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

(a) Parties to international business transactions must act in accordance with good faith and fair dealing in international trade. This standard applies to the negotiation, formation, performance and interpretation of international contracts.

(b) The standards and requirements imposed on the parties by this Principle vary depending on the individual circumstances involved, such as the trade sector in which the parties are operating, their size and degree of professional sophistication, and the nature and duration of the contract.

(c) The parties may not exclude or limit the application of this Principle to their legal relationship.

Commentary:

1 Subsection (a) clarifies that the scope of the Principle of good faith is not limited to the interpretation of contracts but provides a behavioral standard for the parties from the beginning to the end of their (pre-)contractual relationship. This means that each party has the obligation to display a behavior towards the other party which cannot harm the latter and which takes into account the reasonable expectations of businessmen in the shoes of the other side. The parties to a contract have to display a normal degree of honesty and sincerity which is reasonable for the safeguard of the other party's interests, particularly in trying not to act in a way which has a potential to unduly surprise or inflict damages on the other party.

2 The Principle of good faith is of such pivotal significance not only for transnational contract law, but for legal relationships as a whole, that the parties may not contractually exclude or limit its application. Subsection (c) makes it clear that the Principle of good faith is not subject to the Principle of freedom of contract. Such an agreement would itself be void because it is against boni mores.

3 Subsection (b) makes it clear that the application of the good faith principle is never a purely mechanical process, but always requires a determination of what is deemed to be a proper conduct of a party, taking into account all circumstances of the concrete case. This analysis must include the nature of the contract itself. Thus, the reference to the "duration of the contract" in subsection (b) is meant to indicate that the time factor may play an important role as an "amplifier" for the parties' duties imposed on them by the good faith principle. Thus, in long-term, "relational" contracts, the principle of good faith will almost always impose increased duties of good faith on both parties as compared to "one off" exchange contracts. These increased duties may concern, e.g., the parties' duty to notify the other side in case of problems in the performance of the contract and the parties' duty to cooperate with the other party when such cooperation can reasonably be expected for the performance of that party's obligations. The reference to the degree of the parties' professional sophistication in subsection (b) must be seen and applied in conjunction with Trans-Lex Principle I.2.3.

4 Also, the fundamental principle of good faith is the source of many other general but more specific principles and rules of transnational commercial law, such as the principle of sanctity of contracts ("pacta sunt servanda") as the basis of transnational contract law, the prohibition of inconsistent behavior, the duty to renegotiate, the duty to notify and cooperate with the other side, the right to set off, the common intentions of the parties as the goal of every contract interpretation, or the existence of implied contractual obligations. Good faith may also set limits to the exercise of the parties' legal rights, e.g. with respect to the prohibition of abuse of rights or the parties' right to withhold performance. Before resorting to the overriding general principle of good faith, one should always seek to apply these more specific and concrete principles and rules.