Footnote related to title*

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1 Introduction

Most European civil codes contain a general good faith provision. In addition, some codes contain specific rules in which reference is also made to the concept of good faith. Moreover, many specific rules in the codes are said to be special applications of good faith.

2 Good Faith in Theory

[...]

2.4 Concretisation

As said, the abstract standard of good faith must be concretised in order to be able to be applied. The court determines what good faith requires in the circumstances of the specific case (Einzelfallgerechtigkeit). However, the judge is not allowed to simply decide the way which seems most equitable to himself. He has to determine the requirements of good faith in such an objective way as possible. In the Netherlands the code therefore provides in a specific provision what should be taken into account in determining what good faith requires in a particular case. In addition to that, in most systems, particularly in Germany, scholars both in private law and in jurisprudence have developed methods for rationalising and objectivating the decisions of the court. The purpose of these Methodenlehren is to render the application of the law in general, and of general clauses like good faith in particular, as rational and objective (and thereby predictable) as possible, instead of leaving it to the subjective judgment of the individual judge. The generally agreed method for rationalising is that of distinguishing functions and developing groups of cases in which good faith has previously been applied (Fallgruppen). In doing so legal doctrine has developed an 'inner system' of good faith, which is regarded as the content of that norm.

In Germany this operation has already been accomplished to a large extent. Com-
In einer jetzt fast 100jähriger Rechtsentwicklung ist der Inhalt des § 242 durch Herausarbeitung von Funktionskreisen und durch Bildung von Fallgruppen präzisiert und im wesentlichen abschließend konkretisiert worden. The effort of concretisation has made the content of the good faith norm quite comprehensible. The result is a system of sometimes quite specific duties, prohibitions, (sub)rules and doctrines which are all part of the content of good faith. It is said to have made decisions on the basis of § 242 BGB agreeably predictable (legal certainty) and rational.

It is often emphasised, however, that concretisation will not and indeed should not lead to the fossilisation of good faith. First of all, it would be an illusion to think that concretisation will ever lead to a limited set of clearly distinguishable rules. But, it is said, more importantly good faith should remain an open norm in order to be able to continue to play its important role of making the law flexible. The inner system of good faith should not become a strait-jacket.

It should be added that the process of concretisation has not been totally identical in all countries. Whereas in Germany and in the Netherlands legal doctrine rather reacts to court decisions and tries to regroup them, and thus they build up a system (a rather more inductive approach), French and Italian legal doctrine seem to follow the more deductive approach of asking themselves what, in theory, the content of the duty of good faith, or the good faith standard could be, and thus they build up a system of sub-duties et cetera, in which the legal decisions are given their place at a later stage, the Italian authors thereby relying heavily on the achievements of German courts and legal doctrine.


1 See Art. 1134, Section 3 French Civil Code; §242 German Civil Code; Art. 2 Swiss Civil Code arts. 1175 and 1375 Italian Civil Code; Art. 288 Greek Civil Code; Art. 762, Section 2, Portuguese Civil Code, arts. 6.2 and 6:248 Dutch Civil Code. See also Art. 1.7 UP and Art. 1.201 PECL.

2 See e.g Arndt Teichmann, in: Soergel Bürgerliches Gesetzbuch, § 242, No. 6.

3 See e.g. Karl Larenz, Lehrbuch des Schuldrechts I, pp. 126 ff.

4 Art. 3:12 BW: 'In determining what reasonableness and equity require, reference must be made to generally accepted principles of law, to current juridical views in the Netherlands, and to the particular societal and private interests involved'. (Translation P.P.C. Haanappel & E. Mackaay, New Netherlands Civil Code Patrimonial Law, Deventer and Boston 1990).

5 The term inner system (Binnensystem) is taken from Jürgen Schmidt, in: J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen; Zweites Buch Recht der Schuldverhältnisse; Einleitung zu §§ 241 ff.; §§ 241-243, Berlin 1995, § 242, No. 87.


7 See Arndt Teichmann, in: Soergel Bürgerliches Gesetzbuch,§ 242, No. 7.


9 See Herbert Roth, in: Münchener Kommentar, § 242, No. 32.

**Referring Principles:**

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