

Swiss Arbitration Association



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What is "Good faith"? A historical and comparative overview

Christoph Müller (Co-Chair)
Philippe Stoffel-Munck
Neil Andrews
Maurice Mendelson

Swiss Arbitration Association



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Good Faith in Civil Law

Pr. Dr. Philippe Stoffel-Munck

Pantheon Sorbonne University (Paris I)

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A Key Concept of Contract Law in Civil Law Systems

A Key Concept

European Continental Laws

- Switzerland: Article 2 of the Civil Code
 - 1. *Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.* 2 *The manifest abuse of a right is not protected by law*
- Germany: § 242 of the BGB : Performance in good faith
 - *An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration*
- France: Article 1104 of the Civil Code
 - *Contracts must be negotiated, formed and performed in good faith.* 2 *This provision is a matter of public policy*

A Key Concept

In Other Civil Law Countries

- Egypt: Art. 148 of the Civil Code
 - *A contract must be performed in accordance with its contents and in compliance with the requirements of good faith.*
- Thailand: Section 368 of the Civil Code
 - *Contract shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration.*
- China: Article 7 of the Civil Code
 - *When conducting a civil activity, a person of the civil law shall, in compliance with the principle of good faith, uphold honesty and honor commitments*

A Key Concept in general?

- **UNIDROIT PRINCIPLES of International Commercial Contracts**
 - **ARTICLE 1.7**
(Good faith and fair dealing)
 - (1) Each party must act in accordance with good faith and fair dealing in international trade.
 - (2) The parties may not exclude or limit this duty
- **But general principles are merely/typically civil law tools, aren't they?**

Good faith: what is the content?

Content

A fluid norm

Three relevant behavioural registries

- 1) Honesty
 - From “no deceit” to transparency?
- 2) Reasonableness
 - Moderation and proportionality?
- 3) Reliability
 - Coherence with the contractual purpose
 - One’s behaviour should respond to the legitimate expectations one created

Roman Law Root

Generalization of the *Bona Fide* contracts, as opposed to the *Stricti Juris* contracts

Bona Fide allowed for *Aequitas* to operate

Good Faith calls for Equity

Content

A duty oriented in two directions

- ❖ **Achieving the objective purpose of the contract**
 - A behaviour in performance
 - A behaviour for performance
- ❖ **Considering the consequences on the other party**
 - Duty to give (sufficient) prior notice, e.g. in termination (absent a breach)
 - Avoid unjustified harm: respecting or protecting the other's interest?

Content

A duty of varying intensity

❖ Depending on the circumstances

- Expectations created
- Duration
- Etc.

❖ Depending on the type of contract

- Antagonistic contracts are not alike cooperative contracts
- Antagonistic contracts are not alike fiduciary relationships



Good faith: what are the effects?

Effects

A fluid norm turning into solid rules

❖ Irrigating the law

- Various illustrations/mentions throughout contract law
- Example: French Civil Code art. 1304-3 : *A suspensive condition is deemed to have been fulfilled if the party who is interested in its failing has obstructed its fulfilment.*
- Example: Swiss Code of Obligations, art. 25: *A person may not invoke error in a manner contrary to good faith*

Effects

A fluid norm turning into solid rules

❖ An ingredient of other key rules

1. Interpretation of the contract

- BGB, § 157: *Contracts are to be interpreted as required by **good faith**, taking customary practice into consideration.*
- French Civil Code, art. 1188 § 2: *Where this intention cannot be discerned, a contract is to be interpreted in the sense which a **reasonable person** placed in the same situation would give to it.*
- Swiss doctrine of objective interpretation

Cf. Equity of the Praetor.

Papinian: *lus praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam.*"
(Dig. 1, 1, 7)

- Completing the law
- Supplementing the law
- Correcting the law

Effects

A fluid norm turning into solid rules

❖ An ingredient of other key rules

2. Completion of the contract

- BGB, § 242: *An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.*
- French Civil Code, art. 1194: *Contracts create obligations not merely in relation to what they expressly provide, but also to all the consequences which are given to them by equity, usage or legislation.*

Cf. Equity of the Praetor.

Papinian: *Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam.*"
(Dig. 1, 1, 7)

- Completing the law
- Supplementing the law
- Correcting the law

Effects

A fluid norm turning into solid rules

❖ An ingredient of other key rules

3. Correction of the contract?

- Striking out standard terms entailing a significant imbalance between the parties? (clauses abusives)
 - BGB § 307: *contrary to the requirement of good faith*
 - French Civil Code, art. 1171 : no mention of good faith
- Hardship?

Cf. Equity of the Praetor.

Papinian: *lus praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam.*"
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- Completing the law
- Supplementing the law
- Correcting the law

Effects

A fluid norm producing effects on its own

❖ Neutralization of the bad faith exercise of a contractual prerogative

1. France: Les Maréchaux case (10 July 2007)

- *If the rule according to which contracts must be performed in good faith allows the judge to censure the disloyal exercise of a contractual prerogative, it does not allow him to violate the substance of the rights and obligations lawfully agreed by the parties.*
- The right/provision is not stricken out: its exercise is punctually ineffective because its holder used it in deviation of its agreed purpose/in violation of its duty of good faith.
- Claim for payment/performance may not be rejected for lack of good faith. May be deferred on the ground of a particular statute (e.g. equity based art. 1343-5 of the French civil code).

2. In general: abuse of right doctrine

Effects

A fluid norm producing effects on its own

- ❖ Termination for breach of the duty to perform in good faith
 - 1. In connection with the achievement of the contractual purpose
 - Example: taking advantage of the contract to harm the other party's interest
 - 2. Without connection to the achievement of the contractual purpose?
 - Impairing the relationship but fulfilling obligations:
 - Selective approach depending on the type of contract

Effects

A fluid norm producing effects on its own

- ❖ Liability for breach of the duty to perform in good faith

General principles of contractual liability

Effect of liability clauses

To sum up

- ❖ Not a wild norm: Good faith is flexible, good faith is a range but there is a framework guiding its application.
- ❖ Not a « bonne-à-tout-faire »: an inspirational concept for some other rules ; a concept with some specific effects /not any effect



Thank you

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Common Law

Neil Andrews

Professor at University of Cambridge



Thank you

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International Law

Professor Maurice Mendelson QC

Barrister (Queen's Counsel)
at Blackstone Chambers



Thank you