed), Legal Problems of Codes of Conduct for Multinational Enterprises (Kluwer, Antwerp & Boston 1980); N Horn, 'Normative Problems of a New International Economic Problem' (1982) JWTL 338; R Horn and C Schmitthoff (eds), The Transnational Law of International Commercial Transactions (Kluwer-Devanter, Antwerp & Boston 1982).

52 De Ly (n 51) 844 states that, 'The Convention complements the existing self-regulation provided for in URDG, UCG, UCP, and ISP98'.

53 R Horn, The United Nations Convention on Independent Guarantees and the Lex Mercatoria (Centro di Studi e Ricerche di Diritto Comparato e Straniero. Saggi, Conferenze e Seminari N. 30, Roma 1997).

54 Vogenauer adds data in the line of parties upholding the applicability of the lex mercatoria in: 'Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law?' (2010) 6 ERCL 143. The paper can be obtained from the Social Science Research Network electronic library <http://ssrn.com/abstract=1581352> accessed 29 April 2011.

55 *Channel Tunnel Group Ltd. and Another v Balfour Beatty Construction Ltd. and Others* [1992] QB 656, 664-5. See K P Berger, The Creeping Codification of the Lex Mercatoria (2nd edn Kluwer Law International, Alphen aan den Rijn 2010) 57.

56 Bona fides est primum mobile ac spiritus vivificans commercii 'Good faith is the first motive and the spirit that gives life to commerce' Giuseppe Lorenzo Maria Casaregis, Discursus Legales de Commercio ed de Avariis (Genova 1707) 144.

57 See E Graham, Global Corporations and National Governments (Institute for International Economics, Washington 1996).

58 UNCTAD World Investment Report 2011. Non-Equity Modes of International Production and Development, 24 (parentheses added).

59 Graham (n 57) 2.

60 It must be remembered that FDI, in its classic definition was understood as a company from one country making a physical investment into building a factory in another country.

61 Lourdes Casanova in her book Global Latinas (Palgrave Mcmillan, Eastbourne 2009), offers the theory of 'collaborative competition' - she also calls it co-petition' - between Asian and Latin-American firms.

62 See J Hagedoorn, 'Understanding the Rationale of Strategic Technology Partnering: Interorganizational Modes of Cooperation and Sectoral Differences' (1993) 14 Strategic Management Journal 371.

63 See K Hladik, 'R&D and International Joint Ventures' in F Contractor and P Lorange, Cooperative Strategies in International Business (Lexington Books 1988); G Stuart Monteith, R&D Administration (Hiffe Books, London 1969); D Morris & M Hergert, 'Trends in International Collaborative Agreements' (1987) 22 Columbia Journal of World Business 15; and B Simonin, 'Ambiguity and the Process of Knowledge Transfer in Strategic Analysis' (1999) 20 Strategic Management Journal 595.

64 See K R Harrigan, 'Strategic Alliances and Partner Asymmetries' in F Contractor and P Lorange (n 63) 205.

65 P Buckley and M Casson, The Multinational Enterprise Revisited (Palgrave Macmillan, Basingstoke 2010) 41 ff.

66 The cooperative view embraced in these new agreements created by the international commercial practice - such as franchising, engineering, joint venture, transfer of technology and supply chain management (SCM) - denotes a kind of contractual behaviour which may be called 'affectio contractus'. Additionally, other international business contracts denote the underlying cooperative current, inter alia: natural resources, energy, oil and gas contracts; international sales, agency contracts and; contracts of distributorship and transportation of goods by any mode.

67 J Mestre, 'D'une Exigence de Bonne Foi à un Esprit de Collaboration' [1986] RTD Civ 100, 102.

68 ibid 101.

69 See Section Seven.

70 L Diez-Picazo, La Doctrina de los Actos Propios (Bosch, Barcelona 1963) 139. Demogue also emphasizes the cooperative nature of contracts in Traité des Obligations en Général T.6 (Rosseau, Paris 1931) 9.

71 P D Finn, 'The Fiduciary Principle' in T G Youdan (ed), Equity, Fiduciaries and Trusts (Carswell, Toronto 1989).

72 Atiyah (n 18) 716.

73 ibid 724-5.

74 Zimmermann (n 4) 174.

75 The idea of 'Rematerialization of law' is not originally attributable to Zimmermann. Max Weber had suggested the possibilities of a 'Rematerialization of Law': G Teubner, 'Substantive and Reflexive Elements in Modern Law' (1982) 17 Law & Soc'y Rev 239, 243, states that, 'Max Weber also pointed to some antiformal tendencies in modern legal development. In contract law, for instance, these tendencies manifested themselves in an "increasing particularization" of the law and growing legislative and judicial control of the material content of agreements. Weber interpreted this as a renewed infusion into law of "ethical imperatives, utilitarian and other expediential rules, and political maxims"'. Cf M Weber, Max Weber on Law in

Economy and Society (E Shils and M Rheinstein trs, 2nd edn, Harvard University Press 1954).

76 The Convention on Contracts for the International Sales of Goods (CISG) was signed in Vienna in 1980 and came into force on 1 January 1989. As of August 2010, CISG has been ratified by 77 countries, among them all important trading nations, except Brazil, India, South Africa and the United Kingdom. The methodology adopted by the Vienna Sales Convention is to embrace substantive rules specially designed for international transactions, that is to say, once it is ratified, it provides directly applicable rules. CISG functions as the applicable law of the states which have enacted the Convention, in other words, CISG constitutes national law with respect to contracts for the international sale of goods.

77 In ICC award n. 5713 (1990) 15 Yb Comm Arb'n 72, it was stated: 'The tribunal finds that there is no better source to determine the prevailing trade usages than the terms of the United Nations Convention on the International Sales of Goods of 11 April 1980, usually called "the Vienna Convention". This is so even though neither the country of the buyer nor the country of the seller are parties to that Convention. If they were, the Convention might be applicable to this case as a matter of law and not only as reflecting trade usages'.

78 Likewise, article 5 of the UNCITRAL Convention on Independent Guarantees and Stand-by Letters of Credit of 1995 provides: '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 the international practice of independent guarantees and stand-by letters of credit'.

79 W Tetley, 'Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering' (2004) 35 JMLC 561, 589. A further example of a common law jurisdiction where good faith is applied as a standard of behaviour for the parties to a contract on the basis of article 7 is Australia. In *Renard Constructions v Minister for Public Works* [1992] 26 NSWCA 234, Justice Priestley made the first mention of CISG in an Australian judgment. He concluded that 'reasonableness in performance' was implied in the contract concerned and then likened this to notions of good faith in Europe and the US, and noted that, although such a concept was not yet fully accepted in Australia (because it is based on the English legal tradition), 'the time may be fast approaching'. The judgement is retrievable in the website of Pace Law School CISG database <http://cisgw3.law.pace.edu/cases/920312a2.html> accessed 31 May 2011.

80 'The principle of good faith, as embodied not only in article 7 but also in the most specific provisions such as article 16 (2) (b), 21 (2) and 40 of the CISG, is acknowledged as one of the general principles on which the Convention is based'. N Hofmann, 'Interpretation Rules and Good Faith as Obstacles to the UK'S Ratification of the CISG and to the Harmonization of Contract Law in Europe' (2010) 22 Pace Int'l L Rev 145, 168.

81 Article 8 (2) CISG.

82 Article 77 reads as follows: A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

83 J Klein in his article 'Good Faith in International Transactions' (1993) 15 Liverpool L Rev 115, 130, identifies good faith in several articles of this Convention.

84 Good faith is certainly a factor in the application of article 8 that deals with the interpretation of the parties' statements and conduct in order to ascertain their obligations, of article 16, article 29, article 35 (3) and of article 80, among others.

85 For a good picture of the impact of globalisation in the role of the state and in the world economy, see J Delbrück, 'The Changing Role of the State in the Globalising World Economy' in P Bekker, R Dolzer and M Waibel, Making Transnational Law Work in the Global Economy. Essays in Honour of Detlev Vagts (CUP, Cambridge 2010).

86 The movement that brought the interests of the individual to an extreme was reinforced by the tremendous influence that Darwinism and Spencerian individualism exercised at that time. As known, Darwin was the originator of the theory of evolution based on the concept of natural selection. Spencer saw himself as the defender of traditional liberal principles against the state which from 1880 onward started to assume a major role. See M Taylor (ed), Herbert Spencer and the Limits of the State (Thoemmes Press, Bristol 1996).

87 The eighteenth century is called 'Age of Enlightenment'.

88 Encyclical letter Libertas Praestantissimum of 20th June 1888 <http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_20061888_libertas_en.html> accessed 10 October 2011.

89 The individual and its reason are two pillar of Immanuel Kant's theory. See Britannica Guide to the Ideas that Made the Modern World (Constable and Robinson, 2008) XIV.

90 John Wu, Fountain of Justice (Sheed and Ward, London 1959) 135.

91 See W O Henderson, The Industrialization of Europe: 1780-1914 (Thames and Hudson 1969); W O Henderson, The Industrial Revolution on the Continent: Germany, France, Rusia 1800-1914 (Frank Cass & Co. 1961); W O Henderson, Britain and Industrial Europe (Liverpool University Press 1954); D J Jeremy, Transatlantic Industrial Revolution: the Diffusion of Textile Technologies between Britain and America, 1790-1830s (Blackwell 1981); Koji Taira, 'Factory Labour and the Industrial Revolution in Japan' in P Mathias and M Postan (eds), The Cambridge Economic History of Europe, vol 7 (CUP, 1978).

92 Dicey in his Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century published in 1905, already speaks about the second half of the nineteenth century as the period of 'collectivism', while in America individualism still held sway.

93 C Carson, The Fateful Turn. From Individual Liberty to Collectivism 1880-1960 (The Foundation for Economic Education, New York 1963) 71.

94 Confucius (Kong Fuzi) was born in 551 BC.

95 H Feng, Chinese Strategic Culture and Foreign Policy Decision-Making. Confucianism, Leadership and War (Routledge, London 2007) 19.

96 D Roebuck and W Wai-Ip, 'A Step Away from the Market? The Autonomy of Negotiable Instruments and the New Negotiable Instruments Law of the

PRC' in W Guiguo and W Zhenying (eds), Legal Developments in China: Market Economy and Law (Sweet and Maxwell, London 1996) 207.

97 Po Keung Ip, 'Is Confucianism Good for Business Ethics in China?' (2009) 88 Journal of Business Ethics 463, 473. This author (at p. 467) reveals the dark side of Confucianism: 'Confucian reciprocity, in general, is asymmetrical as a result of the embedded hierarchical human relationships that Confucian (sic) sanctions and supports. Indeed, far from being benign, hierarchy when meshed with authoritarianism breeds a domination-subservient social structure that is harmful to the individual's dignity and autonomy'.

98 B Malinowski in Crime and Custom in Savage Society (8th edn Routledge, London 1966) 64 states that, 'The fundamental function of law is to curb certain natural propensities, to hem in and control human instincts and to impose a non-spontaneous, compulsory behaviour - in other words to ensure a type of co-operation which is based on mutual concessions and sacrifices for a common end'.

99 Spencer compared society to a biological organism. See R Carneiro, The Evolution of Society. Selections from Herbert Spencer's "Principles of Sociology" (The University of Chicago, Chicago 1967) Chapter 2.

100 This is the view of the sociological school of jurisprudence - followed here. The sociological school of jurisprudence studies the circumstances which create the legal institutions, and the relationship between those legal institutions and other social institutions which condition the scope and the operation of law. In this school of thought, law is thought of as a social institution which serves collective social purposes and interests (as opposed to merely serving individual purposes and interests). Another important element is that it believes that human experience is the basis of law and that law is designed to meet dynamic social needs. See R Pound, 'The Scope and Purpose of Sociological Jurisprudence I' (1911) 24 Harv L Rev 591; and R Pound, 'The Scope and Purpose of Sociological Jurisprudence II' (1911-1912) 25 Harv L Rev 140.

101 See Carson (n 93) Chapter 5.

102 H Spencer, 'From Freedom to Bondage' in Taylor (n 86).

103 Durkheim, an advocate of contractual solidarity, held that moral rules are compulsory and also, desirable; cf E Durkheim, Sociologie et Philosophie (Librairie Félix Alcan, Paris 1924) 50.

104 The author refers to the 'categorical imperative' of Kant, of course. M Nordau, Morals and the Evolution of Man (Cassell and Co., London 1922) 24.

105 J A Hobson, 'Introduction' in Taylor (n 86) XVIII.

106 For an example of this approach, see the UK House of Lords in *Tsakiroglou & Co. Ltd. v Noblee Thorl G.m.b.H* [1962] AC 93, upholding the decision of the umpire to whom the dispute was originally referred, the board of appeal, Justice Diplock and the Court of Appeal, who all rejected the appellants' contention (namely, that the contract of sale c.i.f. was frustrated because the usual and customary shipment route, Suez Canal, was blocked during the time established for performance). They held the appellants liable to the respondents. It was stated that, although the alternative route - Cape of Good Hope - involved a change in the method of performance of the contract, it was not such a fundamental change from that undertaken under the contract as to allow frustration. The distance from the port of origin, Port Sudan, to the port of destination (Hamburg) via Suez Canal is app. 4,386 miles; via the

Cape of Good Hope it is app. 11,137 miles. Besides, the freight surcharge placed on goods shipped on vessels proceeding via the Cape of Good Hope was increased from 25 to 100 per cent during the period of performance. In spite of these dramatic differences, the alternative route was held a 'reasonable and practicable route available'.

107 An example of the new approach of English law towards good faith in commercial contracts is *Socimer International Bank Limited (in liquidation) v Standard Bank London Ltd.* [2008] EWCA (Civ Div) 116. These two banks had been trading together in the securities of emerging markets. Before the claimant entered into liquidation, it was put into default of US$24.5 million in respect of a portfolio of forward sales of securities which it had bought. The problem was that Standard failed to value the portfolio of assets at the termination date (as clause 14 of the agreement required); instead it realised the assets over a period of time and credited Socimer with the proceeds. The latter sued and the claim was allowed. The valuation of the assets was tried before Justice Gloster, who held that Standard had been impliedly required by the contract to take reasonable care to find the true market value of the assets. However, the Court of Appeal later decided that the seller was entitled to consult its own interest when valuing the portfolio, subject to the requirement of good faith, since, according to Lord Justice Rix, 'Commercial contracts assume such good faith, which is why express language requiring it is so rare'.

108 [1974] 3 All ER 616; [1974] 1 WLR 1308 (HL).

109 H Collins, The Law of Contract (4th edn LexisNexis, London 2003) 28-9. According to Collins, a contract is made for worthwhile purposes when it has the quality of contributing in an important way to the sense of meaning in a person's life (p. 30).

110 ibid 29.

111 R C Williams, Cooperative Movement: Globalization from Below (Ashgate Publishing, Aldershot 2007) Introduction.

112 Similarly, Christian morality is not limited to prohibiting undesired conduct, but asks to 'love your neighbour as yourself'. Departing from a mere suppression of the impulse of selfishness, this aims at extending its effects by changing the impulses of selfishness and indolence into their very antithesis: love.

113 See C Molineaux in 'Moving Towards a Construction Lex Mercatoria, A Lex Constructionis' (1997) 14 J Intl Arb 55.

114 'In Search of Partnering Excellence' (1991) 17 Special Publication CII Austin TX.

115 N Jefford, '"Soft Obligations" in Construction Law: Duties of Good Faith and Co-operation' (Speech at the Seminar organized by Keating Chambers Barristers 12 May 2005) <http://www.keatingchambers.co.uk/resources/publications/2005/nj_soft_obligations_construction_law.aspx> accessed 17 April 2012 (square brackets added).

116 See A F M Maniruzzaman, 'The Pursuit of Stability in International Energy Investment Contracts: A Critical Appraisal of the Emerging Trends' (2008) 1 Journal of World Energy Law and Business 121. <http://jwelb.oxfordjournals.org/content/1/2/121.full.pdf+html>.

117 The Times 22 May 1980.

118 See Brownsword (n 25) 206-7.

119 In a very similar case, *Wiegand v Bachmann-Bechtel Brewing Co.*, 222 N.Y. 272, 277, 118 N. E. 618, 619 (1918), the New York Court of Appeals held that, 'Every contract implies good faith and fair dealing between the parties to it'. In this case a producer of cattle food agreed to install, at considerable expense, a machine for drying and salvaging wet grain that was the by-product of a brewery. In exchange it received the brewery's promise that it could buy the used grain that it produced and salvaged for a period of five years or until half a million barrels had been brewed, after which the brewery was to become the owner of the machine. The brewery sold out its business before either of these events occurred. The New York Court of Appeals held it liable to the producer of cattle food for damages. A promise to remain in business for five years or until half a million barrels had been brewed was implied.

120 cf H Collins, 'Implied Duty to Give Information during the Performance of Contracts' (1992) 55 MLR 556, 557.

121 (1967) 35 ILR 136. The award was rendered in 1963 by an ad hoc tribunal.

122 ibid 173.

123 This was also the interpretation held by the plaintiff. As evidence, in a letter sent by Sapphire International to the Shah of Iran and dated 9 July 1959 it is stated: 'During our initial meetings with the National Iranian Oil Company, we took the precaution of repeatedly pointing out that we were a small company and that this was our first venture outside of North America. In return, NIOC assured us that, although a small company, we would receive the same sincere co-operation and professional treatment afforded companies of major size also active within Iran. Because of this undertaking, we entered into the contract and one of its most important conditions is that the terms and provisions thereof be carried out in accordance with the principles of mutual good will and good faith, the whole as set out in Article 38, para.1, of the contract', ibid 153.

124 Preamble of the PICC; similar article 1:101 of the PECL. Unless indicated otherwise, the following refers to the 2004 edition of the UNIDROIT Principles, rather than the 1994 and the 2010 editions.

125 Award n. 10335 of October 2000. Excerpts of the award published in (2001) 12 ICC Int'l Ct Arb Bull 102.

126 The Preamble of the Principles declares that, 'They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators'. For example, the preliminary Draft OHADA Uniform Act on Contract Law has been prepared by Fontaine in line with the UNIDROIT Principles. See M Fontaine, 'The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts' (2004) 9 Unif L Rev 573. OHADA is the French acronym of Organization for the Harmonisation of Business Law in Africa. On the other hand, the Inter-American Convention on the Law Applicable to International Contracts, signed in Mexico the 17 March 1994 at the fifth Inter-American Specialized Conference on Private International Law, contains article 10: 'In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage

and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case'. This is a call to apply the lex mercatoria to the substance of the dispute. A Boggiano, 'La Convention Interaméricaine sur la Loi Applicable aux Contrats Internationaux et les Principes d'UNIDROIT' (1996) 1 Unif L Rev 219, 227, holds that UNIDROIT Principles can flesh out articles 9 (2) and 10 of the Inter-American Convention.

127 The reason for the influence of the PICC over the harmonisation of business laws in different regions is their comparative, empirical and universal background.

128 J Stankiewicz in 'Good Faith Obligation in the Uniform Commercial Code: Problems in Determining its Meaning and Evaluating its Effect' (1972-1973) 7 Val U L Rev 389, maintains that the quality of conclusions concerning the meaning and effect of good faith in the Uniform Commercial Code depends decisively on the perceptual and conceptual abilities of the particular legal analyst. The main claim in his work is that to understand good faith as a general commercial concept the researcher should look for comparative sources and post code case law and avoid limiting it to common law sources. This is an application of his general theory which proposes that everyone involved with law has a conceptual core of legal reference. It is the subconscious sum of all prior cases (precepts) and legal theories (concepts) stored and categorized in one's memory, which, in turn, is used to approach and make sense out of new legal problems or terms (new precepts). See L Carvajal-Arenas, 'Good Faith in the Lex Mercatoria: An Analysis of Arbitral Practice and Major Western Legal Systems' (PhD thesis, University of Portsmouth 2011) text to n 7 in ch 6.

129 See the official comment of article 1.7 of the PICC.

130 In *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd.* [1988] 1 All ER 348, 352 (CA), Lord Bingham commented that, 'In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "playing fair", "coming clean" or "putting one's cards face upwards on the table". It is in essence a principle of fair and open dealing'.

131 See R Phillips, 'Good Faith and Fair Dealing under the Revised Uniform Partnership Act' (1993) 64 U Colo L Rev 1193.

132 See text to n 142. In Dutch law the term good faith is not used in the Civil Code (which was substantially reformed in 1992) but 'redelijkheid en billijkheid' (reasonableness and fairness), which is considered from a more objective point of view. This concept has been elevated to a rank above custom and statutory law and may affect and correct the application of both, at least in contract law, as provided in article 2 of book 6 of the Burgerlijk Wetboek (BW), which reads as follows: Art. 6:2 BW 1. A creditor and debtor must, as between themselves, act in accordance with the requirements of reasonableness and fairness. 2. A rule binding upon them by virtue of law, usage or a juridical act does not apply to the extent that, in the given circumstances, this would be unacceptable according to criteria of reasonableness and fairness.

133 E A Farnsworth, 'Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws' (1996) 3 Tul J Int'l & Comp L 47, 60.

134 For example, in VTR, Inc. v. Goodyear Tire & Rubber Co., 303 F. Supp. 773 (S.D.N.Y. 1969), the courts held that 'the parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which otherwise would have been forbidden by an implied covenant of good faith and fair dealing'.

135 Inter alia, articles 2.1.4. (2) (b); 2.1.15; 2.1.16; 2.1.18; 2.1.20; 3.8; 3.10; 5.1.2; 5.1.3; 5.2.5; 6.1.16 (2); 6.2.3; 7.1.6; 7.1.7; 7.2.2 (b) (c); 7.4.13; 9.1.3; 9.1.4 and 9.1.10.

136 In the 1994's version of UNIDROIT Principles article 5.1 reads: 'The contractual obligations of the parties may be expressed or implied'.

137 See M J Bonell (ed), The UNIDROIT Principles in Practice (Transnational Publishers, New York 2002) 184. See also ICC award n. 7365/FMS of 05.05.1997 *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems Inc.* in (1999) Unif L R 1014, where in order to justify the application by analogy of a 'Termination for Convenience Clause' to the contract as a result of changed circumstances, the arbitral tribunal applied Articles 5.1 and 5.2 [Arts. 5.1.1 and 5.1.2 of the 2004 edition] of the UNIDROIT Principles and the 'widely accepted principles therein set forth regarding implied obligations'.

138 O Lando and H Beale (eds), Principles of European Contract Law. Parts I-II (Kluwer Law International, The Hague 2000) 115-6.

139 The version of the Principles used here is: Lando and Beale (n 138).

140 ibid 119.

141 ibid 120.

142 D Bush and others, Principles of European Contract Law (Part III) and Dutch Law. A Commentary II (Kluwer Law International, The Hague 2006) 267.

143 See n 132.

144 UNIDROIT 1998 Study L - Doc. 55

145 ICC award n. 9593 (1999) 10 ICC Int'l Ct Arb Bull 107.

146 F Rongeat-Oudin & M Oudin, 'The Reception of the UNIDROIT Principles by the Lex Mercatoria: The Example of Good Faith' (2009) 6 IBLJ 697, 713.

147 See the official comment of article 1.7 PICC. D Tallon in Le Concept de Bonne Foi en Droit Français du Contrat (Centro di Studi e Ricerche di Diritto Comparato e Straniero, Roma 1994) 2 states, 'Et l'on sait que les partisans de la lex mercatoria fait de la bonne foi la base même de celle-ci' ('We know that the partisans of the lex mercatoria make good faith the foundation of it').

148 The Introduction to the 1994 edition of the PICC mentions flexibility and fairness as two substantive characteristics of PICC.

149 R Hyland, 'On Setting Forth the Law of Contract: A Foreword' (1992) 40 Am J Comp Law 541. According to the author, an alternative to overcome this contradiction is the recourse to concepts such as reasonable and appropriate (see p. 549).

150 Hyland (n 149) 547.

151 Oliver Wendell Holmes, The Common Law (first published in 1881, Macmillan, London 1968).

152 ibid 235.

153 Here, in ICC award n. 8264 of 1997 in (1999) 10 ICC Int'l Ct Arb Bull 62, the arbitral tribunal held that claimant's failure to provide respondent with information relating to the equipment caused the latter the loss of an opportunity to develop and adapt its industrial production to the demands of the market. The tribunal referred to article 7.4.3 (2) of the UNIDROIT Principles which reads: 'Compensation may be due for the loss of a chance in proportion to the probability of its occurrence'.

154 See A Burrows, Remedies for Torts and Breach of Contracts (2nd edn Butterworths, London 1994) 17-8.

155 See H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harv L Rev 593. It is worth dispelling here a source of confusion as regards positivist theories: 'Positivism does not strictly deny the importance of moral, ethical or even political quality of law, but the relegation of these issues to a realm beyond jurisprudence increasingly seemed to exclude matters from consideration which were not peripheral but central to the operation of law in the modern world'. The quotation is from J E Penner, McCoubrey & White's Textbook on Jurisprudence (4th edn OUP, Oxford 2008) 101.

156 Gustav Radbruch, a legal scholar and Minister of Justice in Germany's Weimar Republic, after having lived through the horrors of the Nazi regime, abandoned legal positivism in favour of the view that fundamental principles of humanitarian morality are part of the very concept of Recht or legality. See F Haldemann, 'Gustav Radbruch v. Hans Kelsen: A Debate on Nazi Law' (2005) 18 Ratio Juris 162.

157 See L Fuller, The Morality of Law (Yale University Press, London 1964); and D Beyleveld and R Brownsword, 'The Practical Difference Between Natural-Law Theory and Legal Positivism' (1985) 5 Oxford J Legal Stud 1.

158 A Burrows (n 154) 12. Burrow's position could be conceived as a limitation to the theory of the Chicago School of Law and Economics, which is considered an improved model of utilitarianism and propounds the central role of efficiency in the common law. See J W Harris, Legal Philosophies (2nd edn Butterworths, London 1997); see also R Posner, 'Utilitarianism, Economics, and Legal Theory' (1979) 8 J Legal Stud 103.

159 cf R Hyland, 'Pacta Sunt Servanda: Meditation' (1994) 34 Va J Int'l L 405.

160 The translation for pacta sunt servanda by Mazeaud is: 'The given word must be kept, the promise must be performed whatever it costs; pacta sunt servanda'. H Mazeaud, Leçons de Droit Civil Obligations: Théorie Générale (10th edn Montchrestien, Paris 1991) para 721

161 H Grotius, De Jure Belli ac Pacis Libri Tres 2.11.1.4 1646 paraphrasing D. 2,14,1 pr. (F W Kelsey tr, 5th edn, 1925).

162 Pacta sunt servanda is also recognized in Islamic legal system based on Shari'ah, see S E Rayner, The Theory of Contracts in Islamic Law: A Comparative Analysis with Particular Reference to the Modern Legislation in Kuwait, Bahrain and the United Arab Emirates (Graham & Trotman, London 1991) 100.

163 For example, article 6.2.1 of the PICC Contract to be Observed provides: 'Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship'. Those are: articles 6.2.2 and 6.2.3. See Maniruzzaman (n 35) 141.

164 Article 1.3 Binding Character of Contract: A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles.

165 Oliver Wendell Holmes's logic - according to which there is no binding duty to perform and that the law only provides the solution for cases of breach - would terribly hinder international trade. See text to n 151-2.

166 A Hartkamp in 'Judicial Discretion under the New Civil Code of the Netherlands' (1992) 40 Am J Comp L 551, 554-5 states: 'The principle of bona fides or good faith (expressed by the complementary notions "reasonableness and equity") has three functions: ...Third, it has a "derogating" or "restrictive" function, ... in that a rule binding upon the parties does not apply to the extent that, in the given circumstances, this would be unacceptable according to criteria of reasonableness and equity'.

167 See, as support for the theory offered in this article, the official comment of the Principles, number 3.

168 M J Bonell was chairman of the working group for the preparation of the UNIDROIT Principles of International Commercial Contracts 2004.

169 M J Bonell, Un "Codice" Internazionale del Diritto dei Contratti. I Principi UNIDROIT dei Contratti Commerciali Internazionali (Giuffrè, Milano 2006) 134.

170 F Galgano, La Globalizzazione nello Specchio del Diritto (Il Mulino, Bologna 2005) 75.

171 Bonell (n 169) 161.

172 Berger (n 55) 138-9.

173 M McLuhan, The Gutenberg Galaxy: The Making of Typographic Man (Routledge, London 1962) 21, 31.

174 R Axelrod, The Evolution of Co-operation (Penguin, London 1990) 178-9. Axelrod began his project with the question: when should a person cooperate, and when should a person be selfish, in an ongoing interaction with another person? A computerized simulation called the Iterated Prisoner's Dilemma was employed for this project, involving game theorists coming from six countries. The winner of the two tournaments was a programme called TIT FOR TAT. TIT FOR TAT's strategy is to start with cooperation, and then to repeat the previous move of the other player. Axelrod considered that the qualities that made TIT FOR TAT successful in the tournaments would work in a world where any strategy was possible. The cooperation theory that is presented in this book is based upon an investigation of individuals who pursue their own self-interest without the aid of a central authority to force them to cooperate with each other. Among the conditions for cooperation to develop there is the need for an indefinite number of interactions and also the need for the players to remember how the two of them have interacted so far.

175 Buckley and Casson (n 65) 45.

176 ibid 47.

177 ibid 48.

178 COM (2001) 398, 11.7.2001. The European Commission launched a public consultation on the problems arising between Member States' contract laws and on potential actions in this field. In light of the responses, the Commission issued an Action Plan 2003, proposing to improve the coherence and quality of European Contract Law by establishing a Common Frame of Reference (CFR) containing common principles, terminology and model rules to be used by the Union legislators: Commission of the European Communities, A More Coherent European Contract Law: An Action Plan (2003) <http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/com_2003_68_en.pdf> accessed 2 June 2011.

179 Two groups were contracted to jointly produce a DCFR: the 'Study Group on a European Civil Code' and the 'European Research Group on Existing EC Private Law' (Acquis Group), the latter with a focus on the relevant acquis communautaire. They were granted academic independence throughout the process. Other groups were also commissioned with specific purposes: a group of predominantly French scholars to work on terminology and the philosophical underpinnings of the project (this being a joint undertaking by the 'Association Henri Capitant' and the 'Société de Législation Comparée'), the 'Trento/Torino Group' working on the common core of European private law (see: www.common-core.org), and the 'Economic Impact Group'. Stakeholders and other experts throughout the continent were also consulted during the elaboration of the DCFR.

180 C Von Bar, E Clive and H Schulte-Nölke (eds), Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR) Outline Edition (Sellier, Munich 2009). At p. 6 it is stressed that this is 'an academic, not a politically authorised text'.

181 The DCFR includes business-to-business transactions, business-to-consumer and consumer-to-consumer contracts (b2b, b2c and c2c, respectively).

182 Similar to article 7 of CISG, article I 1:102 of the DCFR provides that in the interpretation and development of its provisions, 'regard should be had to the need to promote: (a) uniformity of application; (b) good faith and fair dealing; and (c) legal certainty'. It should be noted that the DCFR, when using 'good faith' on its own, i.e., without 'fair dealing', this takes the sense of 'bona fide': 'a mental attitude characterised by honesty and an absence of knowledge that an apparent situation is not the true situation', DCFR Outline Edition (n 180) 555.

183 S Vogenauer, 'Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law?' (2010) 6 ERCL143.

184 House of Lords, 'European Contract Law: the Draft Common Frame of Reference' (HL Paper 95) <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/95/95.pdf> accessed 7 June 2010.

185 ibid 13. See H Eidenmüller, 'Party Autonomy, Distributive Justice and the Conclusion of Contracts in the DCFR' (2009) Social Science Research Network <http://ssrn.com/abstract=1334648> accessed 22 June 2010

186 The consultation ran until 31 January 2011

187 <http://ec.europa.eu/justice/news/consulting_public/0052/consultation_questionaire_en.pdf> accessed 10 June 2011.

188 <http://ec.europa.eu/justice/news/consulting_public/news_consulting_0052_en.htm> accessed 10 June 2011.

189 Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European Contract Law (OJ L 105/109, 27.4.2010) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:105:0109:0111:ENDF:P> accessed 10 June 2011.

190 See the Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback at: <http://ec.europa.eu/justice/policies/consumer/docs/explanatory_note_results_feasibility_study_05_2011_en.pdf> accessed 6 July 2011.

191 Information obtained at the British Institute of International and Comparative Law Conference, 'The Optional EU Contract Law Instrument - What to Expect?' (7 February 2011).

192 Directive 86/653/EEC, in particular articles 3 and 4. See S Saintier, 'A Remarkable Understanding and Application of the Protective Stance of the Agency Regulations by the English Courts' [2001] JBL 540; and eadem, Commercial Agency Law. A Comparative Analysis (Ashgate, Aldershot 2002).

193 Proposal for a Regulation on a Common European Sales Law of 11 October 2011, see below 6.3.1.

194 ECC 93/13, 5 April 1993. The Directive was implemented in the UK via the Unfair Terms in Consumer Contracts Regulations 1994, which came into force on 1 July 1995. The Regulations of 1994 have been replaced with the Unfair Terms Consumer Contracts Regulations 1999, Statutory Instrument 1999 N. 2083. The relevant provision of the Directive which requires the member States to adapt their systems according to the new normative is article 10.

195 See text to n 23.

196 Despite the name of the Act, it is concerned only with exemption clauses in contracts, providing that the validity of such clauses depends on what has been called 'a reasonable test'. See J Steyn, 'The Role of Good Faith and Fair Dealing in Contract Law: Hair-Shirt Philosophy?' (1991) 6 Denning L J 131.

197 Beatson and Friedmann (n 14) 15 (parentheses added).

198 Directive 93/13/EEC on unfair terms in consumer contracts; Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises.

199 The proposal for a Regulation is retrievable at: <http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf> accessed 28 December 2011.

200 OJL 124, 20.5.2003, p. 36.

201 See text to n 139.

202 C Von Bar et al (n 180) 14.

203 'The Common Frame of Reference for European Private Law - Policy Choices and Codification Problems' (2008) 28 Oxford Journal of Legal Studies 659, 680.

204 Contrary to the opinion of these authors, it has been argued here that good faith is not seen as a restriction to freedom of contracts but as a result of a partnering approach in international contracting. See text to n 18.

205 Eidenmüller et al (n 185) 680.

206 <http://www.justice.gov.uk/lawcommission/docs/Common_European_Sales_Law_Summary.pdf> p. VIII accessed 29 December 2011.

207 See Nathan Searle, 'The Common European Sales Law: a new choice for the EU business' (Practical Law Company, 1 December 2011) <http://plc.practicallaw.com/9-513-7828> accessed 29 December 2011.

208 For example, on 2 February 2012 a colloquium entitled 'Common European Sales Law: Why, and Why Not' was held at the Oxford Law Faculty; another entitled 'European Private Law at the Crossroads: some thoughts on the proposed new European Sales Law' took place the 28 March 2012 at the Institute of Advance Legal Studies.

209 Wieacker argues that, 'The fides uberrima of §242 BGB - as all general clauses in proper sense - is a reference to experiences, rules and maxims to be updated in foro' F Wieacker, El Principio General de la Buena Fe (José Luis Carro tr, Editorial Civitas 1982) 40.

210 Similarly, the PICC; see text to n 131, 132 and 133.

211 See Section 8.

212 The traditional example of the English position is *Walford v Miles* [1992] 2 WLR 174; [1992] 2 AC 128, where a duty to carry on negotiations in good faith is considered inherently repugnant to the adversarial position of the parties when involved in negotiations. However, this article claims that such an adversarial position has been replaced by an underlying cooperative current in international commercial contracts. See text to n 23.

213 See n 112.

214 This is traditionally expressed by the Roman maxim Alterum non laedere, inspired by Ulpian's dictum, now contained in the Corpus Iuris Civilis D.1,1,10,1. Alterum non laedere, i.e., 'not to harm anyone', is the second of the three precepts upon which the Roman emperor Justinian said the law was based. See also honeste vivere, 'to live honestly'; and suum cuique tribuere 'to give each his due'. In Collins Dictionary of Law <http://www.credoreference.com/entry/5978662/> accessed 27 September 2008.

215 Award n. 5073 (1988) 13 Yb Comm Arb'n 68.

216 See A Lowenfeld, 'The Two-Way Mirror: International Arbitration as Comparative Procedure' (1985) 7 Mich YBI Legal Stud 163, 183; and H Collins, 'Good Faith in European Contract Law' (1994) 14 OJLS 229.

217 E Reiley, International Sales Contracts. The UN Convention and Related Transnational Law (Carolina Academic Press, Durham-North Carolina 2008) 75.

218 See Zimmermann (n 4).

219 ICC case n. 2291 of 1975 (1976) 103 JDI 989. Original in French.

220 Regarding this different interpretation, the commentator of the award aptly pointed out: 'The difficulty is that practitioners of international trade belong to both the national group and the international community of merchants', ibid 992.

221 'Promises ought to be obeyed'.

222 (1976) 103 JDI 989, 991.

223 Ibid 990 (parenthesis added).

224 ICC award n. 5904 of 1989 (1989) 115 JDI 1107. Award n. 4761 of 1987 in (1987) 114 JDI 1012 is on the same topic.

225 See Maniruzzaman (n 35) 165-168.

226 (1989) 14 Yb Comm Arb'n 168.

227 The case is available at: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1101&step=Abstract > accessed 5 June 2011.

228 (1990) 15 Yb Comm Arb'n 30. See with regards to this case: N Nassar, Sanctity of Contracts Revisited. A Study in the Legal Theory and Practice of Long-Term International Commercial Transactions (Martinus Nijhoff Publishers, London 1995) 161.

229 A F M Maniruzzaman, 'The Arbitrator's Prudence in Lex Mercatoria: Amiable Composition and Ex Aequo et Bono in Decision Making' (2003) 18 Mealey's International Arbitration Report 1. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1342336>.

230 (1982) 7 Yb Comm Arb'n 77.

231 ibid 80.

232 Award of 21 December 1995 in (1997) 22 Yb Comm Arb'n 13.

233 This is the title of Chapter 5 in Clarence Carson's book The Fateful Turn. From Individual Liberty to Collectivism 1880-1960 (n 93) 71.

234 Nonetheless, the 1980s witnessed an attempt to return to political and economic freedom and liberty of contract, not only in England but over the Western world. According to Atiyah (who fixes the beginning of this new movement of the pendulum with the election of Mrs Thatcher's Government in May 1979), 'We find the same faith in Adam Smith and the operation of market forces, the same distrust of government bureaucracies, the same belief in the rights of individual choice'. P S Atiyah, Freedom of Contract and the New Right (Juridiska Fakulteten i Stockholm 1988) 6.

235 See text to n 98.

236 Carson (n 93) 212.

237 In many cases the parties resort to non-judicial dispute settlement procedures. This allows a quicker solution and, at the same time, clears the way for further cooperation of the parties in a project or future dealings. Cf N Horn and J Norton (eds), Non-Judicial Dispute Settlement in International Financial Transactions (Kluwer Law International, London 2000); L Mistelis, 'ADR in England and Wales: a Successful Case of Public Private Partnership' (2003) 6 ADR Bulletin 53.

238 O Hart and B Holmstrom, 'The Theory of Contracts' in T Bewley, Advances in Economic Theory: Fifth World Congress (CUP, Cambridge 1987) 71.