Bona fides and/or aequitas also dominated relations between merchants and became a fundamental principle of the medieval and early modern lex mercatoria.56 “Bona fides est primum mobile ac spiritus vivificans commercii” (good faith is the prime mover and lifegiving spirit of commerce) as Casaregis put it; and in the same vein Baldus had stated “bonam fidem valde requiri in his, qui plurimum negotiantur” (good faith is much required of those, who trade most).57 As in Roman law, bona fides significantly contributed to the kind of flexibility, convenience and informality required by the international community of merchants.

The combination of Treu und Glauben is sometimes seen to transcend the sum of its components and is widely understood as a conceptual entity. It suggests a standard of honest, loyal and considerate behaviour, of acting with due regard for the interests of the other party, and it implies and comprises the protection of reasonable reliance.137 Thus, it is not a legal rule with specific requirements that have to be checked but may be called an open norm.138 Its content cannot be established in an abstract manner but takes shape only by the way in which it is applied.139 This is the reason for developing an ‘inner system’ of § 242, based upon the existing law and, at the same time, guiding the courts in deciding future cases.

There is general agreement among the jurists as to the importance of good faith as a legal basis for the construction by the courts of obligations de loyauté, and obligations de co-opération.190 However more generally, French jurists are somewhat divided. At one extreme, Flour and Aubert consider art. 1134 al. 3 as “a technical provision, possessing no significance of substance whatsoever” and they deride attempts to give it a more substantial significance as threatening to certainty and useless given art. 1135’s injunction to courts to supplement the parties’ agreement with legal, customary and equitable obligations.191 At the other extreme was Demogue, who emphasised the co-operative nature of contracts, in which “the contractors form a sort of microcosm; [a contract] is a sort of little partnership in which each must work towards a common purpose which is the sum (or more) of individual purposes pursued by each”.192 Not surprisingly, the majority of jurists, however, find themselves holding more moderate positions.

In conclusion, it should be noted that English judges and legal scholars remain divided on the question whether English law’s recourse to piecemeal solutions to achieve many of the results which good faith is perceived to require is satisfactory. Some clearly think that it is,251 and even Lord Steyn, who is clearly not at all hostile to the notion, has observed that there is no need for English law to introduce a general duty of good
faith as it is unnecessary as long as the courts respect the reasonable expectations of the parties "in accordance with [English law's] own pragmatic tradition".252 Other English writers have argued for an overt and more principled approach based on a "rule of good faith", itself reflecting a vision of contract as a co-operative venture rather than the traditional individualistic terms of the free market. 253

57 Both quotations taken from ibid., 62.
137 See for instance Jauernig/Vollkommer (n. 87) § 242, n. 3; Palandt/Heinrichs (n. 67) § 242, n. 3; Münchener Kommentar/Mayer-Maly (n. 125) § 157, nn. 3 f.; Münchener Kommentar/Roth (n. 87) § 242 n. 5; Staudinger/J. Schmidt (n. 61) § 242, nn. 141 ff. Generally see Zeller (n.86) 145 ff., 158 f. Strätz (n. 58) passim.
138 Palandt/Heinrichs (n. 67) § 242, n. 3; Hesselink (n. 35) 288 f.
139 "[T]he character of good faith is best shown by the way it operates": Hesselink (n. 35) 289.
190 An example of breach of the obligation de loyauté, which applies to contracts generally, may be found in a case where a party to a contract deprives the other of the intended benefit of performance of the contract. Obligations de co-opération, on the other hand, are more or less marked in their impact according to the nature of the contract, being particularly prominent in the contract of employment: see Terré/Somler/Lequette (n.162) 322-3; Malaurie/Ayne’s (n. 178) 350.
192 "Les contractants forment une sorte de microcosme; c'est une petite société où chacun doit travailler pour un but commun qui est la somme (ou davantage) des buts individuels poursuivis par chacun": Réné Demogue, Traits des obligations en général, t. VI (1931) 9. The French société ('partnership') has the significance both of the contract of partnership and of the much wider idea of society itself.
251 Cohen (n. 200) 32 (in relation to the conduct of negotiations).

Referring Principles:

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