CHAPTER 2: MODERN APPLICATIONS OF THE GENERAL PRINCIPLES OF LAW

A. Good Faith in Contractual Relations

Good faith is "the fundamental principle of every legal system." Binding individuals, juridical persons, and sovereigns alike, it essentially "converts a moral or ethical precept" into a legal principle—an obligation to act with fairness, reasonableness, and decency in the formation and performance of a contract. It further requires fair dealing in the exercise of rights and prohibits parties from benefiting from their own illegitimate actions. Parties would not enter into contractual relations if there were not a mutual expectation that promises would be honored, that obligations would be performed, and that compensation would be provided in the event of breach. An integral facet of legal certainty, good faith is viewed as "the fundamental principle of the entire system"—the "Magna Carta of international commercial law."

1. Pacta Sunt Servanda: Agreements Must Be Honored

A contract would not be a contract if not binding. The principle pacta sunt servanda, in H.L.A. Hart's phrase, "the minimum content of Natural Law." In 1969, the principle was codified for States in the Vienna Convention on the Law of Treaties, which has been widely accepted as setting forth rules of customary international law. With roots in both Western and Eastern legal systems, this principle has become a fixture in the international legal order precisely because "no international jurisdiction whatsoever has ever had the least doubt as to [its] existence." All civilizations, from the earliest, have recognized the rule, and it has been handed down throughout the centuries...
Pacta sunt servanda also means that obligations should be carried out according to the good faith and mutual intention of the parties—that is to say, in Cheng's words, "carrying out the substance of [the parties'] mutual understanding honestly and loyally." Contractual performance is dictated by contractual interpretation, and the dual inquiries into what a contract requires and how it must be fulfilled often collapse into one. The principle of good faith stands with, and informs the application of, other canons of contract construction. It becomes the "major interpretative principle that is applied ancillary to [the] principle of obligation" of pacta sunt servanda. In this sense, the principle of good faith is as applicable to the judge or arbitrator charged with interpreting a contract as it is to the parties that executed it.

Page: 92

The most elementary interpretive canon emanating from this general principle is that the common intention of the parties at the time of contracting should dictate the obligations of a contract. Because contracts are borne of consent of both sides, the test appropriately focuses on those points of mutual agreement.

Page: 97

An offshoot of this principle is to interpret an agreement as a whole to achieve its purpose and aim, which ensures that individual words or phrases within the agreement are given meaning, force, and effect (known as the principle of effectiveness).

Page: 98

Another interpretive principle recognized by Cheng was that of contra proferentem in the interpretation of agreements, which precludes the party who proposed a provision from not honoring it on the ground that it is ambiguous and which interprets ambiguous phrases against their author. This, too, derives from the general principle of good faith.

Page: 99

The principle of good faith has also been applied to affirm the existence of a contract—whether through the parties' contemporaneous conduct or their past course of dealings.

Page: 101

2. Good Faith in Excusing Contractual Performance

The general principle of good faith has also guided courts and tribunals on when to excuse adherence to a contract. For instance, under most legal systems, one party may be entitled to treat itself as discharged from its obligations if the other has committed a substantial breach—exceptio inadimplenti contractus.

Page: 107

B. Abuse of Rights and the Principle of Proportionality

The negative corollary of the good faith exercise of a legal entitlement is the universal prohibition on abuse of rights. This principle relates not to how rights are obtained (viz., by law or contract), but to how they are exercised.
C. Estoppel

There is broad consensus that, as a "general principle, no party may rely upon its own inconsistency to the detriment of another."\(^{188}\) This principle has been traced back through 12 centuries of Islamic jurisprudence and has deep roots in Roman law, common law, and modern civil law.\(^{189}\) Its "mandatory implication" occurs where a party "tries to undo what he previously undertook";

D. The Prohibition on Advantageous Wrongs and Unjust Enrichment

Nemini dolos suus prodesse debet and nemo auditur propriam turpitudinem allegans: these central tenets mean, inter alia, that a party cannot build a case upon a fraud, cannot cause the nonperformance of a condition precedent to its own obligation, and cannot invoke its own malfeasance to diminish its liability. Although expressed in myriad ways, it is basic that "[n]o one can be allowed to take advantage of his own wrong."\(^{247}\)

E. Corporate Separateness and Limited Liability

Corporate personhood is recognized to allow asset partitioning among related entities.\(^{304}\) In all legal systems, corporate entities have "rights and obligations peculiar to themselves," separate and apart from their constituent owners.\(^{305}\) This concept of "limited liability" allows owners to separate corporate assets and liabilities from their own.\(^{306}\) For both private and public corporations, "[l]imited liability is the rule, not the exception."\(^{307}\) Given its widespread acceptance, separation of legal identity between different companies, and between a company and its shareholders, is a general principle of law.\(^{308}\)

F. The Principles of Causation and Reparation

It is impossible to speak of liability without causation. An elusive concept, causation nevertheless encompasses an inviolable requirement to hold a party liable: a connection between its alleged act and the damage claimed. As Cheng observed, "[i]n jure causa proxima non remota inspicitur"—the proximate, and not the remote, cause is to be considered, and only those losses so occasioned are to be compensated. The requirement that persons are obliged to redress the damage they cause is a general principle of law recognized by all civilized nations.\(^{325}\)

CHAPTER 3: MODERN APPLICATIONS OF THE PRINCIPLES

C. Procedural Equality and the Right to Be Heard

A related concept to judicial impartiality is juridical equality between the parties in their capacity as litigants—audiatur et altera pars. These are, as Cheng said, the "two cardinal characteristics of a judicial process."\(^{111}\) "At the heart of due
process is the idea that adjudication cannot be considered legitimate if it does not prevent arbitrariness from the standpoint of the parties." \(^{112}\)

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**Page: 184**

As noted in the discussion of the prohibition on advantageous wrongs in chapter 2.D, \(^{159}\) the tribunals in *World Duty Free v. Kenya*, *Inceysa v. El Salvador*, *Plama v. Bulgaria*, and *Metal-Tech v. Uzbekistan* arrived at similar conclusions.\(^ {160}\) Affirming that fraud, bribery, and official corruption are contrary to "international bones mores"\(^ {161}\) and "the international public policy of most, if not all, States."\(^ {162}\) International law thus denies protection to an investment procured by bribery\(^ {163}\) or by the submission of doctored financial statements.\(^ {164}\) According to Emmanuel Gaillard, "[t]here is now little doubt that . . . a transnational rule has been established according to which an agreement reached by means of corruption of one of the signatories...is void."\(^ {165}\)

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**Page: 191**

**E. Evidence and Burdens of Proof**

Allegations not admitted, noticed, or presumed must be proven. The traditional formulation of the principle governing the burden of persuasion is *actori incumbit onus probandi*.\(^ {205}\) This rule is universal save where, as noted, the burden is removed by the provisions of a statute or other evidentiary presumption.\(^ {206}\)

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**Page: 195**

But sometimes the best evidence may not be all that good. Where direct evidence is unavailable, "it is a general principle of law that proof may be administered by means of circumstantial evidence."\(^ {428}\) Appropriate inferences may be drawn from; "a series of facts linked together and leading logically to a single conclusion."\(^ {229}\)

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**Page: 197**

**F. The Principle of Res Judicata**

The final principle is, according to Cheng and early twentieth century jurists, the least controversial: "There seems little, if indeed any question as to *res judicata* being a general principle of law."\(^ {241}\) It serves both a general and specific purpose. Generally, "the stability of legal relations requires that litigation come to an end"; specifically, "it is in the interest of [all] parties that an issue which has already been adjudicated...be not argued again."\(^ {242}\)

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\(^{4}\) Id. at 105. Good faith has been expressly recognized as a general principle in civil codes around the world. See, e.g., Argentinean Civil Code of 1869 art. 1198 (contracts); Chilean Civil Code art. 1546; Brazilian Civil Code of 2002 art. 113; French Civil Code art. 1134; German Civil Code art. 242; Italian Civil Code art. 1337 (contracts); Mexican Federal Civil Code art. 1796; Swiss Civil Code art. 2.1.

\(^{5}\) See, e.g., COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) 171 (Stefan Vogenauer 8: Ian Kleinheisterkamp eds., 2009).


\(^{7}\) KP. BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA 165 (Kluwer Law International 1999): see also Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in
Accordance with the Charter of the United Nations ("Every State has the duty to ful?l in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.");

RESTATEMBNT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 321 cmt. (a) (Am. Law Inst. 1987) (stating that the rule of pacta sunt servanda "lies at the core of the law of international agreements and is perhaps the most important principle of international law"); MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 127 et seq. (3d ed. 2004); T.O. ELIAS, NEW HORIZONS IN INTERNATIONAL LAW (1979).


11Texaco Overseas Petroleum Co. (TOPCO) v. Gov't of the Libyan Arab Republic, Award (Jan. 19, 1974), 53 INT'L L. REP. 389, 462 (1979); see also Inceysa Vallisoleitana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, ¶¶ 223-33 (Aug. 2, 2006) ("[T]he maxim Pacta Sunt Servanda [is] unanimously accepted in legal systems"); Texaco Overseas Petroleum Co. v. Gov't of the Libyan Arab Republic (TOPCO), 17 I.L.M. 1, 18—19 (1978) ("A contract must be performed in accordance with its contents and in compliance with the requirements of good faith"); "Surah 5 of the Koran...begins with the verse '0 ye believers, perform your contracts!'); Pacta Sunt Servanda, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 364 (Rudolf Bernhardt ed., 1984).

21CHENG, supra note 2, at 114-15.

22See, e.g., W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 35.02 (Oceana TM 3d ed. 2000) (citing sources); Mustill, supra note 6, at 110 ("A contract should be performed in good faith"); UN, Convention on Contracts for the International Sale of Goods arts. 7(1), 9; UNIDROIT Principles of International Commercial Contracts arts. 1.7 & 1.9 (2010); Ambiente U?cio S.P.A. et al. v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Santiago Torres Bernardes, ¶ 245 (May, 2013), citing Report of the United Nations Conference of the Law of Treaties, First and second sessions, Vienna, March 26—May 24, 1968 and April 9—May 22, 1969, Documents of the Conference UN publication, Sales No. E.70.V.5 at 38, ¶ 5 ("international courts and tribunals are expected to bear constantly in mind, as noted by the International Law Commission, that the interpretation of treaties in good faith and according to the law is essential if the pacta sunt servanda rule is to have any real meaning").


67GARDINER, supra note 27, at 148, 200—01 (citing Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, 1994 I.C.J. 6 (Feb. 3)).

68See, e.g., First Travel Corp. v. Islamic Republic of Iran, Case No. 34 (206-34-1), Award (Dec. 3, 1985), 12 Y.B. COMM. ARB. 257 (1987 (deciding that in face of ambiguity, it would apply the rule of contra proferentem and interpret the agreement against the drafter's interest so as to protect the party who did not draft the agreement).

69See, e.g., Telestat Canada v. Juch-Tech, Inc., Superior Court of Justice of Ontario (OSCI), Case No. 11-29505, ¶¶ 57—65 (May 3, 2012); ICC Award No. 7110, 10(2) ICC BULL. 39, at 44 (1999) (determining that "it is a general principle of interpretation widely accepted by national legal systems and by the practice of international arbitral tribunals, including ICC arbitral tribunals, that in case of doubt or ambiguity, contractual provisions, terms or clauses should be interpreted against the drafting party"); Cysteine Case, China CIETAC Arbitration Proceeding, Award (Jan. 7, 2000); ICC Award No. 3460, J. DROIT INT'L (CLUNET) 939 (1981); UNIDROIT Principles of International Commercial Contracts art. 4.6 (2010); UNIDROIT at 528.

70See UNIDROIT Principles of International Commercial Contracts art. 4.6 (2010). See also COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) 527 (Stefan Vogenerau & Jan Kleinheisterkamp eds., 2009) (stating that today the principle of contra proferentem is “part of the modern lex mercatoria” because the rule is recognized in many major legal systems and applicable to the interpretation of international conventions).

Iran, 2 Iran-U.S. Cl. Trib. Rep. 334, 339 (1983); Iowa State Univ. v. Ministry of Culture, 13 Iran-U.S. Cl. Trib. Rep. 271,
273—75 (1986); Cal-Maine Foods, Inc. v. Islamic Republic of Iran, 6 Iran-U.S. Cl. Trib. Rep. 52, 61—62 (1984); Chas. T.

82 See, e.g., United Nations Convention on Contracts for the International Sale of Goods arts. 49(1)(a) and 64(1)(a) ("The
buyer/seller may declare the contract avoided if the failure by the seller/buyer to perform any of his obligations under the
contract or this Convention amounts to a fundamental breach of contract"); ICC Case No. 3540, Award (Oct. 3, 1980), 7
Y.B. COMM. ARB. 124 (1982); ICC Case No. 2583, Award, 103 J. DROIT INT'L (CLUNET) 950 (1976); Saphire Int'l
Petroleumus Ltd. v. Nat'l Iranian Oil Co., Award, 35 INT'L L. Rep. 136 (Mar. 15, 1963); Diversion of Water from the
Meuse (Neth. v. Beng, Judgment, 1937 P.C.I.J. (See. A/B) No. 70 (June 28, 1937) (dissenting opinion of Judge Anzilotti).
See generally Philip O'Neill et al., Is the Exception on Adimpleti Contractus Part of the New Lex Mercatoria?, in
TRANSNATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION 147 (Emmanuel Galliard ed., 1993).

83 See GARDINER, supra note 27, at 148.

188 CRAIG, ET AL., supra note 22, § 35.02(xvii) (citing Emmanuel Gaillard, 1985 REV. ARB. 241, 248; Paul Bowden,
L'interdiction de se contredire au detriment d'autrui (estoppel) as a Substantive Transnational Rule in International
Commercial Arbitration, in TRANSNATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION 125
(Emmanuel Galliard ed., 1991)).

189 See Desert Line Projects LLC v. Republic of Yemen, ICSID Case No. ARB/05/17, Award, ¶ 207 (Feb. 6, 2008); Case

241 CHENG, supra note 2, at 149 (quoting The Montijo Case (1875)); see also EDWIN M. BORCHARD, THE
DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 713 (Bankslaw
1915) ("It is an established maxim of all law, municipal and international, that no one can pro$t by his own wrong").

(?nding a "wealth of practice already accumulated on the subject" of corporate personhood in municipal law); see also
CLIVE M. SCHRIMMOUTH'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW 137 (BRILL 1988) (noting "the
universal application of the juridical concept of corporateness... [in] all national legal systems"); Henry Hansmann &


308 See Lemire v. Ukraine, ICSID Case No. ARB/06/18, Dissenting Opinion of Arbitrator Dr. Jürgen Voss, ¶¶ 65-67 (Mar.
1, 2011) (noting that "m]ost municipal legal systems recognize corporations as legal persons distinct from their
shareholders," such that it “pervades” those systems of law, and is thus “in principle recognized by international law”);
605 (May 24) (holding that, under international law, “[c]onferring independent corporate personality on a company implies
granting it rights over its own property, rights which it alone is capable of protecting,” and looking to Congolese law for its
treatment of companies); Rompetrol Grp. N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on Respondent's
Preliminary Objections on Jurisdiction and Admissibility, ¶ 90 (Apr. 18, 2008) (citing Barcelona Traction for the proposition
that “a corporate entity has a legal personality, and a set of rights and obligations, which are separate from those of its
shareholders”); HICEE B.V. v. Slovak Republic, UNCITRAL, PCA Case No. 2009-11, Partial Award on Jurisdiction, ¶ 147
(May 23, 2011) (discussing “the default position in international law that the corporate form is...legally distinct”).

320 CHENG, supra note 2, at 245.

321 Id. at 241-53.

110 CHENG, supra note 2, at 290.

112 Sweet & della Cananea, supra note 29, at 943—44.

158 The overlap here with other general principles is evident. For instance, in some European countries, such as Belgium
and France, the “principle fraus omnia corruptis is perceived as a distinct corrective mechanism in relation to the
general principle prohibiting the abuse of rights,” whereas in others, such as Germany and the Netherlands, “the principle
fraus omnia corruptis is considered a specific application of the principle of good faith in its limiting function.” Lenaerts,
supra note 153, at 472, 473.

160Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, ¶¶ 327, 373 (Oct. 4, 2014) (dismissing BIT claim for lack of jurisdiction where investment was tainted by corruption).

161Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award, ¶ 111 (Dec. 8, 2000).

162World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006) (where the tribunal dismissed an investor’s claim after discovering that he had bribed the president of Kenya); see also Carolyn B. Lamm, Hansel T. Pham & Rahim Maloo, Fraud and Corruption in International Arbitration, TDM 3 (May 2013) (“The prohibition of bribery and corruption is widely recognized as a quintessential rule of transnational public policy. International consensus vehemently declares that bribery and corruption is morally and economically unacceptable [and] fundamentally wrong. [This view] is so universal that it has developed into a well-established example of a rule of transnational public policy”).

163World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).


205CHENG, supra note 2, at 327 (citing 2 ARB. INT’L 706, 708 (Transl.)); see also Tokios Takelés v. Ukraine, ICSID Case No. ARB/02/18, Award, ¶¶ 121, 124 (July 26, 2007); Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/ 16, Award, ¶¶ 236-37 (Nov. 8, 2010); Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Award, ¶ 74 (Apr. 29, 1999) (it can be considered as a general principle of international procedure procedure - and probably also of virtually all national civil procedural laws - [that] it is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim”); Salini Costruttori S.p.A. and Italttrade S.p.A. v. Hashemite Kingdom of Jordan, ICSID ARB/02/13, Award, ¶ 70 (Jan. 31, 2006) (“It is a well established principle of law that it is for a claimant to prove the facts on which it relies in support of his claim”); Asian Agric. Prods. Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, ¶ 56 (June 27, 1990), 6 ICSID REV. 526 (1991); Autopista Concesionada de Venezuela, G.A. v. Bolivarian Republic of Venezuela, ICSID ARB/00/5, Award, ¶ 110 (Sept. 23, 2003); Int’l Thunderbird Gaming Corp. v. United Mexican States, UNCITRAL, Award, ¶ 95 (Ian. 26, 2006); ICC Award No. 1434, J DROIT INT’L (CLUNET), at 978, 982 (1976); Perenco Ecuador Ltd. v. Republic of Ecuador Petrolecuador, ICSID Case No. ARB/08/6, Decision on Jurisdiction ¶ 98 (June 30, 2011) (stating that the burden to establish the facts supporting a claim lies with the claimant); SGS Société Générale de Surveillance S.A. v. Republic of Paraguay, ICSID Case No. ARB/07/29, Award, ¶ 79 (Feb. 10, 2012) (holding that the claimant bears the initial burden of proof in substantiating its claims); Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, ¶ 89 (Apr. 12, 2002); Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, ¶¶ 19.1, 19.4 (Sept. 16, 2003); Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/OI/II, Award, ¶ 100 (Oct. 12, 2005); Saipem S.p.A. v. People’s Republic of Bangladesh, ICSID Case No. ARB/05/7, Decision on Jurisdiction, ¶ 83 (Mar. 21, 2007).

206MOITABA KAZAZI, BURDEN or PROOF AND RELATED ISSUES: A STUDY ON EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 72 (1996) (citing JACKSON H. RALSTON, THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS 220 (1973)); see also id. at 53—75 et seq.

228CHENG, supra note 2, at 322; see ICC Award No. 4145 (Second Interim Award), 12 Y.B. COMM. ARB. 97 (1987) (also published in: J. DROIT INT’L (CLUNET), at 985 (1985)) (acknowledging the “general principle [of interpretation [that] a fact can be considered as proven even by the way of circumstantial evidence”).

229Corfu Channel Case (U.K. v. Alb), Judgment, Merits, 1949 I.C.J. 4, 18 (Apr. 9). Although the ICJ in the Corfu Channel case included the caveat that such inference must leave no room for reasonable doubt." that high threshold has disappeared in more recent cases; see also Abraham Rahman Golshani v. Gov’t of the Islamic Republic of Iran, 29 Iran—U.S. Cl. Trib. Rep. 78 (1993); Agric. Prods. Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, ¶ 45 (June 27, 1990).

241CHENG, supra note 2, at 336.


Referring Principles:

I.1.1 - Good faith and fair dealing in international trade

I.1.4 - Abuse of rights

I.1.2 - Prohibition of inconsistent behavior

IV.1.2 - Sanctity of contracts
IV.5.1 - Intentions of the parties
IV.5.3 - Interpretation in favor of effectiveness of contract
IV.5.4 - Interpretation against the party that supplied the term
IV.5.2 - Context-oriented interpretation
IV.7.2 - Invalidity of contract due to bribery
V.1.4 - Principle of simultaneous performance; right to withhold performance
VII.2 - Principle of foreseeability of loss
IX.6 - No restitution in case of knowledge of illegality of performance
X.1 - Foreign corporate entities
XII.1 - Distribution of burden of proof
XII.3 - Circumstantial evidence
XIII.3.1 - Arbitral due process
XIII.4.5 - Conclusive and preclusive effects of awards; res judicata