Table of Contents:
Good faith as a ‘general organising principle’ of the common law

ABSTRACT

2. RECENT DEVELOPMENTS REGARDING GOOD FAITH IN ENGLISH CONTRACT LAW
2.1 Increasing acceptance of good faith in case law
2.2 A general principle of good faith: the Mediterranean shipping judgment of the English High Court

3. THE ‘GENERAL ORGANISING PRINCIPLE OF GOOD FAITH’: THE BHASIN JUDGMENT OF THE CANADIAN SUPREME COURT
3.1 The decision of the Canadian Supreme Court in Bhasin v Hrynew
3.2 Legal nature and content of the general organizing principle of good faith

4. PRACTICAL IMPLICATIONS OF A GENERAL PRINCIPLE OF GOOD FAITH FOR ENGLISH CONTRACT LAW
4.1 Revolution or incremental development of the law?
4.2 More good faith duties for parties to commercial contracts?

5. CONCLUSION

Content:

Good faith as a ‘general organising principle’ of the common law

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ABSTRACT

This Note examines two recent landmark decisions of common law courts which qualify good faith as a ‘general organizing principle’ of common law. In a judgment of 2015, MSC Mediterranean Shipping Co v Cottonex Anstalt, the English High Court took the age-old discussion as to whether good faith is a general principle of common law to a new level and acknowledged, for the very first time, the existence of an organizing principle of good faith. In that judgment, the High Court referred to a 2014 decision of the Canadian Supreme Court, Bhasin v Hrynew, in which the Court held that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs more specific rules and doctrines of common law contract law. Both decisions are highly relevant for arbitrators and counsel in international arbitration, given that the general principle of good faith is not only a rule of substantive law, but is also regarded today as a standard for the time- and cost-efficient conduct of the arbitration.

1. INTRODUCTION

Most civil law jurisdictions recognize and enforce a general duty of good faith. Often codified in statutory ‘catch all’ provisions, such as the well-known section 242 German Civil Code (BGB), it is regarded as one of the basic principles governing the whole life of a contract. The same is true for many international instruments, such as the Convention on
Contracts for the International Sale of Goods (CISG)\textsuperscript{3}

or the UNIDROIT Principles of International Commercial Contracts 2010 (UPICC)\textsuperscript{4}. In public international law, the principle of good faith has always belonged to the ‘general principles of law recognized by civilized nations’ on which the International Court of Justice shall base its decisions pursuant to Article 38(1)c) of its Statute.\textsuperscript{5} Because of its widespread acceptance in domestic laws, international business as well as public international law, good faith is considered as part of transnational commercial law, the New Lex Mercatoria.\textsuperscript{6}

The principle of good faith has also gained increasing significance and attention in recent years in the field of procedure\textsuperscript{7}. Article 11.1 of the ALI/UNIDROIT Principles of Transnational Civil Procedure of April/May 2004 provides that ‘[t]he parties and their lawyers must conduct themselves in good faith in dealing with the court and other parties’.\textsuperscript{8} Paragraph 3 of the Preamble of the IBA Rules on the Taking of Evidence in International Arbitration\textsuperscript{9} provides that the taking of evidence before international arbitral tribunals shall be conducted on the principle that ‘each Party shall act in good faith’. Pursuant to Article 9(7) of those Rules, the arbitral tribunal may take into account a party’s failure to conduct itself in good faith, eg by adopting what are commonly called ‘guerrilla tactics’ intended to disrupt the process,\textsuperscript{10} in the taking of evidence in its decision on costs.\textsuperscript{11} Pursuant to Article 27(d) of the IBA Guidelines on Party Representation in International Arbitration, the arbitral tribunal may, in addressing issues of misconduct, take into account ‘the good faith of the Party Representative’.\textsuperscript{12} Good faith thus becomes one element in what the drafters of the IBA Guidelines have qualified as an ‘overarching balancing exercise to be conducted [by the arbitral tribunal] in addressing matters of misconduct by a party representative in order to ensure that the arbitration proceed in a fair and appropriate manner’.\textsuperscript{13}

In spite of this far reaching acceptance of good faith, both in the area of substantive law and in the field of arbitral procedure, the question whether a general principle of

good faith really exists is far from settled. This is mainly due to the fact that in common law, a general overarching principle of good faith has always met with great scepticism or even outright hostility. The concept of a general duty of good faith has been regarded as inherently unclear and vague\textsuperscript{14} and against a party’s genuine right to pursue its own interests as an integral element of the principle of freedom of contract.\textsuperscript{15} In spite of these fundamental differences, the traditional civil law / common law divide in this area of contract law is gradually disappearing and the concept of a general duty of good faith in contractual performance has gradually gained support in many common law countries. In the USA, the Uniform Commercial Code (UCC) provides that ‘[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement’.\textsuperscript{16} So does the Restatement (2nd) of the Law of Contracts.\textsuperscript{17} In Australia, although the law is not settled,\textsuperscript{18} courts acknowledge that broad duties of good faith can be implied in commercial contracts.\textsuperscript{19} Canadian courts have hitherto been divided over the question whether there is a general duty of good faith. In 2014, however, the Canadian Supreme Court held that there exists an organizing principle of good faith in common law that underlies and manifests itself in more specific doctrines governing contractual performance.\textsuperscript{20}

English courts, however, have traditionally been adamant in their rejection of a general legal principle of good faith. In 2013, the Court of Appeal reiterated its position that ‘there is no general doctrine of “good faith” in English contract law’.\textsuperscript{21} Instead, English courts have relied on ‘piecemeal solutions in response to demonstrated problems of unfairness’.\textsuperscript{22} It is mainly due to this restrictive approach of the English courts that Article 14.5 of the London Court of International Arbitration (LCIA) Arbitration Rules, which became effective on 1 October 2014, provides that the parties to the arbitration shall, at all times, ‘do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration’. Pursuant to Article 32.2 of the LCIA Rules, that duty applies not only to the parties of the arbitration, but also to ‘the LCIA Court, the LCIA, the Registrar, [and] the Arbitral Tribunal’.\textsuperscript{23} The decision of the drafters to include such a specific reference to good faith into the new version of the LCIA Rules has been praised as a ‘remarkable effort to align

the LCIA Rules with the ancestral continental legal tradition of civil law jurisdictions’.\textsuperscript{24}

However, it seems that the English judiciary itself is now beginning to move towards the recognition of good faith as a general principle of law. That development began in 2013 with \textit{Yam Seng PTE Ltd v International Trade Corporation}
In that judgment, Leggatt J noted that in refusing to recognize a general obligation of good faith the jurisdiction would ‘be swimming against the tide’ and that ‘the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced.’ In a landmark decision of 2015, *MSC Mediterranean Shipping Co v Cottonex Anstalt*, the English High Court took that development to a new level and acknowledged, for the very first time, the existence of an organizing principle of good faith.

This Note examines the current role of good faith in English commercial law and discusses the possible practical implications of the acceptance of a general organizing principle of good faith in recent English court judgments. These implications are relevant for both the conduct of parties and party representatives in arbitration seated in England, and for international arbitral tribunals that have to decide a dispute that involves issues of good faith and loyalty if the relevant contract is governed by English law, irrespective of where the arbitration has its seat.

### 2. RECENT DEVELOPMENTS REGARDING GOOD FAITH IN ENGLISH CONTRACT LAW

While traditionally denying the existence of a general principle of good faith, English courts have not been blind to problems of unfairness and dishonesty in the law of contracts. It has long been accepted that some types of contracts, such as employment, insurance, and consumer contracts, oblige the parties to act in good faith. In addition, various rules and doctrines such as (promissory) estoppel, misrepresentation, undue influence, and implied terms reflect to a certain extent ideas of honesty, fairness, and reasonableness commonly associated with good faith.

#### 2.1 Increasing acceptance of good faith in case law

In recent years, English courts have been more ready to find that parties to commercial contracts are subject to good faith obligations. In the area of commercial law, courts mostly rely on the implication of good faith terms in fact, i.e., based on the implied intentions of the parties.

In *Yam Seng PTE Ltd v International Trade Corporation Ltd* the parties entered into a contract which granted Yam Seng the exclusive right to distribute ‘Manchester United’ branded merchandise in a number of duty free outlets. After some months Yam Seng terminated the contract relying on several alleged breaches by ITC, inter alia undercutting agreed prices and providing false information. The High Court found that the distribution agreement contained two implied terms. The first one obliged the parties to act honestly in the performance of the contract, meaning they must not knowingly provide false information on which the other side was likely to rely. Pursuant to the other implied term ITC must not authorize the sale of any product at a lower retail price than the duty free retail price agreed on with Yam Seng. The High Court held that ITC breached the implied term of honesty by leading Yam Seng to believe that the domestic retail price was being increased although it was not.

In this decision, Leggatt J also made some general comments regarding good faith. In his view, practically every contract obliges the parties to act honestly. In addition to honesty, parties to a commercial contract also have to respect ‘other standards of commercial dealing which are so generally accepted that the contracting parties would reasonably be understood to take them as read without explicitly stating them in their contractual document.’ Depending on the context and the type of contract, the parties may be subject to additional good faith obligations. According to Leggatt J, ‘relational’ contracts such as long-term distributorship or joint venture agreements which require a high degree of communication and cooperation during the life of the contract as well as predictable performance by either side may require the parties to ‘share information relevant to the performance of the contract such that a deliberate omission to disclose such information may amount to bad faith’.

This approach of Leggatt J was endorsed by the High Court in *Bristol Groundschool Ltd v Intelligent Data Capture Ltd*. The case concerned the question whether Bristol was in repudiatory breach of the contract for downloading materials from Intelligent’s computer system without consent in order to develop its own software for *Intelligent’s* static artwork. The Court held that the contract in question was a ‘relational contract’ in the sense of *Yam Seng v International* and concluded that it contained an implied term of good faith which at least obliged the parties to act honestly. By secretly accessing and downloading data from *Intelligent’s* computer system Bristol had breached this duty. Due to a number of reasons, however, this breach was not considered to be repudiatory.

In *Emirates Trading Agency Llc v Prime Mineral Exports Private Ltd* the High Court held that a dispute resolution clause calling for ‘friendly discussions’ between the parties was enforceable, thereby ending the English courts’ traditional
hostility towards the enforceability of negotiation agreements. At the same time, the Court required the parties to act in good faith in conducting these negotiations by obliging them to have fair, honest, and genuine discussions aimed at resolving the dispute.37

A good faith obligation was also implied in a case in which a contract provides one party with discretionary power to exercise a contractual right. In *Socimer International Bank Ltd (in liquidation) v Standard Bank London Ltd* the Court of Appeal held that ‘a decision-maker’s discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality’.38 Courts have followed this approach on several occasions, eg with respect to contractual agreements regarding the close-out of a derivate portfolio39 and the awarding of service points for breaches of a long-term private finance initiative (PFI) contract.40

### 2.2 A general principle of good faith: the Mediterranean shipping judgment of the English High Court

While English courts are ready to imply good faith obligations in certain circumstances, they remain divided over the question whether there is an underlying general principle of good faith. In some cases, the courts have insisted on the traditional view that there is no such general principle in English commercial contract law. In a decision of 2014 the High Court reaffirmed this view:

‘So far as the ‘Good Faith’ condition is concerned, there is no general doctrine of good faith in English contract law and such a term is unlikely to arise by way of necessary implication in a contract between two sophisticated commercial parties negotiating at arms’ length.’41

In other decisions, courts have been more open to the idea of a general principle of good faith. In *Yam Seng*, Leggatt J rejected the traditional arguments against an overarching good faith principle. In his view, accepting such a principle would not lead to more uncertainty than is already inherent in any process of contractual interpretation. It would also be ‘entirely consistent with the case by case approach favoured by the common law’, because the content of the good faith obligation is dependent on context and has to be established on a case-by-case basis.42 The application of a general principle of good faith would also not unduly restrict the parties’ freedom to pursue their own interests, as the basis of the good faith duty is the agreement of the parties.43 He concluded that the traditional hostility towards good faith in English contract law is misplaced.

In the recent decision *MSC Mediterranean Shipping Co v Cottonex Anstalt*,44 Leggatt J went one step further. In that case, MSC, which operates a container shipping business, contracted with Cottonex to carry 35 containers of raw cotton to Bangladesh. When the goods arrived, the market price of raw cotton had collapsed and the buyer refused to collect the goods. As the ownership of the goods had passed to the buyer, Cottonex was unable to remove the containers and return them to MSC. MSC claimed liquidated damages (demurrage) on a daily basis on the ground that Cottonex had not returned the containers to MSC within 14 days following discharge as foreseen in the contract. Cottonex claimed that it was in repudiatory breach of the contract and that MSC had no legitimate interest to affirm the contract. Otherwise Cottonex would be subject to a potentially open-ended liability for demurrage. The High Court concurred with that reasoning and held that a party’s discretion whether to terminate or affirm a contract in response to a repudiatory breach by the other side had to be exercised within the limits established in *Socimer*, ie *inter alia* in good faith. In his reasoning Leggatt J considered these fetters on the parties’ discretion as being a manifestation of the general organizing principle of good faith referred to in the decision of the Canadian Supreme Court in *Bhasyn v Hrynew*.

Further impetus has been given to this development by the unanimous judgment of the Supreme Court of Canada . . . holding that good faith contractual performance is a general organising principle of the common law of contract which underpins and informs more specific rules and doctrines. One such more specific rule which is now firmly established in
English law is that, in the absence of very clear language to the contrary, a contractual discretion must be exercised in
good faith for the purpose for which it was conferred, and must not be exercised arbitrarily, capriciously or unreasonably
(in the sense of irrationally).\textsuperscript{45}

This decision is remarkable for two reasons. First, the High Court accepts the existence of a general principle of good
faith in contractual performance. Second, the Court seems to regard the fetters on contractual discretion as a rule of law
or as a term implied in law. So far, English courts have implied these limits not on the basis of a legal principle, but on the
basis of the parties’ intentions.\textsuperscript{46}

3. THE ‘GENERAL ORGANISING PRINCIPLE OF GOOD FAITH’: THE BHASIN JUDGMENT OF
THE CANADIAN SUPREME COURT

In \textit{MSC v Cottonex} the High Court did not elaborate on the content and the legal nature of the general good faith
principle. In order to assess its possible implications for English contract law it is necessary to have a closer look at the
decision \textit{Bhasin v Hrynew} of the Canadian Supreme Court of 2014 to which Leggatt J referred in his opinion.

3.1 The decision of the Canadian Supreme Court in Bhasin v Hrynew

In \textit{Bhasin v Hrynew}\textsuperscript{47} the Canadian Supreme Court dealt with the question whether a general good faith principle exists
in Canadian common law. The case concerned the conduct of former Canadian American Financial Corp. (‘Can-Am’) vis-
à-vis Mr Bhasin, one of its retail dealers who marketed Can-Am’s education savings plans to investors. The commercial
dealership agreement between Can-Am and Mr Bhasin provided that the contract would automatically renew at the end of
the term unless one of the parties gave six months’ written notice to the contrary. After the Alberta Securities
Commission raised concerns about compliance issues, Can-Am appointed Mr Hrynew, a competitor of Mr Bhasin, as
single provincial trading officer who was to review the other retail dealers for compliance with securities laws. Additionally,
Can-Am planned a restructuring of its agencies that included Mr Bhasin working for Mr Hrynew’s agency. Can-Am did
not inform Mr Bhasin of these plans and repeatedly mislead him with regard to the role of Mr Hrynew. When Mr Bhasin
objected to having Mr Hrynew review his confidential business records, Can-Am gave notice under the renewal clause. At
the expiry of the contract term, the majority of Mr Bhasin’s sales agents were solicited by Mr Hrynew’s agency and Mr
Bhasin was forced to take less remunerative work with one of Can-Am’s competitors.

The Supreme Court held that Can-Am had acted dishonestly with Mr Bhasin throughout the period leading up to its non-
exercise of the renewal clause. To justify its conclusion that Can-Am had breached a contractual duty of good faith, the
Supreme Court, upon a careful examination of the Canadian case law on this question, concluded that the Canadian
common law regarding good faith is uncertain, lacks coherence and is out of step with the reasonable expectations of the
parties.\textsuperscript{48} In order to improve the law in this area, the Supreme Court took two significant steps.

First, it recognized that there is an ‘organising principle of good faith in common law that underlies and manifests itself in
more specific doctrines governing contractual performance’.\textsuperscript{49}

Second, the Supreme Court derived a general duty of honesty in contractual performance from that general principle
which forbids parties to lie or otherwise knowingly mislead each other with regard to matters directly linked to contractual
performance.\textsuperscript{50} This duty does not take the form of an implied term, but rather constitutes a general doctrine of contract
law that applies irrespective of the intentions of the contracting parties.\textsuperscript{51}

3.2 Legal nature and content of the general organizing principle of good faith

The general overarching organizing principle of good faith as acknowledged in \textit{Bhasin v Hrynew} and \textit{MSC v Cottonex}
does not itself serve as a basis for rights and duties. In the words of the Canadian Supreme Court, it is not ‘a free-
standing rule,
but rather a standard that underpins and is manifested in more specific legal doctrines’. The general organizing principle is therefore not a rule or doctrine like the general statutory provisions on good faith in civil law legal systems. Rather, claims of good faith have to be based on existing doctrines governing contractual performance.

The general principle of good faith, however, not only provides a conduct-related framework for the application of existing legal doctrines. It also serves as a basis ‘from which more specific legal doctrines may be derived’. The Canadian Supreme Court made use of that ‘creative’ function of the general principle of good faith by assuming a ‘general duty of honesty in contractual performance’. In *MSC v Cottonex* the English High Court saw that principle as the basis for the rule that ‘a contractual discretion must be exercised in good faith for the purpose for which it was conferred, and must not be exercised arbitrarily, capriciously or unreasonably (in the sense of irrationally)’. While this requires contracting parties to take into account the legitimate contractual interests of each other, it does not mean that a party has to put the interests of the other party first. It ‘merely requires that a party may not seek to undermine those interests in bad faith’.

### 4. PRACTICAL IMPLICATIONS OF A GENERAL PRINCIPLE OF GOOD FAITH FOR ENGLISH CONTRACT LAW

What would an organizing principle of good faith mean for English commercial law and the parties to commercial transactions?

#### 4.1 Revolution or incremental development of the law?

It is fair to assume that acknowledging its existence will have an evolutionary rather than a revolutionary effect on English contract law. As discussed, English courts have long accepted that aspects of honesty, fairness, and reasonableness may play a role in the performance of commercial contracts. To enforce these good faith aspects they apply a number of different rules and doctrines. The good faith principle does not replace these doctrines. It is not a free-standing rule of law on which a party may base claims of good faith, but rather a general standard of behaviour that operates and shows legal effects through more specific legal instruments. English courts will therefore continue to rely on existing doctrines such as the implication of terms.

The principle may, however, also serve as a basis for the development of new rules where the existing law is found to be wanting with respect to good faith. It remains to be seen to what extent the courts will make use of this function. It is unlikely that a broad doctrine of good faith comparable to the general ‘catch all’-provisions of civil law jurisdictions such as section 242 of the German Civil Code will be created in the near future. Rather, the courts will proceed incrementally and develop new rules only where they regard the current law as not sufficiently giving effect to the underlying principle of good faith. This approach was taken by the Canadian Supreme Court in *Bhasin v Hrynew*, in which the Court refrained from accepting a broad duty of good faith but rather created a more limited general duty of honest contractual performance relevant for the resolution of the dispute before it.

One possible effect of adopting a general principle could be that the courts rely to a greater extent on the implication in law or doctrines of law to give effect to good faith in commercial transactions. So far, English courts still rely to a great extent on the implication in fact. This approach has been criticized as fictitious because it assumes that the parties intended certain good faith duties to apply to their contract, while in reality, they have not given a thought to that subject. There is indeed a danger that, in order to reach a fair result, the courts overstretch the conceptual limits of the implication in fact. English courts might be more willing to recognize that certain good faith duties should be based on the law if they can rely on the organizing principle of good faith. One step into that direction could be to follow the Canadian Supreme Court and develop a general doctrine of honesty in contractual performance. This would hardly be a revolutionary step. English law already acknowledges the importance of honesty in commercial transactions. As the High Court stated in *Yam Seng*, ‘it is hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance’.

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176

*Bhasin v Hrynew*, in which the Court refrained from accepting a broad duty of good faith but rather created a more limited general duty of honest contractual performance relevant for the resolution of the dispute before it.
4.2 More good faith duties for parties to commercial contracts?

Accepting a general principle of good faith does not necessarily mean that parties to commercial contracts will be subject to new or more extensive good faith duties. The general organizing principle will not impose a pre-fabricated set of specific legal duties that need to be observed by the parties. Rather, it requires the parties in general terms to perform their contractual duties honestly and reasonably and not capriciously or arbitrarily. What good faith requires in a particular case will still be dependent on the factual setting of the contract and context of the dispute. As already noted by the High Court in *Yam Seng*, good faith might require more from parties to long-term contracts, because such contracts require a high degree of cooperation than from parties to on-off contracts that involve a simple exchange. In the area of arbitral procedure, it may even be more appropriate not to develop more specific rules, given the wide variety of guerrilla tactics and other non-good faith conduct that parties in international arbitrations may adopt from time to time.

In the end, it will be up to the courts to shape the content of the general principle of good faith. English courts have already begun to do so under the piecemeal-approach. As discussed above, it is now well-settled that contractual discretion has to be exercised in good faith and must not be exercised arbitrarily, capriciously or unreasonably. It is also accepted that parties to commercial contracts have to observe a certain standard of honesty in contractual performance. However, there is plenty of room for further concretization of what good faith requires from contracting parties. In *Emirates Trading Agency v Prime Mineral Exports*, for example, the High Court decided that a duty to negotiate in good faith obliged the parties to have ‘fair, honest and genuine discussions aimed at resolving the dispute’. But what exactly does this require of the parties? Will they be obliged to meet in person? Do they have to share information? As further case law emerges, more concrete obligations will be identified. As good faith plays an important role in international law and in most countries around the world including many belonging to the common law family, English courts have the possibility to resort to a host of doctrine and case law for guidance. With regard to (re-)negotiation clauses there have already been attempts to create a ‘catalogue’ of more or less concrete and specific obligations, such as keeping to the negotiation framework set out by the clause, respecting the remaining provisions of the contract, having regard to the prior contractual practice between the parties, producing the information necessary for the adaptation process, showing a sincere willingness to reach a compromise, avoiding unnecessary delays in the negotiation process and making a serious effort to reach agreement.

As helpful as such lists may be, they are not carved in stone. They are mere starting points for determining what good faith requires in each individual case, having regard *inter alia* the purpose and nature of the contract and the interests of the parties.

5. CONCLUSION

In the past few years, good faith has gradually gained ground in English contract law. English courts have been more and more willing to imply sometimes broad good faith obligations into commercial contracts. Some judgments have even put into question the traditional rejection of an overarching principle of good faith by the English judiciary. The acceptance of a general organizing principle of good faith by the High Court in *MSC v Cottonex* takes the discussion to the next level and might herald a new era for English contract law. Statutory changes, eg in the area of insurance law, may serve as a further catalyst for this development. Under Article 14 of the UK Insurance Act 2015 and Article 17 of the Marine Insurance Act 1906, operative from 12 August 2016, the principle of good faith is established as an independent interpretative principle of English insurance law.

It remains to be seen whether this means that the English courts themselves are beginning to ‘align themselves... with the ancestral continental legal tradition of civil law jurisdictions’ with respect to the acceptance of a general principle of good faith. In fact, there is, no reason to believe that accepting an organizing principle of good faith would radically change the way English courts handle disputes involving commercial contracts. Good faith will continue to manifest itself through the specific rules and doctrines governing contractual performance such as the implication of terms. The principle itself acts as a standard that underlies and informs those rules. Furthermore, the organizing principle of good faith could help to develop the law in a more ‘coherent and principled way’ than under the traditional piecemeal approach.
beyond the specificities of the individual case would help to bring English law closer to commercial reality and in line with the reasonable expectations of commercial parties.

Fears that recognizing such a principle would create uncertainty or impede freedom of contract are unjustified. The experience from civil law countries, international legal instruments and several common law countries like the USA shows that shaping an overarching principle of good faith is not tantamount to palmtree justice. The law will continue to develop in an incremental way because the existing law will remain the ‘primary guide to future development’. Also, acceptance of such an organizing principle does not call into question the basic notion of freedom of contract, as long as the courts apply it, as the Canadian Supreme Court phrased it in Bhasin v Hrynew, ‘in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest’.

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1 s 242 BGB: ‘An obligor has a duty to perform according to the requirements of good faith, taking customary- ary practice into consideration.’

2 See, eg art 1134 French Code Civil; art 1366, 1375 Italian Codice Civile; art 7(1) Spanish Codigo Civil. See also S Whittaker and R Zimmermann, ‘Good Faith in European Contract Law: Surveying the Legal Landscape’ in S Whittaker and R Zimmermann (eds), Good Faith in European Contract Law (CUP 2000) 7ff.

3 Art 7(1) CISG: ‘In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.’

4 See Art 1.7 (Good faith and fair dealing), art 1.8 (Inconsistent behaviour), art 2.1.15 (Negotiations in bad faith), art 4.8 (Supplying an omitted term), art 5.1.2(c) (Implied obligations) UPICC.

5 Cf also art 2.2 UN Charta; art 26 Vienna Convention on the Law of Treaties; Bin Cheng, General Principles of Law as applied by International Courts and Tribunals (CUP 1987) 105ff.


11 See generally Nathan D O’Malley, Rules of Evidence in International Arbitration, An Annotated Guide (Informa 2012) paras 7.44ff, hinting at the close connection between the duty to act in good faith and the duty to cooperate.


16 s 1-304 UCC.

17 s 205 Restatement (2nd) of the Law of Contracts: ‘Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.’


20 Bhasin v Hrynew, 2014 SCC 71.

21 Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest) [2013] EWCA Civ 200 at [105].

23 Text of these provisions available at accessed 8 February 2016.


26 ibid at [153].


28 See for an example of an LCIA arbitration in which both the claim and the defences were based almost exclusively on good faith ABB AG v Hochtief Airport GmbH and Athens International Airport SA [2006] EWHC 388 (Comm).

29 Interfoto Picture Library (n 22).

30 Yam Seng PTE (n 25).

31 ibid at [156]ff.

32 ibid at [138].

33 ibid at [142].

34 Bristol Groundschool Ltd v Intelligent Data Capture Ltd & Ors [2014] EWHC 2145 (Ch).

35 ibid at [196].


37 ibid at [64].


42 Yam Seng PTE (n 25) at [152].

43 ibid at [148].

44 MSC Mediterranean (n 27).

45 ibid at [97].

46 See Socimer International Bank (n 38).

47 Bhasin (n 20).

48 ibid at [41].

49 ibid at [63].

50 ibid at [71].

51 ibid at [74].

52 ibid at [64].

53 ibid at [64].

54 ibid at [72]–[78].

55 MSC Mediterranean (n 27) at [97].

56 Bhasin (n 20) at [65].

57 ibid at [90].

58 This is why at least parts of the Australian jurisprudence prefer the implication in law, see Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15 at [206]: ‘The obligation to exercise the power . . . in good faith and reasonably, if found, is an obligation imposed by law . . . It is also a prefera-ble use of language, since it recognizes that the obligation is imposed by law - because the term is implied in law - and does not proceed on a fiction that an intention of the parties is being found by a process of construction.’

59 Yam Seng PTE (n 25) at [142]; Bhasin (n 20) at [69].

60 See Dasser and Gauthey (n 7) 269: ‘So keep it simple, less is more. Don’t create specific rules, even if they are very ingenious, when a general rule suffices. In this sense, a pure and simple reference to the gen- eral principle of good faith seems to us the right approach.’ (translation from the French original).

61 Emirates Trading Agency (n 36) at [64].


63 The new s 17 of the Marine Insurance Act provides: ‘A contract of marine insurance is a contract based upon the utmost good faith’, full text available at accessed 8 February 2016; see also Law Commission Report, Nos 353 (England) and 238 (Scotland): Cm 8898; text available at accessed 8 February 2016. Report 353 [30.22].

64 See the quote of Henriques (n 24).

65 Bhasin (n 20) at [69].

66 ibid at [69].

67 ibid at [70].
Referring Principles:

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