Relationship between good faith and reasonableness

LLM Paper

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Ana Zavišić
Student number: 01803853

Promoter: Professor Ignace Claeys
Co-reader: Matthias Meirlaen
Abstract

This work addresses the central concepts in contract law, the “principle of good faith” and the “standard of reasonableness” in common and continental law and assesses the relationship between the concepts. It notes that both concepts have implications in all areas of contract law. This study analyses, firstly, the implications through the stages in the life of the contract. In addition, the study examines the relationship between “principle of good faith” and “standard of reasonableness” in the framework of insurance and sales contract.

Key words: principle of good faith, standard of reasonableness, reasonable man, insurance contract, sales contract
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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>BGB</td>
<td>Bürgerliches Gesetzbuch (German Civil Code)</td>
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<td>C.civ.</td>
<td>Code civil (French Civil Code)</td>
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<td>CESL</td>
<td>Common European Sales Law</td>
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<td>EU</td>
<td>European Union</td>
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<td>PECL</td>
<td>Principles of European Contract Law</td>
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<td>UCC</td>
<td>Uniform Commercial Code (USA)</td>
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I Introduction

The principle of good faith is main principle of contract law and its significance originates from Roman contract law.\(^1\) The implementation of the good faith principle from Roman law is distinctive in common and civil law systems.\(^2\) Among the academics, principle has been both disputed and fully recognised. This paper is dedicated to support the idea that principle of such magnitude is necessary in every legal system.

The principle of good faith also contributed to development of numerous legal doctrines. In common law, the most essential established legal doctrine was the standard of reasonableness.\(^3\) The application of the standard lead to the strong correlation with good faith and the use of reasonableness standard was also notable in the civil law.

Jurisprudence has devoted great attention to principle of good faith and standard of reasonableness. This paper, however, considers mainly the legal theory and law with the assistance of the judiciary observations. The importance of considering legal theory and law is with the purpose of clarifying their relationship. Moreover, this relationship has not been sufficiently analysed in the comparative context.

1.1. Objectives

Principle of good faith and standard of reasonableness have rarely been in the spotlight of legal theory. Hence, this paper provides comprehensive study of their interrelation and strives to elucidate their relationship. The study incorporates the examination of the features, definitions, application and result of their presence in contract law.

The characterisation and determination of the features of the good faith principle and the reasonableness standard is one of the initial objectives of this paper. It is the first step in the analysis, and highly relevant for further analysis.

Subsequently, in terms of definitions, it is crucial to note that this paper does not attempt to produce the exact definition of good faith and reasonableness. However, it clears the disparities and identifies the mutuality in already existing definitions from the case-law, legislation and legal theory.

Another vital objective is to assess the connection between standard and principle through the application in contract law. This objective will be achieved in the framework of the insurance and sales law. This work is

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\(^2\) Id. at p. 64.

limited to reflect on these areas, despite the fact that the application of the good faith principle and reasonableness standard is relevant in other areas of contract law. Although, these areas are not of a core significance to the extent as are the insurance and sales contract.

In line with the application of two concepts, this paper also analysis the current criticism and submits new critical points to be considered. The criticism is included with the purpose to underline the consequences of improper application and to underpin the optimal manner of application.

Finally, the paper observes the results of the description, definition and application on the position of the parties. These results are fruitful foundation for the future implementation of the standard and principle.

1.2. Research questions

This work will in pursuing the objectives respond to two research questions. The first question: are the good faith principle and the standard of reasonableness of equivalent value to the contract law? This requires to examine the standard and principle from the perspective of different legal systems. The second question: does relationship between good faith and reasonableness demonstrate “symbiosis” or it is merely corresponding?4 This requires to illustrate the main points of intersection and delineation between good faith and reasonableness.

1.3. Methodology and structure

In relation to the methodology, two principal approaches are adopted: descriptive and comparative. In Chapter II the methodology is primarily descriptive, while in Chapter III it is combined. In contrast to, Chapter IV that critically examines the existing concepts in the framework of insurance law. The subsequent Chapter V includes jointly descriptive in the first section (5.1) and comparative in the second (5.2).

The specific methodology of this paper is the technique of analysis that commences with the good faith principle and by virtue of good faith arrives to the standard of reasonableness. In other words, the analysis is conducted “through the lenses of good faith”. Thus, good faith functions as “connector” in respect of legal systems that acknowledge both principle and standard. In contrast to, good faith operates as “detacher” in the case of legal systems that do not accept good faith.

4 See Elisabeth Peden, ‘When Common Law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability’ Journal of Contract Law, Vol 21, p.226; Sydney Law R.P. No. 06/57, p. 1. <http://ssrn.com/abstract=947361> who says: ‘Recent cases seem to support the idea that ‘good faith’ is synonymous with ‘reasonableness’ or that there are two co-extensive duties, one of good faith and the other of reasonableness’.
In addition to this specific technique, this work also uses deductive manner of analysis. Thus, it starts deliberately with highly theoretical chapter and as it proceeds with each section the examination narrows. To illustrate, from the abstract characterization of the relationship between good faith and reasonableness the study reaches the particular issues in the sales contract of national legal systems.

On the other hand, the comparative methodology includes the contrast between the common law and continental law. The contrast between traditionally separated legal systems is main comparative technique in the Chapter III.

The common law systems are depicted in American and English law. Rationale for the use of precisely American and English law is the distinctive approach between these legal systems to good faith and reasonableness. The Chapter IV displays this difference.

The unique selection of civil laws (German, French and Spanish) merits greatly to this paper. Firstly, German law illustrates the most extensive implementation of good faith principle. French and Spanish law include limited scope of good faith application with similar approaches. Nevertheless, German and French law express the evident difference in general contract law and in the aspects of good faith and reasonableness. This diversity renders the comparative method in the Chapter V. Moreover, referral to Spanish law mainly presents certain specificities in the application of good faith again for the sake of comparative examination.

Finally, it is significant to include the structure of this work. In addition to Introduction, it is divided into five substantive chapters. Chapter II illustrates the main characteristics of relationship between good faith and reasonableness. It also seeks to establish theoretical basis for all following chapters. The proceeding Chapter III addresses the relationship in every stage of life of the contract. This Chapter does not tackle each stage thoroughly owing to the non-relevance to this study. Nonetheless, it includes the comparison between various afore-mentioned legal systems. Chapter IV considers the application in the framework of insurance contract with the main focus on common law. In contrast, Chapter V concentrates on continental law and considers the implication from sales contract. Chapter VI draws the General Conclusions and answers to the research questions.

Reviewed collectively, these Chapters shall provide comprehensive critical and theoretical analysis of the principle and standard. Lastly, these Chapters shall underline the evolution of the principle of good faith and the standard of reasonableness with main emphasis on their relationship.
II Chapter: Convergence of the good faith and reasonableness

This chapter seeks to provide a descriptive account of the gradual convergence of the concepts of “good faith” and “reasonableness”. The first section establishes the significance and presence of the two concepts within different legal environments (2.1). The second section draws their common attributes and differences (2.2). The third section further deals with the specific features of subjectivity and objectivity, under the assumption of corrective method directed to good faith (2.3). The following section then addresses the opposite wording commonly used in legal theory (2.4). The last section concludes with descriptive remarks (2.5).

2.1. Significance in contract law

The doctrine of good faith has a colossal historical importance in contract law. It originates from Roman law, with the Roman term *bona fides* initially introduced in the contract of sale.⁵

One of the first modern laws in the deliberation of the principle of good faith is found in German law, under Article 242 of the BGB. It states that: “An obligor has a duty to perform according to the requirements of good faith”.⁶ This article guided the establishment of many doctrines such as the doctrine of abuse of rights.⁷ Importantly, the German law advocated for the application of the principle of good faith that is multifaceted and multifunctional.⁸

The good faith principle is substantial and “seen as the highest norm of contract law”,⁹ because it entails both moral and ethical values. It is thus treated as “the gateway through which moral values enter into law”.¹⁰ It has succeeded to address the purpose of contractual relationships rather than simply focusing on the form.¹¹

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⁵ See Zimmermann (n. 3), p. 68.
⁶ § 242, BGB, and “taking customary practice into consideration”.
¹⁰ Id. at p. 3.
It should not be presumed that parties are capable of comprehending the necessity of good faith and acting in actual accordance to it because of the various backgrounds of the contractual actors. In addition, it is less functional if the power to include the obligation of good faith is situated in the will of the parties.\(^{12}\)

Therefore, besides morality, the principle of good faith produces guidelines for the parties\(^{13}\), by urging them to be thoughtful of each other’s interests and is generally the “provider of the solutions”.\(^{14}\) It also serves as the protection of the weaker party as in the case of the vulnerable consumers.\(^{15}\) Esteemed professor and author of European contract law; Ole Lando, has illustrated that good faith to be “penicillin that kills all the pernicious germs”.\(^{16}\)

Summers, a prominent American contract law author, has similarly supported this underlying idea of good faith which is “to guarantee the substantive justice of contractual relations”.\(^{17}\)

That being said, good faith has been put aside for a long period of time in the common law countries in contrast to continental law systems. The fear of including good faith provisions in certain statutes in common law countries is due to its legal context. For example, American contract law is predominantly concerned with economic effects of contracts, and thus weakening the opportunistic behaviour was the central part of its expressed scepticism towards continuing with good faith provisions. However, as this paper will later point out, this typically hostile approach from Commonwealth law is not always the case, since the acknowledgement of good faith in the field of insurance law has been introduced.

On the other hand, European law, particularly in Germany, France and Spain, have embraced the principle of good faith with very versatile techniques. For instance, in German law, the good faith principle was a “source of law-making”.\(^{18}\) This stands in sharp contrast to an English jurist, who once claimed that good faith was merely a cover for creating new law.\(^{19}\) Similarly, in French law, the function of good faith is seen as providing justice for the parties.\(^{20}\)

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\(^{18}\) Beatson (n. 8), p. 189.

\(^{19}\) Hesselink (n. 9), p. 30.

Importantly, even though these legal systems have embraced the good faith principle, they do not allow the limitless application.

It is within this context that the standard of reasonableness, in contrast to good faith was introduced, first and foremost in common law countries.\(^{21}\) The reasonableness standard facilitates “close touch of law and moral”.\(^{22}\) This is seen by the provision of the Uniform Commercial Code, defining good faith as “honesty in fact and the observance of reasonable commercial standards of fair dealing”.\(^{23}\)

The application of the standard of reasonableness necessitates, nonetheless, a reasonable man. This “fictional person”\(^{24}\) is the key factor and personification of the standard.\(^{25}\) Other factors that are significant for its application also include *inter alia*; reasonable notice, care, skill, time and effort. A limited number of these factors or phrases will be analysed. This paper will analyse specifically the factors of reasonable notice.

Furthermore, the concept of reasonableness has been perceived differently in legislation and in case law. In the common law countries, reasonableness is applied in both legislation and to a larger extent in the case law. Whereas in the European countries, legislation includes reasonableness to a greater extent.\(^{26}\)

Currently as it stands, common law systems are fond of reasonableness, however with the limited insertion of the principle of good faith. European law systems, in comparison, resort to as general principle within good faith. Thus, the standard of reasonableness and the principle of good faith are assembled as contrary aspects to freedom of contract.\(^{27}\) Disrespecting the freedom of contract has been one of the main arguments of common law systems for the reluctance expressed towards the good faith.\(^{28}\) The shared substantiability requires drawing and attaching the lines between good faith and reasonableness. Next section thus draws the common and exclusive features.

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\(^{23}\) § 1-201, UCC.


\(^{25}\) Id. at p. 342.

\(^{26}\) Zorzetto (n. 21), p. 122.


2.2. Common and exclusive features

Good faith and reasonableness have more common characteristics than differences.

One common characteristic is flexibility. Good faith is proclaimed to have a task of making the law flexible.\(^{29}\) Although, the flexibility of this principle is still unexplored, the perception of this characteristic is confirmed by its application, which is able to be quickly altered and is based on a case-by-case approach. The same can also be said for the standard of reasonableness, which does not possess one sole meaning and it is also highly contextual.

The upside to flexibility is providing assistance to the understanding of general contractual relationships and its protection for parties, in the contrast to arbitrariness. On the other hand, however, it can lead to formation of custom or application that is more discriminatory particularly to the position of one party. Flexibility, can thus be said to be double-edged sword.

In this matter, reasonableness has a more practical sense to it than good faith, due to the fact that its flexibility is of minor scale. Having said that, some scholars consider flexible nature a strength\(^{30}\) and as it “adapts to fit the needs of society”.\(^{31}\)

The second common characteristic between good faith and reasonableness is their inclusion of elements, such as industry practice, contractual relationship types, and dispute causes, that are assessed in the course of application for both terms. For instance, the context of principle of good faith and standard of reasonableness is specific in the long-term contractual relationships.

A third comparable characteristic is that both good faith and reasonableness lack adequate definitions, making it difficult to assess and frame each principle and standard, respectively. Definitions for reasonableness are mostly derived from cases in common law jurisdictions, while definitions of good faith are vastly found in legal literature. Apart from this, most definitions are unclear and lack functional use.

Consequently, the next binding characteristic is vagueness.\(^{32}\) Canaris and Grigoleit associate good faith with fairness and reasonableness with rationality.\(^{33}\) Yet, this leaves more theoretical questions than it answers. The meaning of fair conduct for the concept of good faith is equally vague. Moreover, even though

\(^{29}\) Hesselink (n. 9), p. 5.


\(^{31}\) Angelo D.M. Forte, Good Faith in contract and property law (Oxford: Hart, 1999), p. 56


rationality within the context of reasonableness is more definable than fair conduct, it is still subject of strong critique.  

This leaves the door open for other adjectives describing the common characteristics between good faith and reasonableness to be ‘ambiguity’, and ‘abstractness’.  

‘Vagueness’, ‘ambiguity’ and ‘abstractness’ are alarming adjective to describe good faith and reasonableness given the significance that both concepts have in common law and civil law jurisdictions. Hence, legislators have the burden of regulating these concepts and play an important role. They can either opt to regulate concrete issues, such as unfair contract terms, in the contract sphere or they can introduce more general definitions as it pertains to good faith and reasonableness. Perhaps the current terms of ‘vague, ‘ambiguous’ and ‘abstract’ are therefore the undesirable result of using the general principles.

The final common characteristic between good faith and reasonableness is their inherent ability to adapt. Both standards and principles are transformable, and as it will be observed later in this paper, they are also “adaptable” to any kind of contractual configuration, despite types of contracts having varying implications. This adaptability extends so far as to the adjustment of meaning to demands of the current law or case.

Even though reasonableness and good faith share many common characteristics, they also have exclusive features that divide them. In terms of legal theory, each concept is distinct.

The common law criticism directed to good faith outlines minor discernible differences that include the freedom of contract and legal uncertainty. Even though reasonableness also impacts on the freedom of contract, it is less over-reaching than good faith. In terms of legal uncertainty too, the difference lies in the fact that reasonableness has a narrower scope than good faith, in which it is only legitimate if the standard is accurately determined. This issue is nonetheless not present in the continental, civil law conceptions. Consequently, the theoretical difference between good faith and reasonableness can be purely a rhetorical one.

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36 Brownword (n. 28), p. 269
37 Zorzetto (n. 21), p. 127.
38 See Michael Bridge “‘Good Faith in commercial contracts’” in Brownword,Good Faith in Contract: Concept and Context (Aldershot: Ashgate 1999)
40 Id. at p. 168.
41 Nili Cohen “‘Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate’” in Beatson, Good Faith and Fault, p. 32.
These differences are nonetheless illuminated when understood in the context of how the judiciary appreciates and applies the two concepts in an inconsistent way. This is partly because both reasonableness and good faith endow judges with an enormous amount of discretion and liberty. This is seen for example in case law, where judges give their personal insight on related issues.\(^{44}\) What is more, the common features of flexibility and abstractness perhaps additionally contribute to judiciary’s discretion and liberty.

In summary, despite these differences, the amount of shared characteristics between good faith and reasonableness is remarkable, considering that they are applied by a diverse set of sources, from both common and civil law jurisdictions.\(^{45}\) The string between the good faith principle and reasonableness standard can therefore best be described as the corresponding or matching bridge between different legal traditions.\(^{46}\)

The submitted attributes of the standard of reasonableness are, however, less amplified. The features of reasonableness cease to exist in one illusory moment. At that point, the principle of good faith surpasses the standard. This illustration is abstract albeit it will be observable with the examination in the life of the contract (Chapter III). In addition, the last attribute to examine is related to the objective or subjective nature of the both. This is examined in the separate subpart due to its importance and extensivity.

### 2.3. Corrective method

The primary objection for refusal to introduce good faith, reflected in the common law view, is the risk of legal uncertainty. Uncertainty is singled out as an immense drawback to the good faith principle. This is because legal uncertainty is regularly associated with the subjective nature of the good faith. It is vital to separately consider the subjectivity and objectivity of good faith. Subsequently, these features conceive the corrective method of reasonableness.

Intrinsic to the European legal context, Hesselink argues that the “subjective good faith is related to the state of mind, while objective good faith is the conduct of the parties”.\(^{47}\) In contrast, common law advocates for solely the application of objective good faith together with the reasonable conduct of the parties.

This is made clear by Peden arguing that “if courts are implying a term of good faith, it requires objectively reasonable behaviour”.\(^{48}\) This illustrates interdependency between the application of good faith and reasonableness in order to determine the good faith as objective.


\(^{45}\) By sources, it is meant civil and common law.


\(^{47}\) Hesselink (n. 9), p. 1.
The section of the UCC 2-103 proclaims that the objective quality of good faith is “the observance of reasonable commercial standards of fair dealing in the trade”. However, this approach is imperfect. The drafting of the UCC was criticized concretely for employing objective good faith, when the word reasonable would have been more convenient for its purpose.

On the other hand, the subjective nature of the good faith is noticeable in the “special” treatment of the parties and their “personal qualities”. This can reach to the extent, that the decision of whether to apply objective or subjective good faith will be evaluated by the courts from the position of the parties towards it. Nevertheless, the judiciary is better suited to take this decision, because this decision can be too complex for parties to resolute.

The subjective approach in conformity with the good faith has been defended by judges, despite its implication to legal uncertainty. However, the legal rationale that can be put forward to counter the contested legal uncertainty is that the good faith principle in some legal institutions was perceived as having a higher legal accuracy than in the cases where the application is not permitted.

Having said that, the law and practice in certain areas noted that good faith does not necessarily mean subjectivity. For instance, German property law applies objective good faith, which is also frequent practice in French courts. Hence, the type of the contract is another important component in the assessment of subjectivity.

The two following assertions can now be outlined. Firstly, good faith contains subjective and objective requirement. Secondly, reasonableness is connected to the objective side of good faith. The corrective method can therefore be that the function of reasonableness is to correct the subjectivity of good faith.

Importantly, the utilization of the reasonableness in the common law completely supports this understanding of corrective method. What is noteworthy is that it has been argued that the redundancy of good faith in the

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49 §2-103 (1) (b), UCC.
50 Snyderman (n. 34), p. 1367.
51 Litvinoff (n. 14), p. 1649.
54 Brownswod (n. 28), p. 272.
light of other legal doctrines is precisely owing to its corrective function.\textsuperscript{57} In a similar vein, good faith is occasionally described “as a cloak with which other doctrines are enveloped”.\textsuperscript{58}

In contrast to declaring good faith as ‘redundant’, it has been already observed that the philosophy behind it orbits around the notion of morality.\textsuperscript{59} The disciplinary aim is to protect one party from the other parties’ conduct.\textsuperscript{60} Yet this can lead to the party itself being hinder as a result of attempt to circumvent the law.\textsuperscript{61}

It is nevertheless important to question, even whether at all the good faith principle has to be corrected. To answer this, one must consider whether a specific area is to be corrected. Taking the outcome and scope of application as an example, the judges’ discretion in terms of applying the good faith principle should be narrowed, so as not to present a “substitute for specific social policies”.\textsuperscript{62} In this case therefore, the correction method is viable in relation to the outcome and scope of application.

In the second place, the corrective method of reasonableness begins with the opportunity to restrict the misuse of good faith by prohibiting unreasonable conduct.\textsuperscript{63} What is more, reasonableness has higher probability to succeed in eliminating negative outcomes of the subjective attribute. This can be accomplished by the virtue of rationality.\textsuperscript{64} An even more persuasive argument however, is that the subjective good faith present in the parties’ state of the mind will be “nearly impossible burden to prove”.\textsuperscript{65}

In spite of these positive uses of the corrective approach of reasonableness, its premise that the function of reasonableness is to correct the subjectivity of good faith, can still be contested. First, reasonableness was declared “as evidence of subjective intent”.\textsuperscript{66} Second, subjective reasonableness is affiliated with the performance of a particular contract, while objective reasonableness is correlated with the economy of the particular market.\textsuperscript{67} Therefore, reasonableness is not entirely liberated from the trait of subjectivity. Third, reasonableness, like the critique of good faith, has also been considered vague,\textsuperscript{68} which has strong impacts on the potential assistance of reasonableness in the scope of good faith’s application.

\textsuperscript{57} Zimmermann (n. 3), p. 683.
\textsuperscript{59} Livinoff (n. 14), p. 1649.
\textsuperscript{60} Robert S Adler and Richard A Mann, 'Good Faith: A New Look at an Old Doctrine' (1994) 28 Akron L.Rev. 31, p. 49.
\textsuperscript{61} See Melvin A. Eisenberg ‘Relation Contracts’ in Beatson (n. 8), Good Faith and Faults, p. 302.
\textsuperscript{62} Rutgers and Sirena (n. 46), p. 144.
\textsuperscript{63} See Daniel Friedmann ‘Good Faith and Remedies for Breach of Contract’ in Beatson (n. 8), Good Faith and Faults, p. 416.
\textsuperscript{65} Snyderman (n. 34), p. 1353.
\textsuperscript{66} Dobbins (n. 52), author’s footnote 70, p. 246.
\textsuperscript{67} Fabrizio Cafaggi, ‘Creditor's Fault: In Search of a Comparative Frame' (2009) 2 European Journal Legal Studies 7, p. 16.
\textsuperscript{68} See Sepe (n. 17), p. 10. Author states: “So-called abolitionists have argued that the reasonableness is too vague”
However, in saying that, vagueness does not inevitably oppose the presence of the corrective method, as it provides the authority to the courts to interpret the best practice in order to protect parties’ expectations. As valuing and protecting parties should be a principle concern, vagueness in relation to reasonableness is thus not per se, a short coming of corrective method. This is best illustrated by the circumstances of worse results than a broad inclusion of good faith, if the standard had the same strict application in all cases.\textsuperscript{69}

Concerns over the characteristic of reasonableness should not therefore interfere with the several beneficial influences it has on the principle of good faith. After all, in certain legal setting it can provide more exact explanation of the party’s conduct, particularly in sale and insurance industry. This, bearing in mind that by assessing one party’s state of mind, the other party “is not being treated equally”.\textsuperscript{70}

Overall however, the dissimilarities in objective and subjective tests for assessing the application of good faith can be minor.\textsuperscript{71}

\section*{2.4. Opposite wording}

It has been previously argued in this paper that that application of the good faith principle should be prohibited in instances of unreasonable conduct. Hence, the use of inverse terminology is a feasible way to provide clarity to the good faith and reasonableness principles. Antonyms can be used to tackle the negative characteristics linked with good faith and reasonableness. The issue of vagueness, abstractness, ambiguity and inadequate definitions can be partially resolved with refined terminology. Legal theory, case law and legislation\textsuperscript{72} identify the constructive importance of opposite wording.\textsuperscript{73} Consequently, this section will briefly examine the terms of “bad faith” and “unreasonableableness”.

Bad faith is referred to as “antagonist”\textsuperscript{74} and an ineluctable component of the good faith principle.\textsuperscript{75} The central theory of the bad and good faith relationship, advanced by American author; Robert Summers is the excluder theory.\textsuperscript{76} The excluder theory is regarded as a breaking point in the development of contract law.\textsuperscript{77} The significance in this context lies in its theory by “formulating an opposite”.\textsuperscript{78} Two points can be made in relation to this excluder theory.

\begin{flushright}
\textsuperscript{69} As the most common negative connotation following good faith is the broadness of the principle.
\textsuperscript{70} Hevia (n. 55), p. 93.
\textsuperscript{71} Farnsworth (n. 30), p. 672
\textsuperscript{72} Art. 1378. C. civ.
\textsuperscript{73} Beaton (n. 8), Good faith and Fault, p. 161
\textsuperscript{74} Litvinoff (n. 14), p. 1664.
\textsuperscript{75} Ibid.
\textsuperscript{76} Zimmerman (n. 3), Good Faith in European Contract Law, p. 125.
\textsuperscript{77} Miller and Perry (n. 44), p. 703.
\textsuperscript{78} Zimmermann (n. 3), p. 126.
\end{flushright}
In the first place, Summers stresses that: “Good faith functioned as an excluder to rule out a wide range of heterogeneous forms of bad faith”.\textsuperscript{79} In other words, forms of bad faith conduct highlight the meaning or the true substance of the good faith principle.\textsuperscript{80} For instance, Summers referred to wrongfully refusing to accept performance as bad faith conduct,\textsuperscript{81} which means not acting in a co-operative way, or not in spirit of good faith.\textsuperscript{82}

The crux of this antonym approach nonetheless, is that more attention is given to numerous models of bad faith, rather than pinpointing and clarifying notions of good faith.\textsuperscript{83}

In the second place, following Summers’ excluder theory, good faith “can be demonstrated by the absence of bad faith”.\textsuperscript{84} The issue here is that defining bad faith will always face the same problems, such as those for defining good faith.\textsuperscript{85}

Nevertheless, bad faith is comprised of “overt” or “inaction” options.\textsuperscript{86} What is evident, legal theory has established more doctrines related to the bad faith that possess “element of wrongdoing”.\textsuperscript{87} The numerous amount of these doctrines, in comparison to those that define good faith, highlight that the understanding of bad faith has a much wider scope. Underlying concern is that these theories can lead to further restriction in the application of the good faith.

Another important aspect that pertains to the role of opposite wording is that acting in good faith is violated when a conduct constitutes bad faith, which is contrary to community standards of honesty, reasonableness or fairness.\textsuperscript{88} Hence, the result of this common law view is that the application of good faith is depended on bad faith phrasing, or just the mere invocation of bad faith. Yet, the application of bad faith cannot always exempt good faith, since the party may be required to act both in good faith and “abstain from the bad faith”.\textsuperscript{89}

\footnotesize
\begin{itemize}
  \item \textsuperscript{80} Zimmerman (n. 3), p. 127.
  \item \textsuperscript{81} See Summers (n. 79), p. 813.
  \item \textsuperscript{82} Zimmerman (n. 3), p. 126.
  \item \textsuperscript{83} Ibid.
  \item \textsuperscript{84} Tyrone M Carlin and Louise Chau, “Good Faith-Time to Put the Genie Back in the Bottle” [2004] Volume 3, no. 2, p. 23
  \item \textsuperscript{85} Ibid.
  \item \textsuperscript{86} Zimmermann (n. 3), p. 137.
  \item \textsuperscript{87} Zimmermann, p. 678.
  \item \textsuperscript{88} Seth William Goren, 'Looking for Law in All the Wrong Places: Problems in Applying the Implied Covenant of Good Faith Performance' (2003) 37 USF L REV 257, p. 266.
  \item \textsuperscript{89} Peter MacDonald Eggers and Partrick Foss, \textit{Good Faith and Insurance Contracts} (London: Lloyd’s of London press 1998), see author’s footnote 14. at p. 33.
\end{itemize}
Moreover, bad faith has also been described as behaving in an “unreasonable way” to the other party.\textsuperscript{90} Despite this description being advanced in Europe’s civil law context, two comments need to be raised. First, it suggests that bad faith conduct is of reduced scope. This means that parties would more easily observe which conduct is unreasonable and how they should refrain from it. Secondly, it elevates the use of the term “unreasonable” as a condition for the presence of the bad faith.

Accordingly, it is frequent to evaluate standard of reasonableness “by excluding clearly unreasonable behaviour”.\textsuperscript{91} There is thus a strong overlap between bad faith and reasonableness. Here, the term “unreasonable” would seem to require less stringent conduct of the contractual participants. This understanding of the standard of reasonableness would allow broader scope of permitted actions, by means of merely eliminating everything that is unreasonable.\textsuperscript{92}

Unreasonableness, in connection to bad faith is thus the source of clarified conduct for the parties, while in the standard of reasonableness, it is the origin of the “over-permissive conduct”.\textsuperscript{93}

The issue of ambiguity can also be addressed concretely through the term “unreasonable”. For instance, in English courts, to assess whether contracts are concluded, judges seek to determine if the party had an unreasonable view of it.\textsuperscript{94} The additional advantage of this term is that once conduct or behaviour is declared as unreasonable, it is really hard to denounce it from the title of “unreasonable conduct”. Contrarily, this can hardly be argument for the term “reasonable” owing to its adaptability.

This “battle” between utilization of the terms “reasonable” and “unreasonable” will be apparent throughout this paper. Some authors claim that string between bad and good faith is “reasonableness”, as a sort of a “grey area”.\textsuperscript{95}

In contrast to these terms, however, bad faith has an own sphere of substance\textsuperscript{96} that is established in certain stages of the life of the contract. One should nonetheless, be careful when using the term bad faith in contracts, due to its potential recourse to tort law. That is, that bad faith contract-tort claim forms a “special relationship”\textsuperscript{97} This, however, falls out of scope for this paper.

\textsuperscript{90} Zimmerman (n. 3), p. 692.
\textsuperscript{91} Sourgens (n. 64), p. 16.
\textsuperscript{92} Zipursky (n. 35), p. 2136.
\textsuperscript{93} Ibid.
\textsuperscript{94} Beale (n. 53), p. 449.
\textsuperscript{95} Eggers (n. 89), \textit{Good Faith and Insurance}, p. 6.
\textsuperscript{97} Goren (n. 88), p. 292.
To finalize, the opposite terms are not rigidly separated. Although, they are indeed in some cases functioning independently. Bad faith in comparison to unreasonable has a higher grade of the independence. In the terms of tackling the negative attributes of good faith and reasonableness, the term unreasonable seems to have a more consistent technique and enhanced assistance despite its accessory nature. On top of all, “bad faith” and “unreasonable” do not represent unquestionable and undoubtful solution. Nevertheless, their presence is not resulting in the worse scenario than prior to introducing them.

2.5. Concluding remarks

This chapter reveals that the notion of good faith and reasonableness function differently in the common and continental legal systems. Nevertheless, it highlights the importance of having both in the same legal framework (2.1). It is significant however that Chapter demonstrates their convergence.

Firstly, convergence appears in the illustration of mutual characteristics. Section (2.2) identified their similarities and connections particularly when discussing vagueness. Concerns for their formulation and the importance of following legal uncertainty was also expressed therein.

Secondly the assessment of the objective and subjective nature of good faith and reasonableness emphasises their interdependency (2.3). Notably, this section points out that reasonableness has a less subjective note than good faith, and thereby can step in to correct it. More precisely, reasonableness assists in narrowing the broad scope of good faith, where good faith is ineffective to determine the desired conduct.

Finally, the examination of opposite wording (2.4) confirmed the possibility of fixing unclarity and confirmed once again the overlap of good faith, bad faith, reasonableness and unreasonable.

In general, the perception of good faith and reasonableness can start with “having no distinction” to “reasonableness being the main ingredient of good faith”. Their relationship is thus paradoxical, due to their convergence, which has been analysed from different perspectives throughout this chapter.

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100 Id. at. p.13.
III Chapter: Life of the contract

This Chapter depicts the relationship between good faith and reasonableness in each specific stage in the life of the contract. The Chapter then follows the steps in creation of one contract by the way of the regular order. More significantly, it aims to provide in a clear manner each step of their application and interrelation. The Chapter then proceeds as follows- the first section incorporates the relationship between good faith principle and standard of reasonableness reflected in pre-contractual duties (3.1). The second section examines the relationship within the interpretation of contract (3.2). The third section illustrates it in the performance of the contract (3.3). The remaining two sections then examine the implications of a breach of contract (3.4) and termination of contract (3.5), respectively. The final section in conclusion, singles out the central conclusions of this relationship (3.6).

3.1. Pre-contractual duties

The pre-contractual phase is highly influenced by the duty of negotiating in good faith. Nonetheless, the implementation of the duty of pre-contractual good faith varies, depending on the jurisdiction at focus. Firstly, the common law jurisdictions claim that the duty of good faith in the bargaining process jeopardises the parties’ ability to take a more ‘conflicting’ stance of conduct.101

This claim is illustrated by judge Lord Ackner in the landmark English case Walford v Miles. Lord Ackner held that, “the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations”.102 It also seen in the American Copeland v Baskins case, which found that the good faith principle should not intrude in negotiations.103

On the other hand, European jurisdictions are less strict in implementing the duty of good faith. The focus of European academics towards this matter has been rather on the harmonization of pre-contractual duties in negotiations, instead of its essence and functionality.104

For instance, according to German law, if one party decides to quit from negotiations, such as in the aforementioned Copeland v Baskins case, without any proper ground, it will be exposed to remedies and paying damages.105

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101 Beatson (n. 8), p. 28.
102 Walford v Miles [1992] 2 AC 128, 138H.
104 Id. at p. 3.
This was attainable in German law due to the well-known doctrine; *culpa in contrahendo*, which describes pre-contractual relationships as “quasi-contractual”\(^{106}\). Despite *culpa in contrahendo* not being incorporated in a separate article of BGB\(^{107}\), it was established through good faith and article 242 of BGB,\(^{108}\) even though its ambit was broad.\(^{109}\)

Importantly, the common law jurists argued that this German application of good faith greatly restricts the freedom of contract. Yet, good faith in German practice was developed to be an objective standard.

In contrast to German law, French law accepts the good faith principle more prudently. Here, good faith has been referred to as a sort of deterrent,\(^{110}\) rather than a general requirement like in German law. The main distinction is that the duty of good faith in French law is “not to negotiate in bad faith”\(^{111}\). French law is similar to Spanish law, in sense that in both countries precontractual duties exist, only if the negotiations are greatly forward.\(^{112}\)

Pre-contractual negotiations can be regarded in two ways. In American and English law, pre-contractual duties are free of any duty. In German law, precontractual negotiations have nearly even obligation to the post-contractual phase.\(^{113}\) At first glance, these distinctive methods appear to be two opposite extreme. Yet, in practice they are more alike, since the duty of negotiating in good faith possesses several recourses in common law, and there are clear limitations to its use in civil laws. Both these recourses and limitations are important for assessing the implications of negotiating in good faith, because they resemble the application of reasonableness.

The reasonableness standard facilitates the application of the good faith principle in five aspects that are crucial to the negotiation phase, namely; expectations, time, interests, reliance and, breaking the duty of pre-contractual good faith.

Firstly, with regard to the party’s expectations in negotiations, the legal theory employs the term “reasonable man”. Simply put, a reasonable man expects the proper conclusion of the contract, or is at least dully informed on ceasing the negotiations. In common law, parties take a more loose approach towards

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\(^{108}\) Ibid. and see also Kessler (n. 105), p. 404.

\(^{109}\) Erp (n. 106), p. 375.

\(^{110}\) Zimmermann (n. 3), p. 241.

\(^{111}\) Nedzel (n. 96), p. 114.,

\(^{112}\) Zimmermann (n. 3), pp. 241. and 245.

\(^{113}\) Beale (n. 53), *Cases on Contract law*, p. 374
expectations, meaning as long as the ‘‘deal is on’’, the only condition is to fulfil the expectations, based on a reasonable belief.\textsuperscript{114} Comparatively, in German law, parties can avoid liability when the other party has been informed on withdrawal of negotiating within the reasonable period of time.\textsuperscript{115} One clever solution, that is used to evade concern over expectations, has been used in the USA, with the right to incorporate provisions in contracts that dismiss invoking actions related to the negotiation phase.\textsuperscript{116}

Secondly, interests can be measured by the values that have been interfered with throughout the process. This is because no judge in any jurisdiction, would be likely to proclaim that the non-conclusion of a contract is unlawful because there was no reasonable interest involved. For instance, a seller of a car always has an underlying interest to sell it, but it is not always reasonable to claim loss of the interest when prospective buyer solely inquiries about the price of the car.

Thirdly, the presence of reliance or trust in the action of parties is a standard of reasonableness in the exercise of the duty of good faith. For instance, lack of trust is experienced, if the potential signers of the contract demanded a service before signing the contract, and in the meantime signed another contract elsewhere. The result is that lack of trust led to lost expenses that were paid in advance for the realisation of the service.

If, for example, young couple wants to rent the venue for their wedding and make request to the owner to install special air conditioning before signing the contract. The same couple eventually signs the contract with another wedding venue and the owner has lost the amount of money allocated in the new air conditioning.

In English law, in order to be able to apply the good faith principle for these types of damages that occur in the pre-contractual phase, the judge must balance the prospect of reasonable reliance on something tangible, that will be adequate risk or exposure.\textsuperscript{117} The same occurs in German law, with the collection of “reliance interest”.\textsuperscript{118} Consequently in this example, the owner of the wedding venue could be said to be certain on the outcome of the negotiations, thus able to seek damages.

However, this cannot be defined as implicit good faith principle, but rather just resorting to reasonableness, in order to prevent from the indecisive young couples. In the fact-setting that young couple just entered into negotiations with the owner and did not ask for the air conditioning, and signed the contract with different wedding venue, no legal consequences can be presumed.

\textsuperscript{114} Kessler (n. 105), p. 413.
\textsuperscript{115} Beale (n. 53), p. 384.
\textsuperscript{116} See Sepe (n. 17), p. 53.
\textsuperscript{117} Doris (n. 103), p. 19
\textsuperscript{118} Zimmerman (n. 3), p. 236.
In view of these distinctions, contract law cannot take the burden of protecting all types of expectations from the reliance of parties, so it must limit expectations to certain kind of behaviour. European academics for instance suggest that this can be the expectation of honest and reasonable trust.\textsuperscript{119}

Lastly, the contribution of reasonableness is displayed in awarding damages for breaking the precontractual duties of good faith. This standard sometimes referred to as “reasonable contemplation”, and has been viewed as the most well-formed standard in comparison to the others.\textsuperscript{120}

In this stage of contract, common law has opted to replace good faith with the standard of reasonableness, whilst continental application has accepted the good faith principle, with the assistance of reasonableness notion. It should therefore be emphasised that reasonableness is evidently complementary element to both legal systems. To put it differently, reasonableness facilitates the correct determination of the duty to negotiate in good faith in civil law, while it determines merely the reasonable expectations of the parties in the common law context.\textsuperscript{121}

Overall, the pre-contractual negotiations remain relevant even after the conclusion of contracts. This will become important in the next section that analyses how the setting of pre-contractual relationships is traced back to during the consideration of certain terms when provisions of the contract are ambiguous.

### 3.2. Interpretation of contract

In this section emphasis shifts briefly from good faith and reasonableness to intentions of contractual parties, and external or internal will theories. This shift to the parties’ intentions targets the consequences of the closeness of good faith and reasonableness.

Contract can lack of specificities or have different aim than its wording. Hence, in these cases interpretation of contracts can be exposed to the judicial discretion. Hesselink claims that one of the main functions of good faith is to provide the correct interpretation of contract.\textsuperscript{122} The same stands in French law.\textsuperscript{123}

Interpretation can, in other words, mean that judges force the views opposite to the parties’ expectations. This matter should concern the parties, despite the standard of reasonableness and good faith principle. More importantly, judges should not rewrite contract according to their own ideas of what parties intended.\textsuperscript{124}


\textsuperscript{121} Nedzel (n. 960), p. 104.

\textsuperscript{122} Hesselink (n. 9), p. 8.

\textsuperscript{123} Storme (n. 98), p. 5.
Parties can intercept judicial intervention and anticipate the usage of good faith by inserting a separate clause. Having the clause in the contract does not alter the consequences of the interpretation. Usually, the parties do not anticipate precise kind of conduct that constitutes good faith conduct. Thus, legal imposition of the good faith principle can be perceived differently, as potential obstruction of the correct meaning of the contract. 125

In the aspect of interpretation long-standing mistrust of good faith from common law jurisdictions is reaffirmed. Interpretation of contracts raises the legal uncertainty, which is considerably higher than in the negotiation phase, and notably more influential on parties financial and legal position 126

Nevertheless, German system is one of the leading jurisdictions that expressly requires good faith interpretation. 127 In contrast to English lawyers, that more willingly give the advantage to the wording of contract, despite it not being constant procedure. 128 This was seen in the breakthrough case Investors Compensation Ltd. v West Bromwich Building Society, 129 which contributed to narrow the space amidst continental and common law perspective in the interpretation. 130

Lord Hoffman provided the lower courts with a clear-cut definition of the interpretation of contracts for the first time in the Investors Compensation Ltd. v West Bromwich Building Society judgment. It stated that: “The interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”. 131

The first stage of the life of a contract examined, in the previous section, the expectations, interests and reliance in contractual relationship. Next substantial element to the interpretation 132 is the intention of the parties. These can be divided into, true 133, common 134 or evident 135 intentions.


126 See Sepe (n. 17), p. 29.

127 § 157, BGB.


131 Ibid. (n. 129)

132 Canaris (n. 33), p. 3.

133 § 133 BGB.

134 Art. 1156. C. civ.

135 Art. 1281, Codigo civil
Analogy can be drawn between the intentions in the interpretation of contracts and expectations arisen in the negotiation stage. To elaborate, the evaluation of the intention of parties is similar to assessing the expectations. As pointed out in previous subtitle, courts have tendency to choose the standard of reasonable man as the most adequate and objective in determining the parties’ expectations. Despite that, diving lines between the intentions and expectations are noticeable.

Expectations of the parties contain far more subjective elements than intentions. That is that, intentions can be assessed with regard to either the internal will or external will of the parties. Interpretation of contracts constantly returns to these internal and external will theories. Although, theories of external and internal will are not of the pivotal relevance for this paper, it should be noted that their applicability is known throughout many versatile jurisdictions, for instance in French and German law. Without entering into complexity, it is valuable to give few core indications.

Most legal systems are in favour of external will while in harmony with the internal will. Even traditional American and English legal system’s approach was to some extent abandoned and subjective intention was introduced.

The external and internal will are firmly established in legal theory while in the grand scheme of practice leading to almost identical outcomes. Hence, the divergence from common law to civil law appears to have been eluded for the sake of the respecting the “presumed” intention of the parties.

Respecting and determining the intention of parties constructs a specific correlation between the good faith principle and the standard of reasonableness. Several European legal scholars characterise the interrelation between the good faith principle and reasonableness as being easily replaceable between each other. The probable rationale behind this characterisation is that German courts interpret the contract in conformity with a reasonable person, and what reasonable person would attribute to the interpretation of their contract or what the “parties, acting as reasonable contracting parties, would have agreed upon…”

In German legal context, hence the condition to incorporate good faith in the contract interpretation can burdensome and its contribution is questionable. Vogenauer seen the issue of good faith particularly “in the

136 Vogenauer (n. 130), p. 11.
137 Beale (n. 53), p. 668.
139 Vogenauer (n. 130), p. 9.
140 Viglione (n. 32), p. 842.
141 Vogenauer (n. 130), p. 5.
142 Nicole Kornet, Contract Interpretation and Gap Filling (Antwerpen: Intersentia 2006),“If they would have considered the unsettled issue in advance” at p. 137.
struggle for legal certainty”  

On the other side, the reasonableness standard in common law jurisdictions is not ideal. Judges take the views that defend “reasonable solutions”. It is debatable whether this “reasonable solutions” match the parties’ actual will. In addition, it remains to be seen whether the intrusion into the contract sphere is undertaken consistently. In French courtroom, judges rarely raise the reasonableness matter. However, the resemblance in the interpretation between French and American jurisprudence is the “objectivity” in the process.

Thus, when considered jointly continental and Anglo-American law commentators, one can conclude with reserve, that the interpretation of contracts is heading to the same harbour. The leading cause can be, namely that parties have been incapable of avoiding the situation, which triggers the need of the judicial interpretation.

In this context it is unsurprising that courts had to anchor their correction of the contract to a more tangible standard, as it is the standard of reasonableness. Thus, the good faith principle is slowly losing its usefulness. A less binding and more attainable option is nonetheless for legislator to avoid the good faith principle and to create an accurate definition of the reasonable person.

Having said that, one should assume that parties are reasonable actors for the sake of interpretation of contract. However, despite the parties’ reasonable or unreasonable intentions, courts should refrain from interfering with the interpretation, where parties have consciously opted to leave a gap in their contract.

The effective application that reasonableness demonstrated in this stage can easily lead to the conclusion that the standard’s efficiency and practicability overcomes the benefits of the good faith principle. Nevertheless, it should be kept in mind that assessing the intention of the reasonable man is not clear-cut and potential outcome is that internal will of the parties will totally be excluded.

In order to complete the interpretation of the contract, assessing a contract’s performance is essential. One possibility is that a contract is never concluded at all. However, if the contract is deemed to be fulfilled, the fulfilment can be qualified by the interpretation, if it is not already clear in the contract. The good faith principle thus fills the gaps in missing contractual provisions, as well as the missing contract performance.

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143 Ibid. (n. 136)
144 Canaris (n. 33), p. 3.
146 Canaris (n. 33), p. 3(Canaris-p3).
147 Id, at p. 4, “For the correct understanding of the contract when both parties have a different perception of it”.
149 Beatson (n. 8), p. 168.
3.3. Contract performance

This section reiterates again the substantiality of good faith in the performance of the contract. In addition, it shows the rather narrow scope of the standard of reasonableness with the example of one particular contract.

One of the latent observations of this paper in the course of the comparative analysis of different legal systems, is that more joins the practice of good faith and reasonableness than separates. Importantly, there is once again a strong connection between civil and common law jurisdictions in contractual performances. This linking thread is best illustrated by the formation of the UCC. Karl Llewellyn, chief reporter for the Uniform Commercial Code, based this legislation precisely on Treu und Glauben of the German Civil Code.\(^{150}\) Therefore, the provisions in relation to good faith performance can be foremost seen in European Civil Codes, such as German Civil Code and French Civil Code in articles 1134 and 242, respectively.

Section 1-203 of the Uniform Commercial Code states that: “Every contract or duty within this subtitle imposes an obligation of good faith in its performance or enforcement.”\(^{151}\) American legislator similarly adopted a position that good faith principle should be crucial in the aspect of performance. In the American legal theory, few authors even advocate more inclusive application of good faith principle.\(^{152}\)

In general, the position of common law is that the standard of reasonableness, decency and fairness are instruments for the depiction of good faith. In other words, “good faith requires to act honestly, reasonably and with fair dealing having regard to the interests of the parties”.\(^{153}\) Similarly, in French law explicit obligation of performing in good faith is discovered in “what the parties as reasonable and fair-minded men would have agreed…”\(^{154}\)

This paper has raised priorly in Section 2.1 (significance) and Section 2.3 (corrective method) subjective and objective characteristics of good faith and reasonableness in a more general fashion. There is no doubt about their relationship in contract performance.

The role of reasonableness in depicting good faith performance is considered flawed.\(^{155}\) This critique relates to the subjective nature of reasonableness and its inability to detach itself from the implications of morality.\(^{156}\) However, certain counterarguments that put aside these flaws are transparent in contract performance. To elaborate, in practice no other standard than reasonableness was useful to depict the good

\(^{150}\) Beatson (n. 8), p. 155.

\(^{151}\) §28:1-203, UCC.

\(^{152}\) Snyderman (n. 34), p. 1344.

\(^{153}\) Kiefel (n. 42), p. 21.


\(^{155}\) Miller and Perry (n. 44), p. 725

\(^{156}\) Ibid.
faith principle. Second argument relates to the parties’ concerns. It is in the nature of contractual relationship to reflect on possible concerns about their contract obligations. To assess these expectations of the parties in the context of performance, one can more satisfactory rely on the standard of reasonableness.\(^{157}\)

Suitable contracts, and the subject matter of multiple articles exactly concerning the good faith performance, are rental agreements. The rental agreement will be briefly demonstrated with the objective to elucidate the link between common and civil law. To assess this link, American and Spanish law will be taken into account.\(^{158}\)

Owing to the severe negative impact of the rules imposed on the tenant, American jurisprudence rejected the old type of performance by the landlord.\(^{159}\) Additionally, in the event of the repairing provided by the tenant, landlord is obliged to recover reasonable expenditures.\(^{160}\) In comparison, similar conduct is expected from the tenant in Spain, although with the exception of referring to the reasonable expenditures.\(^{161}\) Nevertheless, under the Spanish law the conduct from the tenant can be classified as reasonable.

Good faith obligations in both American and Spanish law are notable in particular when landlord is selling its property. In American law, in order to be protected, the tenant must be “bona fide tenant”.\(^{162}\) In Spanish law, the tenant is safeguarded from the buyer of the property, whom is “not acting in good faith”.\(^{163}\)

First strain of convergence between common and civil law was demonstrated in the English case *Mackay v Dick* as early as the 19\(^{\text{th}}\) century. This case identified that parties are responsible to ease the other party’s performance to the extent that it “is reasonably necessary”.\(^{164}\) Grey claims that the case was implicitly alluding to good faith performance, despite the lack of good faith in wording of the decision.\(^{165}\)

Overall, the common law application of the principle of good faith has progressed in contract performance, although, not as advanced as continental law. In common law, good faith is granted to the parties through the formulation and respect of reasonableness and reasonable expectations. On the other hand, civil laws are less acquainted with this standard.

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\(^{158}\) Due to the fact that rental agreements are not regulated on the EU level.


\(^{163}\) Roig (n. 161), p. 21.


\(^{165}\) Ibid.
Nonetheless, German law, for instance, relies on the standard of reasonableness, though not expressly evident, in the institute of withholding performance.\textsuperscript{166} It is allowed to withhold performance on the reasonable grounds that your contracting party will not perform the contract.\textsuperscript{167} Approximately similar rule exists in the Restatement of Contracts with the requirement of one party to provide “adequate assurance of the performance”.\textsuperscript{168}

As already set out, returning to the interpretation of the contract and contract terms is occasionally unavoidable for tackling the issue of performance. While the good faith principle might be favourable, notwithstanding that, not following the explicit provisions of the contract can be destructive.\textsuperscript{169} In conjunction with explicit provisions, important components of the contract are also implied terms that are directly engaged with contract performance. To be precise, performing in good faith transformed in an implied term of the contract and “… so that another party will not be deprived of his reasonable expectations.”\textsuperscript{170}

Steven Burton reached the conclusion that good faith performance is economically functional.\textsuperscript{171} Another factor to take into account is the intermediary that manoeuvres this conduct of good faith performance.\textsuperscript{172} The industry practice can manoeuvre parties’ performance. Hence, it can deliver more certainty in terms of performance and assist the courts. Whether this is fair and in the spirit of the good faith principle, will be explored in the insurance and sales contract below.

Hence, in this section the necessity of good faith is not disputed, as was the case in the section on the interpretation the contracts (3.2). The central purpose of good faith is thus to offer more security for parties in a similar manner to negotiation stage. These observations do not disregard the involvement of standard of reasonableness. However, the standard- serves as criterium for the application of good faith. Moreover, it can be declared that reasonableness is an incidental component.

Finally, despite the efforts to regulate contract performance within the large sphere of good faith performance, many contracts are breached or non-performed. The breach occurs at times as a consequence of performing in bad faith.

\textsuperscript{166} For the purpose of comparative analysis, withholding performance was put in section 3.3 (Contract Performance)
\textsuperscript{169} Snyderman (n. 34), p. 1368.
\textsuperscript{170} See Farnsworth (n. 30), p. 669.
\textsuperscript{171} Miller and Perry (n. 44), p. 708.
3.4. Breach of contract

With the purpose of tackling the breach of contract, it is primarily significant to note that good faith principle has two distinctive capacities. One being the breach due to the violation of the good faith principle. The second being the impact that good faith has on the party suffering from the breach of contract, without consideration of the action that lead to the actual breach. Nevertheless, it is essential in this section to imply the effects of good faith and reasonableness on remedies, rules of damages and the duty to mitigate.

The application of good faith in the common law jurisdictions is limited in the sphere of breach. Remedies for breach of good faith obligation are therefore scarce. In the past, judges were highly reluctant to address the breach of the good faith obligation\textsuperscript{173} or to provide it the autonomy of legal recourse.\textsuperscript{174} However, in English law, lack of the good faith principle is balanced with the appropriate provisions on remedies.\textsuperscript{175}

In comparison, the rules for breach of contract in civil law countries are markedly different. In German law for instance, one of the disposable remedies provided, is the annulment of the contract. This annulment is attainable solely “where enforcing the contract would be unreasonable in the light of doctrine of good faith”, as Beaton states.\textsuperscript{176} Whereas, the obligation for the debtor is not to act contrary to good faith in the French law.\textsuperscript{177}

It is crucial to note that the doctrine of good faith can impair parties’ available rights in the remedies for the breach.\textsuperscript{178} The provision of the CESL states that “the party in breach may be precluded from exercising or relying on a right, remedy of defence”.\textsuperscript{179}

Having said all above, the first segment of this section are rules related to the damages and awarding damages. These rules are particularly pertained to the standard of a reasonable man. The list of functions of this standard is remarkably long. The following analysis of these functions are not in order of significance.

Firstly, expectations, reliance and restitution interests are enlisted by courts when awarding damages to injured party.\textsuperscript{180}

English jurisprudence is particularly fruitful in this matter. Lord Hoffman in \textit{Transfield Shipping Inc v Mercator Shipping Inc} case stated that: “It seems to me logical to found liability for damages upon the

\textsuperscript{174} Id. at p. 630.
\textsuperscript{175} Beaton (n. 8), p. 425
\textsuperscript{176} Id. at p. 175.
\textsuperscript{177} Art. 1147. C.civ.
\textsuperscript{179} Article 2, CESL.
intention of the parties (objectively ascertained) because all contractual liability is voluntarily undertaken. It must be in principle wrong to hold someone liable for risks for which the people entering into such a contract in their particular market, would not reasonably be considered to have undertaken.”

Hence, the amount of damages are restrained by the type of “damages which were foreseen or which could have been foreseen at time of the contract”, as in the French legal context. This practice resembles to English law, in so much that “damages recoverable should be as such as may fairly and reasonably be considered”.

Analogous to French law, German law permits the exclusion of the damages in so far as they were unforeseeable. The foreseeability is assessed from the “perspective of an objective observer”. Here, an “objective observer” is differently to a “reasonable man”. This assumption is supported in outcome of the German doctrines for testing the liability in breach. It was concluded that reasonable will be the fitting personal quality for the observer. Moreover, some authors claim that a “debtor must certainly be expected to master an impediment which he could reasonably have foreseen …”.

In the methodological calculation of damages to be recovered, only reasonable expenses are included. Whilst, French law is in deficit of providing elaborations on the same calculation, the UCC goes to extent that in provision that offers a seller the choice in case of buyer’s breach, when “in the exercise of the reasonable commercial judgment”.

Criticism directed to the foreseeability doctrine exists and lies in it being inadequate. The essence of the critique is relevant in the stimulus that shall be provided to the parties, to indeed discuss about potential risks awaiting.

Contracts that are accompanied by risks, will make parties to seek to balance through the potential for benefits. The cautious party is thus under the duty to consider risk of the “consequences which the reasonable man in his place should have thought were probable”.

181 Transfield Shipping Inc v Mercator Shipping Inc [2008] UKHL 48, at par. 12
182 Art. 1150, C. civ.
183 Beale (n. 53), p. 1005.
184 Id, p. 1010.
185 Ibid.
189 Beale (n. 53), p. 994.
190 § 2-704(2), UCC.
192 Cafaggi (n. 67), p. 19.
The conduct of the party who is not in breach must also be taken into account and it is the second segment of this section. Behaviour of the party impacts on the parties’ remedial rights. Therefore, touching upon the mitigation of damages is mandatory. In awarding damages, Anderson suggests that reasonable opportunities of the injured party to evade injury is the most important identifier.¹⁹⁵

Reasonableness of the actions before and after the breach can be estimated differently in relation to the “duty to mitigate”. This “duty” is one of the core principles in English law.¹⁹⁶ The reasonable steps (as in English law) or measures (as in German law) are required in the process of mitigation, unlike French jurisdiction that has no phrase equivalent to mitigation.¹⁹⁷

Not only do reasonable steps need to be taken, but the party undertaking these steps will have an option to refund the reasonable cost, in the effort of the duty to mitigate.¹⁹⁸ Introducing the duty to mitigate or the duty of solidarity¹⁹⁹ is additional evidence that in common law countries, fairness is considered, and good faith is acknowledged.²⁰⁰

Finally, underlying sensitive issue in the sphere of breaches of contracts is the fading string between contract and tort law. The damages parties can obtain differ significantly when they are claimed under contract or tort law. This is illustrated by the duty to mitigate in English law that was initially only granted in tort.²⁰¹ In addition, entering into tort law may hinder the proper functioning of contractual rules.²⁰²

To summarize, in breach of a contract complexity of delineation between good faith principle and reasonableness standard is smaller than in the following section. Although, good faith and reasonableness are equally significant with the detailed examination of the standard of reasonableness. In this manner, it can be concluded that reasonableness has a higher practical value in both continental and common law systems.

¹⁹⁴ Farnsworth (n. 188), p. 1203.
¹⁹⁵ Anderson (n. 180), p. 9. See also Farnsworth (n. 188), p. 1183.
¹⁹⁶ Beale (n. 53), p. 1015.
¹⁹⁷ Id. p. 1019.
¹⁹⁹ Id. at p. 817.
²⁰⁰ Ibid.
²⁰¹ Beale (n. 53), p. 1022.
3.5. Termination of the contract

This part incorporates the implications of good faith principle and reasonableness standard in connection with the right to terminate, notice of termination, and restrictions of rights to terminate, and it gives a brief separate treatment to long contractual relationships.

Termination rights are generally under the auspices of the judiciary and good faith principle in German and French contract law. Contrarily, besides the fact that the doctrine of good faith was absent in English law, the right to terminate in the Sale of Goods Act from 1979 was affected by a reminiscent of good faith. In American law, the good faith obligation of termination is recognized in individual types of contracts, such as lease and rent contracts, which was also the case in the contract performance.

The main obligation of the party wanting to terminate a contract is to inform (notice) the other party. In some instances, in German law notice can be avoided, such as when: “the terminating party cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period”. Despite that, creditors should not provide notice that is unreasonably long or they risk it being invalidated. In contrast to this, the excessively short time of notice can be inapposite. In addition, the reasonable amount of time for the notice period impedes the likely negative impact that unilateral termination can develop, with consideration to the termination clauses.

The legal institution of Nachfrist in German law, under which creditor has an obligation to give additional time (notice) to the debtor, sets out time framework of the notice as reasonable. The court “will find whether the further period was objectively too short”.

The right to terminate is nonetheless, not limitless. When termination of the contract is refused in French law, the good faith principle restricts the judges and parties in requesting more than what is sufficient for the satisfaction of one party. More precisely, one party is only allowed to demand partial performance, if that is satisfactory. Perhaps this objective standard to request the satisfactory performance is suitable to be

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204 Beale (n. 53), Cases on Contract Law, p. 938.
206 § 314, BGB.
207 Beale (n. 53), p. 925.
208 Id, p. 947.
209 Ibid
210 Id. (n. 53), p. 931.
211 Ibid
replaced with the term ‘reasonable’. In line with this good faith interference in French law, same explanation is put forward in Nachfrist for a minor deferral in performance.\textsuperscript{212}

Common law prevents the termination of a contract that is unreasonable, with the doctrine substantive performance that allows “party in breach to recover the contractual price”.\textsuperscript{213} The doctrine of substantive performance is an indicator of overlap between principle of good faith in contractual performance, as well as the breach of contract and its termination.

This overlap is also evident in the aspect of withholding the performance. Although it was discussed in the framework of the section of contract performance (section 3.3), in this section, is has different function. Namely, its existence is directly tied up with termination and phase prior to it. Legal theory places withholding the performance in the same area as termination.\textsuperscript{214} Regular solution to the issue of withholding the performance is either to terminate the contract\textsuperscript{215} or the termination as type of remedy for breach.\textsuperscript{216} The principle of good faith concretely delineates which obligation can be or cannot give rise to cause for the withholding performance in both German and French law.\textsuperscript{217}

The intersection between breach and termination of contract falls out of the scope of this paper. To further proceed with the termination of a contract, the length of contractual obligation is a significant aspect of the right to terminate. Contracts without fixed time framework have to be terminated in conformity with good faith principle.\textsuperscript{218} In addition, termination clauses should also be exercised in good faith.\textsuperscript{219}

Credit contracts will be taken as an example to illustrate this claim, as it lacks fixed terms. The cancellation of credit contracts can occur when “all circumstances according to good faith the other party cannot reasonably be demanded to continue the contract”.\textsuperscript{220} In particular, German law states that “if facts are present on the basis of which the party giving notice cannot reasonably be expected to continue to the end of the notice period”.\textsuperscript{221}

The uniqueness of termination is nonetheless evident in long contractual relationships. The termination of these contractual relationships is a topic of its own. However, these contractual relationships regularly accentuate mutual trust and reliance between parties. Hence, the good faith principle and reasonableness

\textsuperscript{212} Id. p. 951.
\textsuperscript{213} Beatson (n. 3), p. 416.
\textsuperscript{214} Beale (n. 53), p. 723.
\textsuperscript{215} Id. p. 893.
\textsuperscript{216} Id. p. 894.
\textsuperscript{217} Id. p. 903.
\textsuperscript{218} Hesselink (n. 9), p. 15.
\textsuperscript{219} Beale (n. 53), p. 963.
\textsuperscript{220} Brownsworth (n. 28), p. 299.
\textsuperscript{221} § 626, BGB.
standard must raise to a greater level of application than in the regular contractual relationships. The central idea on termination in long-lasting service contract, as above-mentioned, is that it can be prohibited as a result of application of good faith. Having said that, German legislator in credit contracts prefer the term reasonableness rather than good faith.222

Contracts, without termination clauses, further complicate already sensitive relations between parties. However, forecasting long-term contractual relationship is commonly against the idealistic nature of the contract.223 Therefore, termination clauses may be non-existent. The termination of long contracts is particularly delicate when only one party wants to terminate.224 Common law judges can treat the termination in bad faith in instances where a party intentionally uses the breach of the other party in order to engage in finer arrangement.225

Thus, notice for the termination of the contract for long-term relationships should be longer and should be in accordance with the reasonable expectations.226

In the termination of the contract, demarcation of the standard of reasonableness and the principle of good faith is not clear. It is present in certain legal institution that reasonableness is eminent when issuing a notice for termination. However, the mutual influence is also noticeable as the same notice for termination must be exercised in good faith. Nevertheless, good faith seems to be dominantly applicable despite references to the standard of reasonableness.

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222 Brownword (n. 28), p. 306.
226 Zimmermann (n. 3), p. 546.
3.6. Concluding remarks

This Chapter provides broad examination of good faith and reasonableness in each phase of the contract. Three main remarks on this principle and standard can be thus made. These remarks are divided in three groups. First group (group 1) of remarks is that application of good faith principle and reasonableness standard is moderately separated, even though it is still attached. Second group (group 2) sums up that good faith principle is a central figure in that stage of the life of contract, while reasonableness is subordinated to it. Third group (group 3) deduces that not only both standard and principle have same level of importance and application but also, they are still highly interdependent on each other.

The pre-contractual phase (Section 3.1) identifies the accessory nature of the standard of reasonableness even in common law which does not accept good faith principle in negotiations, therefore it represents the conclusion of the (group 2). The interpretation of contracts (Section 3.2) points out the easily changeable nature, and the elevation of the standard of reasonableness (group 3). The performance (Section 3.3) of contracts reiterates that the significance of good faith and reasonableness is solely present in the depiction of good faith (group 2). The breach section (Section 3.4) describes substantial characteristics of both concepts in the equal manner (group 1). Lastly, the termination of the contract (Section 3.5) has similar a conclusion to the breach, with a weaken possibility of delineation between the standard and principle (group 3).
IV Chapter: Insurance law

The preceding chapter was based on general contract law with few implications correlated to specific contracts. This chapter is entirely concentrated on the insurance law. The ordinary segregation of insurance contracts is between marine and non-marine insurance. However, it is beneficial to suggest that this chapter will not take special note of any particular insurance contract.

The first section amplifies the historical significance of the general duty of the utmost good faith in the entire insurance contract (4.1). Subsequent section pursues the duty of disclosure in the precontractual phase that stems out the duty of the utmost good faith (4.2). Last section sheds light on the duty of the utmost good faith after contract is concluded (4.3).

4.1. Duty of the utmost good faith

It is substantial to have a brief separate treatment of the elevation of good faith principle in common law. The principle of good faith has an extensive application in the multiple domains of the insurance contract.227

The duty is referenced as the duty of the utmost good faith or uberrimae fidei. More importantly, the principle is omnipresent in all kinds of the insurance228 and directed to both parties.229 The parties in this chapter will be referred to as insurer and insured.230

Universal historical significance and genesis of the good faith in common law lies precisely in the domain of the insurance law and contract. Lords Mansfield judgment and the landmark common law case Carter v Boehm is first case in the history with reference to the good faith principle.231 With this case, the good faith principle has become “fundamental”232 and spread across Commonwealth legal systems.233

The foundation of the case is in the law of non-disclosure.234 Hence, embodiment of the utmost good faith rests on the duty of disclosure. At the time of the Carter v Boehm judgment, the duty to disclose was conceived in a reduced scope.235 As Lord Mansfield stated: “Good faith forbids either party by concealing what he privately knows, to draw the other party into a bargain, from his ignorance of that fact, and his

227 Eggers (n. 89), p. 3.
228 Id., p. 10.
229 Browsword (n. 28), p. 311.
230 Many scholars use also underwriter and assured.
231 Grey (n. 164), p. 3.
233 Ibid.
believing the contrary”.

The authenticity of *Carter v Boehm* is also in the perception of materiality which will be discussed below.

In addition, without considering the historical and case details, statements included in the decision are manifestly in favour of the insured. What is evidently ground breaking is that the integration of the duty to disclose falls also on the behalf of the insurer. Despite the outstanding inspiration and development in the insurance law, Lord Mansfield’s innovative conclusions and the nature of the insurance contractual relationship was altered vastly.

## 4.2. Duty to disclose

Lords Mansfield established the utmost good faith in the duty to disclose. The distinctiveness of the duty is owing to the nature of insurance contract. The role of negotiations in insurance is more significant than in others contracts when bearing in mind the risk that insurer is exposed to. Each insurer will focus on measuring the income and profits. On the other hand, insured has different personal inclination towards the same risk that is the central factor for concluding the contract.

The duty to disclose has been debated in every insurance-related dimension. The duty is rationalized on the basis of disparity in the information between parties. More evidently, in common law this duty is deemed to be the most rigorous of all. Disclosing all the facts is unreasonable from the purely economic perspective. Therefore, one of the requirements for the information is its practical value to the conditions of insurance. From the legal perspective, it is essential to underline which information must be disclosed in the negotiations, and which information is competent to influence either risk or premium, as main factors of insurance contract.

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236 *Carter v Boehm* (1766) 3 Burr 1905, 97 ER 1162
237 *Watterson* (n. 234), p. 82.
238 Id. at p. 91.
239 Id at p. 117.
246 Id. at p. 19.
247 Id. at p. 9.
248 Loacker (n. 244), p. 23.
249 *Eggers* (n. 89), p. 40.
Firstly, analysis will commence with the duty of insured. The duty of insured has been developed in both case-law and legal theory. More importantly, in common law the raising concern is related to the practice, in which the duty of disclosure has a more detrimental effect on insured than on insurer.250

The precontractual good faith in insurance contract has been recognized also accepted in civil law. To render just a brief comparison, French law highly emphasises the importance of good faith and particularly within the duty to disclose in insurance contract.251 In the face of ordinary divergence between civil and common law, the application of good faith in insurance can result in almost identical result.252

In general contract law, common law systems strongly disputed the benefits of the principle of good faith. Nevertheless, in insurance contract the principle of good faith has a more important purpose, which is to tackle the potential dishonesty of party.253 The underlying explanation for “imposing” good faith is observed in the vast tendency of parties to the fraud and the misrepresentation in insurance.254 Hence, insurer can avoid the insurance policy on the grounds that insured did not disclose material fact despite acting in good faith.255

As preceding sentence initiates, the main premise of this section is that the fact to be disclosed must be material. It is crucial to note that materiality is undetachable particularly from the standard of reasonableness256 and that whole duty of disclosure is under the realm of the good faith principle. The issue of materiality is enhanced owing to its function as a factual element.257

In terms of facts necessary for insurance contract, insured possess more relevant information and has an easier access to them. This is used as justification for imposing the broad duty of disclosure on insured. Nevertheless, this assertion is rebuttable for two reasons. Firstly, it can present a hardship for insured to know the kind of facts that are mandatory to disclose. Secondly, even with that knowledge certain facts are costly to obtain.

The ability of the insured to estimate, whether information is material or not, can be labelled as “ability to see the future or magical”.258 What is more, insured is obliged to disclose the duties “which he might have

251 See Muriel Fabre-Magnan ‘Duties of Disclosure and French Contract Law’ in Beatson (n. 8), p. 100.
252 Id, p. 107.
253 Eggers (n. 89), p. 44.
256 Eggers (n. 89), p. 318.
257 Id, p. 320.
258 Park (n. 232), Duty of disclosure in insurance, p. 31.
discovered if he had made reasonably careful inquire”. Therefore, the range of the insured’s obligation is overreaching.

Disclosure of the facts and materiality of the facts are highly conditional upon the context and type of insurance. Ascertaining materiality is a subject of each case. With the purpose of determining the materiality, different types of tests were introduced by the courts. To avoid the confusion, it should be marked that following tests are firmly associated with the determination of the insured’s duty to disclose. This section includes two tests- the test of reasonable or prudent insurer and the test of reasonable insured. These tests are marked as objective.

The test of prudent insurer has been more evolved in the jurisprudence and frequently observed as a finer alternative than the reasonable insured test. Starting with the question: “Would a rational insurer, governing himself by the principles and calculations commonly applied to policies and risks, have regarded these facts as bearing on those risks?”

Insurers’ conduct and insurance industry are highly systemized. Furthermore, the procedure of signing insurance contract is standardized and governed with the particular principles viz. aligning the risk and premium. Thus, the advantage of this test is definitely the higher probability of detecting the conduct of reasonable insurer.

Eggers held that “fundamental character of the notional insurer is that of reasonableness”. The linguistic meaning of the word reasonable is behaviour in “using good judgment and therefore being fair and practical”. This definition is indeed in the conformity with good faith, particularly in terms of fairness, however the term ‘reasonable’ requires exploring numerous other distinctive elements in itself.

Additional advantage of the reasonable insurer test is employing precisely the standard of reasonable man. The standard is a “device” contributing in the favour of the insured, by eliminating potentially additional
responsibilities. The term ‘reasonable’ was used to monitor “absurdly stringent insurance practice” in relation to the reasonable insurer test.

Similarly, the application of the test of prudent insurer, in some instances, results in declaring the duty of the utmost food faith as being absurd. The conviction of absurdity can be rationalized in the mandatory disclosure of, at first glance, completely irrelevant facts to risk assessment such as disclosure of nationality.

The duty owned by insured can incorporate disclosing the previous breach of the duty of the utmost good faith. The policy can be thus avoided on this claim. Although it is rarely accepted as the basis for avoiding the insurance policy, the test of prudent insurer is applicable in these cases.

Electing the test of the prudent insurer is nonetheless flawed. Firstly, it identifies materiality as a purely objective element, and it does not include the mind of the particular insurer. Secondly, objective materiality will not always impact on the insurer’s decision in the presumed manner.

This criticism continues in relation to the terminology applied in the test of reasonable insurer and prudent insurer. To elaborate, the use of the term ‘prudent’ has been, without consideration, easily replaced with the term ‘reasonable’. The terminology switch can cause disarray in the minds of future insurers, insureds and also in the upcoming judicial determination of materiality. Besides that, the interchangeability also occurs between prudent and rational insurer, together with reasonable insurer.

Park mentions that in the framework of the prudent insurer test, insured acts with presumption of being “reasonable man with reasonable care and skill and discloses those facts which a reasonable insurer would regard as material”. Nonetheless, the presumable anticipated conduct of the insured is insufficient.

Commentators of Principles of European Insurance Contract law have underlined that reasonable insurer is a “mythical figure”. Having said that, however, the drafters did not preclude to use of the standard. It is

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270 Clarke (n. 262), p. 459.
271 Id. p. 448.
272 Hasson (n. 235), p. 630.
273 Id. p. 680.
275 Clarke (n. 262), p. 445.
276 Id. p. 446.
277 Park (n. 232), p. 75.
278 Id. at p. 83.
observable in article that clarifies the obligation of insured to further inform upon request “as far as reasonably be expected from the insurer, all matters relevant to the performance of the contract”.280

When bearing in mind all previous observations, conclusion reached is that the test of prudent insurer has an adverse effect on the position of insured. The adverse effect in terms of not only in “heavy burden on the insured” but also, with that the breach of the duty of disclosure can occur despite acting in good faith.281

The question of assessing materiality brings out injustice and imbalance between parties to insurance contract. To illustrate this injustice, the judiciary discretion in these matters can be regarded as selective or even discriminatory towards the insured.282

The next test that is applied in practice for the determination of materiality, is the test of reasonable insured. This test is perceived as fairer than the prudent insurer test.283 With its application, the ambit of duty is narrower.284

Prior to contemplation of the reasonable insured test, Hasson points out the question “whether reasonable applicants for insurance are aware in general about the duty to disclose”.285 It seems implausible that this argument can be tolerated as defence to a reasonable insured particularly.

Hasson’s concern over the duty of insured is irrelevant when insurer undertakes the inquiry of the facts. Moreover, there is even a supplementary duty of insured. Insured has to disclose facts as the reasonable man that would have been obtained if the inquiry had been provided by the insurer.286

What is highly disputable in the reasonable insured test, and definitely not allowed in the civil law context, is the following statement from the case Joel v Law Union and Crown Insurance: "There is the further duty that he should do it to the extent that a reasonable man would have done it; and, if he has fallen short of that by reason of is bona fide considering the matter not material, whereas jury, as representing what a reasonable man would think, hold that it was material, he has failed his duty, and the policy is avoided."287

In other words, despite that duty of disclosure depends on the reasonableness of insured, if insured wrongly apprehends some fact as immaterial, insurer has still the right to avoid the insurance policy. Breach of the duty is even viable in the cases of non-disclosure of any material information irrespective of its impact on

280 Article 2:702, PEICL.
281 Park (n. 232), Duty of Disclosure in insurance, p. 83.
282 Id. at p. 86.
283 Ibid.
284 Id. at p. 87.
287 Eggers (n. 89), see author’s footnote 22 at p. 34.
the insurance.\textsuperscript{288} The strictness of these principle in English law is contradictory to the intended aim of the utmost good faith \textit{viz.} the “equality in the knowledge between the parties”.\textsuperscript{289}

American law acknowledges, nonetheless, this unfairness and corrects it in the prospective of the non-marine insurance.\textsuperscript{290} Furthermore, American case law solely condemns disclosure given in bad faith with consequence of potential undermining of the policy.\textsuperscript{291}

The justification for the overreaching duty of disclosure for insured can be also found in that insureds would taken into account less amount of the facts to be material than insurers.\textsuperscript{292} Here added value of the reasonable insurer test is expressed through the complexity in estimating the mind of the reasonable insured.\textsuperscript{293}

In addition to the test of reasonable insured and test of a prudent insurer, legal literature distinguishes the test of a particular insured.\textsuperscript{294} It is closely interlinked with the utmost good faith principle, though it is very unreliable for the insurer.\textsuperscript{295}

Having said all above, the duty of disclosure is also an obligation of the insurer.

The test of materiality for the insurer’s duty is not developed.\textsuperscript{296} Nonetheless, instead of introducing similar types of test such as in the instance of materiality test for the insured, some judges turn to the concept of good faith and fair dealing.\textsuperscript{297} Good faith and fair dealing are perceptible, according to the judiciary, through the “contemporary morality of the market”.\textsuperscript{298}

The duty of insurer shall be symmetric to the duties of insured.\textsuperscript{299} Forcing the disclosure of facts such as financial credibility of the insurer and payment records,\textsuperscript{300} can be reckoned as fair and reasonable.\textsuperscript{301} Insurers claim that imposing the broad duty of disclosure on them is “suicidal for business”.\textsuperscript{302} Despite that, considering the ambit of the insured’s duty of disclosure, it is counter to the spirit of the utmost good faith principle to allow insurers these types of justifications.

\textsuperscript{288} Park (n. 232), p. 13.
\textsuperscript{289} Eggers (n. 89), p. 43.
\textsuperscript{290} Achampong (n. 286), p. 339.
\textsuperscript{291} Id. p. 342.
\textsuperscript{293} Ibid.
\textsuperscript{294} Park (n. 232), p. 73.
\textsuperscript{295} Ibid.
\textsuperscript{296} Park (n. 232), p. 192.
\textsuperscript{297} Id. at p. 195.
\textsuperscript{299} Park (n. 232), p. 200.
\textsuperscript{300} Yeo (n. 298), p. 141.
\textsuperscript{301} Id. at p. 142.
\textsuperscript{302} Ibid.
Lastly, the materiality of the facts is miscellaneous. The definite selection of the material information is proved to still represent an issue in the context of insurance contract.

Finally, the tests of materiality clearly lay down the autonomy of the standard of reasonableness. The autonomy of the standard is restricted. More notably, the utmost good faith is an instrument that rectifies the unfairness or excessiveness of the standard of reasonableness.

4.3. After the conclusion of the contract

It is crucial to depict the demarcation between the duty to disclose in the precontractual phase and postcontractual phase. Nature of the duty is modified after the conclusion of the insurance. Thus, the section will in first place include the continuation of the duties in the general state of affairs in insurance contract. Subsequent topic relates to the rise of claim. The extension of duties is more accommodated in the spectrum of claims.

Firstly, apparent contrast with the precontractual duty of good faith and disclosure can be illustrated on three bases. To commence with, the application of the duties is highly contested. Correspondingly, it is not a subject matter of the legal theory to extent as the precontractual duties. Third basis is the ample contradiction of the courts in this matter.

In the post-contractual phase, disclosing material facts is not an obligation for insured. However, that is not always the rule. In addition, the judgment clearly states that: “It is an essential condition of the policy of insurance that the underwriters shall be treated with good faith, not merely in reference to the inception of the risks, but in the steps taken to carry out the contract.” This dictum indicates primary protection of the insurer in the post-conclusion period.

In general, certain theories that are in favour of attenuated version of utmost good faith entitle that “parties should refrain solely from bad faith” in this setting. Nevertheless, this kind of theories cannot be applicable in the variation of insurance contract. It is functional to reiterate the importance of the utmost good faith by mentioning its implications concerning the variation

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303 Eggers (n. 89), p. 212.
of insurance contract. More precisely, variation is influenced upon the duty to disclose.\textsuperscript{308} Non-disclosure will be evaluated in the harmony with the precontractual duty.\textsuperscript{309} The grounds for introducing the good faith are also identical.\textsuperscript{310}

The reiteration of the duty to disclose can be equally pursued by the parties. It is not exceptional that insurer inserts the clause that the duty of disclosure will be prolonged “until actual delivery of the policy to the insured”.\textsuperscript{311} Although, the incorporation of these clauses raises the concern of the materiality, in this sense no tests such as the reasonable insurer test seems to exist. In essence, this clause stands as additional burden to insured.

Hence, the succeeding court statement is the key of the good faith principle and vital for the protection of the insured: "The courts have consistently set their face against allowing the assured’s duty of good faith to be used by the insurer as an instrument enabling the insurer himself to act in bad faith".\textsuperscript{312}

Accordingly, the right of insurer to repudiate the insurance should be restrained and avoidance should be the last resort.\textsuperscript{313} The utmost good faith safeguards insured’s interest here more than in the precontractual phase. The protection is also displayed in the rights of insurer within cancellation clauses.\textsuperscript{314}

The utmost good faith and duty of disclosure have certain peculiarities in the claim procedure. The duty of good faith commences with insured’s notice of the claim that is mandatory.\textsuperscript{315} Notice is coupled with the report of subsequent developments.\textsuperscript{316} Furthermore, it must be given “within a reasonable time”.

The hypothesis in claiming is that insured is acting in the good faith.\textsuperscript{317} However, the clear case of insured’s breach of the duty is making fraudulent claims,\textsuperscript{318} and to less extent making exaggerated claims.\textsuperscript{319}

The counter duty of insurer in the claim procedure is to refrain from demanding the proofs of loss that are “unreasonable for the satisfaction of any reasonable view of the case”.\textsuperscript{320} Courts opt to find solidity of the fraud with already analysed prudent insurer.\textsuperscript{321} Having said that, the application of this test is distinctive to

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\textsuperscript{308} Eggers (n. 89), p. 215.  \\
\textsuperscript{309} Ibid.  \\
\textsuperscript{310} Id. p. 241.  \\
\textsuperscript{311} Park (n. 232), p. 64.  \\
\textsuperscript{312} Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd and Others [2003] 1 A.C. 469, 497.  \\
\textsuperscript{313} Lowry (n. 304), p. 118.  \\
\textsuperscript{314} Eggers (n. 89), p. 218.  \\
\textsuperscript{315} Hardy Ivamy, General principles of insurance law (London: Butterworths 1979), p. 348.  \\
\textsuperscript{316} John Birds, 'The Statement of Insurance Practice - A Measure of Regulation of the Insurance Contract' (1977) 40 MOD L REV 677, p. 681  \\
\textsuperscript{317} Clarke (n. 262), p. 566.  \\
\textsuperscript{318} Eggers (n. 89), p. 224.  \\
\textsuperscript{319} Id. p. 230.  \\
\textsuperscript{320} Ivamy (n. 315), pp. 358. and 369.  \\
\textsuperscript{321} Clarke (n. 262), p. 566.
\end{flushleft}
one in the precontractual setting.\textsuperscript{322} In the presentation of risks, insurer must be “reasonable careful insurer” and must take consideration of the necessity for more “inquiries”.\textsuperscript{323} Lowry underlines that the task of insurer is to be “proactive”.\textsuperscript{324}

To a more negative note, the insurer’s range of duties evolves into being ultimately broad. “An insurer owes to insured an implied-in-law duty of good faith and fair dealing that it will do nothing to deprive the insured of the benefits of the policy”.\textsuperscript{325} In other words, the target to achieve is that the insurers must allow the claims and “not denying them unreasonably”.\textsuperscript{326} This achievement lead to an extreme outcome in the American case-law. More precisely, insurer’s position was more onerous particularly due to the existence of the implied covenant of good faith.\textsuperscript{327}

Thus, the standard of reasonableness was marginalised in the claim procedure. It is pivotal to mark that the reasonableness can contribute greatly to the enhanced delineation of the duties. In addition, the standard does not exceed the initial motive for introducing the utmost good faith, which is “to strike the optimum balance”.\textsuperscript{328}

The possible contribution of reasonableness is also in the expectation of the claimants. Therefore, court considers only claims “that the policyholders (insureds) could reasonably expect to be covered”.\textsuperscript{329} Herewith, legal theory created the doctrine of reasonable expectations that is crucial in the protection of the insureds.\textsuperscript{330} Nevertheless, it falls out of the range of this paper owing to the fact that good faith is explicitly excluded from its application.\textsuperscript{331}

In American law, the insurer’s breach of the duty of good faith allows separate claim in tort. To elaborate, bad faith of insurer will occur, in instances as it is “an absence of a reasonable basis for denying benefits of the policies”.\textsuperscript{332} In the section 3.4. this fading line between contract and tort law has already been noted in the breach of the contract. In the insurance context, it is also quite perceptible.

\textsuperscript{322} Ibid.
\textsuperscript{323} Lowry (n. 304), p. 131.
\textsuperscript{324} Id. p. 133.
\textsuperscript{326} Id. p. 1933.
\textsuperscript{327} Reuben A Hasson, ‘Good Faith in Contract Law - Some Lessons from Insurance Law’-it is already up, p. 114.
\textsuperscript{328} Lowry (n. 304), p. 149.
\textsuperscript{329} Wright (n. 157), p. 12.
\textsuperscript{331} Id. see author’s footnote 118. at p. 147.
Lastly, the reciprocity of the duties among insurer and insured is the genesis of the Lord’s Mansfield breakthrough vision in insurance contract.\textsuperscript{333} Nevertheless, in this section the awareness of inequality between the parties is noticeable, and specifically in the area of claims.

The utmost good faith principle was thus revitalised on the back of insurer. Despite the controversy that this burden can attract, it is helpful to eliminate the disproportionate impact of the duty of disclosure in the precontractual stage. Another key point is that reasonableness prior to the signing contract enlightens the conduct of insured, while in the process of claiming it instructs the conduct of the insurer to a larger degree.

The coinciding presence of the utmost good faith and the standard of reasonableness is a necessary incentive for both parties to abstain from undertaking the operations that can cause detriment to the interest of their counterparty.

\textsuperscript{333} Yeo (n. 298), p. 133.
V Chapter 5: Sales law

Previous chapter accentuated the common law jurisdictions. This chapter takes note of mainly European contract law instruments such as Principles of European Contract Law and Common European Sales Law. The second part includes the sales law of national legislations.

The first section entails the examination of the definitions in the framework of PECL and CESL with the aim of having analysis within similar instruments (5.1), and to tackle complexity of inadequate defining. The second section exemplifies the specific segments of sales contract (5.2) owing to its expedient value.

5.1. Collision of definitions in the PECL and CESL

5.1.1. Good faith

The Principles of European Contract Law are the stepping stone on which the European Civil Code was built.334 Together with CESL, that is the youngest publication, it is one of many attempts of the most eminent European academics to harmonise European contract law. The objectives of this effort are multi-layered, though it can conveniently come down to “overcoming legal diversity”.335

The principle of good faith is believed to be one of the main principles under the PECL336 and its primary position is evident in the CESL.337 On the other hand, the standard of reasonableness is not neglected, it is “in the shadow” of the good faith principle.

Firstly, the definition of good faith is virtually identical with only slight extension in the definition of CESL, which incorporates the consequence of breach of the duty to act in good faith.338 Therefore, the creators of the CESL were confident in the quality of the definition provided by the PECL.

It is rather unconventional that the drafters of the PECL and CESL have put good faith and fair dealing in the same basket, that is rare in the national legislation.339 The same group of authors remarked that good faith in the CESL is an objective standard of conduct.340 It can be contested to proclaim that good faith and

334 Ciacchi (n. 124), Contents and Effects-CESL, p. 5.
338 Article 2(2), CESL.
340 Ibid.
fair dealing are objective. To illustrate non-objectivity, it is beneficial to compare the definitions of the PECL and CESL with provisions of the UCC. In the UCC, the good faith principle is subjective in “honesty in fact”, where in the CESL good faith requires “conduct characterised by honesty”. The factor of ‘honesty’ is effective argument to oppose the objectivity.

Contrarily, it is taken as such that the fair dealing in the PECL is an objective complement of subjective good faith. Flechtner correctly lays that the reasonable trade standards are a qualifier of the obligation of the fair trading.

Intriguingly to note, the CESL did not include the specific provision concerning the duty to negotiate in good faith, which is not in conformity with the current state of European laws. However, Article devoted to negotiations in the PECL is guided by the good faith principle. Whether general Article 2 on good faith and fair dealing of the CESL is limited, or can be an overreaching rule applied to the duty to negotiate in good faith is still unrecognized. It can be claimed that Article 2 is applicable in a general fashion to the pre-contractual phase.

The good faith principle in the PECL and CESL is a general principle. In the CESL, good faith is, to certain extent, symmetry towards the freedom of contract. Additional imposition of the good faith principle on the freedom of parties is that “parties may not exclude the application of this Article or derogate from or vary its effects”.

Hence, both instruments deny to provide the parties a discretion of electing whether or not to include the good faith principle. The rationale behind this decision, can be sought in the aspiration to ‘moralise’ contract law. In comparison with PECL and CESL, UCC also does not provide this discretion to the parties. In spite that, the UCC entitles parties “to determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.”

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341 Article 2, CESL, and § 2-103, UCC.
342 Flechtner (n. 336), p. 304.
344 Article 2:301, PECL.
345 Rutgers and Sirena (n. 46), Rules and Principles in European Contract Law, p. 108.
346 Article 2(3), CESL.
347 Rutgers and Sirena (n. 46), p. 109.
5.1.2. Reasonableness and points of collision

The PECL and the CESL contain separate articles of the good faith principle and the standard of reasonableness. Hence, the comparison will be fruitful for several causes. Firstly, national laws rarely single out the definitions and comments in the particular manner undertaken by the creators of the PECL and CESL. In second place, the difficulty in national laws is a myriad of variations in law and theory.

The standard of reasonableness, despite having the momentum in the independent article, does not evade far from the good faith principle. The standard of reasonableness “will be evaluated in conformity with persons acting in good faith”\(^{349}\) as clearly highlighted by the CESL commentators. At the same time, in the PECL definition of reasonableness expressly mentions “to be judged by what persons acting in good faith would consider reasonable”.\(^{350}\)

It is noteworthy to mark that the repetition of word ‘reasonable’ is remarkable in the framework of the PECL. Moreover, the term ‘reasonable’ (within 41 articles)\(^{351}\) in the CESL was believed to be an incredible step in restructuring legal practices and customs that same authors perceive as not being modern.\(^{352}\) Although, criticism towards the term ‘reasonable’ and standard of reasonableness was notable. The ambiguity which term carries\(^{353}\) was the target of this criticism. The authors indeed demonstrate possible substitute words for reasonable.\(^{354}\)

Special consideration must be given to the criticism of the standard of reasonableness in the framework of CESL owing to the fact that good faith was, at least in the wording, excluded from the definition of reasonableness. Along with the ambiguity, standard was declared to be subjective,\(^{355}\) that is exactly criticism that ordinarily follows good faith. Furthermore, this can be rather paradoxical when bearing in mind that definition states “reasonableness is to be objectively ascertained”\(^{356}\)

First element, present in both PECL and CESL, in the definition of reasonableness is “having regard to the nature and purpose of the contract”.\(^{357}\) It is appropriate to declare that the purpose of the contract is to create a contract that preserves the balance between the parties. This again insinuates the application of good faith.

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350 Article 1:302, PECL.
351 Schulze (n. 339), CESL: Commentary, p. 100.
352 Id. p. 98.
353 Id. p. 102
354 Ibid.
355 Ibid.
356 Article 5, CESL.
357 Ibid.
The insinuation is attainable, for the reason that CESL’s definition of good faith includes “consideration for the interests of the other party to the transaction or relationship in question”.358

The second integral part of the definition of reasonableness are usages and practices in both considering sources.

Ole Lando and Hugh Beale explicitly noted that usages and practices, from the PECL’s article 1:105, are “companion to the good faith”.359 Although, with the assumption that good faith and usages and practices are strongly correlated, the good faith principle can be levelled off to the reasonable.360 In addition, usages and practices can be classified as having the “social dimension”.361 The motive rests to be found, with the premise that usages and practice have “social dimension”, for placing it in the PECL and CESL under reasonableness article.

In a grand scheme of sale contract, issue that can be raised, regardless of good faith and reasonableness, is the absence of rules or theory that inform on European usages and practices.

Bernstain, concludes that the usages “exist only when their content can be proven to the courts with reasonable accuracy at a reasonable price”.362 Bernstein's conclusion is in line with the provisions of usages and practices. The exorbitant amount of money necessary to prove certain usage that affected contract is not in harmony with the good faith principle.

Hence, with reasonableness ability to adequately balance the particular usage and practice with the good faith is enhanced. This is affirmed in the following consideration of the provision in the PECL.

When taking the closer look into the individual articles of usages and practices, one may observe the diversity between PECL and CESL. To be exact, the CESL opted to leave out the standard of reasonableness. While, in the PECL, antonym was used by saying “the parties are not bound where the application of such usage would be unreasonable”.363

Article 67 on usages and practices in the CESL is strictly connected to contracts between traders. Differentiation between traders, buyers, customers, professional sellers and specialists is significant in the evaluation of reasonable conduct.364

358 Article 2, CESL.
359 Lando and Beale (n. 13), p. 53.
360 Rutgers and Sirena (n. 46), see author’s footnote 27. at p. 140.
361 Id. p. 145.
363 Article 1:105(2), PECL.
364 Zimmerman (n. 3), p. 171.
The standard of reasonableness is not solely eliminated in the CESL definition of usage and practice. Moreover, it is eliminated in the provisions on defects of the consent. These provisions are entangled with good faith principle. The definitions on mistake and fraud are nearly indistinguishable with a minor alternation in the CESL. In Article 49 of the CESL, legislators precisely settle the requirement to disclose particular information.\textsuperscript{365} Although, in the provision for fraud the sentence in PECL “whether the other party could reasonably acquire the information for itself”\textsuperscript{366} is substituted with CESL’s “the ease which the other party could have acquired the information”.\textsuperscript{367}

This substitution can be attributable to the speculation that standard of reasonableness is not adequate in the area of the defects of consent.\textsuperscript{368} It is evident that the standard of reasonableness is also confronted with mistrust and the recommendation is to “assess the information, to be disclosed, individually”.\textsuperscript{369}

### 5.1.3. Concluding remarks

The unique creation of the PECL and CESL can contribute immensely to comprehend the definitions of good faith and reasonableness in a different light.

The only practical difference between these sources is that PECL incorporates provisions applicable to all types of contract, while CESL mandates the transnational sales contract.\textsuperscript{370} Both instruments incorporate vast amount of definitions accompanied by unavoidable negative connotation.\textsuperscript{371}

In the terms of definitions of good faith and reasonableness the distinctiveness is minor. Definition of good faith is almost identical in the PECL and CESL (5.1.1). In contrast, the crucial observation of the definition of reasonableness is that reference to good faith was abolished in the CESL (5.1.2). Nevertheless, the practical use of these definitions is unfeasible to assess. Undoubtedly, the CESL will assist immensely to ease the cross-border sales contract, though the actual application of the definitions by the courts is highly unpredictable.

Through the examination of the definitions, the failure to set a clear-cut definition is evident. This is manifested in number of shared elements in the definitions of good faith and reasonableness. Moreover, the

\textsuperscript{365} Article 49(3), CESL.

\textsuperscript{366} Article 4:107(3), PECL.

\textsuperscript{367} Article 49(3), CESL.


\textsuperscript{369} Ibid.


\textsuperscript{371} Ibid.
vagueness and ambiguity of the terms is partly blamed for this conclusion. Lastly, overlap is pervasive across entirety of the PECL and CESL, and not solely in the question of good faith and reasonableness.

However, it is difficult to claim that the overlap is illegitimate. Given the wide ambit of application of both sources, it is highly improbable for the creators to have opted to include narrower definitions. Lastly, the ultimate goal of harmonisation of contract law can be unachievable owing to the diverse national systems.

Hence, the examination of European law systems might justify the preference of the creators of PECL and CESL. Aside from that, consideration of national law will emphasise another dimension of good faith and reasonableness and signalise different findings.

5.2. National Laws: A comparative analysis

The structure of this section will be consistent with methodology applied in the Chapter III and pursuing the steps in the life of the contract. The section examines: duty to inform, offer and acceptance of the sales contract, absence of certain terms and clauses, unfair contract terms and change of circumstances.

5.2.1. Duty to inform

In the precontractual phase, as concluded in section 3.1., good faith principle is a key device in the conduct of negotiations. The importance of duties to inform is undoubtable in the negotiations of sales.\(^{372}\) The issue can be illustrated on typical German legal institution, namely to inform the other party about required formalities particularly within the scope of sales of immovable property.\(^{373}\)

Formalism in sales contracts will be employed as a depiction of how good faith can be accompanied by reasonableness. German law is requiring the notarial authentication for sales of the immovable property. Good faith can hinder court’s decision to declare contracts without notarial authentication null or void.\(^{374}\)

The successful invoking of good faith, in this line of cases, is solely viable when the voidance of the contract triggers “extreme hardship”.\(^{375}\) In addition, awarding damages is feasible when “purchaser was induced to believe that no form was needed”.\(^{376}\) This appears rather unfair towards the buyer of the property. It can be

\(^{372}\) Beale (n. 53), p. 372.
\(^{373}\) Id., p. 420.
\(^{374}\) Beale (n. 167), Contract Law, p. 159.
\(^{375}\) Beale (n. 167), Contract Law, p. 160.
practical to state, that if the buyer presents to the court proof of being reasonable man, that contract will not be annulled or declared void.

Initiating the inclusion of the standard of the reasonable man is thus advantageous. This hypothesis will be drawn through the policy considerations to include the formal requirements. Firstly, Markesinis considers that form intends to warn parties.377 The warning will be needless to the reasonable party that is aware of the seriousness in entering the contract of the sale of property and expressed the intention. Besides that, by paying the price, reasonable party comprehends the gravity of the obligation.

In second place, Markesinis points that notarial form operates as an evidence.378 In French law, any other written evidence can operate with the same goal “where there so no doubt about the intention of the parties”.379 It has been already pointed out that standard of reasonable man is the most adequate for the assessment of the parties’ intentions. All above stands, notwithstanding the fact that party can claim damages for the culpa in contrahendo.380

This duty to inform is, however, more rigorously imposed on the seller.381 The duties to inform permeate in both German and French law, particularly in regards to the sale. In French law, if one party decides not to disclose certain fact, as stated by Beatson “such silence must relate to a circumstance or a fact which the other party could reasonably be expected not to know”.382 For instance, it is implausible to imagine that professional seller of photographs would not be aware of the price of photography by really famous photographer.383

The duty to disclose can be broaden up by additional inquiry from the buyer.384 Thus, notably in German context, the more descriptions of the subject the buyer gets, the safer he is in the perspective of liability for disclosing. Both German and French law require the disclosure in connection to some significant element of the subject of sale.385

Despite not bringing up openly standard of reasonableness, to a certain degree, drawing boundaries in the duties to inform in significant or essential element386 of the subject of sales, appears to allude to reasonableness. Oddly enough, German courts refer to the criterium of “wilful or foolish individual”.387

377 Id. p. 84.
378 Ibid.
380 Id. p. 255 and p 256. “this will occur in cases where party was not notified on the form requirement”
381 Beale (n. 53), p. 511.
382 Beatson (n. 8), p. 102.
383 For the opposite, case when the seller is non-professional, the duty to inform is not mandatory. See Beale (n. 53), p. 518.
385 Beale (n. 53), p. 530.
386 Id. p. 474.
5.2.2. Selected Issues

In previous section reference was made to the mistake and fraud in the articles of PECL and CESL. German BGB states in relation to the mistake that: “if it may be assumed that he would not have made it with knowledge of the facts and with reasonable appreciation of the situation”. 388 What is more, for the correct application of culpa in contrahendo doctrine, if both parties reasonably have shared wrong apprehension of the contract then contract did not come into life and no damages can be compensated. 389

The subsequent step to analyse in sales contract is thus the offer and acceptance. Offer and acceptance of sales contract are point of intersection of precontractual and contractual stage. In sales contract, intention to offer and offer broadly speaking are complex to distinct.

In German law, under the watch of the good faith principle in negotiation phase, the standard of reasonableness displays again its application, in order to delineate the time period in which offer can or cannot be revoked. This time framework is ought to be “reasonable”. 390 Same position is taken in French law in connection with the sale of property and duration for accepting the offer. 391 It goes without saying, in the advancement of this paper, that English and American law precisely refer to it. 392

Another issue to consider is lack of particular element in already existing agreement. In German law: “one of the parties should made specification at the reasonably exercised discretion of the party making it”. 393 Moreover, when part of the price is not determined, as cited in one Langericht judgement: “Parties must, as reasonable people, have intended to agree on a fair price”. 394 Similar practice is viable in French jurisprudence. 395 The determination of price to a “reasonable price” is present in the CESL. 396

Despite the fact that this section is mainly focused on the national laws, EU law must be briefly mentioned. More importantly, reference to the consumer protection is due to its autonomy as field of law in EU 397 and correlation with the sale of movable items. Consumer protection was initiated 398 with the Directive 93/13/EEC on the Unfair Terms in Consumer Contracts. This Directive embodies rules in its Articles 3 and 4

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387 Id. p. 484.
388 §119(2), BGB.
391 Beale (n. 53), p. 268.
393 Article 315(1), BGB.
394 Beale (n. 53), p. 327.
396 Article 73 and 74, CESL.
398 Id. p. 154.
relevant to respecting the requirement of good faith in order to prevent “significant imbalance in the parties’ rights and obligations arising under the contract”. Prior to introducing the Directive, in the United Kingdom the Unfair Contract Terms Act have already been placed.

Strikingly, the provisions of the EU Directive appear to have looked up to the Unfair Contract Terms Act from 1977. Nevertheless, the reasonable was solely present in regards to the reasonable notice. In contrast to the Directive, the Unfair Contract Terms Act applied so-called “reasonable test” that provided guidelines for parties. For instance, one of the guidelines noted: “whether the consumer knew or ought reasonably to have known the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties)”. These kinds of provisions can provide more clarity to the consumers in the EU law than simple referral to the principle of good faith.

Previously discussed issue of balance between parties appears to be more relevant in the aspect of changed circumstances. In other words, the parties’ position can drastically alter after signing sales contract. This change is commonly titled as hardship. The doctrine of hardship was firstly established in a German case related to exactly sale of the spinning meal.

In modern German law, when changes are of such magnitude, Article 313, the basis of doctrine rebus sic stantibus that has its origins in good faith principle, states that “one of the parties cannot reasonably be expected to uphold the contract without alteration”.

Under the umbrella of the good faith principle, in both German and French law the burden of this alternation is shared between parties. Rationale behind sharing is usually sought in the fact, that one party is not “unreasonably burdened”. The authors frame these beliefs in relation to imposition of taxes.

Thus, in the area of changed circumstances, standard of reasonableness has been of the great beneficence and according to Rosler even “properly construed” for the judges as counterbalance to “shaky footing of good faith principle” particularly in the context of German law.

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400 Id. see Annex-1(g).
401 Beale (n. 167), p. 545.
403 Hardship-in-German-Codified-Private-Law, p. 491.
405 Beale (n. 53), p. 500.
406 § 313(1), BGB.
407 Grigoleit (n. 404), Unexpected circumstanes, p. 271.
408 Id. p. 258.
409 Rosler (n. 402), p. 509.
Despite the fact that French judges will with good faith principle share the burden between the parties in some instances, ordinary practice is that only force majeure will be allowed. The distinction must be made between hardship and force majeure.

Impossibility or force majeure entitles the debtor not to perform, even so in the Code civil “although there is no bad faith on his part”. Judges in France vastly lean on the reasonable person and what would reasonable person perceive in the cases of force majeure. In particular, judge resort to reasonable man in terms of the perception towards conditions for force majeure.

Practical and ordinary example is selling the goods that are dependent on the weather conditions. In German case-law, the courts would not “require one to do more than reasonably perform considering good faith requirements”. In spite of the fact that, for instance, droughts are event that can be reasonably foreseen, in certain cases their severity will be sufficient to invoke the application of force majeure. In French case-law, in the cases of previous statement force majeure can be employed.

5.2.3. Concluding remarks

This section draws the particular institutions of sales contract with the aim of elucidating the good faith and reasonableness in an explicit manner. The duty to inform (5.2.1) illustrates the necessity for introducing reasonableness and its potential aim of fostering the buyers’ interest in the issue of formalism. What is more, the standard of reasonableness reduces the scope of the seller’s duty.

Furthermore, reasonableness is firmly established and self-contained in the context of price determination (5.2.2). On the other hand, comments on unfair terms (5.2.2) indicate the capacity of the reasonableness to tackle the requirement of good faith in balancing the rights of the parties. Finally, in the area of changed circumstances both standard and principle are intertwined, with reasonableness mainly assisting as criterium of allowing the invocation of hardship and force majeure.

410 Rosler (n. 402), p. 510.
411 Id. p. 500.
412 Id. p. 485.
413 Beale (n. 53), p. 1095.
414 C.civ 1147.
415 Beale (n. 53), pp. 1096 and 1098.
416 Id. p. 1105.
VI General Conclusions

The paper starts with the description of the convergence (Chapter II) between principle of good faith and standard of reasonableness. This description mainly represents theoretical perspective although it is essential to achieve one of the objectives of this paper, namely to characterise and determine features of their relationship more elaborately. The number of common features between good faith principle and standard of reasonableness not only draw the convergence between them but also draw the difficulty to strongly delineate their relationship. These findings answer affirmatively and in the abstract manner to the second research question concerning the relationship between good faith and reasonableness demonstrating the “symbiosis”. It is also evident that delineation between good faith and reasonableness is clearer in the institution of ‘bad faith’.

Moreover, the examination of corrective method of standard of reasonableness in connection with the subjectivity of good faith marks the value of reasonableness standard in contract law and legal theory. Similarly, to the findings of common features, the corrective method of reasonableness answers affirmatively to the first research question: are good faith and reasonableness of equivalent value to contract law? Nevertheless, these confirmatory answers to both research questions are limited to the purely theoretical aspect.

Hence, the conclusions from Chapter III clarify the theoretical aspect and application of both good faith principle and standard od reasonableness in the life of the contract. In all stages of contract, principle and standard are important despite different legal contexts. It is in line with Zimmermann and Whittaker’s summary of the importance of good faith in contract law:

“It is clear that a legal system’s attitude to either the recognition or use of a general principle of good faith is based, to a certain extent; on it lawyers’ juristic taste: here we agree with the received wisdom that at least European common lawyers, in contrast to civil lawyers, in general seem more at home with the particular than the very general.”\(^{419}\)

However, Chapter III identifies the inseparable character of the relationship between good faith and reasonableness. These findings are notable in the all stages of contract due to the fact that in most aspects

\(^{419}\) Zimmermann and Whittaker “Coming to the Terms of Good faith” (n. 3), p. 687.
application of good faith is closely attached to the reasonableness standard (through resort to ‘reasonable man’).420

Inseparability is amplified particularly in the sphere of the interpretation and termination of the contracts. More notably, this cohesion is useful as it underlines the traits of the good faith principle (e.g. in terms of good faith performance) and indicates the flaws of the good faith principle (e.g. in interpretation of the contracts). Thus, the analysis of stages in the life of the contract also manifests predominant position of good faith principle- i.e. it illustrates the greater value of good faith principle to contract law.

On the other hand, Chapter IV emphasises the significance of standard of reasonableness, which functions more distinctively in the terms of insurance contract. In context of common law reasonableness in insurance contract achieves to exceed the application of the utmost good faith principle. This particularly stands in the determination of the duties of insured through the vail of materiality421 and duty to disclose.

The tests of reasonable insurer and reasonable insured depict the broad application of the standard of reasonableness and unfairness to position of the insured. Nevertheless, standard’s main role in the insurance context is to elucidate and determinate the conduct of the parties. Despite the usefulness of reasonableness standard, the new dimension of the relationship with good faith principle is here evident. More importantly, the principle of the utmost good faith corrects precisely the unfairness in the position of the parties that favours the insurer. This is confirmed also in the post-contractual settings, where the principle of utmost good faith is more significant. Chapter IV thus answers in favour of the “symbiosis” of the both concepts to a more concrete extent.422

In the context of sales law, particularly through the examination of PECL and CESL, the importance of good faith is reiterated. At the same time, framework of PECL and CESL highlights the influence of standard of reasonableness on European contract law. The value of the notion of reasonableness is evident with its practical use (e.g. in terms of assessing the trade usages and practices). Having said that, the notion was also neglected in the certain areas (e.g. defects of consent).

Chapter V notes the leading role of good faith as general principle in CESL and PECL.423 The standard of reasonableness supports the leading role of good faith by assisting it in achieving its purpose, namely I agree with Storme that purpose of good faith is: “in relation to which that other party must in its turn take into

420 Viglione (n. 32), p. 836. See also Litvinoff (n. 14), p. 1662 or “reasonable person”
421 Eggers (n. 89), p. 35.
422 Park (n. 232), p. 32.
423 Ciacchi (n. 124), see pp. 37 and 96.
account the legitimate interest of the other party”. This reaffirms the interdependence between good faith principle and reasonableness standard in the framework of European contract law instruments.

In addition, the assistance transcends even more in the comparative analyses of national laws, in particularly to the area of changed circumstances. More notably, using the standard of reasonable man clearly sets out the potential to introduce standard of reasonableness in sphere where good faith is predominant (e.g. the duty to inform in German legal context).

In pursuit of research objectives, this work has illustrated the importance of the relationship in contract law that included the analysis of common and civil law. Moreover, common and civil contract law seem to gradually converge in the matters of good faith principle and reasonableness standard. This paper underlined the intersections of the good faith and reasonableness in the all stages of the contract and in particular in regard to the contract of sale and insurance, which led to discovery of strong link between the two concepts.

Considered jointly, these findings have classified primacy of the principle of good faith. Although, it is crucial to note that this conclusion does not undermine the great value of the standard of reasonableness in contract law. The importance of standard of reasonableness along with its role presented throughout this entire study in fact illustrates their relationship as “symbiosis” rather than solely corresponding concepts.

424 In elaborating the dimensions of good faith Storme underlines the “formal” dimension which lead to my conclusion in this aspect, see Storme (n. 98), pp. 3 and 4.
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