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Substance or Mere Technique? A Precis on Good Faith Performance in England, France and Germany

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I. Introduction

1. Foreword

Good faith in the performance of a contract is *but one* of the possible uses of the notion of *good faith*. Possible other areas of application are, for instance, good faith *purchase*,[1] good faith in the *negotiation* leading up to a contract[2] and good faith *enforcement*, meaning in the assertion of one's entitlements.[3] The breadth of applications of the notion of good faith has – by some – even been understood as hinting towards the existence of a more general 'principle' of *good faith*.[4]

2. The 'Thin Red Line' Between Good Faith Performance and Enforcement

According to this swift categorisation, good faith *performance* could at first appear, from a strict theoretical point of view, as something conceptually separate from good faith *enforcement*. In particular, good faith *performance* should relate to situations in which one

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[1] Russi, Luigi, 'Can Good Faith Performance Be Unfair? An Economic Framework for Understanding the Problem' [2008] 29 *WhittierLR* 3, 565, 568.

[2] Ibid.

[3] Ibid, 569. Good faith enforcement, as will be further outlined below, represents the logical counterpart to good faith performance (see eg Pei Yee, Woo, 'Protecting Parties' Reasonable Expectations' [2001] 1 *Oxford University Commonwealth Law Journal* 2, 195, 211). In fact, while the latter deals with the performance of an *obligation* or *duty* in the Hohfeldian sense of the term (see Nyquist, Curtis, 'Teaching Wesley Hohfeld's Theory of Legal Relations' [2002] 52 *Journal of Legal Education* 1-2, 238, 240), the former is, instead, concerned with the assertion of claims by holders of *rights*, which constitute the logical complements of *obligations* or Hohfeldian *duties*.

[4] Pei Yee. In this respect, it is however submitted how speaking of a general 'principle' of good faith may be misleading, for the 'jurisprudential' implications it might possess. and, in particular, for the reference it might imply to the debate ignited by Dworkin, Ronald, 'The Model of Rules' [1967] 35 *University of Chicago Law Review* 1, 14. In answer to Dworkin's contentions see, among others, Mackie, John, 'The Third Theory of the Law' [1977] 7 *Philosophy & Public Affairs* 1, 3. Assuming that legal principles as such could not be considered to be part of a legal system (thereby concurring with Dworkin's critics), this would not automatically imply that a general notion of good faith may not serve a useful function at all. Quite on the contrary, it may perform a very beneficial epistemological role. It is, in fact, not uncommon for legal operators to attempt to find a 'common thread' to several possible rules, with a view to using this shared rationale for hermeneutically extending or restricting the scope of application of particular rules. In the words of a respected continental commentator, a principle may be regarded as a 'general and abstract rule obtained through sequential groupings with respect to particular rules . . that can all be traced at the apex, the vertex, the principle to be exact' (Alpa, Guido, *I principi generali* (Giuffré Editore, Milan, 1993), 9).

party is bound to fulfil a particular *obligation*. On the other hand, good faith *enforcement* pertains to the slightly different, although related, issue of the exercise of one's *rights*.

However, when a party asserts a particular claim under a right of hers, thereby giving rise to a disagreement with the recipient of the claim, it is often impossible to determine whether good faith *forbids* the assertion of the contested claim, or whether it *enables* a given conduct on the part of the debtor.

For this close logical interconnectedness, 'good faith performance' will be understood, throughout this work, as including both performance (in the strict sense, with respect to an *obligation*) and enforcement.

This premise having been made, it is necessary – in order to provide a structure to the analysis to follow – to attempt some broad categorisation of the instances in which 'good faith performance' (even if under the guise of some other doctrine) might be seen at work.

This, however, first requires to adopt some definition, even if stipulated, of what it is to be meant by 'good faith.' For our purposes, 'good faith' will be regarded as the *nature* of the *solution mechanism* adopted with respect to situations in which one party to a contract does something – either in the performance of the contract or in the assertion of a right under same contract – which is either not explicitly regulated in the agreement's text, or – if it is - under circumstances which are not themselves expressly contemplated in the contract. In these cases, then, the solutions offered by the various systems will generally rely on some *balancing of the parties' respective interests* in order to achieve a suitable composition of the problem.

This being said, one first set of cases has to do with the modes of delivery of the contractual performance by the obligor. In fact, rarely do contracts explicitly regulate in full detail what, how and when does a certain performance have to be delivered.[5] The reason for this is simple: because it is simply impossible to forecast all possible events.

Some aspects are therefore left for the burdened party to sort out 'as she goes along.' Therefore, the first set of cases deals precisely with similar 'deficiencies' in the regulation of a party's performance. For instance, controversies often arise when the rhythm, or other features, of delivery are – somehow – not wholly satisfactory to the recipient, which may then attempt to make a claim asserting the need for different modes to be adopted in the performance of the contract

In other situations, instead, one party may require the other to perform something. Often it is something with the request, such as its timing, the existence of pre-existing practices between the parties or its strictness in the light of the circumstances, that may cause discomfort to the party whom such performance is requested to. Again, the balance will have to be found between the opposing interests of the two parties.

Once again before moving on, it is however important to outline the merely theoretical difference between good faith performance (of an obligation) an good faith enforcement, which has more or less been paralleled in the drawing of the two chosen sets of cases.

In fact, 'good faith' should practically be understood as a fine-tuning process of opposing interests, for the solution of a controversy involving interrelated legal positions of *right* and *obligation.* Good faith enforcement, therefore, can only refer to the assertion of a right to good faith performance. Similarly, good faith performance is all that can be sought under a right, for it to be enforced according to good faith.

[5] Russi, 571.

II. Controversies Relating to (Unregulated) Aspects of Performance

In this first strand of cases, the question is generally one regarding the definition of the precise modes of performance to be adopted by the obligor. In this respect, any use of the mechanism of 'good faith' for solving a controversy ultimately amounts to an implication of collateral terms relating 'to the *performance* of the *main* obligations owed by the parties.'[6] Therefore, in similar situations, good faith performance ends up intertwining with questions of contract interpretation. This being said, it is now possible to immerse oneself in the analysis of the single jurisdictions.

1. Germany

In German law, the main provision on good faith in performance is §242 of the German Civil Code. With respect to the subset of cases which we have set out to consider - namely those in which a particular aspect of performance is unspecified, leaving it to the parties or, failing an agreement between them, to the courts to fill it according to good faith – another very important provision seems to be also § 157, which deals with the standard for contractual interpretation: good faith.
Of course, separating instances of outright implication of a term (also referred to as *ergänzende Vertragsauslegung*)[7] from those of mere good faith interpretation of existing provisions is a very close call, which is why courts 'sometimes quote both relevant codal provisions simultaneously.'[8]
The general significance of the 'good faith' parameter, for this purpose, is that of mandating an inquiry as to 'whether the parties would have agreed to a term if they had considered the situation.'[9]

Protective Duties

Normally, the natural focus of 'good faith' implication of terms consists of missing aspects of the *principal* duties of a party.[10] However, it also has to be outlined how German courts also resort to good faith for a somewhat different purpose, namely that of implying *collateral* duties, separated from the principal obligations of a party, such as duties of information, documentation, co-operation, protection and disclosure.[11]
Particularly relevant are, for instance, *protective* duties. These may serve to extend any obligations towards the other party to the post-performance phase, covering any damage suffered by the recipient *after* the completion of the obligor's performance (which was

[6] Markesinis, Basil S., Unberath, Hannes and Johnston, Angus, *The German Law of Contract* (Hart Publishing, Oxford, 2008), 128.
[7] Weir, Tony (tr), Kötz, Hein and Flessner, Axel, *European Contract Law, vol I* (Clarendon Press, Oxford 1997), 118. A typical case of implication of terms to specify peculiar aspects of performance (otherwise unregulated, even by reference to legal default rules) is that of a sale of a business, in which courts often imply the term that the seller is not to start another business in direct competition with that of the buyer for a given period of time, as a means to preserve goodwill (eg RG 31 May 1925, RGZ 117,176).
[8] Weir, Kötz and Flessner, 124.
[9] See eg BGH 7 Feb 1957 BGHZ 23, 282. Translated by Kurt Lipstein in Markesinis, Unberath and Johnston (nt 6) 656.
[10] Weir, Kötz and Flessner, 117.
[11] Whittaker, Simon and Zimmermann, Reinhard (eds), *Good Faith in European Contract Law* (Cambridge University Press, Cambridge, 2000), 24.

formally delivered), but somehow caused by the latter (eg the supply of a defective good which damages the recipient's body or property).
The present-day normative basis for similar claims has shifted, after the recent reform of the law of obligations, from § 242 (where it originally stemmed from)[12] to §241 (2), which requires the obligor to take into account 'the rights, legal interests and other interests of the other party.' Yet, it is respectfully submitted that the theoretical difference between §242 and §241(2) seems to be merely one of *perspective*: §242 focusing on the *bearing* of good faith on a party's obligations (and, as will be observed in the further section, also on the other party's rights), while §241 (2) focuses on the *mechanism* (i.e. a balancing of interests) through which a conformation of contractual rights and obligations in accordance with good faith is to be achieved. In other words, §242 seems to be the normative consequence of the application of the interest balancing mechanism that art §241(2) apparently mandates.
Aside from this textual difference, however, it has to be outlined how the German inclusion of 'protective' duties within the scope of good faith likely exceeds the 'natural' scope of good faith performance, as limited to the mere clarification of *details* of performance (but not of its consequences). Such a development can however be explained by the limitedness of the 'headings' of damages that can be claimed pursuant to §823 (which excludes 'pure economic loss,' meaning damage other than that arising from an injury to the body or property of the claimant).

2. France

Similarly, in the presence of gaps in the principal obligations of a party that are however specific enough to require a 'made-to-measure' solution, courts do provide implied terms, although the *aegis* under which they do so is not referred to as *good faith.*
What they do, instead, is refer to the *commune intention des parties contractantes*, as mandated by art 1156 of the *Code Civil*. Of course, implication of terms is different from mere interpretation, which the provision of the *Code* seems to refer to. However, is it usually 'impossible as well as unnecessary to draw a clear distinction.'[13]
Notwithstanding the common reference to the subjective intention of the parties, what courts really seem to look for is 'what the parties as reasonable and fair-minded men would have agreed if a third party had drawn their attention to the point omitted.'[14] Nonetheless, all of these considerations have to be balanced with the countervailing remark that ample discretion is generally given to the lower courts, as part of their 'sovereign power of assessment' of the factual matters,[15] therefore making it risky to draw any overly broad conclusion.
Finally, French courts tend to imply *collateral* duties as well, therefore going beyond the mere definition of aspects of the parties' *principal* duties, which the latter have left unregulated. The normative coverage for such operation is usually found in arts 1135 and 1160 of the *Code Civil*, the former stating that contracts also bind the parties to 'all the consequences which equity, custom or the law itself gives to the obligation according to its

[12] Ibid, 121.
[13] Ibid, 119.
[14] Ibid, 120.
[15] Bell, John, Boyron, Sophie and Whittaker, Simon, *Principles of French Law* (Oxford University Press, Oxford, 2008), 328.

nature,' and the latter that customary terms should be read into the contract, despite the lack of an express reference to them.
An example of such collateral duties is given, for instance, by *obligations de securité*, which generally extend a party's liability to damage suffered by the other party, or to property thereof, and linked to the performance of contractual obligations.

3. England

English courts will generally resort to the notion of terms 'implied in fact'[16] to complement the parties' defective agreement with respect to circumscribed aspects of the parties' *principal* duties. The justification for doing so is usually that of 'filling out the (unexpressed) agreement of the parties.'[17] The way in which this is practically achieved, however, is through the so-called 'officious bystander' test, whereby courts inquire whether

> *. . . while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common "Oh, of course!"*[18]

Some other times, instead, the courts will move slightly away from the parties' (implied) intentions,[19] by resorting to the 'business efficacy' test, whereby terms are implied, that are deemed necessary to give business efficacy to the contract.
Without moving away from these lines of reasoning, courts have sometimes imposed veritable *collateral* duties requiring one of the parties to take reasonable care in order to prevent her partner from suffering damage. This was so, for instance, in *The Moorcock*[20] case, where – following damage suffered by a ship, harboured at the defendant's pier, in the presence of low tide which consequently made it rest on the uneven river bed – a term was implied to the effect that the defendant should have taken care of the safety of the dock for the plaintiff to unload his ship.

4. Interim Conclusions: Implication of Terms

On overview, it can then be observed how a common tendency pervades German, French and English courts, as regards the implication of terms for the purpose of solving controversies as to the precise content of the obligor's duties.
Courts will, in fact, intervene and supply such missing terms. Also, despite the lack of a common terminology (*good faith* is explicitly used in German law only), it seems that the standards for filling such gaps are – to an extent – similar, involving some sort of objective counterfactual test which, however, is still required to factor in the parties' intentions (eg the 'officious bystander' test).[21]
If one then considers the definition of 'good faith' offered in the opening paragraphs, namely as a mechanism for balancing the parties' opposing interests to solve possible

[16] Terms 'implied in fact' are often distinguished from terms 'implied in law', the difference being essentially in the 'traceability' of the former to the parties' intentions, whereas the latter are merely added by virtue of 'the courts' own characterization of particular types of contracts carrying particular implied terms' (Cartwright, John, *Contract law* (Hart Publishing, Oxford, 2007) 190.
[17] Cartwright, 188.
[18] *Shirlaw v Southern Foundries Ltd* [1939] 2 KB 206 (CA) 227.
[19] In the words of a commentator: '. . . this is moving away from the real intentions of the parties and starting to allocate the risks between them as the court decides that they should have done.' (Cartwright, 188-89).
[20] (1889) 14 PD 64 (CA).
[21] Whittaker and Zimmermann, 680, sharing this view with respect to the 'officious bystander' test.

controversies on the scope and mode of performance, it is possible to make a claim that all three systems share a similar view in resorting to 'good faith' for the purpose of specifying the parties' principal duties.
In order to avoid making overbroad conclusions, it has however to be acknowledged that the level of departure from the parties' 'implied' intentions in favor of a purely objective test may however differ across jurisdictions, with an express refusal of a purely 'reasonableness-oriented' test by no less than the House of Lords in England,[22] and with more permissive attitudes by German and French courts.
A similar conclusion should be made with respect to *collateral* duties. English courts have, in fact, imposed any only insofar as it was enabled by the ordinary tests for implying terms. On the other hand, both German and French courts seem to have considered the mere reasonableness of a particular allocation of risks under the contract:[23] an approach which English courts could be reluctant to follow.

III. Controversies Arising in Connection With the Assertion of a Right

In this second subset of cases, the question is – really – no different from that underlying the first subset of cases. Namely, one is once more confronted with gaps in a contract. Gaps which, however, do not so much pertain to the nature or scope of the claim which the right holder is entitled to assert, but rather to the presence of particular circumstances or modes which are not as such regulated by the contract. With respect to the first subset of cases, the difference essentially lays in that the controversy arises not out of an allegedly faulty performance on the part of the obligor, but instead from an allegedly excessive request put forth by the right holder in the assertion of her entitlements under the contract.
Yet, it is self-evident that when good faith is used to 'shape' the content of performance – as in the cases discussed in the previous section – courts are simultaneously shaping the complementary legal claim which the promisee is entitled to make. Symmetrically, while the 'shaping' – in this second subset of cases – is formally addressed to the promisee's legal positions, it ends up affecting the obligor's duties as well.

1. Germany

As a further confirmation of this position, it is interesting to notice how – in German law - the legal 'basis' for court intervention in similar cases is the exact same one for instances of good faith 'performance'; namely § 242 of the German Civil Code.[24]
The possible uses of § 242 of the German Civil Code in limiting the exercise of one's rights can be grouped in different strands. In the first subset of situations, one party claims from the other what the former is, at any rate, under an obligation to immediately return to the latter (*dolo agit, qui petit, quod statim redditurus est*).[25]

[22] *Liverpool City Council v Irwin* [1977] AC 239 (HL) 262 (Salmon LJ).
[23] Weir, Kötz and Flessner, 122.
[24] In this respect, the following observation by a group of authoritative commentators proves meaningful:
. . . the wording of § 242 BGB itself refers to a special form of abuse of rights, namely as to the manner in which the debtor performs. As already mentioned, the narrow confines of the exact wording of § 242 BGB have from the very outset been ignored. . . . Ironically, the case envisaged by § 242 BGB itself plays only a minor role in German law. (Markesinis, Unberath and Johnston, 125).
[25] BGH 21 December 1989, NJW 1990, 1289.

Another more important line of reasoning is that which can be broadly traced to the principle *venire contra factum proprium*, which is – generally speaking – used to limit the assertion of a right on the part of the right holder, after having elicited reliance – by the obligor – as to a particular state of affairs.

The actual form which a similar limitation takes, with respect to the exercise of the right holder's entitlements, varies widely across different types of cases. In some situations, for instance, courts may deprive of effectiveness an act of termination of the legal relationship with the obligor.[26] In other situations, instead, the doctrine of *Verwirkung* (the German 'label' for cases of *venire contra factum proprium*) may yield effects quite similar to the passing of a limitation period for asserting a right (with the important difference, however, that the right is not actually lost, but that it is merely its exercise which is being prevented).

In this respect, it is interesting to note what the German Supreme Court observed, with respect to the defense of laches (ie *Verwirkung*) raised by a defendant vis-à-vis a claim by the plaintiff to enforce its right to prevent use of a trademark which could be confused with its own, in referring the parties back to the trial court:

> *. . . it matters … whether or not a balancing of interests in the particular case, having regard to all the circumstances governed by the principles of good faith in accordance with §242 BGB, justifies the rejection of the defence of laches. It becomes clear that satisfactory results can only be achieved by this method if a situation is envisaged in which the injured party behaved unquestionably in a manner which entitled the injuring party to believe that his acts were being tolerated . . .*[27]

Finally, other situations involve the rejection of claims asserted by a plaintiff for enforcing aspects of the obligor's duties that are objectively irrelevant for the plaintiff's satisfaction,[28] or other cases in which the owner of the right requires enforcement without accounting for the reasonable interests of the obligor.[29]

Finally, and maybe most importantly, *good faith* has – although in limited circumstances – even been used by Courts as a lever to 'fiddle' with express contractual terms, as a sort of 'police' function with respect to the contract's fairness.[30] However, it has been outlined how the instances in which such interference occurred can be considered as exceptional circumstances, to the effect that §242 of the German Civil Code should not be normally taken to include a similar authority on the part of Courts.[31]

2. France

In France the idea that contracts need be performed in good faith was present in the *Code Civil* since its adoption. Namely, art 1134 (3) requires that contracts be performed in good faith. At any rate, it was not until the nineteenth century that such provision (along with art 1156, which obliges parties to a contract to comply with *equité*) came to be used to perform a function similar to that which §242 of the German Civil Code performs in its own jurisdictions.[32]

[26] Whittaker and Zimmermann, 404.
[27] BGH 15 June 1956 BGHZ 21, 66. Translated by Kurt Lipstein in Markesinis, Unberath and Johnston, 627-28.
[28] Whittaker and Zimmermann, 292.
[29] Ibid, 25.
[30] Ibid.
[31] Markesinis, Unberath and Johnston, 131-32.
[32] Whittaker and Zimmermann, 34.

In particular, with respect to disputes as to the assertion of rights by their owner, art 1134(3) has been used in a twofold manner.

On the one hand, through the concept of ***abus de droit*** (abuse of right).[33] No clear-cut definition has been endorsed once and for all by French courts. Instead, the approach seems to be tailored more to a case-by-case reasoning. This notwithstanding, several useful categories of possible uses have been fleshed out over time. In particular, ***abus de droit*** has been identified (i) with the presence of an intent to harm the other party by asserting a given claim, or (ii) with the usage of the right outside of its permissible 'economic or social'[34] purpose or further (iii) with the presence of a 'fault in the exercise of the right.'[35] For instance, termination of a contract in the presence of a legitimate reason, for the other party, to believe that the relationship would not have been discontinued, and upon sinking of consistent investments by the latter as a result of such belief, has been deemed to be ***abusive***.[36] At any rate, it is relevant to observe that, while the purported abuse of right occurs with respect to a contractual relationship, the legal consequence generally consists in the awarding of damages in tort.[37]

In situations where a bold claim has been asserted by the holder of a right, but where – however – the threshold for the ***abuse*** of such right has not occurred,[38] French courts nonetheless require compliance with duties of loyalty and co-operation between the parties, whose legal basis is also identified with art 1134(3). Such duties, in particular, may require the right holder to facilitate the performance on the part of the obligor,[39] or may prevent her from exercising rights which she has neglected to assert over a period of time long enough to make their subsequent exercise contrary to good faith.[40]

3. England

English law knows no general principle of good faith. Yet, it is far from indifferent to some of the concerns which have been outlined in the preceding sections on France and Germany. The English approach, in fact, is simply not one pegged on a general clause, but rather entrenched in various piecemeal solutions to problems that are – in other jurisdictions – generally solved by appealing to 'good faith.'

It has already been observed how one such line of piecemeal solutions consists in the implication of terms, in order to supply any 'made-to-measure' terms which the parties may need to successfully perform their respective duties.

Moving on the side of the rights holders' perspective, one limit to the exercise of contractual rights, when that would amount to an instance of ***venire contra factum proprium***, is afforded by the doctrine of promissory estoppel. While the view in English law is that promissory estoppel may only be used as a defense against a claim raised on

[33] For its derivation from art 1134(3), see ibid, 35.
[34] Ibid, 34.
[35] Bell, Boyron and Whittaker, 373.
[36] Whittaker and Zimmermann, 535.
[37] Bell, Boyron and Whittaker, 374.
[38] This threshold, despite any possible references to a deliberate intention of the party committing such an abuse, can usually be met by a showing of a significance of losses suffered by the obligor having to abide by the other party's right (see Whittaker and Zimmermann, 407).
[39] Ibid, 310.
[40] See eg Civ (1) 16 Feb 1999, Bull civ I no 52.

other grounds, ie a contract[41] (thereby excluding any form of reliance-based liability in cases of failed negotiations),[42] this does not have any negative bearing on the possibility to resort to promissory estoppel in the presence of a contract. In particular, promissory estoppel will operate in similar instances by preventing the exercise of contractual rights in a manner that frustrates the reliance cast by one party on previous statements made by the other one.[43]

Other common law jurisdictions, for instance Australia, have even gone further, by implying a 'good faith' limit to the contractual right to terminate a contract in the presence of inexact performance, however minor might the missing aspect be.[44]

On a more specific level, statutory law may sometimes provide solutions – with respect to designated types of contracts - that already stem from a balancing of the parties' reciprocal interests with respect to a specific contract.[45]

Finally, although the link with the exercise of contractual rights becomes more tenuous, one also has to recall the various doctrines which have been developed in recent times, mitigating the 'absoluteness of contractual obligations,'[46] such as the doctrine of economic duress.[47]

IV. Conclusion

Boldly stated, the conclusion to the above discussion could be that there is a close similarity of *concerns* across legal systems to provide answers to particular patterns of controversial situations.

Generally speaking, it has in fact been observed how, both with respect to the implication of 'made-to-measure' terms and the restraining of the exercise of rights, all three systems seem to use an objective test in the former case, and they similarly have legal responses to instances of *venire contra factum proprium* in the latter scenario.

Within such limited areas, therefore, one could argue that the difference between the systems is, indeed, just one as to the names of the legal constructs used for performing a certain function. In fact, ultimately, France, Germany and England all take pains to regulate the particular instances examined (eg *venire contra factum proprium* in asserting contractual claims, supplementing the parties' express agreement with additional, made-to-measure requirements), and the regulatory mechanisms for achieving such ends generally involve some amount of discretion (eg the understanding of the 'implied' intentions of the

[41] *Combe v Combe* [1951] 2 KB 215 (CA).

[42] Although possible future developments in this direction cannot be excluded, given the reciprocal influence of judgments handed down throughout the Commonwealth and, more generally, in other common-law jurisdictions (Cartwright, 10), and the presence of Australian (*Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 (High Court of Australia) and American (*Hoffmann v Red Owl Stores, Inc.* (1965) 26 Wis.2d 683, 133 N.W.2d 267 (Supreme Court of Wisconsin)) decisions affirming the contrary position might be an indicator of where English common law might be heading in the near future as well.

[43] A useful statement of the requirements of promissory estoppel is contained in *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326 (Privy Council) 1330.

[44] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 (CA).

[45] In this respect, for instance, the Sale of Goods Act 1979 contains a series of useful provisions regarding the quality or fitness of the sold products (s 14), the exercise of the right to reject defective goods (s 15A), as well as the right to reject a delivery that is slightly smaller or bigger than the contractually stipulated one (s 30(2D)).

[46] Whittaker and Zimmermann, 47.

[47] A ground for contract voidability, based on threat to a party's economic interests (Cartwright, 170).

parties in implying terms, or the determination as to when a party's reliance on statements made by the other is 'reasonable') which ultimately affords courts some leeway to perform that balancing of the opposing interest which, it has been contended, is the heart of a general notion of good faith. Good faith as a balancing mechanism, in fact, seems the only possible way to rationalize under a single heading the possible solutions adopted within the various systems, notwithstanding the absence of a common lexicon (eg *good faith* in German law, the common intention of the parties and abuse of rights in French law, estoppel and implied-in-fact terms in English law).

Yet, aside from this general similarity in the way in which legal systems *consider* problematic factual patterns, it might amount to making an overbroad claim stating that the solutions that are achieved are also identical in every single instance. In fact, particularly in the 'grey area' situations to which any good faith-based solution applies, judicial attitudes may vary broadly. In particular, greater restraint is to be expected by English courts as opposed to continental judges. This might be so because English courts have a much more limited and piecemeal toolbox than their continental counterparts.

Hence, in the end, what we have is indeed a narrow common ground. A common ground as to the *issues* but in which – it is important to acknowledge – differences in techniques cannot ultimately exclude the possibility that – in some instances – substantially diverging solutions would be offered with respect to similar factual patterns.