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"The Good Faith Principle in International Commercial Law"

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ABBREVIATIONS

CISG	The United Nations Convention on Contracts for the International Sale of Goods
Group	The UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts
ICC	The International Chamber of Commerce
New York Convention	The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
UCC	The Uniform Commercial Code
UNCITRAL	The United Nations Commission on International Trade Law
UNIDROIT	The International Institute for the Unification of Private Law
UNIDROIT Principles	The UNIDROIT Principles of International Commercial Contracts
PECL	The Principles of European Contract Law
VCLT	The Vienna Convention on the Law of Treaties

PRESENTATION

Contract Law has now become highly relevant in the different spheres of life - from daily living to the completion of big international transactions. It contributes to the flow of commerce, economy and everyday life.

Contracts are probably one of the most important instruments within our society, since nowadays, economy is evolving faster than ever due to technology, the Internet, the use of applications and different virtual platforms that are making it easier to do business all over the world. In that sense, Contract Law has definitely lost its domestic character as most of private agreements currently involve more than one jurisdiction.

Agreements today are no longer just performed within communities, small societies or even a whole nation. International development is using contracts for its purposes and that is where legal communication in Contract Law has evolved - from the simple notion of an agreement between two individuals within national borders to a legal matter that emerges from the international stage.

The good faith principle is one of the most important principles of Contract Law, which embodies, in some way, a different notion in each and every legal system. In that sense, domestic legal systems do not uniformly recognize good faith, which makes it a non-global legal concept.

Seeing that, one has to analyze the notion of the good faith principle in the most relevant legal systems, namely the Common Law and the Civil Law, in order to understand this principle in the domestic setting. Additionally, one has to study the characteristics and

features of good faith in the elements of *lex mercatoria* and international arbitral case law to be able to grasp such concept in the transnational field.

Carrying out the aforementioned tasks will help accomplish the purpose of this research, which is to review the concept and scope of the good faith principle in International Commercial Law. Specifically, studying the good faith principle in the transnational realm and comparing its application with one of the relevant domestic legal systems will identify the characteristics and features of the principle of good faith in International Commercial Law.

For such purpose, developments of Transnational Law, the relevant case law and other legal sources, including the works of highly qualified publicists, will support the analysis of this legal monograph on the good faith principle in International Commercial Law.

INTRODUCTION

The good faith principle has several problems in International Commercial Law, since domestic legal systems do not embrace its notion in the same way. Hence, it is not a global legal concept.

On the one hand, good faith in some legal orders, mostly in Civil Law countries, is an implied covenant in every contract. However, in most of the Common Law traditions, there is not a general doctrine or duty of good faith, even though the good faith principle is notably developing in the United States' Commercial Law.

On the other hand, some of the most relevant developments of *lex mercatoria*, such as the UNIDROIT Principles of International Commercial Contracts, refer to good faith as an imposition to act or negotiate in good faith. They do not, however, provide a definition of the concept.

For that reason, the main objectives of this work are as follows:

1. To analyze the notion of the good faith principle in the Civil Law and Common Law traditions in order to recognize the main features, in general, of good faith in those domestic legal systems
2. To analyze and describe International Commercial Law, including its subjects and its sources, in order to embrace the framework by which this paper will study the good faith principle
3. To specially analyze transnational sources and *lex mercatoria*, among the sources of International Commercial Law, as this work will contend that these are the most relevant and authentic sources in such field of the law

4. To extensively analyze the good faith principle in Transnational Commercial Law, notably in the UNIDROIT Principles of International Commercial Contracts and arbitral case law

5. To identify the character and the main features of the good faith principle in Transnational Commercial Law

5. To define the good faith principle in International Commercial Law

6. To formulate conclusions on such matter

For accomplishing the abovementioned objectives, this document, in its first part, will examine the concept of the good faith principle in both the Civil Law and the Common Law legal systems (**CHAPTER I**). In its second part, it will delimit the frame of International Commercial Law and describe its subjects and sources (**CHAPTER II**). In its third part, it will point out the relevant aspects of the good faith principle in Transnational Commercial Law, specifically in the UNIDROIT Principles of International Commercial Contracts and arbitral case law (**CHAPTER III**). Finally in its last part, it will provide conclusions on the subject (**CONCLUSIONS**).

CHAPTER I - THE GOOD FAITH PRINCIPLE IN DOMESTIC LAW

Law in general might regard good faith, which is *bona fide* in Latin, as one of its main principles. Good faith is specifically the main topic of this work, and in that sense, one must first understand it in the domestic field in order to analyze it in the frame of international trade.

To start, this chapter will analyze the good faith principle in: (i) the Civil Law (**1.**) and (ii) the Common Law (**2.**). Hence, it will do comparisons and formulate conclusions on the domestic notions of the good faith principle in these two legal systems.

1. The good faith principle in the Civil Law

Civil Law countries conceive the good faith principle as an implied covenant in every contract, and its breach may entitle the non-breaching party to seek relief for the damage caused.[1]

The term Civil Law derives from the Latin *ius civile*, which was the law applicable to all Roman citizens.[2] This law, together with Germanic and Canon Laws, served as the basis for the legal discipline in Continental Europe.[3]

The Civil Law tradition, developed in continental Europe, influenced the laws of the colonies of European imperial powers.[4] Legislative decisions are the basis of Civil Law jurisdictions, and there lies the importance of codifications.[5]

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[1] For instance, see Articles 1134 and 1135 of the French Civil Code, Article 242 of the German Civil Code (BGB), Article 2 of the Swiss Civil Code (ZGB), Article 1603 of the Colombian Civil Code and Articles 863 and 871 of the Colombian Commercial Code.

[2] The Common Law and Civil Law Traditions, https://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf. At 2.

[3] C. Arnold-Baker, *The Companion to British History* (Routledge, London, 2001). At 308.

One could regard the French Civil Code of 1804, known as the Napoleonic Code, as one of the landmarks of the Civil Law,[6] since this code highly influenced the Chilean Civil Code of 1855, and afterwards, Colombia adopted Chile's Code with a few modifications in 1873.

Following that reasoning, the present section of this work will raise the notion of good faith embraced in French, German, Swiss and Colombian codifications, as that will evidence that written rules, at first, have determined the scope of the good faith principle in the Civil Law tradition countries.

One finds the good faith principle in France in Articles 1134 and 1135 of the French Civil Code. These articles provide the following:

> "**Article 1134.** Agreements formed according to law bind those who make them. They cannot be revoked, except by mutual consent, or for reasons permitted by law. Agreements must be carried out in good faith.
> **Article 1135.** Agreements are binding not only to what is directly expressed therein, but also to all the consequences which equity, usage or law give to the obligation according to its nature."[7]

One could sustain, from Domat's findings, that good faith emanated from natural law,[8] which, according to Aquinas, is the natural inclination of humans to achieve their proper end through reason and free will.[9]

Article 242 of The German Civil Code (BGB) establishes good faith in German Law. It reads as follows:

> "An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration."[10]

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[4] The Common Law and Civil Law Traditions, https://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf. At 1.
[5] *Ibid*. At 1 and 2.
[6] *Ibid*. At 2.
[7] French Civil Code [FCC]. Arts. 1134 and 1135. March 21, 1804 (France).
[8] Ed. and Comm. By J. Remy, J. Domat, *Traité des lois* (Paris, 1835). At 38.
[9] Ed. by R.W. Dyson, *Aquinas: Political Writings* (Cambridge University Press, Cambridge, 2002).

One should emphasize that German doctrine applies this article with Kantian references to the categorical imperative.[11] In that sense, "*good faith is connected to that universal law which arises from the metaphysics of customs*"[12] and one should construe it as "*the submission to the law itself that results from the rightful conscience of each being.*"[13]

Comparing French and German Law, one could notice that, first, French Law imposes to observe good faith under "*usage,*"[14] which might be similar to the German Law standard to observe good faith under "*customary practice.*"[15] Secondly, French Law appeals to a bigger criteria of good faith, as it also implies watching "equity or law according to the nature of the obligation."[16] And third, French Law refers to all the parties of a contract in explaining the notion of good faith, while German Law only mentions the obligor.

Similar to French Law, but not in the exact same wording, Swiss Law covers both the obligor and the obligee in describing the principle of good faith. Article 2 of the Swiss Civil Code (ZGB) says:

> "(1) Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.
> (2) The manifest abuse of rights is not protected by law."[17]

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[10] Bürgerliches Gesetzbuch [BGB]. Art. 242. January 1, 1900 (Germany). http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0726.
[11] Good Faith in International Arbitration, by B. M. Cremades. http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1783&context=auilr (2012). At 6 and 13.
[12] R. Johnson, *Kant's Moral Philosophy*, *Stanford Encyclopedia of Philosophy* (April 6, 2008) http://plato.stanford.edu/entries/kant-moral/.
[13] *Ibid*.
[14] French Civil Code [FCC]. Art. 1135. March 21, 1804 (France).
[15] Bürgerliches Gesetzbuch [BGB]. Art. 242. January 1, 1900 (Germany). http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0726.
[16] French Civil Code [FCC]. Art. 1135. March 21, 1804 (France).
[17] Schwizerisches Zivilgesetzbuch [ZGB]. Art. 2. December 10, 1907 (Switzerland). https://www.admin.ch/opc/en/classified-compilation/19070042/201407010000/210.pdf

One might argue that good faith prohibits the abuse of rights in Swiss Law, following the content of Article 2 of the Swiss Civil Code (ZGB). Nevertheless, Swiss Law reproaches such abuse provided that it is "manifest."

Swiss judges are in charge of evaluating whether there is an abuse of rights, and for doing so, they analyze its constitutive elements, which are as follows: (i) violations of good faith and (ii) the "*manifest*" abusive exercise of rights.[18] In that sense, the judge is in charge of interpreting what is "*manifest*" in the specific case, following Article 1 of the Swiss Civil Code (ZGB).[19]

Good faith is a constitutional principle in Colombia. Article 83 of the Constitution enshrines this principle in the following provision:

> "The activities of individuals and public authorities must conform to the postulates of good faith, which will be presumed in all dealings that the former engage in with the latter."[20]

In this sense, the roots of the good faith principle for civil matters are in Article 1603 of the Colombian Civil Code, which states the following:

> "Contracts must be performed in good faith, therefore they oblige not only to what is expressed on them, but to all things that emanate precisely from the nature of the obligation, or which by law belongs to it."[21]

Additionally, Articles 863 and 871 of the Colombian Commercial Code include the good faith principle in commercial agreements. These articles state the following:

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[18] V. Bolgár, *Abuse of Rights in France, Germany and Switzerland: A Survey of a Recent Chapter in Legal Doctrine*, 35 *Louisiana Law Review*, 1015 – 1036 (1975). At 1032.

[19] "(1) The law applies according to its wording or interpretation to all legal questions for which it contains a provision.
(2) In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that would make as legislator.
(3) In doing so, the court shall follow established doctrine and case law." Schwizerisches Zivilgesetzbuch [ZGB]. Art. 1. December 10, 1907 (Switzerland). https://www.admin.ch/opc/en/classified-compilation/19070042/201407010000/210.pdf

[20] Political Constitution of Colombia [Const]. Art. 83. July 7, 1991 (Colombia). (Unofficial translation). http://confinder.richmond.edu/admin/docs/colombia_const2.pdf.

[21] Colombian Civil Code [CCC]. Law 57, 1887. Article 1603. May 26, 1873 (Colombia). (Free translation).

> "**Article 863.** The parties shall proceed in good faith free of negligence during the pre-contractual period, under penalty to compensate the damages caused.
> **Article 871.** Contracts must be concluded and performed in good faith and, consequently, will compel not only to the expressly agreed into them, but all that applies to their nature thereof, according to the law, custom or natural equity."[22]

One could easily notice the similarity between Article 1603 of the Colombian Civil Code, Article 871 of the Colombian Commercial Code and Article 1135 of the French Civil Code, as nineteenth's century French Law highly influenced the Colombian Civil Code and Colombian Law in general.

The similarity is significant mainly between Article 1135 of the French Civil Code and Article 871 of the Colombian Commercial Code, since both articles refer to the nature of the obligation according to "law, custom or equity."[23] On the contrary, Article 1603 of the Colombian Civil Code only refers to "what by law belongs to the nature of the obligation."

It definite, French, German, Swiss and Colombian Law (Civil Law tradition legal systems) establish that obligors must comply with obligations in good faith.

Nevertheless, Colombia is the only country (of the abovementioned) with an express provision obliging to negotiate in good faith during the pre-contractual stage, namely, Article 863 of the Colombian Commercial Code. However, this does not mean that there is not an obligation to act in good faith in such stage in France, Germany or Switzerland.

The cited Colombian and French norms are evidence that the good faith principle determines the content of a contract, since the obligations that arise from it are not just the

[22] Colombian Commercial Code [CCOC]. Decree 410 of 1971. Arts. 863 and 871. March 27, 1971 (Colombia). (Free translation).
[23] French Civil Code [FCC]. Art. 1135. March 21, 1804 (France); Colombian Commercial Code [CCOC]. Decree 410 of 1971. Art. 871. March 27, 1971 (Colombia). (Free translation).

ones directly expressed therein.[24] To be specific, the obligations that arise from an agreement are binding also to what is inherent to their nature by law, equity or usage.[25]

In that sense, good faith is an interpretative tool for the parties or the judge, depending on the case,[26] that could fill the gaps of a contract, considering that interpreting a contract in good faith could ascertain the scope of its obligations.[27]

Also, the fact that parties must perform contracts in good faith implies that they must do so with loyalty and right and positive intention,[28] so that the object of a contract can be effectively accomplished.[29] Taking that into account, the purpose of good faith is for debtors to perform their obligations without circumventing the rights of creditors.[30]

On the other hand, Article 863 of the Colombian Commercial Code indicates that the principle of good faith is not only applicable to the performance of contracts. The parties must also observe good faith in the pre-contractual stage, as the law binds them to negotiate in good faith; otherwise, they could be found liable for the damages caused.

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[24] A. Solarte Rodríguez, *La buena fe contractual y los deberes secundarios de conducta*, in *Vniversitas* (num. 108, 2004). At 282-315. P. 295.
[25] G. Ospina Fernández & E. Ospina Fernández, *Teoría general del contrato y del negocio jurídico* (6th. ed., Temis, Bogota, 2000). At 328; J. Cubides Camacho, *Obligaciones* (5th. ed., Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas – Colección Profesores, Bogotá, 2005). At 255; A. Solarte Rodríguez, *La buena fe contractual y los deberes secundarios de conducta*, in *Vniversitas* (num. 108, 2004). At 282-315. P. 297 and 298.
[26] G. Ospina Fernández & E. Ospina Fernández, *Teoría general del contrato y del negocio jurídico* (6th. ed., Temis, Bogota, 2000). At 328.
[27] *Ibid*.
[28] F. Hinestrosa, *Tratado de las Obligaciones I* (3rd. ed, Universidad Externado de Colombia, Bogota, 2007). At 113.
[29] G. Ospina Fernández & E. Ospina Fernández, *Teoría general del contrato y del negocio jurídico* (6th. ed., Temis, Bogota, 2000).. At 327; J. Cubides Camacho, *Obligaciones* (5th. ed., Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas – Colección Profesores, Bogota, 2005). At 252
[30] G. Ospina Fernández & E. Ospina Fernández, *Teoría general del contrato y del negocio jurídico* (6th. ed., Temis, Bogota, 2000).. At 328.

However, the good faith principle embraces both objective and subjective notions[31] in the Civil Law tradition countries.[32]

The objective notion binds an individual to not only comply with the literally agreed on obligation, but also to what equity dictates.[33] Thus, the objective notion is understood as the method used to impose secondary duties of behavior on contractual relationships,[34] tempering the inequalities that could result from party autonomy.[35]

One could then agree that the most important secondary duties of behavior that arise from the objective notion of the good faith principle are the duties of: (i) protection;[36] (ii) disclosure; (iii) cooperation; (iv) advice; (v) loyalty and (vi) confidentiality or secrecy.[37] These duties are applicable in all the contractual stages, namely: (i) the pre-contractual stage;[38] (ii) the performance of a contract and (iii) the post-contractual stage.[39]

In Solarte's view, the duty of protection has a negative purpose, as it prevents the occurrence of impairments to the parties' interests.[40] On the other hand, Solarte contends that other secondary duties, particularly the duties of disclosure, cooperation, advice and

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[31] A. Solarte Rodríguez, *La buena fe contractual y los deberes secundarios de conducta*, in *Vniversitas* (num. 108, 2004). At 282-315. P. 287.
[32] E.g. France and Colombia.
[33] J. Cubides Camacho, *Obligaciones* (5th. ed., Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas – Colección Profesores, Bogotá, 2005). At 252.
[34] J. Cubides Camacho, *Obligaciones* (5th. ed., Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas – Colección Profesores, Bogotá, 2005). At 255.
[35] A. Solarte Rodríguez, *La buena fe contractual y los deberes secundarios de conducta*, in *Vniversitas* (num. 108, 2004). At 282-315. P. 287; Legiscompare, *Chapter 5: Good Faith*. http://www.legiscompare.fr/web/IMG/pdf/13._CH_5_Good_faith.pdf. At 7.
[36] F. Hinestrosa, *Tratado de las Obligaciones I* (3rd. ed, Universidad Externado de Colombia, Bogota, 2007). At 113.
[37] A. Solarte Rodríguez, *La buena fe contractual y los deberes secundarios de conducta*, in *Vniversitas* (num. 108, 2004). At 282-315. P. 304.
[38] In other words, negotiations.
[39] *Ibid*. P. 305.
[40] *Ibid*. P. 306.

loyalty, are duties with a positive purpose, since they intend to complement the performance of a contract.[41] In this sense, Solarte states that the duty of confidentiality or secrecy has both a negative and a positive purpose.[42]

The subjective notion, on the other hand, is an individual's right disposition in the fulfillment of the obligations that arise from an agreement.[43] It aims to protect the mistaken belief of one contracting party and to give effect to appearances.[44]

For instance, Article 1512 of the Colombian Civil Code establishes that when two parties enter into an agreement and the first party entered into such agreement due to the person of the second party but there is an error[45] in the person, the first party is entitled to ask a judge to declare the contract void. [46]

Nonetheless, Paragraph 2 of the same article provides that the second party has the right to claim damages for the undertakings carried out in good faith, by virtue of the contract if it was not aware of the error at the time of concluding the contract.[47] In that way, good faith protects the second party from the negligence of the first party[48] and enables the second party to recover the incurred expenses.

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[41] *Ibid.*
[42] *Ibid*. P. 307 and 308.
[43] J. Cubides Camacho, *Obligaciones* (5th. ed., Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas – Colección Profesores, Bogotá, 2005). At 252.
[44] A. Solarte Rodríguez, *La buena fe contractual y los deberes secundarios de conducta*, in *Vniversitas* (num. 108, 2004). At 282-315. P. 287; Legiscompare, *Chapter 5: Good Faith*. http://www.legiscompare.fr/web/IMG/pdf/13._CH_5_Good_faith.pdf. At 7.
[45] Understood as "mistake" in the UNIDROIT Principles. UNIDROIT Principles 2010. Article 3.2.1.
[46] Colombian Civil Code [CCC]. Law 57, 1887. Paragraph 1 Article 1512. May 26, 1873 (Colombia).
[47] *Ibid*. Paragraph 2 Article 1512.
[48] G. Ospina Fernández & E. Ospina Fernández, *Teoría general del contrato y del negocio jurídico* (6th. ed., Temis, Bogota, 2000). At 200.

In summary, the good faith principle in the Civil Law is of the following attributes: (i) It is an interpretative tool of contracts; (ii) It serves as a gap-filling tool; (iii) It could extend the scope of contracts and the obligations that arise from them; (iv) It protects and assures the rights of the parties and, in that order, imposes obligations upon the parties, such as secondary duties of behavior, and (v) It is a principle that the parties must also observe in the pre-contractual and in the post-contractual stage.

2. The good faith principle in the Common Law

Statutes, as opposed to the Civil Law legal systems, do not mainly direct the Common Law legal systems. On the contrary, case law and relevant jurisprudence have framed most of their legal guidelines. Thus, there is neither a clear binding obligation to negotiate, conclude or perform contracts in good faith,[49] nor such principle is a rule of interpretation for private agreements.

The law of most of the Common Law countries presupposes that each party has its own capabilities and does not owe a fiduciary duty to the other. In this sense, the only limit imposed to negotiating parties is a prohibition to incur in fraud or deceit.[50]

English Common Law has not typically required an implied general duty of good faith in the negotiation or in the performance of contracts between two commercial parties.[51]

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[49] See Good Faith in International Arbitration, by B. M. Cremades. http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1783&context=auilr. (2012). At. 774 and 775; see House of Lords (U.K.). Walford v. Miles. 2 A.C. 128 (1992); Lord Steyn, also supporting this notion, indicated that there was no need in English Law to introduce a general duty of good faith inasmuch as the tribunals respect "the reasonable expectations of the parties" according to pragmatic traditions of English Law; and see Lord Steyn, *Contract Law: Fulfilling the Reasonable Expectations of Honest Men* , 113 *Law Quarterly Review* 433 (1997). At 439.

[50] Legiscompare, *Chapter 5: Good Faith.* http://www.legiscompare.fr/web/IMG/pdf/13._CH_5_Good_faith.pdf. At 7.

Concretely, in English Contract Law, there is no 'general doctrine of good faith.'[52] Therefore, the parties have to veil for the real assurance of their own interests and they are not obliged to comply with certain implicit contractual covenants in benefit of the other party, which do not arise from the literal meaning of the terms used in a contract or statutory law.[53]

On the other hand, Section 1-201(20) of the United States Uniform Commercial Code ("**UCC**") defines good faith as follows:

> " "Good faith," except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing."[54]

Moreover, Section 1-304 of the UCC states the following:

> "Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement."[55]

Hence, American Commercial Law understands the good faith principle as a commercial standard, which is at odds with English Law. Thus, commercial transactions that are governed under the UCC indeed contemplate a duty to carry out obligations in good faith. Nevertheless, American courts have held that the duty of good faith is limited to contract performance and does not apply during negotiations.[56]

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[51] C. Perry, *Good Faith in English and US Contract Law: Divergent Theories, Practical Similarities*, 17 *Business Law International* 1, 27-40 (January 2016). At 34.
[52] [2012] EWCA Civ 781.
[53] A. von Mehren & J. Gordley, *The Civil Law System: An Introduction to the Comparative Study of Law* (2nd. ed., Little, Brown, 1977). At 56.
[54] Uniform Commercial Code [UCC]. § 1-201(20). 1952 (U.S.A.).
[55] *Ibid.* § 1-304.
[56] Scott Timber Co. V. United States, 692 F.3d 1365, 1372 (Fed. Cir. 2012); Market Stt. Assocs. L. P. V. Frey, 941 F.2d 588, 596-97 (7th Cir. 1991); Land O' Lakes v. Gonsalves, 281 F.R.D. 444, 453 (E.D. Cal 2012).

In that sense, Common Law tradition countries have not embraced the good faith principle as a principle that imposes obligations upon the parties, such as secondary duties of behavior (as in the Civil Law tradition countries).

Specifically, good faith does not have in the Common Law the same character as an interpretation tool that it has in the Civil Law. English Law has not embraced good faith as an instrument for gap-filling, since there is not a legal rule that binds the parties to comply with obligations not just to what they literally express, but also to what is inherent to their nature by law, equity or usage. In that sense, the good faith principle is not a gap-filling tool in the interpretation of contracts in the Common Law, besides the standard of behavior enshrined in the UCC.

Yet, parties might not have to observe the good faith principle in the pre-contractual stage in the Common Law as in the Civil Law. Hence, a party's failure to negotiate in good faith might not entail liability, at first, in the Common Law.

In conclusion, the good faith principle does not have the same scope in the Civil Law and in the Common Law. Furthermore, within the Common Law tradition countries, there is not a uniform conception of the good faith principle in Contract Law, since the scope of good faith in the UCC tends to lean toward the subjective notion of the good faith principle (a standard of behavior) in the Civil Law tradition countries.

CHAPTER II – INTERNATIONAL COMMERCIAL LAW

This second chapter will evaluate International Commercial Law prior to analyzing the principle of good faith in such context.

In order to do the foregoing, this chapter will analyze International Commercial Law; explain its characteristics and definition (**1.**); and enunciate its subjects (**2.**). In the end, it will also explain the sources of International Commercial Law (**3.**).

Concretely, this chapter will demonstrate why transnational sources and *lex mercatoria* are the most relevant sources of international commercial transactions - after international contracts - which might enshrine the parties' intention.

Additionally, this chapter will help to understand the context of *lex mercatoria*, as this work contends that the principle of good faith is the main principle of International Contract Law in the said context (claim sustained and reaffirmed on the analysis carried out in Chapter III, below).

1. Characteristics and definition of International Commercial Law

One must embrace the following two concepts to understand what is International Commercial Law: (i) "International" and (ii) "Commercial."

On the one hand, the meaning of the term "Commercial" in the international field has a wide interpretation, which covers all matters arising from relationships that originated in the course of business, whether contractual or not, excluding consumer relationships. A commercial relationship can be, for instance: (i) any trade transaction for the supply or

exchange of goods and services; (ii) a distribution agreement; (iii) a commercial representation or agency; (iv) factoring; (v) leasing; (vi) construction; (vii) consulting; (viii) engineering licensing; (ix) investment; (x) financing; (xi) banking; (xii) insurance; (xiii) exploitation agreements or concessions; (xiv) joint ventures and other forms of industrial or business co-operation or (xv) carriage of goods or passengers by air, sea, rail or road, amongst others.[57]

On the other hand, "International" relates to the scope of regulation of International Commercial Law, namely international transactions. Nevertheless, the notion of international varies according to the criteria used to interpret it. Following that reasoning, international is not a standard and universal legal term, as different legal systems and international conventions adopt different notions of the concept.[58]

For instance, Article 1 of the United Nations Convention on Contracts for the International Sale of Goods ("**CISG**") establishes that a contract for the sale of goods has an international character when the places of business of the parties are located in different States, regardless of their nationality.[59] Article 1 of this convention reads as follows:

> "(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
> (a) when the States are Contracting States; or
> (b) when the rules of private international law lead to the application of the law of a Contracting State.
> (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

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[57] G. Cordero-Moss, *Lectures On International Commercial Law*, *Publication Series of the Institute of Private Law, University of Oslo*, No. 162 (2003). At 8; N. Blackaby, C.Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on International Commercial Arbitration* (6th. ed., Oxford University Press, Oxford, 2015). At 1.38; C. Schmitthoff, *Schmitthof's Export Trade. The Law and Practice of International Trade* (9th. ed, Steven & Sons and Sweet & Maxwell, 1990). At VII.

[58] G. Cordero-Moss, *Lectures On International Commercial Law*, *Publication Series of the Institute of Private Law, University of Oslo*, No. 162 (2003). At 9.

[59] The United Nations Convention on Contracts for the International Sale of Goods. Article 1. April 11, 1980.

> (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention."[60]

The CISG adopts a criterion acknowledged as the subjective criterion, since the parties involved are connected with or located in different jurisdictions.[61]

Article 1492 of the French Code of Civil Procedure defines what is international under French Law, and it provides the following:

> "An arbitration is international if it implicates interests of international trade."[62]

The Cour d'appel de Paris has explained the concept of implicating interests of international trade as follows:

> "The international nature of an arbitration must be determined according to the economic reality of the process during which it arises. In this respect, all that is required is that the economic transaction should entail a transfer of goods, services or funds across national boundaries, while the nationality of the parties, the law applicable to the contract or the arbitration, and the place of arbitration are irrelevant."[63]

Hence, the concept of international under French Law comprehends implicating interests of international trade, which implies analyzing whether there is a transfer of goods, services or funds across national boundaries in the economic reality of a transaction. Such understanding of the international character of a transaction is the objective criterion, since it focuses on the subject matter of the transaction.[64]

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[60] *Ibid.*

[61] J. D. M. Lew, L. A. Mistelis & S. M. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003). At 59; N. Blackaby, C.Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on International Commercial Arbitration* (6th. ed., Oxford University Press, Oxford, 2015). At 1.26 and 1.29.

[62] French Code of Civil Procedure [FCCP]. Art. 1492. 1991 (France).

[63] Cour d'appel de Paris, March 14, 1989, *Murgue Seigle v Coflexip*, Rev Arb 355 (1991). This definition was confirmed by the Cour de cassation, May 21, 1997, *Renault v V 2000 (formerly Jaguar France)*, Rev Arb 537 (1997).

[64] J. D. M. Lew, L. A. Mistelis & S. M. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003). At 58; N. Blackaby, C.Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on International Commercial Arbitration* (6th. ed., Oxford University Press, Oxford, 2015). At 1.26.

However, Article 62 of the Colombian Statute on National and International Arbitration, Law 1563 of 2012, defines the following as when Colombian Law construes an arbitration as international:

> "a) the parties to an arbitration agreement have, at the moment of the execution of such agreement, their domiciles in different States; or
> b) the place of performance of a substantial part of the obligations or the place which has the strongest relationship with the matter in dispute is located outside the State in which the parties have their domicile; or
> c) the dispute submitted to arbitral decision affects the interests of international trade."[65]

The United Nations Commission on International Trade Law ("**UNCITRAL**") Model Law on International Commercial Arbitration inspired Colombia in adopting a combined criterion. Such criterion comprises the subjective and the objective criterions.[66]

One could easily notice that Colombian Law comprehends both the French and the CISG notions of international. In that sense, a contract is international under Colombian Law in both of those circumstances, but also when: (i) the place of performance of a substantial part of the obligations or (ii) the place that has the strongest relationship with the matter in dispute are outside the State in which the parties have their domicile.

This proves that the international character of a commercial transaction varies depending on the applicable law to it and the internationality criteria adopted by such law.

Another aspect that distinguishes International Commercial Law from other subjects of law is that it is not a collection of substantive rules. It directs the parties to choose the applicable law to their relationships and, when a dispute arises, its desired ultimate resort is

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[65] Statute on National and International Arbitration. Law 1563 of 2012. Art.62. July 12, 2012 (Colombia). (Free translation).
[66] J. D. M. Lew, L. A. Mistelis & S. M. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003). At 60; N. Blackaby, C.Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on International Commercial Arbitration* (6th. ed., Oxford University Press, Oxford, 2015). At 1.26, 1.33 and 1.34.

to assist the parties to achieve an enforceable decision, a court judgment or an arbitral award depending on the case.[67]

Hence, International Commercial Law is a map that helps in determining where to find the rules that regulate rights and obligations[68] in international trade, while preserving the autonomy of the parties, as they may choose the law governing their international transactions.[69]

All in all, International Commercial Law is the subject of the law that deals with the applicable rules that govern international commercial transactions, bearing in mind that: (i) commercial transactions are the ones that occur in the course of commerce and (ii) the international character of such transactions depends on the notion used to determine it.[70]

2. Subjects of international trade

The subjects of international trade are, among others, individuals, corporations, States[71] or State entities.[72] These are the actors that might be involved in international commercial transactions and hence participate in the frame of International Commercial Law.

3. Sources of International Commercial Law

There are many classifications of the sources of International Commercial Law. Some of them are really complex while some others are quite specific. In particular, Cordero-Moss'

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[67] G. Cordero-Moss, *Lectures On International Commercial Law*, *Publication Series of the Institute of Private Law, University of Oslo*, No. 162 (2003). At 12.
[68] *Ibid*. At 13.
[69] *Ibid*. At 17.
[70] *Ibid*. At 12; M. Rodríguez Fernandez, *Introducción al Derecho Comercial Internacional* (Universidad Externado de Colombia, Bogota, 2009). At 149.
[71] N. Blackaby, C.Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on International Commercial Arbitration* (6th. ed., Oxford University Press, Oxford, 2015). At 1.01.
[72] *Ibid*. At 1.22.

classification is very concrete and will serve as point of reference for the purposes of this work.

Cordero-Moss divides the main sources of International Commercial Law into four categories: (i) international contracts (**3.1**); (ii) State laws regulating international transactions (**3.2**); (iii) international conventions (**3.3**); and (iv) trans-national sources (**3.4**), which include *lex mercatoria* (**3.5**).

One has to stress that these are just a few of the authoritative sources of law within International Commercial Law and cannot be considered as an exhaustive regulation of the sources of International Commercial Law.[73]

Furthermore, the sources of International Commercial Law are not a hierarchic reference to the applicable law, such as the one enshrined in Article 38 of the Statute of the International Court of Justice for Public International Law disputes, where the sources are: (i) international conventions; (ii) international custom; and (iii) general principles of law; along with: (i) judicial decisions; and (ii) teachings of highly qualified publicists, "*as subsidiary means for the determination of rules of law.*"[74]

In that sense, the sources of International Commercial Law are like a puzzle that must be assembled in order to find the applicable law. One must look to the contract that enshrines the choice of the parties, conflict of laws,[75] international mandatory rules (*lois de police*),[76]

[73] G. Cordero-Moss, *Lectures On International Commercial Law*, *Publication Series of the Institute of Private Law, University of Oslo*, No. 162 (2003). At 21.
[74] Statute of the International Court of Justice. 18 April 1946. Article 38(1)(d).
[75] "Conflict of laws. Or, private international law. A part of the municipal law of each state which provides rules for deciding cases involving foreign factual elements, for example, a contract made abroad." I. Brownlie, *Principles of Public International Law* (7th. ed., Oxford University Press, Oxford, 2008). At Glossary.

mandatory law,[77] international trade usages,[78] and general principles of law,[79] among others, in order to find the applicable law to a specific international commercial transaction.

3.1 International contracts

An international contract is an agreement that comprises legal obligations and has an international element (according to the notion of international under the applicable law).[80]

The parties to an international transaction, or the judge, shall at first revise the contract when differences arise,[81] as party autonomy is a guiding principle of International Commercial Law.[82]

The main difference between an international contract and a treaty is the fact that Public International Law, generally, governs the latter,[83] while one or more domestic legal

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[76] Are the rules that should be taken into account in order to refrain from contravening international public policy. P. Fouchard, E. Gaillard & B. Goldman, *Fouchard, Gaillard, Goldman On International Commercial Arbitration*. Ed. by E. Galliard & J. Savage (Kluwer Law International, The Hague/Boston/London, 1999). At 850.

[77] "Those rules that cannot be derogated from by way of contract." N. Blackaby, C.Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on International Commercial Arbitration* (6th. ed., Oxford University Press, Oxford, 2015). At 3.128

[78] Practices usually followed in a particular industry or business, as opposed to genuine rules of law. P. Fouchard, E. Gaillard & B. Goldman, *Fouchard, Gaillard, Goldman On International Commercial Arbitration*. Ed. by E. Galliard & J. Savage (Kluwer Law International, The Hague/Boston/London, 1999). At 806 and 807.

[79] "The general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of States." I. Brownlie, *Principles of Public International Law* (7th. ed., Oxford University Press, Oxford, 2008). At 17; "they deal with such topics as the principle of good faith in treaty relations, abuse of rights, and the concept of State and individual responsibility." N. Blackaby, C.Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on International Commercial Arbitration* (6th. ed., Oxford University Press, Oxford, 2015). At 3.135.

[80] A. Aljure Salame, *El Contrato Internacional* (1st. ed., Legis, Bogota, 2011). At 9.

[81] G. Cordero-Moss, *Lectures On International Commercial Law*, *Publication Series of the Institute of Private Law, University of Oslo*, No. 162 (2003). At 21; M. Rodríguez Fernandez, *Introducción al Derecho Comercial Internacional* (Universidad Externado de Colombia, Bogota, 2009). At 105.

[82] See UNIDROIT Principles 2010. Article 1.1: "(*Freedom of contract)* The parties are free to enter into a contract and to determine its content."; A. F. Lowenfeld, *International Litigation and the quest for Reasonableness* (1st. ed., Oxford University Press, Oxford, 1996). At 208 and 209; R. J. Weintraub, *Functional Developments in Choice of Law for Contracts*, 187 *Collected Courses of the Hague Academy of International Law* (1984). http://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*-ej.9789024731800.239_305. At 239 and 271.

systems, or even trans-national law, could govern the former,[84] depending on the choice of the parties or the conflict of laws rules.

Dispute settlement is also decisive in differentiating between an international contract and a treaty. Generally speaking, disputes that arise from an international transaction are subject to international arbitration[85] or rarely to domestic courts, while disputes that arise from a treaty must be referred to courts of Public International Law.[86]

The principle *par in parem non habet iurisdictionem*, a development of the right of sovereign equality of States,[87] preaches that between equals, one cannot have jurisdiction over the other.[88] Thus, no domestic judge of States party to a treaty can have jurisdiction over a dispute concerning the treaty. This is the reason why courts of public international character must resolve Public International Law disputes.[89]

This principle does not apply to international transactions and parties to international contracts. Parties to international transactions, most of the time, voluntarily agree to empower impartial arbitrators to resolve their disputes in connection with international contracts.

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[83] A. Aljure Salame, *El Contrato Internacional* (1st. ed., Legis, Bogota, 2011). At 11.
[84] M. Rodríguez Fernandez, *Introducción al Derecho Comercial Internacional* (Universidad Externado de Colombia, Bogota, 2009). At 108.
[85] *Ibid*.
[86] A. Aljure Salame, *El Contrato Internacional* (1st. ed., Legis, Bogota, 2011). At 28.
[87] "The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality. If international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states (and to organizations of states) defined by law." I. Brownlie, *Principles of Public International Law* (7th. ed., Oxford University Press, Oxford, 2008). At 289.
[88] A. Aljure Salame, *El Contrato Internacional* (1st. ed., Legis, Bogota, 2011). At 28.
[89] *Ibid*.

In short, international contracts and international conventions differ, mainly: (i) in their applicable law; (ii) the subjects that enter into them; and (iii) the bodies in charge of dispute resolution in each scenario.

In conclusion, international commercial contracts are highly relevant to International Commercial Law as they are the means by which the reigning principle of party autonomy is embodied. Accordingly, subjects of international trade can choose in an international contract the applicable law and the mechanisms for dispute resolution to an international transaction.

3.2 State laws regulating international transactions

State laws regulating international transactions are the statutes that some States specifically issue for regulating international transactions in their domestic legislation.[90]

For instance, China's Foreign Economic Contract Law of 1985 and Colombia's Law 518 of 1999, which adopted the CISG in the internal legal order of Colombia, are State laws regulating international transactions.

3.3 International conventions

International conventions are agreements or treaties under the definition of Article 2.1(a) of the Vienna Convention on the Law of Treaties ("**VCLT**"),[91] entered into by States and cover a specific aspect of Commercial Law.[92]

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[90] G. Cordero-Moss, *Lectures On International Commercial Law*, *Publication Series of the Institute of Private Law, University of Oslo*, No. 162 (2003). At 26.

[91] Vienna Convention on the Law of Treaties. Article 2.1(a). May 23, 1969: ""treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

One might claim, from a personal view, that the principal conventions on this subject are the CISG and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"). It is important to note that the course of international trade highly uses international contracts for the sale of goods and that one of the goals of International Commercial Law is to ensure that an enforceable decision is obtained when a dispute arises (as explained above).

On the one hand, the UNCITRAL promoted the CISG, a treaty in the light of the VCLT, to which 84 States are parties.[93] The CISG aims to regulate the formation of contracts of sale of goods.

The origins of the CISG come from the General Assembly of the United Nations, which in its resolution 33/93 of 16 December 1978, adopted on the basis of Chapter II of the Report of the UNCITRAL on the work of its 11th session in 1978, convened the Conference on Contracts for the International Sale of Goods. Afterwards, Vienna held the United Nations Conference on Contracts for the International Sale of Goods, from 10 March to 10 April 1980.

The CISG opened for signature at the concluding meeting of the Conference on Contracts for the International Sale of Goods on 11 April 1980, and remained open for signature at the United Nations Headquarters in New York until 30 September 1981.

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[92] G. Cordero-Moss, *Lectures On International Commercial Law*, *Publication Series of the Institute of Private Law, University of Oslo*, No. 162 (2003). At 23.
[93] Status of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

On the other hand, the New York Convention is also a treaty, under the scope of the VCLT, which requires courts of contracting States to give effect to private agreements to arbitrate and to recognize and enforce foreign arbitral awards issued in other contracting States.

A United Nations diplomatic conference adopted the New York Convention on 10 June 1958, and it entered into force on 7 June 1959. It was sponsored by the UNCITRAL and 156 States are parties to it.[94] This affirms that the New York Convention is the most important treaty on enforcement of foreign arbitral awards and is a crucial element for international arbitration.

The Resolution 2205 (XXI) of 17 December 1966 of the General Assembly of the United Nations established the UNCITRAL, the international forum in charge of the CISG and the New York Convention. Such resolution states that the main purpose of the UNCITRAL is "*the promotion of the progressive harmonization and unification of the law of international trade.*"[95]

Unification of the law is "*the process by which conflicting rules of two or more systems of national laws applicable to the same international legal transaction are replaced by a single rule.*"[96] International conventions such as the CISG and the New York Convention[97] are examples of unification instruments.

Harmonization of the law is the procedure that modifies the legislation of several States for having convergent legislations guided by the same or similar principles, but without

[94] Status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention"), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html
[95] U.N. GAOR. 2205 (XXI). Session No, 21St. Doc. A/6396. Supp No, 17 (December 17, 1966).
[96] U.N. GAOR. Session No.20Th. 872 mtg. At, 5 Doc. A/C.6/L.572 (November 9, 1952).
[97] Colombia is a party to both of those treaties.

accomplishing complete unification. Such modification has the purpose of creating a similar solution to a particular matter of international trade in different domestic legal orders.[98]

Model laws and legislative guides are examples of harmonization instruments. The 1985 UNCITRAL Model Law on International Commercial Arbitration and the 1997 UNCITRAL Model Law on Cross-Border Insolvency are among the most relevant elements of harmonization.

For instance, UNCITRAL Model laws have highly influenced Colombian domestic legislation. Particularly, the UNCITRAL Model Law on International Commercial Arbitration inspired the Third Section of Law 1563 of 2012, the Colombian Statute on National and International Arbitration, and the UNCITRAL Model Law on Cross-Border Insolvency inspired the Law 1116 of 2006,[99] which "*establishes the Regime of Corporate Insolvency in the Republic of Colombia.*"[100]

In conclusion, international conventions unify International Commercial Law, and international forums are the main promoters of such treaties. Certainly, the UNCITRAL is one of the most important of such forums.

[98] M. Rodríguez Fernandez, *Introducción al Derecho Comercial Internacional* (Universidad Externado de Colombia, Bogota, 2009). At 229.
[99] R. E. Wilches Durán, *a Insolvencia Transfronteriza en el Derecho ColombianoP*, in *Revista de Derecho, Universidad del Norte* (num. 32, 2009) At 162-198. P. 163 and 165.
[100] Law 1116 of 2006. 27 December 2006 (Colombia). (Free translation).

3.4 Trans-national sources

Fouchard, Gaillard and Goldman describe trans-national sources as all rules that do not originate exclusively from a particular national legal system.[101]

Such sources are the various non-authoritative compilations, codes, standard agreements, model laws and similar instruments produced with the purpose of regulating specific international transactions or international contracts.[102] One could regard these instruments as soft law,[103] since they are quasi-legal instruments that do not always have a binding force, or whose force is somewhat "weaker" than the binding force of traditional law or what is often referred to as hard law.[104] Consequently, trans-national sources, at first, might not necessarily have a binding character.

Private associations or international organizations generally produce trans-national sources of International Commercial Law. The International Institute for the Unification of Private Law ("**UNIDROIT**") and the already mentioned UNCITRAL are examples of such bodies that produce trans-national sources of International Commercial Law.[105]

Additionally, acknowledged principles and rules are also part of the trans-national sources of International Commercial Law.[106] This work will contend, after carrying out an analysis on the good faith principle in Trans-national Commercial Law, that trans-national sources

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[101] P. Fouchard, E. Gaillard & B. Goldman, *Fouchard, Gaillard, Goldman On International Commercial Arbitration*. Ed. by E. Galliard & J. Savage (Kluwer Law International, The Hague/Boston/London, 1999). At 806.
[102] G. Cordero-Moss, *Lectures On International Commercial Law*, *Publication Series of the Institute of Private Law, University of Oslo*, No. 162 (2003). At 23.
[103] *Ibid*.
[104] A. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law,* 48 *International and Comparative Law Quarterly* 4, P. 901 – 913 (1998). At 901.
[105] G. Cordero-Moss, *Lectures On International Commercial Law*, *ublication Series of the Institute of Private Law, University of Oslo*I, No. 162 (2003).. At 23.
[106] *Ibid*.

acknowledge the good faith principle as part of its cardinal principles (see Chapter III below).

Scholars are of the opinion that certain international conventions are part of trans-national sources if: (i) a plurality of States have ratified them so they do not represent some national feature of the law of a specific State; and (ii) they regulate international commercial transactions, thus, they are not conceived for domestic transactions.[107]

Consequently, trans-national sources comprise international conventions when such conventions are applicable as some sort of binding source, even when the law of a State not party to the conventions is governing an international transaction.[108]

This work supports Codero-Moss' contention that trans-national law suits better to regulate international transactions, compared to State law, mainly for three reasons: (i) States create laws mainly for regulating domestic transactions, even if they deal with commercial relationships; (ii) State laws are different from each other and therefore create confusion among subjects of international trade as to what rules actually govern their transactions; and (iii) State laws are rigid and slow in adapting with regard to new commercial practices or technologies.[109]

Bearing in mind all the aforementioned, one could say that the non-domestic elements that compose trans-national sources of International Commercial Law are: certain treaties, compilations, codes, standard agreements, model laws and general principles.

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[107] *Ibid*. At 25.
[108] *Ibid*.
[109] *Ibid*. At 24.

Consequently, one could contend that these are the authentic sources of International Commercial Law, as they are not directed by domestic influences and are created for, and in consideration of, international trade.

Chapter III of this work will study the good faith principle in Trans-national Commercial Law in order to understand it in the context of International Commercial Law.

3.5 *Lex mercatoria*

The common factor in *lex mercatoria* and trans-national sources of International Commercial Law is that both sources do not necessarily observe domestic legal systems.

Goldman defines *lex mercatoria* as "*a set of general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law.*"[110]

This source of International Commercial Law covers international trade usages and general principles that do not necessarily accord with domestic legal systems. International trade usages are the practices usually followed in a particular industry or business,[111] as opposed to genuine rules of law.[112]

Moreover, *lex mercatoria* encompasses rules that are common to several legal systems, as well as general principles of International Commercial Law. Said principles of International

[110] B. Goldman, *Contemporary Problems in International Commercial Arbitration*. Ed. by J. D. M. Lew (Martinus Nijhoff Publishers, Dordrecth, 1987). Pp. 113 – 125. At 116.
[111] P. Fouchard, E. Gaillard & B. Goldman, *Fouchard, Gaillard, Goldman On International Commercial Arbitration*. Ed. by E. Galliard & J. Savage (Kluwer Law International, The Hague/Boston/London, 1999). At 806.
[112] *Ibid*. At 807.

Commercial Law could be drawn from all legal systems, international arbitral case law[113] and international conventions that evidence widespread acceptance of the international community on a rule of a specific matter.[114]

It is important to acknowledge the fundamental role that Comparative Law plays in identifying the general principles of International Commercial Law that are part of *lex mercatoria*.[115] Likewise, instruments of representative international organizations can also lead to recognize the general principles that may govern international transactions.

For example, the UNIDROIT Principles of International Commercial Contracts (the "**UNIDROIT Principles**") (the subject matter in Section 1 of Chapter III, below) are considered as an influential means to determine general principles of International Commercial Law,[116] and could apply to an international transaction under four circumstances related to *lex mercatoria*: (i) the parties have agreed that general principles of law will govern their contract; (ii) the parties have agreed that *lex mercatoria* or the like will govern their contract; (iii) the parties have not chosen any law to govern their contract; or (iv) they can be used to interpret or supplement international uniform law instruments.[117]

With respect to international conventions, one has to say that such instruments of *lex mercatoria* are relevant as they reflect the agreement of a number of States on a particular

[113] International arbitration is crucial for *lex mercatoria* as it helps determining the scope of said source of International Commercial Law. *Ibid.* At 812 and 817.
[114] *Ibid*. At 807.
[115] *Ibid*. At 816.
[116] *Ibid*. At 817.
[117] UNIDROIT Principles 2010. Preamble.

issue connected to international transactions. For instance, the CISG could govern an international sale of goods that provides that *lex mercatoria* is its substantive law.[118]

One has to stress that party autonomy allows the parties to regulate their transactions under any of the rules that comprise *lex mercatoria*.[119] However, it is a fact that it is difficult to determine the exact content of *lex mercatoria*, regardless of whether one advocates for it or against it as a source of International Commercial Law.[120]

To that end, one should analyze the good faith principle in the frame of trans-national sources and *lex mercatoria*, following Cordero-Moss' claim that these are the most relevant sources of International Commercial Law (of course, after international contracts, which embrace the parties' freedom of choice).

Some contend that *lex mercatoria* comprises the principle of good faith,[121] inasmuch as arbitral case law has avowed said principle as a general one.[122] Also, Fouchard, Gaillard and Goldman consider that this principle provides the basis for more specific rules in International Commercial Law.[123] Consequently, the following chapter will analyze these assertions.

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[118] P. Fouchard, E. Gaillard & B. Goldman, *Fouchard, Gaillard, Goldman On International Commercial Arbitration*. Ed. by E. Galliard & J. Savage (Kluwer Law International, The Hague/Boston/London, 1999). At 816.
[119] *Ibid*. At 807.
[120] *Ibid*. At 811.
[121] *Ibid*. At 807.
[122] October 26, 1979 Award by Messrs. Cremades, chairman, Ghestin and Steiner, arbitrators, in ICC Case No. 3131, Pabalk Ticaret Limited Sirketi v. Norsolor, 1983 REV. ARB. 525, 531.
[123] P. Fouchard, E. Gaillard & B. Goldman, *Fouchard, Gaillard, Goldman On International Commercial Arbitration*. Ed. by E. Galliard & J. Savage (Kluwer Law International, The Hague/Boston/London, 1999). At 820.

CHAPTER III – THE GOOD FAITH PRINCIPLE IN TRANS-NATIONAL COMMERCIAL LAW

Following the previous chapter, Trans-national Commercial Law is the Commercial Law that is not necessarily influenced by domestic legal orders, in the sense that it could even not observe them.

Accordingly, one should study and analyze the good faith principle in trans-national sources in order to understand its notion and scope in International Commercial Law. The latter lies in the point that trans-national sources are the most authentic sources of International Commercial Law (as contended in the previous chapter).

In order to do the aforementioned, this chapter will analyze the good faith principle under the UNIDROIT Principles (**1.**) and in arbitral case law(**2.**).

1. The UNIDROIT Principles of International Commercial Contracts

The UNIDROIT Principles is a document elaborated by the UNIDROIT, which intends to harmonize International Contract Law. The UNIDROIT published its first edition in 1994. Subsequently, it published in 2004 the second and enlarged edition, and in 2010 the third and last edition with new sections.

The importance of the UNIDROIT Principles for International Commercial Law derives from the fact that it is a work that involved "*the participation of a large number of eminent lawyers from all five continents of the world,*"[124] including "*practicing lawyers, judges, civil servants and academics from widely differing legal cultures and professional*

[124] UNIDROIT Principles 2010 with Commentaries. Foreword to the 1994 Edition.

backgrounds."[125] Furthermore, "*representatives of interested international organizations and arbitration centers or associations*" attended as observes to the working sessions for the elaboration of the 1994[126] and the 2010 editions.[127]

This means that the UNIDROIT Principles was the product of discussions held between lawyers of the most representative legal systems, including Civil Law, Common Law and the socialist systems.[128] Those experts tried to settle what might be a theory of International Contract Law, putting into consideration their expertise and their legal background in order to arrive at an agreement regarding the principles that govern international commercial contracts.

The UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts (the "**Group**") took into consideration the CISG and the Principles of European Contract Law ("**PECL**"),[129] among other instruments,[130] for elaborating the UNIDROIT Principles. In that sense, one might regard the UNIDROIT Principles as a legal instrument that is the most up-to-date when it comes to Trans-national Commercial Law.

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[125] *Ibid*.
[126] *Ibid*. Introduction to the 2004 Edition.
[127] *Ibid*. Foreword to the 2010 Edition.
[128] *Ibid*. Introduction to the 1994 Edition.
[129] The PECL embody a legal instrument carried out by European academics, namely the European Commission on Contract Law. These rules intend to suggest basic rules of Contract Law and aim to be the first part of what would be a European Civil Code. The European Parliament encouraged the elaboration of the PECL, namely in resolutions on the codification of Private Law issued in 1989 and 1994.
The Commission on European Contract Law completed Parts I and II of the PECL on November 1998, and subsequently, Part III on 2002. To date, the Study Group on a European Civil Code, founded in 2005, is continuing the work of the Commission on European Contract Law.
The CISG highly inspired the PECL, in the same fashion as it inspired the UNIDROIT Principles. The PECL, as the UNIDROIT Principles, are a private codification which its main goal is to compile uniform legal principles for reference within the European Union Law, and also promote the development of national legal systems of the European Union.
[130] The INCOTERMS, the UNCITRAL Legal Guide on Electronic Funds Transfer (1986), the UNCITRAL Model Law on International Credit Transfers (1992), the UNCITRAL Legal Guides on Drawing Up International Contracts for the Construction of Industrial Works (1988) and on International Countertrade Transactions (1993), the Convention on International Guarantee Letters (1995) and the draft Model Statutory Provisions on Legal Aspects of Electronic Data Interchange (EDI).

The UNIDROIT Principles have various purposes and uses for International Commercial Law. The Preamble states that they: (1) set forth general rules for international commercial contracts; (2) are applicable when the parties have agreed that their contract will be governed by them; (3) may be applicable as a reference when the parties have agreed that their contract will be governed by *lex mercatoria*, general principles or alike; (4) may be applicable when the parties have not chosen the applicable law to govern the contract; (5) may be used as a tool of interpretation for supplementing international uniform law instruments and domestic law; and (6) are intended to serve as a model for instruments of harmonization and unification of International Commercial Law.[131]

Given this, one has to analyze the scope of the principle of good faith in the UNIDROIT Principles in order to embrace good faith in Trans-national Commercial Law. In this regards, this section of the chapter will analyze good faith in the *travaux préparatoires* of the UNIDROIT Principles (**1.1)** and in the latest version of the UNIDROIT Principles (**1.2),** in order to fully embrace the good faith principle under the UNIDROIT Principles.

1.1 The good faith principle in the preparatory works (*travaux préparatoires*) of the UNIDROIT Principles of International Commercial Contracts

This section will focus on the Group's discussions of the good faith principle. Undoubtedly, the Group had to establish good faith as one of the main tenets of the UNIDROIT Principles, although that was not an easy task since the good faith principle is not a global notion and not all legal systems understand this principle in a unique and consistent manner (as stated in Chapter I).

[131] UNIDROIT Principles 2010. Preamble.

Notably, the problem with this task was in deciding whether the UNIDROIT Principles would advocate for an international, a trans-national or a global insight of the good faith principle, as seen in the discussions held between 1991 and 1994, which this section will analyze.

On account of the latter, the following subsections will analyze the discussions of the article on good faith (**1.1.1)** and the discussions of the comments to the article on good faith (**1.1.2**).

1.1.1 Discussions of the article on good faith

The main concerns of the Group with regard to establishing good faith in the UNIDROIT Principles were: (i) whether the UNIDROIT Principles should adopt a principle that is rather unfamiliar in some jurisdictions; and (ii) the qualification that the UNIDROIT Principles should provide to good faith and fair dealing, since they referred to good faith and fair dealing in international trade at first.[132]

In that order, the main issues that will be analyzed in this subsection are: the concept of good faith (**1.1.1.1**), the character of good faith (**1.1.1.2**), the obligation to act in good faith at the negotiation stage (**1.1.1.3**) and the mandatory character of the good faith principle (**1.1.1.4**).

[132] Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992. At 62.

After carrying out that analysis, this subsection will formulate conclusions on the core issues that the Group settled in the discussions on the content of the article on good faith (**1.1.1.5**).

1.1.1.1 The concept of good faith

One has to note that the members of the Group had to try to divest themselves as much as possible of their traditions, in order to support uniformity on the notion of good faith that the UNIDROIT Principles sought to establish.[133] The fact that the members of the Group acted in an advisory capacity and not as legal representatives of their respective governments is evidence of the latter.[134]

When discussing the concept of good faith, the Group was clear on the point that good faith and usages are certainly different, due to the fact that usages depend on the trade concerned and on the region.[135] Nevertheless, one could see that they are similar in a certain way, since trade usages are capable of filling the gaps in a contract and interpreting the contract's terms[136] (which this work has highlighted as some of the functions of good faith in the Civil Law).

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[133] *Ibid*. At 74.
[134] G. Baron, *Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria?*, 15/2 *Arbitration International* 115 (1999). At 123.
[135] Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992. At 64; bearing in mind that international trade usages are the practices usually followed in a particular industry or business. P. Fouchard, E. Gaillard & B. Goldman, *Fouchard, Gaillard, Goldman On International Commercial Arbitration*. Ed. by E. Galliard & J. Savage (Kluwer Law International, The Hague/Boston/London, 1999). At 806.
[136] S. Bainbridge, *Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Convention*, 24 *Virginia Jorunal of International Law*, 619 – 665 (1984). At 619.

Notably, the CISG establishes a double function for trade usages:[137] an interpretative function that provides that trade usages are a factor for interpreting the will of the parties,[138] and a normative one that prescribes that usages also oblige the parties.[139]

However, some members of the Group stated that good faith was an ethical standard in a broad sense.[140] In that order, one could argue that although good faith and trade usages could have similar functions, the difference between both of those concepts is that good faith attends to ethics and fairness,[141] while usages attend to the economic reality of international trade.

Regarding interpretation in good faith, the problem that the Group found was that some countries have well-established notions of either good faith or fair dealing, while there are others that do not have such notions[142] (as demonstrated in Chapter I).

In the international field, Article 7(1) of the CISG establishes:

> "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."[143]

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[137] C. Pamboukis, *The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods*, 25 *Journal of Law and Commerce*, 107 – 131 (2005). At 108.
[138] The United Nations Convention on Contracts for the International Sale of Goods. Article 8(3). April11, 1980.
[139] *Ibid*. Article 9.
[140] Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992. At 66.
[141] "The UNIDROIT Principles attempt to ensure fairness in international commercial relations by expressly stating the general duty of the parties to act in accordance with good faith and fair dealing". UNIDROIT Principles 2010 with Commentaries. Introduction to the 1994 Edition.
[142] Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992. At 66.
[143] The United Nations Convention on Contracts for the International Sale of Goods. Article 7(1). April 11, 1980.

One could erroneously say, from the literal sense of this Article, that good faith is a principle that applies only to interpreting the provisions of the CISG, not to the contracts that it governs nor the conduct of the parties.[144]

Some other members of the Group doubted that common lawyers would really enter into an entirely unknown and unexplored field, namely, the good faith principle in Contract Law. However, the only legal instrument that had tried to define good faith, with questionable success, was the UCC.[145]

E. Allan Farnsworth ascertained that good faith, under the scope of the UCC, related to the performance and the exercise of remedies in non-performance. Withholding performance and suspending performance were examples of such remedies.[146]

In the terms of the UCC, withholding performance can occur when "*the manner of payment fails because of domestic or foreign or governmental regulation,*"[147] and "*the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent.*"[148]

Whereas, suspending performance can occur:

> "When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return."[149]

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[144] This work will further support and explain this claim in Sections 1.2 and 2, Chapter III.
[145] Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992. At 66 and 67.
[146] *Ibid*. At 67.
[147] Uniform Commercial Code [UCC]. § 2-614(2). 1952 (U.S.A.).
[148] *Ibid.*
[149] *Ibid*. § 2-609(1)

Both of those remedies can find its simile in the *exceptio non adimpleti contractus* of the Civil Law, which is applicable to bilateral contracts.[150] This exception prevents one party from demanding compliance from the other party, while the first party has not complied with its obligations under a contract.[151]

Following Farnsworth's statement, one could assert that the UCC does not impose to act in good faith during negotiations.[152] The Group did not take this into account as the commentaries to Article 1.7 of the UNIDROIT Principles established that the parties shall negotiate in good faith.[153]

Moreover, Farnsworth clarified that performance was similar in a certain sense to enforcement under the UCC's notion of good faith, and that from that point, it would not be a problem to use both in the text of the UNIDROIT Principles.[154] In that reasoning, Farnsworth suggested that these terms be included in the English version of the UNIDROIT Principles.[155]

Nonetheless, performance is different to enforcement in the Civil Law. Performance occurs when the debtor carries out the content of an obligation in favor of the creditor,[156] while enforcement is the power that the creditor has to oblige the debtor to comply with a certain

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[150] See Article 1496 of the Colombian Civil Code.
[151] G. Ospina Fernández & E. Ospina Fernández, *Teoría general del contrato y del negocio jurídico* (6th. ed., Temis, Bogota, 2000). At 60; J. Cubides Camacho, *Obligaciones* (5th. ed., Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas – Colección Profesores, Bogota, 2005). At 393; see Article 1609 of the Colombian Civil Code.
[152] Which Section 2, Chapter I of this work evidenced.
[153] UNIDROIT Principles 2010 with Commentaries. Commentaries on Article 1.7. At 19 (1).
[154] Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992. At 68 and 69.
[155] *Ibid*.
[156] J. Cubides Camacho, *Obligaciones* (5th. ed., Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas – Colección Profesores, Bogota, 2005). At 43. Which German Law recognizes as *schuld*.

obligation,[157] even though the latter does not want to voluntarily comply with it.[158] Enforcement goes as far as the creditor can ask a judge to force the debtor to comply with the obligation.[159]

In that sense, one might argue that the UCC's notion of good faith does not differentiate between carrying out obligations and coercing their compliance. Nevertheless, the Group decided not to make a specific reference to performance or to enforcement, since the contents of Article 1.7 of the UNIDROIT Principles only establishes that "*each party must act in accordance with good faith and fair dealing.*"[160]

According to the foregoing, one might contend that the Group reaffirmed that the observance of good faith did not relate to a specific contractual stage, since it did not follow Farnsworth's proposition. In that order, the good faith principle conceived in the UNIDROIT Principles fully governs an international commercial relationship.[161]

Farnsworth stated that fair dealing was comparable to good faith in the United States. Therefore, he suggested including both terms in the English version of the UNIDROIT Principles.[162] M. J. Bonell agreed with the latter, since the Common Law's reference to

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[157] *Ibid*. At 9.
[158] *Ibid*. At 43. Which German Law recognizes as *haftung*. See Articles 2488 and 2492 of the Colombian Civil Code.
[159] *Ibid*. At 44 and 311.
[160] UNIDROIT Principles 2010. Article 1.7(1).
[161] This contention supports why under the UNIDROIT Principles, the parties should observe good faith even in the negotiation stage.
[162] Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992. At 68 and 69.

good faith and fair dealing is comparable to the objective and subjective notions of good faith in Continental Europe.[163]

On the one hand, good faith in American Law refers to a standard of behavior that comprises acting honestly and watching the reasonable commercial standards of fair dealing.[164] Meanwhile, one could say that fair dealing pertains to adhering to the right standards in commercial traffic. In that order, one could see that good faith comprises fair dealing. Thus, one could argue that fair dealing is a species of the genus good faith.

On the other hand, the objective notion of the good faith principle in the Civil Law binds an individual to not only comply with the literally agreed-on obligation, but also to what equity dictates.[165] Meanwhile, the subjective notion of good faith is an individual's right disposition in the fulfillment of the obligations that arise from an agreement.[166]

One might say that Bonell made his contention based on two points, the first of which is the fact that one could say that the subjective notion of good faith in the Civil Law is a standard of behavior, and good faith in American Law is indeed a standard of behavior. The second is that the objective notion of good faith depends on an objective criterion as fair dealing in American Law. The objective criterion in the Civil Law is what is inherent to an obligation's nature by equity, but in American Law the objective criterion is what is right and fair in the commercial traffic.

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[163] *Ibid*. At 69. Section 1, Chapter I of this work already analyzed the objective and subjective notions of the good faith principle in the Civil Law.
[164] Which, Section 2, Chapter I of this work evidenced; Uniform Commercial Code [UCC]. § 1-201(20). 1952 (U.S.A.).
[165] J. Cubides Camacho, *Obligaciones* (5th. ed., Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas – Colección Profesores, Bogotá, 2005). At 252; see Chapter I, Section 1 of this work.
[166] *Ibid*; see Chapter I, Section 1 of this work.

According to the abovementioned, one can consider Bonell's argument valid, even though the Civil Law's objective notion of good faith is not the same as fair dealing in American Law, and good faith as a standard of behavior in the UCC does not have the same implications as the subjective notion of good faith in the Civil Law.

Perhaps what Bonell intended with his motion was that the UNIDROIT Principles would adopt a notion of the good faith principle that does not conflict with the separate conceptions of such principle in the Common Law and the Civil Law.

The Group found, in the course of discussions, that what they were intending by using the concept of good faith and fair dealing was resorting to the recent tradition in Commercial Law in the United States. It was a reference that allowed systems that were currently working through these concepts to influence international trade.[167]

However, one can sustain that the Group was resorting to the American tradition for ease of reference in the wording of the article, not to wholly follow the American concept of good faith. This takes into account the matters analyzed in the present section at this point, which so far demonstrate that the notion of the good faith principle that the Group was shaping would also pertain to features of such principle in the Civil Law.

After the Group consented to use this American reference, the Group agreed that formation and substantive validity of the contract should come under good faith.[168] Consequently, the

[167] Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992. At 75.
[168] *Ibid*. At 70.

Group voted on the question of whether good faith should cover the parties' interpretation and eight members of the Group concurred. Therefore, the Group agreed on this matter.

Moreover, the Group decided that the comments on the corresponding article should also impose to arbitrators and courts to interpret contracts in good faith, as the parties must carry out interpretation under good faith.[169] Hence, the good faith principle as a tool of interpretation binds, both the party identifying its obligations and rights, and the party decision maker when enforcing and declaring these obligations and rights.[170]

After analyzing the discussions of the Group on the concept of good faith, one can claim that the principle of good faith in the UNIDROIT Principles would pertain to the American notion of good faith, since it is evidence of a system developing this concept, but would give it some of the features of the good faith principle in the Civil Law. Most notably, that the principle of good faith attends to ethics and fairness, which it is applicable to all the stages of an international commercial relationship (even to negotiations), and that it is an interpretation guidance for the parties and judges in identifying the rights and obligations of an international commercial contract.

Thus, the UNIDROIT Principles would adopt a mixed notion of good faith, which would contain elements of the Civil Law and the Common Law, notably, the wording of the latter, but mostly the features of the former.

[169] *Ibid*. At 71.
[170] *Ibid*. At 66.

1.1.1.2 The character of good faith

The UNIDROIT Principles had to consider the character of the good faith principle in a different manner from that commonly used within the different jurisdictions, since the UNIDROIT Principles would apply to international commercial contracts.[171] The Group was conscious of the latter as its members agreed that the UNIDROIT Principles should assign a higher qualification standard to good faith, specifically an international standard.[172]

The Group adopted the standard of "*international trade,*"[173] but there were different positions on the matter. Some members of the Group maintained that good faith and fair dealing in international trade is what is common and well accepted within a particular area or region, and thus is binding in such area or region. On the contrary, others contended that the UNIDROIT Principles should embrace international trade on a more global basis.[174]

For the Group, it was very important to make clear that the UNIDROIT Principles do not concern about national standards of fair dealing and good faith; quite the opposite, the UNIDROIT Principles had to impose some kind of international standards on the matter.[175] For this reason, some members of the Group suggested that it must be firmly indicated that the standards on good faith in the UNIDROIT Principles were universally supported standards.[176]

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[171] UNIDROIT Principles 2010 with Commentaries. Preamble, Introduction to the 1994 Edition.
[172] Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992. At 62.
[173] UNIDROIT Principles 2010. Article 1.7(1).
[174] Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992. At 63.
[175] *Ibid*. At 66.
[176] *Ibid*.

D. Tallon considered that the words "international trade" did not add much to the provision, since the first article of the UNIDROIT Principles said that the UNIDROIT Principles applied to international commercial contracts.[177] However, some other members of the Group contended that good faith in international trade did not have to be identical to good faith in domestic trade,[178] and in that sense, the addition of the words "international trade" would help to clarify that point.

In this regard, Bonell mentioned that the UNIDROIT Principles should take two aspects into account in order to embrace the concept of good faith and fair dealing in international trade: (i) international refers to standards that one can consider to reflect an international feeling; and (ii) trade is not a homogeneous framework, but it is divided into so many trade sectors besides the geographical areas.[179]

Article 7(1) of the CISG previously adopted the wording "*good faith in international trade.*"[180] The CISG's internationality criterion is based on the circumstance that the places of business of the parties are located in different States.[181] Thus, one might contend, following Bonell's statement, that the CISG's notion of good faith depends on the specific business industry (e.g., the automotive industry, the home appliance industry, the clothing industry, etc.) and the specific regions or areas that concern a sale of goods between two parties that have their places of business in different States.

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[177] *Ibid*. At 75; later, The UNIDROIT Principles adopted that statement in its Preamble. UNIDROIT Principles 2010 with Commentaries. Preamble.
[178] Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992. At 66
[179] *Ibid*. At 77.
[180] The United Nations Convention on Contracts for the International Sale of Goods. Article 7(1). April 11, 1980.
[181] *Ibid.* Article 1(1).

For example, the notion of the good faith principle applicable to a sale of automotive goods between parties that have their places of business in Colombia and Mexico could be different to the notion of the same principle applicable to a sale of clothing goods between parties that have their places of business within the European Union.

In that order, one can argue that the notion of good faith in international trade that the UNIDROIT Principles were to enshrine was the embracement of good faith in the light of an international criteria that covers a transaction in a specific business industry. However, the internationality criterion would depend on the governing law of the commercial transaction and does not necessarily have to be that the parties have their places of business in different States.

Accordingly, for finding the applicable notion of the good faith principle applicable to an international transaction, under the UNIDROIT Principles, one shall bear in mind: (i) the internationality of the commercial relationship (depending on the applicable law); (ii) the area(s) or region(s) in which the transaction (all of its stages) takes place;[182] and (iii) the specific trade concerned.

Nevertheless, one could say that an issue that arises from that point is that the UNIDROIT Principles do not provide an internationality criterion, as the CISG does.[183]

The Group agreed to leave the words “international trade” in the notion of good faith and fair dealing. The Group approved this motion with seven votes.[184]

[182] Negotiation, performance and enforcement.
[183] The United Nations Convention on Contracts for the International Sale of Goods. Article 1(1). April 11, 1980.

One can contend that the UNIDROIT Principles would give to the good faith principle a transnational character, since good faith under its scope does not necessarily have to attend to its conceptions in domestic legal orders. Furthermore, the notion of good faith governing an international commercial relationship could not even have to resort to domestic orders.

A.S. Komarov proposed to include a reference in which the UNIDROIT Principles understand good faith on internationally supported or widely recognized standards. However, the Group did not accept said proposal.[185]

The rejection of Komarov's proposal supports why one could assert that the UNIDROIT Principles would give a trans-national character to good faith, since the article on good faith would provide guidelines for finding the notion of good faith applicable to an international commercial transaction, rather than imposing a unique, concrete and global concept of good faith, which would give an international character to the good faith principle.

1.1.1.3 The obligation to act in good faith at the negotiation stage

Some members of the Group were devoted to embrace good faith as a principle that governed all the stages and all those persons involved in an international transaction.[186] Thus, the Group discussed whether it was strictly necessary to include the obligation to act in good faith during the negotiation stage. Some members of the Group were in favor of

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[184] Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992. At 77.
[185] Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992. At 77.
[186] *Ibid.* At 66.

stating it expressly in the contents of the article, while others did not think it was necessary.[187]

One could contend that it was not necessary because the Group was shaping the character of the good faith principle according to certain standards of the Civil Law, such as the rule that the parties shall negotiate in good faith.[188] Also, one could see that the UNIDROIT Principles were departing, on this issue, from American Law and the Common Law in general,[189] because the Group decided that the good faith principle is applicable to an international commercial relationship, not specifying to what precise stage of such relationship.

M. Furmston suggested simply saying, "*each party must act in accordance with good faith and fair dealing,*" and argued that it would be sufficient and much more elegant if the comments explained that the word "*party*" in this article included the negotiation process as well. Such formula was subject to voting and nine of the members of the Group voted in favor. Thereby, the Group adopted the formula proposed by Furmston.[190]

One could contend that such formula would be appropriate. It certainly was the final wording of the article.[191] Consequently, the comments to the article would clarify that the duty to act in good faith is applicable to the negotiation stage.[192]

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[187] *Ibid*. At 71.
[188] Which Section 1, Chapter I of this work evidenced; see an example in Article 863 of the Colombian Commercial Code.
[189] See Section 2, Chapter I of this work, which evidenced that in American Law and the Common Law in general, there is not a duty to negotiate in good faith.
[190] Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992. At 73.
[191] UNIDROIT Principles 2010. Article 1.7(1).
[192] UNIDROIT Principles 2010 with Commentaries. Commentaries on Article 1.7. At 19 (1).

The closing of this issue can lead one to reaffirm and further sustain that the concept of good faith under the UNIDROIT Principles would adopt the American wording, but would embrace, mostly, the features of the good faith principle in the Civil Law.

1.1.1.4 The mandatory character of the good faith principle

Not a single member of the Group was against the mandatory character that the UNIDROIT Principles should attribute to the principle of good faith. However, the issue was how to enshrine the mandatory character of the good faith principle in the text of the UNIDROIT Principles.

The Group considered including the PECL formula in paragraph 2 of the article on good faith, "*the parties may not exclude or limit this duty.*"[193] 14 members of the Group voted in favor of said formula, and therefore the Group decided to adopt the PECL formulation.[194]

From this point, one could assert that it is definite that the good faith principle has a mandatory character in International Commercial Law. One could regard such assertion as a categorical one, taking into account that the expert lawyers of the different legal systems that composed the Group agreed on it.

In conclusion, there was no doubt that the good faith principle has a mandatory character in Trans-national Commercial Law.

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[193] The Principles of European Contract Law 2002 (Parts I, II and III). http://www.transnational.deusto.es/emttl/documentos/Principles%20of%20European%20Contract%20Law.pdf. Article 1:201(2).

[194] Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992.. At 78.

1.1.1.5 Conclusions to the discussions of the article on good faith

All in all, one could highlight, from the discussions of the Group, that good faith is a principle that attends to ethics and fairness, and in that sense, it is a standard of behavior that the parties shall adopt, but that it is also an interpretation tool for ascertaining rights and obligations.

Consequently, the parties and/or the judge shall interpret an international contract under good faith, and in doing so, they might fill the gaps or interpret the terms of a contract. The latter is one of the main functions of the good faith principle in the Civil Law tradition.

Also, good faith is applicable to an international commercial relationship in whole, and in that order, the parties shall act in good faith during the negotiation stage as in all the stages of an international transaction. This is opposed to what happens in the Common Law tradition, where there is not a binding obligation to negotiate in good faith.

The UNIDROIT Principles would affirm that good faith has an international character, which one can actually consider as trans-national, since it does not necessarily have to attend to domestic standards. However, it is not a global and unique legal concept.

Furthermore, one cannot challenge the mandatory character of the good faith principle in International Commercial Law, which Article 1.7(2) of the UNIDROIT Principles then would evidence: "*the parties may not exclude or limit this duty.*"[195]

[195] UNIDROIT Principles 2010. Article 1.7(2).

In conclusion, the principle of good faith under the light of the UNIDROIT Principles would be a convergent principle, as sustained above, which adopts its wording from American Commercial Law, but mostly gets its features from the Civil Law.

1.1.2 Discussions of the comments to the article on good faith

The Group, while discussing the contents of the commentaries to the article on good faith, settled that good faith is one of the fundamental ideas underlying the UNIDROIT Principles.[196]

The findings of the Group (explained in the previous subsection) can explain why the principle of good faith would be one of the main roots of the UNIDROIT Principles. Not all the principles of Contract Law have a mandatory character, are an interpretation tool for ascertaining rights and obligations and are a standard of behavior that the parties shall comply with, even in the negotiation stage of an international transaction.

This could also support why the Group decided to make clear in the comments that the parties' behavior throughout the life of a contract must always conform to good faith and fair dealing, even in the absence of special provisions in the UNIDROIT Principles. Thus, the Group confirmed that the duty to act in good faith would comprise the negotiation

[196] UNIDROIT Principles for International Commercial Contracts (Draft text and comments). Rome, March 1994. At 15; Prep. by M. J. Bonell, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Revised Draft and Comment on Chapter 1 – General Provisions*. Rome, May 1992. At 15; Prep. by M. J. Bonell, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Draft and Comment on Chapter 1 – General Provisions*. Rome, December 1991. At 14.

process,[197] since the good faith principle would govern all the different stages in the life of a contract.[198]

Accordingly, there would be no doubt that the good faith principle is compulsory to the parties in the negotiation process, departing from American Law and the Common Law in general, and the contents of Article 1.7 of the UNIDROIT Principles would clarify that matter.

Furthermore, the Group decided that the comments would mention that the principle of good faith, under the scope of the UNIDROIT Principles, must not be applied according to the standards ordinarily adopted within the different national legal systems,[199] unless those domestic or national standards are generally accepted among the various legal systems. The Group stressed that one could resort to those standards when they are commonly accepted in a comparative level.[200] Precisely, this means that one must construe good faith and fair

[197] UNIDROIT Principles for International Commercial Contracts (Draft text and comments). Rome, March 1994. At 15; Prep. by M. J. Bonell, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Revised Draft and Comment on Chapter 1 – General Provisions*. Rome, May 1992. At 15; Prep. by M. J. Bonell, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Draft and Comment on Chapter 1 – General Provisions*. Rome, December 1991. At 14.

[198] Prep. by M. J. Bonell, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Draft and Comment on Chapter 1 – General Provisions*. Rome, December 1991. At 14.

[199] UNIDROIT Principles for International Commercial Contracts (Draft text and comments). Rome, March 1994. At 16; Prep. by M. J. Bonell, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Revised Draft and Comment on Chapter 1 – General Provisions*. Rome, May 1992. At 15; Prep. by M. J. Bonell, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Draft and Comment on Chapter 1 – General Provisions*. Rome, December 1991. At 13.

[200] UNIDROIT Principles for International Commercial Contracts (Draft text and comments). Rome, March 1994. At 16; Prep. by M. J. Bonell, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Revised Draft and Comment on Chapter 1 – General Provisions*. Rome, May 1992. At 15; Prep. by M. J. Bonell, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Draft and Comment on Chapter 1 – General Provisions*. Rome, December 1991. At 13.

dealing in the light of the special conditions of the international trade,[201] not following domestic standards at first.

Thereby, the Group decided to include in the commentaries its view of the international character of the good faith principle, which one might contend as actually having a trans-national character (following the arguments put forward in Sections 1.1.1.2 and 1.1.1.5 of this work).

Also, the Group decided that the comments had to clarify that the parties' duty to act in accordance with good faith and fair dealing is of such a fundamental nature that the parties may not contractually exclude it or limit it, as good faith is more than a general principle, it is a fundamental one.[202] Hence, the article and the commentaries would establish that the good faith principle has a mandatory character in the framework of the UNIDROIT Principles.[203]

The final version of the UNIDROIT Principles provided all the already mentioned points that the Group settled while discussing the contents of the commentaries to the article on good faith,[204] namely, the importance of the good faith principle for the UNIDROIT Principles, the scope of the international character of the good faith principle (which one

[201] UNIDROIT Principles for International Commercial Contracts (Draft text and comments). Rome, March 1994. At 16.
[202] UNIDROIT Principles for International Commercial Contracts (Draft text and comments). Rome, March 1994. At 17; Prep. by M. J. Bonell, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Revised Draft and Comment on Chapter 1 – General Provisions*. Rome, May 1992. At 18; Prep. by M. J. Bonell, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Draft and Comment on Chapter 1 – General Provisions*. Rome, December 1991. At 16.
[203] UNIDROIT Principles 2010. Article 1.7(2).
[204] See Section 1.2, Chapter III of this work.

can contend that actually is a trans-national character),[205] and the mandatory nature of good faith.

Nevertheless, one could criticize, from the discussions of the comments to the article on good faith, that the Group did not want to refer to differentiating between good faith and fair dealing, which, from a personal view, would have been important since the Group decided to use these American terms, as they resemble to the objective and subjective notions of good faith in the Civil Law. Therefore, one could say that this was a big omission, which otherwise would have served to clarify even more the notion of good faith in Trans-national Commercial Law.

1.2 The good faith principle in the UNIDROIT Principles of International Commercial Contracts

Article 1.7 of the UNIDROIT Principles is the cardinal rule enshrining good faith in the UNIDROIT Principles. This Article states:

> "(*Good faith and fair dealing*)
> (1) Each party must act in accordance with good faith and fair dealing in international trade.
> (2) The parties may not exclude or limit this duty."[206]

Three ideas are clear from the commentaries on the cited Article of the UNIDROIT Principles, which follow the points settled in the discussions (analyzed in the previous subsection): (i) good faith and fair dealing is a fundamental idea underlying the UNIDROIT Principles; (ii) one should apply good faith and fair dealing in the framework of the corresponding international trade; and (iii) the principle of good faith and fair dealing has a mandatory character.

[205] Following the reasoning of Sections 1.1.1.2 and 1.1.1.5, Chapter III of this work.
[206] UNIDROIT Principles 2010. Article 1.7.

First, the UNIDROIT Principles consider good faith as one of its fundamental ideas, since several articles of the UNIDROIT Principles develop the good faith principle.[207] The other provisions, besides Article 1.7 of the UNIDROIT Principles, that set forth and frame good faith in the UNIDROIT Principles are: Articles 1.8, 1.9(2), 2.1.4(2)(b), 2.1.15, 2.1.16, 2.1.18, 2.1.20, 2.2.4(2), 2.2.5(2), 2.2.7, 2.2.10, 3.1.4, 3.2.2, 3.2.5, 3.2.7, 4.1(2), 4.2(2), 4.6, 4.8, 5.1.1, 5.1.2, 5.1.3, 5.2.5, 5.3.3, 5.3.4, 6.1.3, 6.1.5, 6.1.6(2), 6.1.17(1), 6.2.3(3)(4), 7.1.2, 7.1.6, 7.1.7, 7.2.2(b)(c), 7.4.8, 7.4.13, 9.1.3, 9.1.4 and 9.1.10(1).[208]

Said provisions that deal with the good faith principle are in the following titles: (i) Chapter I – General Provisions (Articles 1.7, 1.8 and 1.9(2)); (ii) Chapter II – Formation and Authority of Agents – Section 1: Formation (Articles 2.1.4(2)(b), 2.1.15, 2.1.16, 2.1.18 and 2.1.20); (iii) Chapter II – Formation and Authority of Agents – Section 2: Authority of Agents (Articles 2.2.4(2), 2.2.5(2), 2.2.7 and 2.2.10); (iv) Chapter 3 – Validity – Section I: General Provisions (Article 3.1.4); (v) Chapter 3 – Validity – Section 2: Grounds for Avoidance (Articles 3.2.2, 3.2.5 and 3.2.7); (vi) Chapter 4 – Interpretation (Articles 4.1(2), 4.2(2), 4.6 and 4.8); (vii) Chapter 5 – Content and Third Party Rights – Section 1: Content (Articles 5.1.1, 5.1.2 and 5.1.3); (viii) Chapter 5 – Content and Third Party Rights – Section 2: Third Party Rights (Article 5.2.5); Chapter 5 – Content and Third Party Rights – Section 3: Conditions (Articles 5.3.3 and 5.3.4); (ix) Chapter 6 – Performance – Section 1: Performance in General (Articles 6.1.3, 6.1.5, 6.1.6(2) and 6.1.17(1)); (x) Chapter 6 – Performance – Section 2: Hardship (Article 6.2.3(3)(4)); (xi) Chapter 7 – Non-Performance – Section 1: Non-Performance in General (Articles 7.1.2, 7.1.6 and 7.1.7); (xii) Chapter 7 –

[207] UNIDROIT Principles 2010 with Commentaries. Commentaries on Article 1.7. At 19 (1).
[208] *Ibid*.

Non-Performance – Section 2: Right to Performance (Article 7.2.2(b)(c)); (xiii) Chapter 7 – Non-Performance – Section 4: Damages (Articles 7.4.8 and 7.4.13); and (xiv) Chapter 9 – Assignment of Rights, Transfer of Obligations, Assignment of Contracts – Section 1: Assignment of Rights (Articles 9.1.3, 9.1.4 and 9.1.10(1)).

Thus, one could claim that good faith permeates all the content of the UNIDROIT Principles in an express manner, as almost every section of every chapter of the UNIDROIT Principles addresses the good faith principle. The latter demonstrates how the principle of good faith and fair dealing is a quintessential concept in the contents of the UNIDROIT Principles, and can unquestionably lead one to also say that the good faith principle is "*one of the fundamental ideas underlying the Principles.*" [209]

The latter is contrary to what occurs in the CISG, in which one might understand that the good faith principle only applies to interpret its provisions.[210] Nevertheless, the Official Records of the United Nations Conference on Contracts for the International Sale of Goods affirm that although the CISG only expressly refers to good faith in Article 7(1), "*there are numerous rules in the Convention that reflect the good faith principle,*"[211] and arbitral case law has supported those rules in the light of the CISG (which Section 2 will analyze).

Second, one should understand good faith and fair dealing only in the context of international trade. In that sense, one shall not regard and/or apply the good faith principle in the frame of the UNIDROIT Principles according to the standards ordinarily adopted

[209] UNIDROIT Principles 2010 with Commentaries. Commentaries on Article 1.7. At 19 (1).
[210] Which Section 1.1.1.1, Chapter III of this work explained; The United Nations Convention on Contracts for the International Sale of Goods. Article 7(1). April 11, 1980.
[211] The United Nations Conference on Contracts for the International Sale of Goods, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee. Vienna, 10 March – 11 April 1980 (1981). At 18; UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2012). At 43 par. 9.

within different national legal systems (as this work explained above). One may take into account such domestic or national standards only to the extent that they are generally accepted among various legal systems,[212] as evidence of some sort of usage or custom of International Commercial Law, depending on the specific trade that is dealt with.

In that order, the UNIDROIT Principles embrace good faith in a trans-national manner, since they do not first attend to the domestic notions of such concept. Notably, such embracement is not a global understanding of the good faith principle, as the UNIDROIT Principles advocate looking in the specific trade or region in order to find what would be the corresponding notion of good faith applicable to an international commercial contract.

And third, the good faith principle has a mandatory character under the light of the UNIDROIT Principles, bearing in mind that Article 1.7(2) of the UNIDROIT Principles indicates that subjects of international trade cannot limit or exclude the standards applicable to the good faith principle:

> "The parties may not exclude or limit this duty."[213]

Furthermore, Paragraph (1) of Article 7.1 of the UNIDROIT Principles leaves no doubt to positively affirm that even in the absence of special provisions in the UNIDROIT Principles, the parties' behavior throughout the life of the contract, including the negotiation process, must be in good faith.[214] Hence, the good faith principle is an imperative rule in the UNIDROIT Principles, as each party at all times must act in accordance with good faith and fair dealing.[215]

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[212] UNIDROIT Principles 2010 with Commentaries. Commentaries on Article 1.7. At 21 (3).
[213] UNIDROIT Principles 2010. Article 1.7(2).
[214] UNIDROIT Principles 2010 with Commentaries. Commentaries on Article 1.7. At 19 (1).
[215] *Ibid*.

The abuse of rights is an example of behavior contrary to the good faith and fair dealing principle.[216] The abuse of rights in contractual matters is the prohibition of a claim, which although legal per se, is brought purely to cause loss or damage to the other party.[217]

One could consider that a party bringing a claim or several claims in that sense would not attend to ethics and fairness, but even it would not seem loyal. This can lead one to note why the abuse of rights is a conduct that contravenes the good faith principle. This is further sustained in the fact that the prohibition of the abuse of rights is a normative consequence of good faith as a general principle of law. [218]

In sum, one might contend that the good faith principle in the UNIDROIT Principles, a highly relevant instrument of Trans-national Law: (i) is a fundamental element of International Contract Law, taking into account all its features; (ii) should be understood in the context of the specific international trade, not necessarily resorting to national notions of the concept, nor meaning that good faith in International Commercial Law is a global, uniform and widely recognized concept; and (iii) has an imperative character, thus the parties to an international transaction cannot limit or exclude the said principle.

The latter, in objective terms, but one might claim, from a personal perspective, that good faith in the light of the UNIDROIT Principle is a convergent notion that is influenced by the Common Law and the Civil Law tradition, although its features are mainly ones of the Civil Law.

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[216] *Ibid*. Commentaries on Article 1.7. At 20 (2): "A party's malicious behavior which occurs for instance when a party exercises a right merely to damage the other party or for a purpose other than the one for which it had been granted, or when the exercise of a right is disproportionate to the originally intended result."
[217] Legiscompare, *Chapter 5: Good Faith*. http://www.legiscompare.fr/web/IMG/pdf/13._CH_5_Good_faith.pdf. At 35.
[218] *Ibid*. At 9.

Perhaps the former might lead one to see that Trans-national Commercial Law is developing a concept that has not had a clear doctrine in the Common Law. This means that the UNIDROIT Principles, in a certain way, might be intending to harmonize the law of good faith, because one can regard such principle as one of the main principles of International Contract Law, taking into account all its features and its important character in the light of the UNIDROIT Principles.

Otherwise, the Introduction to the first edition of the UNIDROIT Principles would not have made an express reference to good faith, in order to apply fairness to the UNIDROIT Principles:

> "The UNIDROIT Principles attempt to ensure fairness in international commercial relations by expressly stating the general duty of the parties to act in accordance with good faith and fair dealing."[219]

And the Group would not have discussed all the already analyzed issues that revolved around good faith.

Concretely, the UNIDROIT Principles as an instrument that reflects the state of the art in Trans-national Commercial would not have taken into account what the present section of this work explained, and embraced the importance of the good faith principle in such a manner, in addition to affirming that this principle has all those features, if the reality of International Commercial Law did not allow them to do so.

2. The good faith principle in arbitral case law

Some contend that the principle of good faith is included in *lex mercatoria*,[220] as arbitral case law has avowed it as a general principle.[221] Furthermore, French Law regards such

[219] UNIDROIT Principles 2010 with Commentaries. Introduction to the 1994 Edition.

principle as the main general principle of contractual interpretation since contracts should be construed in good faith[222] and arbitral tribunals have found that the good faith principle is inherent to international contracts.[223]

Due to the latter, the present subsection of this work will analyze how relevant arbitral case law has interpreted and applied the good faith principle in international commercial disputes.

Concretely, if one resorts to the good faith principle in interpreting a contract, that implies a search for the common intention between the parties.[224] Therefore, a literal interpretation of a contract should not prevail over an interpretation reflecting the parties' true intentions.[225]

The tribunal in International Chamber of Commerce ("**ICC**") Award No. 8908 referred to the UNIDROIT Principles, in terms of good faith in contract interpretation, to determine the scope of a previous settlement agreement between the parties.[226] The tribunal described this interpretative principle as based upon "*the reciprocal trust between the parties*".[227] The decision implies that a tribunal will attribute fairness not only to the terms of an agreement

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[220] P. Fouchard, E. Gaillard & B. Goldman, *Fouchard, Gaillard, Goldman On International Commercial Arbitration*O. Ed. by E. Galliard & J. Savage (Kluwer Law International, The Hague/Boston/London, 1999). At 806. At 807.
[221] October 26, 1979 Award by Messrs. Cremades, chairman, Ghestin and Steiner, arbitrators, in ICC Case No. 3131, Pabalk Ticaret Limited Sirketi v. Norsolor, 1983 REV. ARB. 525, 531.
[222] CC Award No. 2291 (1975), French transporter v. English company, 103 J.D.I. 989 (1976).
[223] Andersen Consulting Business Unit Member Firms vs. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Societe Cooperative. Case No. 9797, Final Award. ICC International Court of Arbitration, Geneva (July 8, 2000). Available at www.unilex.info/case.cfm?pid=2&do=case&id=668&step=FullText (last visited on January 2, 2016).
[224] Award of June 10, 1955 by President Cassin, Gouvernement Royal Hellénique v. Gouvernement de sa Maje*U*sté Britannique, 1956 REV. CRIT. DIP 279.
[225] P. Fouchard, E. Gaillard & B. Goldman, *ouchard, Gai*A*llard, Goldman On International Commercial Arbitration*. Ed. by E. Galliard & J. Savage (Kluwer Law International, The Hague/Boston/London, 1999). At 825.
[226] *Unknown* ICC International Court of Arbitration, Award No. 8908, Milano (00.09.1998), available at http://www.unilex.info/case.cfm?pid=2&do=case&id=663&step=FullText (last visited on April 1, 2016)
[227] *Ibid.*

but also to the parties' behavior (such as acceptance of a counterproposal) in order to give meaning to the terms of an agreement.[228]

From that decision, one might contend that the good faith principle in International Commercial Law also requires trust between the parties. It can also be argued that the good faith principle relates to ethics and fairness, like what the Group arrived at through its discussions on good faith. but in addition, it could also imply recognizing the trust between the parties, as what the tribunal found.

The arbitral tribunal in ICC Award No. 9651 applied Swiss law but referred to the UNIDROIT Principles in interpreting a contract in good faith.[229] Specifically, the tribunal referred to Article 1.7 of the UNIDROIT Principles to explain that one should interpret a contract to give effect to the intent of the parties. The intent of one party's declaration, in the tribunal's opinion, could not be found in what the declarant had in mind or in the words of the declaration itself, but rather "*in the meaning which the addressee could in good faith attribute to it*".[230] The tribunal found that the only understanding in good faith of the choice of law provision in the contract was that it applied to both pre-contractual and contractual disputes, because both disputes arose "*in connection with*" the contract, despite the language of the provision and the subjective belief of the parties.[231]

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[228] *Ibid.*
[229] *Unknown*, ICC International Court of Arbitration, Award No. 9651 (00.08.2000), available at http://www.unilex.info/case.cfm?pid=2&do=case&id=692&step=FullText (last visited on April 1, 2016).
[230] *Ibid.*
[231] *Ibid.*

From this decision, one can see how arbitrators observe good faith at all stages of an international commercial relationship, particularly in the declarations of the parties. Consequently, these acts can also be subject to interpretation under good faith.

Moreover, one can notice how, in this specific case, the tribunal resorted to one of the purposes of the UNIDROIT Principles, namely "*interpret or supplement domestic law*".[232] Thus, one can see how good faith, in light of the UNIDROIT Principles, supplemented Swiss Law, thereby enabling a tribunal to properly resolve a dispute concerning matters of International Commercial Law.

The parties requested to apply the UNIDROIT Principles in ICC Award No. 9875.[233] The tribunal mentioned that it would specifically take into account the good faith principle. The tribunal held in the award that good faith prevents an interpretation of a contract that would allow a party to "*do indirectly through a contract with a third party what the contract prevents a party from doing directly. Good faith prevents a party from selling to an entity which one knows or should reasonably know intends to resell in another licensee's territory*".[234] Hence, the tribunal held that the execution of the third-party contract breached the initial contract and allowed the third party to do what the party itself could not.[235]

This award evidences two remarkable points. Firstly, one could notice how the parties used either of the purposes of the UNIDROIT Principles -- notably, that they are applicable "*when the parties have agreed that their contract be governed by them*".[236]

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[232] UNIDROIT Principles 2010. Preamble.
[233] *Unknown*, ICC International Court of Arbitration Case No. 9875 (00.03.2000), available at http://www.unilex.info/case.cfm?pid=2&docase&id=697&step=FullText (last visited on April 1, 2016).
[234] *Ibid.*
[235] *Ibid.*
[236] UNIDROIT Principles 2010. Preamble.

Secondly, one could say that the principle of good faith prevents an indirect breach of a contract. Furthermore, the aforementioned rule could extend the scope of the good faith principle.

The tribunal in an ad hoc arbitration in 2004 held that under French Law and Article 1.7 of the UNIDROIT Principles, parties have a good faith obligation when attempting to resolve disputes arising under a contract.[237] However, the tribunal concluded that the mere failure to reach an agreement was not in itself a breach of good faith and that parties are not required to "*grant large concessions*" in order to comply with the good faith obligation.[238]

From this award, one can contend that Article 1.7 of the UNIDROIT Principles might be congruent with the French notion of good faith, since both oblige the parties to negotiate in good faith.[239] Under that reasoning, this award might confirm that such obligation applies when the parties attempt to resolve a dispute, which one could regard as a contractual negotiation.

In light of the aforementioned, one could claim that the parties shall observe good faith in any kind of negotiation, whether pre-contractual or contractual. In addition, one cannot consider that the parties are acting in bad faith if they do not reach an agreement, which is a different situation from when one of the parties "*enters into or continue negotiations when*

[237] *Unknown*, Ad hoc Arbitration, (04.03.2004), available at http://www.unilex.info/case.cfm?pid=2&do=case&id=690&step=FullText (last visited on 1 April 2016).
[238] *Ibid.*
[239] Which was evidenced in Section 1, Chapter II and Section 1, Chapter I, respectively, of this work.

intending not to reach an agreement with the other party".[240] Clearly, one cannot consider not wanting to grant large concessions, in order to resolve a dispute, as bad faith behavior.

The tribunal In ICC Award No. 8540 referred to the UNIDROIT Principles only as further support for its decision that an agreement to negotiate in good faith is binding under the laws of the State of New York.[241] The tribunal stated that "*the undertaking to negotiate in good faith is valid, binding and enforceable under general principles of law as reflected in the UNIDROIT Principles*".[242] The tribunal, in defining what it meant to negotiate in good faith, asserted that conducts such as "*renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement*" would not constitute good faith negotiations.[243]

One should highlight several points in this decision. In the first place, this case was another example of how the UNIDROIT Principles can "*interpret or supplement domestic law*",[244] namely the laws of the State of New York.

In the second place, it is important to notice how the tribunal recognized that to negotiate in good faith is a general principle of law, even though the law of the merits was the law of the State of New York, and American Law has not expressly recognized the duty to negotiate in good faith (as this work has evidenced). Nevertheless, one could sustain that this award did not change that concept in American Law since, in the specific case, there was an express agreement to negotiate in good faith.

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[240] UNIDROIT Principles 2010. Article 2.1.15.
[241] *Unknown*, ICC International Court of Arbitration, Award No. 8540, Paris (04.09.1996), available at http://www.unilex.info/case.cfm?pid=2&do=case&id=644&step=FullText (last visited on April 1, 2016).
[242] *Ibid.*
[243] *Ibid.*
[244] UNIDROIT Principles 2010. Preamble.

Yet the tribunal, in recognizing that negotiating in good faith is a general principle of law, might have opened the door for American Law, and the Common Law in general, to consider expressly recognizing a duty to negotiate in good faith even in the absence of a binding agreement to do so.

Finally, one should say that it was remarkable how the tribunal nurtured the concept of bad faith behavior, in negotiations, with concrete examples.

Meanwhile, the observance of good faith in international trade and relevant case law, within the scope of the CISG, has specifically led to clarify certain issues. These include the performance of obligations;[245] avoidance of contracts;[246] award of damages;[247] the validity of jurisdictional clauses;[248]and the prohibition of *venire contra factum proprium*,[249] as well as that the abuse of process is contrary to good faith;[250] that the interpretation of the content of a contract should be as anticipated by the parties, in accordance with the principle of reasonable expectation;[251] that the duty of cooperation is imposed upon the parties;[252] that estoppel is also one of the general principles that forms the basis of the

[245] See CLOUT case No. 277 (Oberlandesgericht Hamburg, Germany, 28 Febrary 1997).
[246] *Ibid.*
[247] See CLOUT case No. 154 (Cour d'appel de Grenoble, France, 22 February 1995).
[248] Audiencia Provincial de Navarra, Spain, 27 December 2007, English translation available on the Internet at http://cisgw3.law.pace.edu/cases/071227s4.html.9
[249] CLOUT case No. 595 (Oberlandesgericht München, Germany, 15 September 2004); Tibunale di Padova, Italy, 31 March 2004, English translation available on the Internet at http://cisgw3.law.pace.edu/cases/040331i3.html; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at http://cisgw3.law.pace.edu/cases/040225i3.html.
[250] *Ibid.*
[251] CLOUT case No. 547 (Audiencia Provincial de Navarra, Spain, 22 September 2003).
[252] Oberlandesgercht Celle, Germany, 24 July 2009, English translation available on the Internet at http://cisgw3.law.pace.edu/cases/090724g1.html; Tribunale di Rovereto, Italy, 21 November 2007, Unilex; Oberlandesgericht Köln, Germany, 21 December 2005, English translation available on the Internet at http://cisgw3.law.pace.edu/cases/051221g1.html; Landgericht Neubrandenburg, Germany, 3 August 2005, English translation available on the Internet at http://cisgw3.law.pace.edu/cases/050803g1.html; Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce, Serbia, December 2002, English translation available on the Internet at http://cisgw3.law.pace.edu/cases/021209sb.html; CLOUT case No. 445

CISG, namely, it is a manifestation of the good faith principle;[253] and that the CISG avails the *favor contractus* principle,[254] according to which avoidance of the contract constitutes an *ultima ratio* remedy.[255]

Notably, arbitral case law recognizes that good faith prohibits the international principle of *venire contra factum proprium*.[256] This principle is known in German and Swiss Law as *non concedit venire contra factum proprium*, as estoppel by representation in Common Law legal systems, and as the principle of consistency in French Law.[257]

Furthermore, arbitral case law has decided that if one party has not observed the covenant of the contract that expressly requires modifications or termination of the contract to be in writing, and the other party has relied upon that conduct, the first party cannot invoke the

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(Bundesgerichtshof, Germany, 31 October 2001), also in Internationales Handelsrecht, 2002, 14 ff.r

[253] See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce andIndustry, Russian Federation, 27 July 1999, English translation available on the Internet at http://cisgw3.law.pace.edu/cases/990727r1.html; CLOUT case No. 230 (Oberlandesgericht Karlsruhe, Germany, 25 June 1997) (see full text of the decision); CLOUT case No. 94 (Internationales Schiedsgericht der Bundeskammer der gewerblichen (Wirtschaft—Wien, Austria, 15 June 1994); CLOUT case No. 93 (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria,15 June 1994) (see full text of the decision); Hofs'Hertogenbosch, the Netherlands, 26 February 1992, Nederlands Internationaal Privaatrecht, 1992, No. 354.

[254] CLOUT case No. 248 (Bundesgericht, Switzerland, 28 October 1998) see full text of the decision).

[255] CLOUT case No. 747 (Oberster Gerichtshof, Austria, 23 May 2005) (see full text of the decision); CLOUT ase No. 428 (Oberster Gerichtshof, Austria, 7 September 2000), also available on the Internet atS www.cisg.at/8_2200v.htm.

[256] September 25, 1983 Jurisdictional Decision in *FAmco,* 177, 23 I.L.M. 377-82 (1984); 113 J.D.I. 218-21 (1986); the September 2, 1983 Award of the Iran-U.S. Claims Tribunal in Woodward-Clyde Consultants v. Iran, Award No. 73-67-3, 3 Iran-U.S. Cl. Trib. Rep. 239 (1983); the June 5, 1990 Award in ICSID Case No. ARB/81/1, Amco Asia Corp. v. Republic of Indonesia, 5 INT'L ARB. REP. D4, D37 (Nov. 1990); XVII Y.B. COM. ARB. 73 (1992); 1 ICSID REP. 569 (1993); Preliminary Award in ICC Case No. 1512 (Jan. 14, 1970); Indian cement company v. Pakistani bank, 1992 BULL. ASA 505; V Y.B. COM. ARB. 174 (1980); ICC Award No. 5926 (1989), Unpublished: The parties, from Latin America and North America respectively, both recognized the existence of the principle but each sought to invoke it to support its case; See, for the same situation, ICC Award No. 6363 (1991), Licensor v. Licensee, XVII Y.B. COM. ARB. 186 (1992), especially ¶ 44 at 201; the April 8, 1999 *ad hoc* Award made in Paris, Construction companies v. Middle East State, unpublished (at 75): decides that a party which has assigned a contract without the prior consent of its co-contractor cannot rely on this circumstance in the context of the determination of the parties to the arbitration agreement.

[257] P. Fouchard, E. Gaillard & B. Goldman, *ouchard, Gaillard, Goldman On I.nternational Commercial Arbitration*. Ed. by E. Galliard & J. Savage (Kluwer Law International, The Hague/Boston/London, 1999). At 820.

said provision of the contract because *venire contra factum proprium* is inconsistent with good faith[258] and likewise emphatically prohibited by estoppel, which is a manifestation of the good faith principle in International Commercial Law and is applicable to the circumstance.[259]

Another obligation that good faith imposes upon the parties is that the avoidance of a contract is not allowed under certain circumstances.[260] This obligation is a development of the *favor contractus* principle that appeals to maintaining valid the effects of the contract at all costs and consequently leaving avoidance of the contract as an *ultima ratio* remedy.[261] One can consider this obligation as derived from the good faith principle, since it consists of not allowing one party to avoid the contract when there are acts or circumstances that involve both parties, which could lead them to preserve their agreement.

One could certainly affirm, from those arbitral findings related to the CISG, that the principle of good faith under the CISG indeed encompasses several rules.[262] Even though

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[258] CLOUT case No 595 (Oberlandesgericht München, Germany, 15 September 2004); Tribunale di Padova, Italy, 31 March 2004, English translation available on the Internet at http://cisgw3.law.pace.edu/cases/040331i3.html; Tribunale di Padova, Italy, 25 February 2004, English translation available on the Internet at http://cisgw3.law.pace.edu/cases/040225i3.html.

[259] See Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 July 1999, English translation available on the Internet at http://cisgw3.law.pace.edu/cases/990727r1.html; CLOUT case No. 230 (Oberlandesgericht Karlsruhe, Germany, 25 June 1997) (see full text of the decision); CLOUT case No. 94 (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria, 15 June 1994); CLOUT case NSo. 93 (Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, Austria,15 June 1994) (see full text of the decision); Hofs'Hertogenbosch, the Netherlands, 26 February 1992, Nederlands Internationaal Privaatrecht, 1992, No. 354.

[260] See Articles 47(2), 64(2) and 82 of the United Nations Convention on Contracts for the International Sale of Goods.

[261] CLOUT case No. 747 (Oberster Gerichtshof, Austria, 23 May 2005) (see full text of the decision); CLOUT case No. 428 (Oberster Gerichtshof,Austria, 7 September 2000), also available on the Internet at .www.cisg.at/8_2200v.htm.

[262] UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2012). At 43 par. 9; The United Nations Conference on Contracts for the International Sale of Goods, Official Records, Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee. Vienna, 10 March – 11 April 1980 (1981). At 18.

the CISG only expressly provides said principle in its Article 7(1) and one might wrongly understand, at first sight, that good faith exclusively applies to interpret the provisions of the CISG.

In summary, arbitral case law understands the good faith principle as a principle of contractual interpretation that must seek the parties' true common intention over a literal interpretation of an agreement; an interpretation principle that prevents an indirect breach of a contract; a principle which, by its application, directs that a party's declaration shall have the meaning that the addressee could attribute to it in good faith; a principle that indicates that when the parties made a choice of law in connection with a contract, it applies to both pre-contractual and contractual disputes; a principle that attributes fairness to the parties' behavior in order to provide fairness to the meaning of the terms of an agreement; a principle which obliges parties to attempt to resolve disputes arising under a contract in good faith; a principle which dictates that the undertaking to negotiate in good faith is valid, binding and enforceable under general principles of law; a principle which prohibits the international principle of *venire contra factum proprium*; and a principle that prohibits the parties from avoiding a contract in certain circumstances, as an application of the *favor contractus* principle.

Notably, arbitral case law has acknowledged the principle of good faith as the most general principle of contractual interpretation, and has also regarded it as inherent to international contracts. Thus, one could argue that the good faith principle is lodged within *lex*

mercatoria and that it provides the basis for several rules, as the ones mentioned above, following Fouchard, Galliard and Goldman's contention. [263]

Moreover, one could say that arbitral tribunals interpret the good faith principle in a manner similar to how the UNIDROIT Principles comprehend it, mostly directed by its notion and features from the Civil Law.

Arbitral decisions, however, affirm the trans-national character of this principle in International Commercial Law since they do not necessarily appeal to its domestic standards. That being said, arbitral tribunals have done so when they are in front of accepted standards at a comparative level (such as the ones related to the Civil Law), but also resort to international conventions (as the CISG) and pure trans-national sources (as the UNIDROIT Principles).

On the other hand, the fact that the principle of good faith is considered a general principle of law in arbitral decisions, particularly in resolving international commercial disputes, could persuade the legal orders of the Common Law tradition to develop a general doctrine of good faith for their domestic legal systems.[264]

In any event, arbitral case law is highly important for understanding the principle of good faith precisely because International Commercial Law *per se* is a dynamic field that requires judicial decisions in accordance with its state of affairs.

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[263] P. Fouchard, E. Gaillard & B. Goldman, *Fouchard, Gaillard, Goldman On International Commercial Arbitration*. Ed. by E. Galliard & J. Savage (Kluwer Law International, The Hague/Boston/London, 1999). At 820.

[264] Which is happening in the United States, Australia and Canada. Prep. by the Secretariat of UNIDROIT, UNIDROIT Working Group for the Preparation of Principles for International Commercial Contracts, *Summary of Records of the Meeting held in Miami from 6 to 10 January 1992*. Rome, May 1992. At 42.

In conclusion, one can argue, based on arbitral case law, that the good faith principle is the most important principle of International Contract Law, and accordingly one of the most important principles of Trans-national Commercial Law, bearing in mind its wide character and that it is the basis for many rules of International Commercial Law.

CONCLUSIONS

This work defines the good faith principle in International Commercial Law as an interpretation principle that permeates all laws relating to international commercial contracts,[265] which *lex mercatoria* has notably developed in its frame, and that in such frame has become a fundamental principle.[266]

The principle of good faith is not only directly applicable to international contracts,[267] which means that the parties and the judge shall interpret the content of contracts (terms, obligations and rights) in good faith. Also, it is a standard of behavior, since subjects of international trade must negotiate, execute, perform and enforce international contracts in good faith.

Trans-national Commercial Law, at first, does not support domestic conceptions of the good faith principle, unless at a comparative level they are generally accepted standards in a specific region and/or trade. Finally, one might say that commonly accepted domestic standards, for the most part, compose some of the main features of the good faith principle in the Civil Law tradition.

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[265] See Legiscompare, *Chapter 5: Good Faith* http://www.legiscompare.fr/web/IMG/pdf/13._CH_5_Good_faith.pdf. At 14: "The idea that a contract must be interpreted according to the principle of good faith permeates all the law relating to commercial contracts".
[266] See *Ibid*: "It has developed notably in the frame of the *lex mercatoria* to such an extent that it has become one of its fundamental principles"; also see Good Faith in International Arbitration, by B. M. Cremades. http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1783&context=auilr. (2012). *L*At 784: "Good faith continues to be the essence of the *lex mercatoria*."; and see B. Goldman, *La lex mercatoria dans les contrats internationaux: réalités et perspectives* (JDI, 1979). At 475.
[267] J. Jacquet, *e contrat international* (2nd. ed., Dalloz, Paris, 1999). At 101 and 102.

The main features of the good faith principle in Trans-national Commercial Law are its mandatory character along with its international character, which this work contends actually is trans-national.

However, neither the Civil Law nor the Common Law have exclusively framed the good faith principle in International Commercial Law. On the contrary, the influence of both legal systems has shaped this principle, taking its written form from the Common Law and contributing features from the Civil Law.

Certainly, the good faith principle in International Commercial Law is not a unique and static notion, as subjects of international trade, arbitrators and judges have to assemble it like a puzzle on a case-by-case basis, taking into account the complexities of the sources of International Commercial Law. In other words, the good faith principle in International Commercial Law is not a global concept.

In practice, arbitral tribunals applying good faith have found that this principle is crucial for contractual interpretation; has to veil for finding the common intention of the parties in contracting; prevents the indirect breach of a contract; is applicable in the pre-contractual stage, thus governing negotiations; protects fairness in the parties' behavior and fairness in the terms of a contract; prohibits inconsistent behavior, and hence *venire contra factum proprium*; and is the basis of the *favor contractus* principle, which is one of its applications.

In conclusion, the good faith principle is a cardinal principle of Contract Law within International Commercial Law, if not the most important one, inasmuch as it is a widely acknowledged general principle of *lex mercatoria* and Trans-national Law.

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