
GOOD FAITH IN INTERNATIONAL ARBITRATION

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I. INTRODUCTION

It is difficult to find any international arbitration award not based on, or that does not at least mention, good faith. The omnipresence of good faith does not mean (rather quite the contrary) that it is clearly understood, that we know how to use it, or that we are able to predict how an arbitral tribunal may apply good faith in a particular case. Throughout my experience in arbitration I have repeatedly faced the need to resolve claims based on good faith, and will discuss three proceedings by way of example.

At the beginning of my career, I was appointed, by the

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International Chamber of Commerce (ICC) International Court of Arbitration, chairman of an arbitral tribunal, known today principally by the name of the plaintiff: NORSOLOR.¹ The case involved a commercial conflict surrounding a sale and purchase agreement between the French company Norsolor, and the Turkish company Pabalk. The parties agreed to ICC arbitration without specifying either the place of arbitration or the applicable law.² The ICC International Court of Arbitration selected Vienna as the place of the arbitration, and Austrian procedural law. Absent an express agreement between the parties, the arbitration would be arbitration at law.³ When it came time to deliberate, the tribunal was of the opinion that it could choose French or Turkish substantive law.⁴ However, depending on whether one law or the other was applied, the arbitration could conclude in a diametrically different manner. The tribunal upheld as a reasonable solution the application of the general principles of international economic law, invoking the *lex mercatoria* it believed to be in force between international merchants.⁵

The party in disagreement, namely Norsolor, petitioned for annulment of the award in the Austrian courts on the basis that the tribunal was required to conduct the arbitration at law and, as a consequence of invoking *lex mercatoria*, had actually decided in equity.⁶ Austria's Supreme Tribunal held that the arbitrators

1. Pabalk Ticaret Ltd. v. Norsolor S.A., Case No. 3131 of 1979, 9 Y.B. Comm. Arb. 109 (ICC Int'l Ct. Arb.) (identifying the parties to the arbitration as Pabalk and Norsolor) [hereinafter *Nosolor Award*].

2. *See id.* (identifying "[t]he preliminary question as to the law applicable to the agency agreement between Pabalk and Ugilor/Norsolor . . .").

3. *See, e.g.*, Rules of Arbitration of the International Chamber of Commerce, art. 21.1, available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf (last visited Mar. 25, 2012) (permitting parties "to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute" but providing that "[i]n the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate").

4. *See Nosolor Award*, 9 Y.B. Comm. Arb. at 109-10 (describing the comparative law principles behind applying Turkish law or French law).

5. *Id.* at 109.

6. Oberster Gerichtshof [OGH] [Supreme Court] Nov. 18, 1982, in 9 Y.B.

had proceeded correctly by invoking the general principles of international law and applying *lex mercatoria*.⁷ The dispute over the award later reappeared before the French courts when one of the parties, namely Pabalk, petitioned for exequatur to enforce the award.⁸ Norsolor argued the violation of public policy on the basis that an arbitration, which was supposed to be conducted as arbitration at law, had been converted into an arbitration in equity precisely because it was decided pursuant to *lex mercatoria*.⁹ The Court of Cassation once again affirmed the correctness of the arbitration, on the basis that general principles of international law form part of the sources of law.¹⁰ Therefore, by applying said principles, the initial arbitral tribunal had likely acted correctly in its obligation to arbitrate pursuant to international law. This first appearance of *lex mercatoria* in international arbitration would give rise to a heated controversy; Professors Berthold Goldman and Clive Schmitthoff initiated a series of lectures and congresses, with their opposing positions on the role of *lex mercatoria* in international law, that still

Int'l Arb. 159 (1984) (Austria) [hereinafter *Norsolor Austria*].

7. *Norsolor Austria*, 9 Y.B. Int'l Arb., at 160 (finding that that the tribunal "applied a principle inherent in the private law systems which in no way is contradictory to strict legal regulations of the countries here concerned" and thus, did not "go beyond the claims submitted by the parties" by invoking the use of equity).

8. See Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 3, 1984, Bull. civ. I. No.8-9 (Fr.) [hereinafter *Pabalk*] (discussing the procedural history of the case and noting that the president of the Tribunal de grande instance de Paris granted enforcement of the award on February 5, 1980).

9. Berthold Goldman, *The Applicable Law: General Principles of Law—The Lex Mercatoria*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 120 (Julian D.M. Lew ed., 1986); see *Pabalk*, *supra* note 8 (noting that the Tribunal de grande instance de Paris had rejected Norsolor's argument, leading the French company to file an appeal). But see Cour d'appel [CA] [regional court of appeal] Paris, Nov. 15, 1982, 11 Y.B. Comm. Arb. 484, 488, note A. Jan van den Berg (Fr.) (holding that the appeal filed by Norsolor's to the present court would be sustained and that the order of Tribunal de grande instance de Paris must be reversed in light of an appeal in the Court of Appeal of Vienna that set aside part of Pabalk's award on January 29, 1982).

10. See *Pabalk*, *supra* note 8 (holding that the Paris Court of Appeals wrongly quashed the award enforcement in light of governing provisions in French and international law).

appears in doctrinal writing today.¹¹

Years later I was appointed to an important arbitration between Abbott Laboratories and Baxter International, Inc, with two prominent colleagues: Japanese professor, Kazuo Iwasaki, and Texan attorney, Gaynell Methvin.¹² The seat of the arbitration was Chicago; the applicable law was Illinois law.¹³ The arbitration concerned a patent assignment agreement with strong implications in various Middle Eastern countries. Our American colleague, whom we had appointed chairman, considered that good faith could not be a legal basis to decide the claims.¹⁴ Nevertheless, the majority of the panel upheld that the international efficiency of the contract in question required the direct application of the general principle of good faith.¹⁵ The dissenting opinion of our minority colleague, based on his Anglo-Saxon training, did not convince the majority,¹⁶ and did not prevail in the subsequent judicial challenge to this arbitration award.

Later, in an International Center for Settlement of Investment Disputes (ICSID) arbitration,¹⁷ the convened panel had to analyze

11. See Nikitas E. Hatzimihail, *The Many Lives—and Faces—of Lex Mercatoria: History as Genealogy in International Business Law*, 71 LAW & CONTEMP. PROBS. 169, 174 (2008) (describing the contributions of Clive Schmitthoff and Berthold Goldman, who are the “founding fathers of the modern lex mercatoria”).

12. Petition for Writ of Certiorari at 43a-45a, *Baxter Int'l Inc. v. Abbott Labs.*, 540 U.S. 963 (2003) (No. 03-59) (describing the arbitration panel convened pursuant to the parties Dispute Resolution Agreement, selected by the Center for Public Resources (CPR) for Non-Administered Arbitration of International Disputes).

13. *Id.* at 44a (noting that the CPR Arbitral Panel could apply either the law of Japan or Illinois).

14. See *Abbott Labs. v. Baxter Int'l Inc.*, 315 F.3d 829, 834 (7th Cir. 2003) (Cudahy, J., dissenting).

15. See *Abbott Labs. v. Baxter Int'l Inc.*, Nos. 01 C 4809, C 4839, 2002 WL 467147, at *6 (N.D. Ill. Mar. 26, 2002), *aff'd*, 315 F.3d 829 (7th Cir. 2003) (stating that “[t]he arbitrators found that the obligation of good faith under Illinois law establishes an independent cause of action under the Baxter/Maruishi Agreement” and noting that “arbitrators concluded it would be a breach of the duty of good faith for Baxter to ‘deprive its own sublicensee of the fruits of its contract.’”).

16. Petition for Writ of Certiorari, *supra* note 12, at 69a-70a.

17. *Empresas Lucchetti S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4,

good faith in the context of a jurisdictional objection of the Republic of Peru against the Chilean company, Lucchetti.¹⁸ The arbitral tribunal additionally studied the evidence presented on the corruption at the time the investment was accepted and the award of the relevant licenses against environmental regulations.¹⁹ Consequently, the tribunal held that because the Bilateral Investment Treaty between Peru and Chile was not in force at the time Lucchetti first invested,²⁰ and despite the alleged corruption in obtaining favorable judgments to continue with the investment (in its most serious form because this case entailed corruption by the judiciary), the international arbitration could not proceed on the merits.²¹ Previously, the arbitration award of Lanco International Inc., in its litigation with the Republic of Argentina, had for some time determined the nature of arbitration agreements in investment arbitration.²² The arbitration agreements would arise from the public offering made by a state in the investment protection treaty²³ with respect to the investors of the other contracting country, with the investor's individual acceptance occurring at the time of presenting the request for arbitration.²⁴ Nevertheless, the public offering made by the State must be accepted in good faith by the investor at the time of initiating the arbitration.²⁵ Thus, the Lucchetti tribunal deprived the judicial decisions that authorized

Award, (Feb. 7, 2005), 19 ICSID Rev. 359 (2004) (noting that the claimants submitted a request for arbitration to ICSID based on the Bilateral Investment Treaty between Peru and Chile).

18. *Id.* at 362.

19. *Id.* at 364-67.

20. *Id.* at 388.

21. *Id.* (finding that the tribunal lacked "jurisdiction to hear the merits of the present claim").

22. Lanco Int'l v. The Argentine Republic, ICSID Case no. ARB/97/6, Jurisdiction of the Arbitral Tribunal (Dec. 8, 1998), 40 I.L.M. 457 (2001).

23. *See, e.g., id.* ¶ 8 (describing the Treaty Concerning the Reciprocal Encouragement of Investment signed by the United States and Argentina).

24. *See generally id.* ¶ 31 (explaining that the U.S.-Argentina treaty provided the investor with the ability to select a dispute settlement method and that "once the investor has expressed its consent in choosing ICSID arbitration, the only means of dispute settlement available is ICSID arbitration").

25. *Id.* ¶ 40.

the investment in Peru, of the effect of *res judicata*.²⁶

These three arbitration experiences, among many others, have resulted in the acceptance of the principle of good faith in international arbitration. Nevertheless, it is not clear what the concept of good faith actually means. Some view this principle with religious connotations: in Rome, the goddess Fides was entrusted by Jupiter with justice in contracts. In medieval times, good faith was connected to Christian morality. The French doctrine of the 19th and 20th centuries introduced a key element of altruism or loyalty. German doctrine applies paragraph 242 BGB with Kantian references to the categorical imperative. In the Anglo-Saxon sphere, doctrine and jurisprudence demonstrate a radical rejection of good faith that they hold to be “abhorrent” with the adversarial spirit, which must govern in the world of contracts. Naturally, this rejection has been mitigated in the legal system of the United States, where there is no shortage of voices advocating good faith as the great recent discovery in U.S. law.²⁷ In other legal systems, good faith is questioned as are, in general, any standards which may lead to arbitrariness by judicial or arbitral decision-makers. Among ourselves, the categorical voice of Peruvian maestro Fernando de Trazegnies is radical in this respect. He tells us that good faith is the terrorist of law,²⁸ allowing for arbitrariness in judicial decision-making.²⁹

It is therefore of enormous interest to focus our attention on

26. *Empresas Lucchetti S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award (Feb. 7, 2005), 19 ICSID Rev. 359, 386 (2004) (finding that because the original dispute over the judgments allowing the investment never ended, *res judicata* under Peruvian law could not prevail).

27. See, e.g., Chunlin Leonard, *A Legal Chameleon: An Examination of the Doctrine of Good Faith in Chinese and American Contract Law*, 25 CONN. J. INT'L L. 305, 311-12 (2010) (asserting that “[t]he doctrine of good faith, with regard to contractual relations, has a relatively recent history in the US” and that it “received a boost when the UCC officially adopted the concept in the 1950s”).

28. See Fernando De Trazegnies Granda, *Desacralizando la buena fe en el derecho* [*Desecrating the Good Faith in Law*], in 2 TRATADO DE LA BUENA FE EN EL DERECHO 19, 43, 45 (Marcos M. Córdoba ed., 2004) (“la equidad y la buena fe — con la vaguedad implícita a la que se ha hecho referencia — se convierten aquí en los agentes terroristas de la seguridad contractual.”).

29. See *id.* at 46 (“las consideraciones aducidas por los defensores de la ‘buena fe’ objetiva son simplemente los motivos personales”).

good faith in international arbitration. At the onset of a proceeding, one of the most delicate and fundamental tasks is the selection of the panel's arbitrators and, especially, of its chairman. For those who set the parties' strategy when a case arises in which good faith may play a material role, the major question to ask is whether or not the legal culture and training of the potential arbitrators might condition their ultimate decision. Counsel must be aware of the various angles that can be given to good faith in legal argument as well as in the arbitrators' decision-making process.

Undoubtedly, the globalization of the economy and the extraordinary professionalization of arbitrators minimize the importance in practice of issues that might generate heated confrontation in the field. Gustave Flaubert was right when he said that "truth lies as much in shading as it does in vivid tones."³⁰

The analysis of good faith in international arbitration requires consideration of the general principles of law; good faith in so-called classical contract law, starting from the XIX century; good faith in international law; good faith in international arbitration; and the requirements for arbitrating in good faith.

II. GENERAL PRINCIPLES OF LAW

Article 1, paragraph 1 of the Spanish Civil Code starts out by stating that "[t]he sources of the Spanish legal order are statutes, custom and general legal principles."³¹ Article 1, paragraph 4, elaborates that: "[g]eneral legal principles shall apply in the absence of applicable statute or custom, without prejudice to the fact that they contribute to shape the legal system."³² From this example, it may be inferred that in the legal order of a state, general principles of law appear as true, authentic sources, together with laws and custom. The nature of good faith as a binding guide for the legal order is emphasized, so that both laws

30. See GUSTAVE FLAUBERT, CORRESPONDENCE 1846, at 417 (1927) ("[L]a vérité est tout autant dans les demi-teintes que dans les tons tranchés.").

31. CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 1.1 (Spain).

32. *Id.* art. 1.4.

and custom must be construed in light of general principles of law. In addition, it is clear that general principles of law are the basis for claims: they will apply in the absence of laws or custom. The parties can thus invoke the general principles of law as a direct basis for claims.³³

It is in this context in which good faith in the legal order must be analyzed. The Dictionary of the Spanish Language of the Spanish Royal Academy defines good faith” (fe- buena) as: “rectitude, honor; criterion of conduct to which the honest behavior of subjects of the law must adapt; in bilateral relations, behavior appropriate to the expectations of the other party.”³⁴ Good faith appears as conduct based on trust. Francis Fukuyama was right by pointing out that social relations, including especially the law, must be based on trust.³⁵ Good faith is required by law in all human conduct.³⁶

Nevertheless, good faith as conduct must have a normative basis in order to become a general principle of law. Good faith appears frequently in numerous articles of the Spanish Civil Code applying in various contractual contexts. Luis Díez Picazo rightly said that “[t]he concept of good faith is one of the most difficult to grasp within civil law, and is one of the legal concepts that has

33. See Emmanuel Gaillard, *La Distinction des Principes Généraux du Droit et des Usages du Commerce International [Distinction of the General Principles of Law and the Uses of International Trade]*, in ETUDES OFFERTES A PIERRE BELLET 201, 216 (1991) (“L’auteur de ces lignes espère avoir montré la nécessité de réserver le terme « usages du commerce international » aux pratiques habituellement suivies dans une branche d’activité déterminée et de ne reconnaître à cette notion qu’un rôle purement supplétif, à la différence des principes généraux du droit qui constituent de véritables règles transnationales.”).

34. Fe Definition, Rae.es, http://buscon.rae.es/draeI/SrvltObtenerHtml?IDLEMA=83119&NEDIC=Si#mala_fe (last visited Apr. 7, 2012).

35. See FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY 26 (1995) (“Trust is the expectation that arises within a community of regular, honest, and cooperative behavior, based on commonly shared norms. . .”).

36. See M. TULLI CICERONIS, DE OFFICIIS 22 (1994) (Fundamentum autem est iustitiae fides, id est dictorum conv entorumque constantia et veritas. Ex quo, quamquam hoc videbitur fortasse cuiusdam durius, tamen audeamus imitari Stoicos, qui studiose exquirunt unde verba sint ducta, credamusque, quia fiat quod dictum est, appellatam fidem.”).

given rise to the longest and most passionate controversy.”³⁷

Specific manifestations of good faith as a general principle of law might be the abuse of law through an antisocial exercise of a right, the doctrine of estoppel or good faith in the participation of any judicial proceeding. Article 7 of the Spanish Civil Code establishes that

[r]ights must be exercised in accordance with the requirements of good faith. The law does not support abuse of rights or the antisocial exercise thereof. Any act or omission which, as a result of the author’s intention, its purpose, or the circumstances in which it is performed manifestly exceeds the normal limits to exercise a right, with damage to a third party, shall give rise to the corresponding compensation and to the adoption of judicial or administrative measures preventing persistence in such abuse.³⁸

The prohibition of the abuse of a right or antisocial exercise thereof is a clear normative consequence of good faith as a general principle of law.

The doctrine of estoppel is another normative consequence of good faith as a general principle of law. As Díez Picazo points out good faith implies “a duty of consistent conduct, consisting in the need to observe in the future, the conduct that prior acts made foreseeable.”³⁹ The doctrine of estoppel, having its roots principally in jurisprudence based on good faith, constitutes a limit on subjective rights. It does not extinguish the right, but rather only limits its exercise. It postulates the inability to exercise the right.

Consequently, in some countries, any participation in judicial or arbitral proceeding must be conducted in good faith. The Spanish Civil Procedure Act affirms this view⁴⁰ and is supported by the country’s Law on the Judiciary: “[i]n all types of

37. LUIS DÍEZ-PICAZO PONCE DE LEÓN, *LA DOCTRINA DE LOS PROPIOS ACTOS* [English Translation] 134–35 (1963).

38. CÓDIGO CIVIL [C.C.] [CIVIL CODE] art. 7 (Spain).

39. DÍEZ-PICAZO, *supra* note 37, at 245 (“[I]mplica un deber de coherencia del comportamiento, que consiste en la necesidad de observar en el futuro, la conducta que los actos anteriores hacían [prever].”).

40. Civil Procedure Act art. 247.1 (B.O.E. 2000, 1) (Spain) (“The parties involved in any kind of proceedings in keeping with the rules of good faith.”).

proceedings the rules of good faith will be observed. 2. Evidence directly or indirectly obtained in violation of fundamental rights or liberties will lack effect. Courts and tribunals will reject with reason all requests, applications and objections made in manifest abuse of rights or that entail legal or procedural fraud.”⁴¹ On the subject of arbitration, reference can also be made to the Peruvian Arbitration Act of 2008, article 38 of which states that “the parties are required to respect the principle of good faith in all of their acts and participations in the course of arbitral proceedings and to cooperate with the arbitral tribunal in the development of the arbitration.”⁴²

The general principles of law and, inter alia, good faith as a principle of principles, are enshrined in various legal systems.⁴³ Hence, in 1987 René David spoke of the nationalization of private international law,⁴⁴ though the French maestro never knew economic globalization or the establishment of a universal economic legal order. International commercial arbitration began as a subject then referred to as comparative law. Arbitral jurisprudence and the activity of arbitrators have created an international economic law, distinct from the legal orders regulating persons or companies in arbitration. It is even possible to question the applicability of national conflict of laws rules when the parties have expressed their desire to submit to a decision pursuant to general principles of international law. Treaties regulating international arbitration allow arbitrators to apply the conflict rules they deem most appropriate. For example, the Spanish Arbitration Act holds that in an international arbitration “if the parties do not indicate the applicable rules of law, the arbitrators will apply those they deem appropriate.”⁴⁵

41. LEY ORGÁNICA DEL PODER JUDICIAL 6/1985 [L.O.P.J.], B.O.E. n. 157, art. 11, ¶¶ 1-2, July 2, 1985 (Spain).

42. Ley de Arbitraje art. 38 (D.O. 2008, 1071) (Peru).

43. Pierre Mayer, *Le principe de bonne fois devant les arbitres du commerce international*, Etudes de droit international en honneur de Pierre Lalive, 1993, p. 554: “la bonne fois apparaît ainsi comme le principe des principes.”

44. RENE DAVID, LE DROIT DU COMMERCE INTERNATIONAL [THE LAW OF INTERNATIONAL TRADE] 10 (André Tunc ed., 1987).

45. Ley de Arbitraje art. 34 (B.O.E. 2003, 60/2003) (Spain).

III. GOOD FAITH IN CLASSICAL CONTRACT LAW

International arbitration has evolved beyond the boundaries of national laws. Nevertheless, arbitrators are the protagonists of international arbitration and, therefore, it is appropriate to ask whether the legal culture they come from and the training they have received, conditions their decisive mental process at the time of applying the general principle of good faith. Hence, it is interesting to analyze the acceptance of good faith in the legal systems we might consider to be of essential reference: French, German, and Anglo-Saxon law. What has come to be called “*classical contract law*” dates from the 19th century and the beginning of the 20th century, revolving around the major codification movements. The different schools train their respective national jurists at times pursuant to radically different criteria. A brief analysis is indispensable in responding to the question of the influence of the arbitrator’s own legal culture on the decisions the arbitrator is required to make.

A. THE FRENCH CIVIL CODE

The French Civil Code, in force since the year 1804, establishes that contracts “must be performed in good faith.”⁴⁶ For the French legislator, good faith applies initially in the performance of contracts. French jurists preparing the code looked to the Roman tradition, in which the goddess Fides was, above all, a religious notion,⁴⁷ to whom the divine protection of contracts was attributed. Subsequently, good faith was integrated within the Christian faith and followed by Jean Domat and Robert-Joseph Pothier, founders of the French Civil Code.⁴⁸

46. CODE CIVIL [C. CIV.] art. 1134 (Fr.).

47. Fides (Roman goddess), Britannica.com, <http://www.britannica.com/EBchecked/topic/206119/Fides> (last visited Apr. 7, 2012).

48. See generally Romain Loir, Les fondements de l’exigence de bonne foi en droit français des contrats [The Foundations of the Requirement of Good Faith in French Contract Law] 20–49 (2002) (unpublished doctoral thesis, l’Université du Droit et de la Santé de Lille), available at http://edoctrale74.univ-lille2.fr/fileadmin/master_recherche/T_1_chargement/memoires/contrats/loi_r

Good faith, undoubtedly, was for them a notion of religious inspiration. For Domat, good faith constituted a direct consequence of the mutual love among mankind—a divine mandate. His Christian influence as an active member of the Hansenist community is reflected in his legal works. Subsequently, Pothier, the true successor of Domat's work, also sustained that good faith is closely tied to the religious inspiration of mutual love among mankind, thus mandating the need to consider third-party interests.

The entry into force of the French Civil Code was accompanied by an ideological evolution of good faith.⁴⁹ There was not so much emphasis on the religious connection but rather on the need to consider what came to be classified as altruism. André Gide would come to affirm that “good faith is an essential lay virtue, which simply replaces faith.”⁵⁰ Good faith thus becomes a general requirement imposed on all individuals—whether or not bound by a contract. Hence, every contract must be interpreted in light of its social relevance, whether or not this was taken into consideration by the parties upon entering into the contract.

B. GERMAN LAW

The German Civil Code (BGG), entered into force in the year 1900, establishes the need to act with good faith.⁵¹ Paragraph 242 of the BGB, due to its subsequent importance in jurisprudence, has been classified as the “king” of the German Civil Code.⁵²

02.pdf.

49. Yves Derains & Stephan Adell, *Los nuevos principios de lealtad, celeridad y confidencialidad del Código de Procedimiento Civil Francés* [*The New Principles of Loyalty, Speed and Confidentiality of the French Code of Civil Procedure*], in *SPAIN ARB. REV.*, no. 11, 2011, at 25, 27 (2011) (“La lealtad en derecho francés es uno de los deberes asociados a la exigencia de buena fe que se impone en la ejecución de los contratos. . .”).

50. André Gide, Dec. 13, 1927 Journal, in *JOURNAL*, Volume II (1925-1950) (Gallimard ed., 1997) at 62 (“[L]a bonne foi est une vertu essentiellement laïque, qui remplace la foi tout court.”).

51. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Aug. 18, 1896, REICHSGETZBLATT [RGL.] 42, as amended, art. 242 (Ger.) (noting that in performing good faith, customary practices are to be considered).

52. Ole Lando, *Is Good Faith an Over-Arching General Clause in the*

German scholars were quite divided throughout the 19th century as to whether or not it was appropriate to codify civil legislation. Well-known is the controversy begun by Anton Friedrich Justus Thibaut in his book on the need to codify law in Germany⁵³ and the violent reaction by Friedrich Carl von Savigny, for whom the law must develop slowly and as a result of the study of custom and of the traditions of each State.⁵⁴ In the Germany of the 19th century, the idea of the well-cultured man triumphed; the struggle between the so-called jurisprudence of concepts and jurisprudence of interests reflects the intense cultural debate of German jurists of that era.⁵⁵

The concept of good faith crystallized in the BGB breaks with the past and is founded on the “categorical imperative” of Immanuel Kant.⁵⁶ Good faith is connected to that universal law which arises from the metaphysics of customs. With an indubitable influence of Rousseau, Kantian philosophy construes liberty, not by the fact of being removed from any law, but rather by the submission to the law itself that results from the rightful conscience of each being.⁵⁷ Therefore, the contracting party under German law knows that he must negotiate in good faith. He assumes, if he has not done so, an eventual *culpa in contrahendo*, or fault at the time of contracting.

Paragraph 242 of the BGB has played an extremely important

Principles of European Contract Law?, in LIBER AMICORUM GUIDO ALPA: PRIVATE LAW BEYOND THE NATIONAL SYSTEMS 601, 604 (Mads Andenas et al. eds., 2007).

53. See ANTON FRIEDRICH JUSTUS THIBAUT, UEBER DIE NOTHWENDIGKEIT EINES ALLGEMEINEN BÜRGERLICHEN RECHTS FÜR DEUTSCHLAND (J.C.B. Mohr ed., 1840).

54. See Aniceto Masferrer, *Defense of the Common Law Against Postbellum American Codification: Reasonable and Fallacious Argumentation*, 50 AM. J. LEGAL HIST. 355, 418 (2008–2010) (describing the influence of Savigny’s theory against codification and arguing that “it is hard to believe that Savigny would have done what he did without Thibaut and his heated confrontation with him”).

55. See SIR BASIL MARKESINIS ET AL., THE GERMAN LAW OF CONTRACT: A COMPARATIVE TREATISE 12 (2d ed. 2006) (describing the impact of German theorists in the sixteenth and seventeenth centuries on the development and teaching of the law).

56. Lando, *supra* note 52, at 602.

57. Robert Johnson, *Kant’s Moral Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Apr. 6, 2008), <http://plato.stanford.edu/entries/kant-moral/>.

role in German jurisprudence. The judge or, as the case may be, the arbitrator, acts (a) in exercising his function, to apply the law and, as appropriate, to specify the consequences of what is established by law; (b) to limit the exercise of contractual rights where there may be an excess in the abusive exercise of the right; and (c) even *contra legem*, to impose himself in the form of a true ethical-legal rupture of the legal right. Hence, the German trier of fact has learned how to use the letter of paragraph 242 in a radically different manner depending on the ethical-political demands of the time.⁵⁸

The German jurist has introduced, together with the principal obligations of any contract, so-called accessory obligations. These include, for example, the duty of vigilance, the obligation of clarification to the other party, loyalty, the obligation to cooperate, and the obligation to inform.⁵⁹

C. ANGLO-SAXON LAW

Despite the fact that in the XVIII century Lord Mansfield, the father of English commercial law, believed that good faith was the principle by which all contracts and negotiations should be governed,⁶⁰ it is true that present-day English law has a strong tendency to interpret documents literally.⁶¹ That magical power

58. See Werner F. Ebke & Bettina M. Steinhauer, *The Doctrine of Good Faith in German Contract Law*, in GOOD FAITH AND FAULT IN CONTRACT LAW 171, 190 (Jack Beatson & Daniel Friedmann eds., 1995) ("German courts are moving in the direction of common-law jurisdictions, where judges openly admit that they are making-law. . . . The doctrine of good faith is a particularly tempting instrument for interstitial law making."); cf. Simon Whittaker & Reinhard Zimmerman, *Good Faith in European Contract Law: Surveying the Legal Landscape*, in GOOD FAITH IN EUROPEAN CONTRACT LAW 7, 22 (Reinhard Zimmerman & Simon Whittaker eds., 2000) ("Today we have still not managed to find a magic formula which defines the line to be drawn between what may properly be classified as 'interpretation' and what is usually referred to as 'judicial development' of the law.").

59. See Ebke & Steinhauer, *supra* note 58, at 177 (describing the development of "secondary" or "auxiliary" obligations").

60. See *Carter v. Boehm*, [1766] 97 Eng. Rep. 1162, 1164 (K.B.) ("The governing principle is applicable to all contracts and dealings.").

61. See Jori Munukka, *Harmonisation of Contract Law: In Search of a Solution to the Good Faith Problem*, 48 SCANDINAVIAN STUDIES IN LAW 229, 233 (Peter Wahlgren ed., 2005) (observing that "the majority view is that good

has been described by D'Amato as follows: "in the early days of contract, if the paper on which it had been written was itself lost or destroyed, the contract was regarded as dissolved."⁶² Lord Ackner clearly expressed the English jurist's position on good faith in *Walford v. Miles*:

The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations.... A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party.⁶³

Lord Steyn, also supporting this notion, indicated that there was no need in English Law to introduce a general duty of good faith inasmuch as the tribunals respect "the reasonable expectations of the parties" according to pragmatic traditions of English Law.⁶⁴

This indeed explains the violent reaction of English jurists to the controversy arising from *lex mercatoria* in international arbitration on the occasion of the judgment cited in the Norsolor case. Lord Mustill led the radical criticism against the potential use of *lex mercatoria* by international arbitrators.⁶⁵ Good faith, the general principles of law or, generally, *lex mercatoria*, were contrary to the fundamental bases of English law: sacramental respect of the literal text of the contract. The integration of the United Kingdom into the European Community has introduced legislation in England allowing the radical positions that were

faith is not a generally applicable principle in English contract law").

62. See Anthony D'Amato, *Good Faith*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 599, 600 (Rudolf Bernhardt ed., 1995) ("Thus if one party performed its obligation under a written contract and then lost (or was forcibly deprived of) the paper upon which the contract was written, the other party was entirely relieved of its reciprocal obligation.").

63. *Walford v. Miles*, [1992] 2 A.C. 128 (H.L.) 138 (U.K.).

64. Lord Steyn, *Contract Law: Fulfilling the Reasonable Expectations of Honest Men*, 113 LAW Q. REV. 433, 439 (1997).

65. See generally Michael Mustill, *The New Lex Mercatoria*, in LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE 149 (Maarten Bos & Ian Brownlie eds., 1987).

upheld decades ago to be questioned. Consumer legislation,⁶⁶ the ratification of the United Nations (U.N.) Convention on Contracts for the International Sale of Goods,⁶⁷ or the English participation in the principles of European law are clear manifestations of a potential evolution in this respect.⁶⁸

In other common law countries, admitting good faith as a general principle of law is a recent development and of enormous importance. In the United States, section 1-304 of the Uniform Commercial Code indicates that “[e]very contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement.”⁶⁹ Section 205 of the Restatement (Second) of Contracts established in 1981 that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”⁷⁰ According to the comments in this section, the conduct must also adjust to the “common purpose of the parties and, congruently to the justified expectations of the other party.”⁷¹ Hence, for E. Allan Farnsworth, the spread of the concept of good faith is in part due to its recognition in the United States, and is now a pillar of Anglo-Saxon law of contracts.⁷² Furthermore, paragraph 31 of arbitral award in

66. See Jean Calais-Auloy, *Le Devoir de se Comporter de Bonne Foi Dans Les Contrats de Consommation* [Duty to act in good faith in consumer contracts], in GENERAL CLAUSES AND STANDARDS IN EUROPEAN CONTRACT LAW 189-95 (Stefan Grundmann & Denis Mazeaud eds., 2006).

67. U.N. Convention on Contracts for the International Sale of Goods, art. 7(1), Apr. 11, 1980, 1489 U.N.T.S. 3; see also E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant Conventions and National Laws*, 3 TUL. J. INT'L & COMP. L. 47, 54-57 (1995).

68. See ELISABETH PEDEN, GOOD FAITH IN THE PERFORMANCE OF CONTRACTS 11 (2003) (noting that the duty of good faith “is slowly being introduced into England through European and international initiatives”); Hugh Beale, *General Clauses and Specific Rules in the Principles of European Contract Law: The Good Faith Clause*, in GENERAL CLAUSES AND STANDARDS IN EUROPEAN CONTRACT LAW 205, 218 (Stefan Grundmann & Denis Mazeaud eds., 2006) (criticizing inconsistent usage of the Principles of European Contract Law (PECL) and remarking that “Article 1:102 needs to be revised to make clear that good faith and fair dealing is not an overarching control mechanism.”).

69. U.C.C. § 1-304 (1981).

70. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

71. *Id.* at comments & Illustrations a.

72. See Farnsworth, *supra* note 67, at 51-54 (1995).

Abbott Laboratories v. Baxter International indicated that [t]he tribunal found “that the obligation of good faith under Illinois Law establishes an independent cause of action under the . . . Agreement. . . . [G]ood faith is not only an aid in the interpretation of the Agreements, but is a distinct legal basis for contractual commitments.”⁷³ Finally, in Australia, Anthony Mason has had no problem commenting that “[b]elow the level of the High Court, reflecting developments in other jurisdictions, our courts appear to accept that a duty of good faith in contract performance may be implied,”⁷⁴ although whether the High Court agrees still remains unanswered.⁷⁵

D. CONSEQUENCES OF THE DIFFERENCE BETWEEN CONTINENTAL LAW AND ANGLO-SAXON LAW

In practice, a confrontation between Continental and Anglo-Saxon ideas can be avoided. Particularly, an experienced arbitrator in a globalized economy knows how to interpret and apply legal concepts from other systems although they may seem unusual to him. Nevertheless, it is of interest to contrast the most radical positions of the Continental and the Anglo-Saxon jurists, since in practice we frequently witness the psychological reaction of the arbitrator, as explained in his decision. Today, with the importance international arbitration has in Latin American countries, we are seeing arbitrations where Latin American law is applied without any of the arbitrators being familiar with the basic principles of Continental Law since often they do not even understand the local language. To what extent are foreign trained arbitrators they able to make decisions based on translations or explanations of the parties of legal concepts, sometimes so closely tied especially with Spanish-speaking lawyers, such as the general principle of good faith?⁷⁶

73. Petition for Writ of Certiorari, *supra* note 12, at 65a.

74. See Hon. Sir Anthony Mason, *Foreword* to ELISABETH PEDEN, GOOD FAITH IN THE PERFORMANCE OF CONTRACTS, at v (2003).

75. *Id.*

76. See generally Jack Beatson & Daniel Friedmann, *From ‘Classical’ to Modern Contract Law*, in GOOD FAITH AND FAULT IN CONTRACT LAW 4 (Jack Beatson & Daniel Friedmann eds., 1995) (“English contract lawyers have shown a greater willingness to export ideas than to import them.”).

1. *Good Faith and Pre-Contractual Liability*

The Continental jurist has a clear idea that an eventual *culpa in contrahendo* will exist if a party breaks off negotiations without just cause. Pre-contractual liability also exists when the duty of confidentiality is breached, even if not expressly agreed to, and the other party incurs damages. If one party to the negotiations learns of any impediment that would make the contract void or voidable, and does not inform the other party, the former may be subject to pay damages suffered (negative interest) or the profits the innocent party is unable to recoup from the contract (positive interest).

On the contrary, common law takes the point of view that each party has his own capabilities and does not owe a fiduciary duty to the other. The only limit of such party in this negotiation consists of not committing fraud or deceit.⁷⁷

2. *Good Faith in Contract Interpretation*

Contracts must be performed in good faith. This requires that parties' representations be construed as coming from reasonable people. Hence, different rules of the civil codes admit a subjective and objective interpretation: subjective to discover the true intent of the contracting parties, and objective to obtain the most reasonable and equitable interpretation.

On the other hand, English law does not refer to good faith.⁷⁸ Contract interpretation is a process in which tribunals attribute to the language of the parties the true meaning of the words used.⁷⁹ The approach is objective, seeking out the parties' intent

77. See ROBERT A. HILLMAN, *PRINCIPLES OF CONTRACT LAW* 262 (2d ed. 2009) ("Judge Posner found a good faith obligation to cooperate, which he characterized as 'halfway between a fiduciary duty ... and the duty merely to refrain from active fraud"); see also Jean-François Roman, *Théorie critique du principe général de bonne foi en droit privé. Des atteintes à la bonne foi, en général, et de la fraude, en particulier, (Fraus omnia corrumpit)* (2000).

78. But cf. John Klein, *Good Faith in International Transactions*, 15 LIVERPOOL L. REV. 115, 117-18 (1993) (discussing the limited role good faith has in English law due in part to separate courts of law and equity).

79. Cf. Elena Christine Zaccaria, *The Dilemma of Good Faith in International Commercial Trade*, 1 MACQUARIE J. BUS. L. 101, 103 (2004) (noting that English law takes a different "route" to reach results arrived at in civil law, without

in the contract itself, without the subjective intent of the parties having any decisive value.⁸⁰

3. *Good Faith in Contract Performance*

For the Continental jurist, the contract must be performed in good faith. For such purpose, two criteria are established: the basic criterion of a '*good head of a family*' or due diligence, or a more demanding criterion in the case of a professional relationship.

Under English law, the parties can exercise their contractual rights and plaintiffs have standing to request what they deem appropriate, provided that they have not breached their own contractual obligations. Anglo-Saxon law starts from the premise that contract liability is absolute and, therefore, if one party cannot perform then, the payment of damages always follows.⁸¹

At conferences, we sometimes tend to present the different points of view by exaggerating the differences between Continental and Anglo-Saxon Law. What is truly important is to know whether or not, when we appoint an arbitrator from one cultural background or the other, we can predict any tendency in that arbitrator's decision. If, for example, the case involves pre-contractual liability, a question is whether an Anglo-Saxon arbitrator will decide differently from an arbitrator trained on the Continent.

This practice is reflected by Philippe Kahn who concludes that "the arbiters must thus engage in the delicate work of interpretation, which closely resembles a creative work."⁸²

recurring to good faith).

80. See MARVIN A. CHIRELSTEIN, *CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS* 1 (2006) ("[L]egal rules in some way provide assurance that the agreement will be honored. Contract law is supposed to implement that expectation.").

81. See Beatson & Friedmann, *supra* note 76, at 425; cf. OMRI BEN-SHAHAR & ARIEL PORAT, *FAULT IN AMERICAN CONTRACT LAW* (Omri Ben-Shahar & Ariel Porat eds., 2010). See generally MICHAEL E. SCHNEIDER & JOACHIM KNOLL, *PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION* (Michael E. Schneider & Joachim Knoll eds., 2011).

82. Philippe Kahn, *Les principes généraux du droit devant les arbitres du commerce international [English translation]*, 116 J. DROIT INT'L 305, 308

Farnsworth, a distinguished university professor from the Anglo-Saxon tradition, concludes that “[c]ivil law lawyers regard the concepts of good faith and fair dealing as essential components of their legal systems. On the other hand, common law lawyers, generally regard these concepts as fairly recent innovations to their legal systems.”⁸³

Among the Anglo-Saxon law systems, only the United States has a relatively developed doctrine of good faith and of faithful conduct in relation to the execution of contracts. I would also like to add to this idea the opinion of Lord Steyn on the subject of contracts by referring to performance that imposes good faith: “[a]fter all, there is not a world of difference exists between the objective requisite of good faith and that of the reasonable expectations of the parties.”⁸⁴

IV. GOOD FAITH IN INTERNATIONAL LAW

The international public law we were taught in our youth reflected the observation of Machiavelli, who wrote in 1513 that every prince of our time preaches peace and good faith but respects neither.⁸⁵ More specifically, Romain Yakemtochouk indicates that “international practice also demonstrates that the supposed good faith on the part of states is a great myth since there is no angelic practice in international politics.”⁸⁶

International public law arose from the exercise of power of sovereign States. Therefore, the introduction of good faith into international law, and more specifically in international public

(1989).

83. Farnsworth, *supra* note 67, at 63.

84. Steyn, *supra* note 64, at 439.

85. NICCOLÒ MACHIAVELLI, *THE PRINCE* 55 (David Wootton ed., trans., Hackett Publ'g Co. 1995) (discussing that if the ruler were to show respect for good faith or peace, their reign would end).

86. See François Xavier Saluden, *La Bonne Foi: Approche objective du concept de bonne foi et de sa normativité* [Good Faith: An Approach to the Concept of Objective Good Faith and Its Normativity] 5 (citing Romain Yakemtochouk YAKEMTOCHOUK, R., *La bonne fois dans le pratique coutumière des États*, at p. 7, available at <http://edi.univ-paris1.fr/travaux/06SaludenBF.pdf>).

law, is a very recent phenomenon.⁸⁷ The U.N. Charter indicates that “[a]ll Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.”⁸⁸ In furtherance of this, in 1970, the U.N. General Assembly adopted the Declaration of the Principles of International Law on Amicable Relations and Cooperation among States: “[e]very state has the duty to fulfill in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.”⁸⁹

Basic texts have helped solidify the general principle of good faith in international law.⁹⁰ Article 38.1.c of the Statute of the International Court of Justice (ICJ) establishes that “the general principles of law recognized by civilized nations” constitutes one of the sources of international law which must be applied by the Court.⁹¹ Professor Georg Schwarzenberger points out with good reason, in the prologue to Bin Cheng’s book on the general principles of law that the drafters of the Statute of the International Court of Justice launched (perhaps without realizing the consequences) “a challenge to the Doctrine of

87. See William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT’L L. 307, 378 (2008) (“While good faith has long been a core principle of international law, a workable standard of good faith review has yet to be fully developed.”)

88. U.N. Charter art. 2, para. 2.

89. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018, at 124 (Oct. 24, 1970).

90. See Judge Mohammed Bedjaoui, Keynote Address at the Conference on Good Faith, International Law, and Elimination of Nuclear Weapons 18 (Linda Asher & Peter Weiss trans., May 1, 2008), available at <http://lcn.org/disarmament/2008May01eventBedjaoui.pdf> (“Good faith is a fundamental principle of international law, without which all international law would collapse.”).

91. Statute of the International Court of Justice art. 38.1, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (“The Court, whose function is to decide pursuant to international law such disputes as are submitted to it, shall apply . . . the general principles of law recognized by civilized nations . . .”).

International Law to sail into new and uncharted seas.”⁹²

The principle of good faith, from that time, constitutes a source of international law which must be taken into consideration in decisions of the ICJ and, in general, by the public and private protagonists of international law. It is therefore no surprise that the ICJ stated in the Nuclear Tests Case that “[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.”⁹³ Nonetheless, the ICJ’s jurisprudence has fluctuated in this regard since in 1988, in the Border and Transborder Armed Actions case between Nicaragua and Honduras, it elaborated that good faith, as a concept, “is not in itself a source of obligation.”⁹⁴

Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties⁹⁵ establishes that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”⁹⁶ Logically, it also applies to treaties regulating international arbitration involving commercial and investment protection.⁹⁷ Its preamble is interesting, noting “the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized.”⁹⁸ Consequently, arbitral tribunals are interpreting treaties by extrapolating the logical consequences of this reference to the principle of good faith.⁹⁹ Among many other examples, one may cite the arbitral

92. See BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS xi (1953); see also GEORG SCHWARZENBERGER, *THE FUNDAMENTAL PRINCIPLES OF INTERNATIONAL LAW*, 290–326 (1955).

93. Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253, 268 (Dec. 20).

94. Border and Transborder Armed Actions (Nicar. v. Hond.), Judgment, 1988 I.C.J. 69, 105 (Dec. 20).

95. Vienna Convention on the Law of Treaties art. 31.1, May 23, 1969, 1155 U.N.T.S. 331.

96. *Id.* art. 31.1.

97. See *id.* art. 1 (asserting that the Vienna Convention applies to treaties between States); *id.* art. 2.1(a) (defining “treaty” as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”).

98. *Id.* pmbl.

99. See Thomas W. Wälde, “Equality of Arms” in *Investment Arbitration:*

award between Técnicas Medioambientales Tecmed, S.A. and the Republic of Mexico: “[t]he Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.”¹⁰⁰

The U.N. Convention on Contracts for the International Sale of Goods also speaks of the principle of good faith: “[i]n 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.”¹⁰¹ The commentary emphasizes the nature of the compromise which resolved the differences between Anglo-Saxon and Continental jurists regarding good faith. The sale and purchase need not be governed by good faith, but rather the observance of good faith in international commerce must be ensured. The minutes of the deliberations on this delicate subject matter reflect the compromise between the representatives of countries that sought a general rule on good faith as applicable to contracts, and those that did not accept this position because it would introduce a factor of uncertainty, of undeniable risks in the judicial or arbitration proceeding.¹⁰²

Another very different but clear position is that reflected in the UNIDROIT Principles of International Commercial Contracts.

Procedural Challenges, in *ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS* 161, 161 n.1 (Katia Yannaca-Small ed., 2010).

100. *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154, (May 29, 2003).

101. U.N. Convention on Contracts for the International Sale of Goods, *supra* note 67, art. 7(1).

102. See Alexander S. Komarov, *Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)*, 25 *J.L. & COM.* 75, 83 (2005); cf. Ulrich Magnus, *Comparative Editorial Remarks on the Provisions Regarding good Faith in CISG Article 7(1) and the UNIDROIT Principles Article 1.7*, in *AN INTERNATIONAL APPROACH TO THE INTERPRETATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) AS UNIFORM SALES LAW* 45 (John Felemegas ed., 2007).

Article 1.7, states that “[e]ach party must act in accordance with good faith and fair dealing in international trade. The parties may not exclude or limit this duty.”¹⁰³ Article 2.1.15, goes on to further indicates that “[a] party is free to negotiate and is not liable for failure to reach an agreement. However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party. It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.”¹⁰⁴

In concluding with this reference to basic texts that mention the general principle of good faith from the perspective of international law, we cannot overlook the Understanding on Rules and Procedures Governing Dispute Settlement of the World Trade Organization. Article 3.10, mentions that “[i]t is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute.”¹⁰⁵

V. GOOD FAITH IN INTERNATIONAL ARBITRATION

We have already highlighted the challenge presented to the international jurist following the ICJ Statute. The general principles are the source of law and, as such, must serve not only to inform international legal relations, but also, in a contentious phase, may be the direct basis for claims. The same applies in international commercial arbitration and, naturally, in investment protection, which sits between international public law and private law.

Goldman, in studying *lex mercatoria*, distinguished the general

103. INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW [UNIDROIT], PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS art. 1.7 (2010), available at <http://www.unidroit.org/english/principles/contracts/principles2010/translations/blackletter2010-main.htm>.

104. *Id.* art. 2.1.15.

105. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.10, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

principles of law recognized by civilized nations for the purposes of article 38 of the ICJ Statute from the uses and practices of international commerce. From the era in which maestro Goldman analyzed the *lex mercatoria* up to the present, few years, albeit extraordinarily intense ones in the area of international arbitration, have passed.¹⁰⁶ The generalization of investment protection arbitration has leaped across the borders of public and private in international law. Arbitration arising from bilateral or multilateral treaties has eliminated the distinction between the public and private, including the area of general principles of law. In the words of Goldman, good faith continues to be the essence of the *lex mercatoria* but it is also found in the core of investment protection arbitration.

According to Kahn, the essential contribution of the Norsolor judgment is “having directly connected liability to a general principle of transnational law.”¹⁰⁷ Such direct connection of an arbitration decision to general principles of law also permeates in the judicial phase in decisions seeking assistance with or oversight of arbitration rulings. The Swiss Federal Tribunal, in a case brought by the United Arab Emirates against Westland Helicopters Ltd., a British company, upheld that the oversight exercised in Switzerland over an award should be carried out on the basis of transnational or universal public policy which includes “the fundamental principles of law imposed without any consideration of the ties of a litigation to a given country.”¹⁰⁸

106. See generally Berthold Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives [English translation]*, CLUNET 475 (1979); see also Berthold Goldman, *Cour de cassation, 1re Chambre civile, 9 octobre 1984, société Pabalk Ticaret Sirketi c/ société Norsolor*, 1 REVUE L'ARBITRAGE 431 (1985).

107. Kahn, *supra* note 82, at 321 (“Et l’apport essentiel de la sentence Norsolor est d’avoir directement rattaché la responsabilité à un principe général de droit transnational.”).

108. Bundesgericht [BGer] [Federal Supreme Court] Apr. 19, 1994, 120 ENTSCHEIDUNGEN DES SCHWIZERISCHEN BUNDESGERICHTS [BGE] II 155, 168 (Switz.) (“[S]oit le choix d’un ordre public transnational ou universel incluant ‘les principes fondamentaux du droit qui s’imposent sans égard aux biens du litige avec un pays déterminé’”); see Emmanuel Gaillard, John E.C. Brierley Commemorative Address: L’ordre juridique arbitral: réalité, utilité et spécificité [The Arbitral Law: Reality, Utility and Specificity] (Sept. 24, 2009),

The link of arbitration to the general principles of law appears clearly and categorically in investment protection. Suffice it to recall that article 42, paragraph 1, of the Washington Convention establishes that “[i]n the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”¹⁰⁹ Consequently, the arbitrator’s conduct in an ICSID proceeding is linked to the rules or principles of international law.

The principle of good faith has governed the arbitrator’s conduct in investment protection matters since its inception. An example of this is found in the Lanco arbitration against Argentina referred to earlier.¹¹⁰ The arbitration tribunal in *Inceysa Vallisoletana S.L. v. Republic of El Salvador* also clearly expressed itself in this respect: “[g]ood faith is a supreme principle, which governs legal relations in all of their aspects and content.”¹¹¹ Thus, arbitration jurisprudence has repeatedly held that good faith acceptance by the investor is not possible if there were corruption, money-laundering or fraud in making the investment; the investment would be precluded by the principle of good faith.

When an arbitrator decides on specific claims based on a legislative text he enjoys an interpretative precision that he lacks when basing his decisions on the general principles of law, specifically on the principle of good faith. Therefore, the logical

in 55 REVUE DROIT MCGILL 891, 903–04 (2010).

109. Observe that the official translations are not a faithful reflection of what was agreed. *Compare* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 42(1), Mar. 18, 1965, 575 U.N.T.S. 160 (stating, in English, “such rules of international law as may be applicable”), *with* Convenio Sobre Arreglo de Diferencias Relativas a Inversiones Entre Estados y Nacionales de Otros Estados art. 42(1), Mar. 18, 1965, 575 U.N.T.S. 206 (stating, in Spanish, “normas de derecho internacional”), *and* Convention pour le Reglement des Differends Relatifs aux Investissements entre Etats et Ressortissants d’Autres Etats art. 42, Mar. 18, 1965, 575 U.N.T.S. 161 (stating, in French, “ainsi que les principes de droit international en la matière”).

110. *See supra* notes 22-25 and accompanying text.

111. *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, ¶ 230 (Aug. 2, 2006), 28 ICSID Rep. 311 (2008).

hesitation that exists in practice and in doctrine makes recurring to good faith replete with legal insecurity or, in a worst case scenario, leads to a risk of arbitrariness. Franz Wieacker expressed himself in those terms,¹¹² as did the drafter of the Egyptian code, Abdel-Razzak al-Sanhuri.¹¹³ Nevertheless, any judicial or arbitral decision, as a human activity, has a strong discretionary content subject to personal valuation. Therefore, arbitrators are extraordinarily cautious in their decisions when they must apply the principle of good faith. Specifically, arbitrators are well aware of the risk of subsequent judicial oversight or oversight by a special tribunal of annulment.¹¹⁴ However, it is clear that the application of the general principles of law in international arbitration does not open the door to arbitrariness. Good faith is exercised in the contractual negotiation and in the subsequent performance of the contract. If a dispute arises from the legal relationship, there is no doubt that arguments based on good faith are of a more precarious nature than others and thus, the need for a greater conviction at first

112. See FRANZ WIEACKER, EL PRINCIPIO GENERAL DE LA BUENA FE [THE GENERAL PRINCIPLE OF GOOD FAITH] 30 (Jose Luis Carro trans., 1982) (“[S]e ha querido encontrar en las cláusulas generales una válvula para las exigencias ético-sociales, una especie de ilustrado positivismo social que en cierto modo inhala como por diósmosis una fresca ética social de primera mano . . . Se teme que se produzca una debilitación del Derecho a través de una laxa y hasta demagógica equidad y se ve en las cláusulas generales una puerta abierta a la arbitrariedad . . .”).

113. See Al-Sanhouri, *Le Standard juridique*, in RECUEIL D'ETUDES SUR LES SOURCES DU DROIT EN L'HONNEUR DE FRANÇOIS GENY (VOL. II: LES SOURCES GENERALES DES SYSTEMES JURIDIQUES ACTUELS) 144, 155 (Librairie du Recueil Sirey ed., 1934) (“...en donnant au juge le pouvoir discrétionnaire nécessaire pour l'application du standard, on risque de tomber dans l'arbitraire ; le juge donnerait libre essor à ses tendances personnelles, et appliquerait ses propres doctrines sociale et économiques.”). See generally STEFAN GRUNDMANN & DENIS MAZEAUD, GENERAL CLAUSES AND STANDARDS IN EUROPEAN CONTRACT LAW (Stefan Grundmann & Denis Mazeaud eds., 2006).

114. Accord José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 379, 426 (Karl P. Sauvant ed., 2009) (“Given the uncertainties about what precisely is meant by a standard of only ‘good faith’ review, arbitrators who opt for it without explicit textual warrant are in uncharted waters and might be accused, as by a subsequent ICSID annulment body of exceeding their legal mandate.”).

and the need for a more exact reasoning by the arbitrator in his decision-making process afterwards.

VI. THE REQUIREMENTS FOR ARBITRATING IN GOOD FAITH

Just as with any contract, the negotiation and performance of the arbitration agreement must be governed by the principle of good faith. This principle affects both the parties to the dispute as well as the arbitrators or arbitration institutions or, in general, any person participating in the arbitral proceeding, whether as an attorney or an expert.

In the *Methanex v. United States* arbitration, “[i]n the Tribunal’s view, the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of ‘equal treatment’ and procedural fairness.”¹¹⁵

The duty to arbitrate in good faith is infringed upon when improper pressure is applied to the arbitrators, when illegally obtained evidence is used, when the principle *non venire contra factum propium* is violated, when anti-suit injunctions are abused, when the arbitrators are challenged for the sole purpose of obtaining a delay or when the proceeding is delayed as a consequence of the refusal to pay the arbitration costs and expenses.¹¹⁶ In turn, arbitrators and arbitration institutions must fulfill their role in good faith, protecting the integrity of the proceeding. Dedication, diligence and celerity in the procedural phases as well as the sound management of the proceeding are obligations that derive from the good faith of the performance of arbitration commitments.

115. *Methanex Corp. v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, ¶ 54 (NAFTA Ch. 11 Trib. Aug. 3, 2005), available at <http://www.state.gov/documents/organization/51052.pdf>.

116. See generally Julie Bédard et al., *Arbitrating in Good Faith and Protecting the Integrity of the Arbitral Process*, 2010 PARIS J. OF INT'L ARB. 737 (2010).

A great deal is said about arbitrators or experts at lectures and congresses. Oftentimes, the specific professional obligations of attorneys in the area of arbitration are not taken into consideration. The attorney's ethics and his professional responsibilities are the same when he acts in consultations, in judicial proceedings or in arbitration. Nevertheless, many arbitration proceedings are brought for the sole purpose of negotiation. The deadlines required by mutual agreement by the parties' counsel to the tribunal are frequently excessive. Discovery battles at times deadlock the development of the proceeding. Experts, and especially so-called legal experts, are abused. Documentation submitted is frequently superfluous. Excessively costly hearings are requested which are a true waste of time, if the submissions to the tribunal had been prepared appropriately.

VII. CONCLUSION

The fact that the principle of good faith appears in one form or another in the majority of arbitral awards is clear evidence of its importance in international arbitration; the *Norsolor* case went so far as to link the specific arbitration award to general principles of law. In many arbitration awards, the general principles of law and, specifically, of good faith, are not only guides, but rather the specific basis for the claims. In investment protection arbitration good faith already appears in the jurisdictional phase in that the investor's individual acceptance presupposes good faith without which the arbitration agreement does not exist. The content of good faith tends to depend on the legal tradition involved. The Anglo-Saxon rejection of the principle of good faith has, in practice, been mitigated by legal modifications recently introduced into U.S. law or by osmosis in English law as a consequence of joining the European Union. The selection of arbitrators constitutes one of the fundamental elements for success in the arbitration strategy. The legal culture and training potential arbitrators receive must be taken into consideration at the time of their appointment, anticipating the impact these factors have on the ultimate decision-making process. The arbitrators' professionalism and their frequent

decisions pursuant to laws that are foreign to them minimizes, but does not exclude, the risks of a mistaken appointment. The globalization of the economy and the development of investment protection arbitration have erased that fine line between international public law and private law. The general principles of law recognized in the civilized nations to which article 38 of the Statute of the ICJ alludes to, also have their legal efficacy in the areas of commerce or international investment. Arbitration presupposes trust between the parties and the arbitrators or other actors in international transactions. A professional solution to dispute is sought because it is assumed that the legal relations have arisen in good faith, and the parties trust in the good faith of the arbitrators and, unless expressly excluded, assume that they will take into consideration in their decision, apart from other normative or procedural elements, the general principle of law of good faith.