

**Achieving flexibility in contracting by using vague terms  
in international business contracts:  
A comparative approach from the perspective of  
Common law, German, Polish and Chinese Law**

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It is common to find general clauses referring to codes of ethics, professional standards and customs in commercial contracts between parties from different legal systems. Those clauses may impose obligations or provide permission to apply certain provisions, rules or customs. Such general clauses may contain vague phrases, such as ‘principles of fair trading’, ‘good manners’, ‘common good’, ‘important reasons’, ‘legitimate reasons’, ‘special circumstances’, ‘good faith’, “friendly negotiation”. The examples are taken from different legal texts such as statutes and contracts written in Chinese, German, Polish and English. The vague contract terms are taken from standard contracts that are used in certain fields of commerce in which long-term obligations are usually found, for example, construction contracts.

What do those general clauses and vague phrases in contracts mean to commercial parties? Do they really have the same understanding when they sign the contracts? Can such clauses and phrases be understood flexibly to accommodate both parties’ commercial interests? How important are such clauses for those parties who seek long-term relationship?

The authors show the differences in the meaning of selected general clauses, which apparently signify the same entities and concepts but in fact differ significantly due to the different law-systems that form the background of those terms and other factors. The main aim of this Chapter is to establish the constituent characteristics of the concepts being analyzed and to distinguish near equivalence and partial equivalence of selected vague phrases referring to codes of ethics, professional standards and customs.

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## 1. Introduction

Contracting is a process that culminates in the finalizing phase in which the contract is actually signed and then executed. The process of contracting starts with developing trust in the future contract partner, followed by a phase in which the parties negotiate the terms of the contract and finally the matter is closed in a contract. Therefore one might seek flexibility in contracting in the first two stages of the process of getting to contract rather than in the later period after the signing of the contract. A contract, once concluded, binds the parties and is intended to remain binding even if circumstances change. For instance, if the financial position of one of the parties changes, his or her need for the object of the contract alters or the value of the object goes up or down, the validity of the contract itself will not be affected.<sup>4</sup> The principle of *pacta sunt servanda* is guaranteed in most, if not all legal systems respecting individual liberties and the freedom of contract.<sup>5</sup>

But even if the contract is fixed and closed, a need may arise to adapt the contract to altered circumstances. This need may be most acute in contracts entailing continuous obligations for a significant period.

One can argue that trust and negotiation never entirely cease during the process of getting to a contract. Trust as an inherent and accompanying value must be established and maintained. In the contract itself it is often expressed as the principle of “good faith” that lies underneath the provisions of the contract and it is of course also expressed in the private law rules of the different legal systems.

## 2. How does vagueness foster flexibility in contracts

Flexibility for the period after the rendering into force of the contract can be achieved by several methods.

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<sup>4</sup> Hondius, E., Grigoleit, H.C., (2011), ed., *unexpected circumstances in European contract law*, Cambridge: University Press, p. 3.

<sup>5</sup> *Ibidem*, p.4.

Frame contracts are used for the purpose of designing a frame for the general conditions in, for instance, a long term delivery relationship. In contrast, the concrete price, time and amount of a special delivery is fixed by additional single contracts for each sale.

There are boilerplate-clauses that indicate a duty to negotiate certain matters, if a specific need to do so arises. This formalizes the principle that communication never entirely ceases even after the enforcement of a contract. These clauses can be taken from template clauses, i.e. the Principles of European Contract Law (PECL) which can serve as a model for a contract when the parties have agreed to incorporate them into their contract. Hardship-clauses or force-majeur-clauses often state the duty to renegotiate terms in case the performance of a contract becomes more onerous to the parties. Art 6:111 PECL contains a duty to negotiate, if circumstances change. Other legal rules which can likewise be used as templates contain similar but not identical obligations to negotiate when certain conditions are met.<sup>6</sup> The INCOTERMS for example contain a secondary obligation about who has to inform the other partner about what. Another common method to make a contract more flexible is to use vague terms in it, so that the contract would fit under a variety of circumstances. There are contract clauses referring to codes of ethics, professional standards and customs which are applicable to the relation regulated of the contract. Clauses containing vague phrases are often also used in flexible contracting between parties from different legal systems to impose obligation or permission to apply certain provisions, rules or customs such as: “good faith”, “reasonableness”, “onerous”, “due progress”.

In this article we would examine the selected vague phrases/clauses of good faith and reasonableness from contracts actually used in business transactions, business template contracts or other legal instruments and would try to show how they would be understood (although the text is the same) under common law, German, Polish, and Chinese law.

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<sup>6</sup> Ibidem, p. 657.

### 3. The concept and scope of the term “general clause”

It is not easy to define precisely the term “general clauses” in Polish literature and legal acts for example there are numerous discrepancies and diverging functions or definitions for vague clauses or phrases.

In accordance with s. 155 lit. 1 of the annex of the decree of the President of the Council of Ministers from 20.6. 2002 on the Rules of Legislative Techniques<sup>7</sup> the legislator may apply terms with flexible meanings, general clauses or indicate uncrossable upper and lower borders of freedom of decisions, if there is a need to provide flexibility of a statutory instrument<sup>8</sup>.

General clauses in the language of the law are usually understood as:

- specific legal provisions containing various types of terms with flexible/undefined meaning<sup>9</sup>
- terms with flexible/undefined meaning out of which the content of legal provisions is composed.<sup>10</sup>

As far as the application of general clauses is concerned in Polish legal literature scholars favor the institution of “reference”. It means that the text recipient is referred to general assessment criteria of non-legal character – that is to say moral values, political values or economic values.<sup>11</sup> This stance finds confirmation in the following definition: “a general clause is a flexible expression included in a legal provision referring to certain assessments typical of a given social group, to which such a legal provision refers by obliging persons to abide by them when determining a factual state of affairs regulated by a given norm”.<sup>12</sup>

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<sup>7</sup> Załącznik do rozporządzenia Prezesa Rady Ministrów z dn. 20 czerwca 2002 r. w sprawie "Zasad techniki prawodawczej", Dz.U. no. 100, pos. 908.

<sup>8</sup> „Jeżeli zachodzi potrzeba zapewnienia elastyczności tekstu aktu normatywnego, można posłużyć się określeniami nieostrymi, klauzulami generalnymi albo wyznaczyć nieprzekraczalne dolne lub górne granice swobody rozstrzygnięcia”.

<sup>9</sup> Wolter, A., Ignatowicz, J., Stefaniuk, K. (1996) *Prawo cywilne. Zarys części ogólnej*, Warszawa: Wydawnictwa Prawnicze PWN, p. 67.

<sup>10</sup> Zieliński, T. (1988) *Klauzule generalne w prawie pracy*, Warszawa: Wydawnictwo Prawnicze, p. 38.

<sup>11</sup> Rott-Pietrzyk, E. (2007) *Klauzula generalna rozsądku w prawie prywatnym*. C.H. Beck, Warszawa, p. 280-281.

<sup>12</sup> Radwański, Z., 2003, *Prawo cywilne – część ogólna*, C.H. Beck, Warszawa, 51.

Therefore a general clause is understood as a type of authorization for a body applying the law to use the criteria specified in a given general clause in the decision-making process.

There is, however, another stance in accordance with which general clauses are obligations of government bodies applying the law to assess factual states of affairs on their own. Such assessments shall be made in reference to all circumstances and earlier decided cases. The rules, principles, norms and moral values specified in a general clause are treated as a factor which is either a starting point or a guide in the process of making judgments by law-applying bodies.<sup>13</sup> According to *W. Wolter*, the legislator consciously does not (or may not) want to state more precisely the meaning but designates only some more or less subjectively specified meaning “field” which is to be filled in by the court practice with its individual assessments and judgments.<sup>14</sup>

Both notions about the aim of general clauses are reasonable and reflect a certain function of general clauses. The second stance presented in the doctrine and the cited decree of the Polish President of the Council of Ministers would suggest the application of general clauses for achieving flexibility in lawmaking and contracting. It is clear that flexibility in contracting may be preserved by applying general clauses instead of precise guidelines. Such clauses could refer to general rules, i.e. principles that are laid down in a law of a higher rank such as the constitution, to principles of social behaviour and conduct, to ethics customs etc. Especially in the case of contracts whose parties come from different legal systems expressions with flexible meaning may enable flexibility in interpreting contract fragments in which they are used.

#### 4. General Clauses in international business contracts

There are several legal instruments – some of them stated before – which can serve as a model for the contract, as a template.

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<sup>13</sup> Rott-Pietrzyk, 2007, see supra note 11, p. 282-283.

<sup>14</sup> Wolter, W, 1976, *Uwagi o znamionach wymagających ilościowej oceny*, in: Państwo i prawo, vol. 6., p. 25.

#### 4.1. Instruments issued by private organizations

Instruments issued by private organizations which contain international rules for the interpretation of standard contract formulas are for example the INCOTERMS from the international chamber of commerce. Template contracts for certain fields of contracting include, for example, the ORGALIME General Conditions that are primarily intended for use in international contracts for delivery of engineering industry products in general, or the FIDIC rules which contain guides and templates for international contracts and business practice documents. Although they are referred to as “*lex mercatoria*” it is now the common opinion of scholars that they are not totally independent from the national law system from which they were originally drafted,<sup>15</sup> so i.e. the FIDIC rules – although the full name of FIDIC: “*Fédération Internationale des Ingénieurs-Conseils*” – implies French roots were drafted from a common law background.<sup>16</sup>

#### 4.2. Instruments issued by international organizations, branch associations or academic groups

There are also legal instruments that can serve as contract templates of a more general scope, issued by international organizations, branch associations or academic groups. Such are the UNIDROIT principles of international commercial contracts (UPICC), the principles of European contract law (PECL) or the Draft Common Frame of Reference (DCFR) as a restatement of principles of general contract law.<sup>17</sup> All of these documents contain also general clauses.

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<sup>15</sup> Lorenz, M., 1993, *Unterbeteiligungen an Krediten im Common Law und im Civil Law*, in: *Untersuchungen über das Spar-, Giro- und Kreditwesen* Bd. 84, Duncker und Humblot, Berlin, p.358.

<sup>16</sup> Triebel, V., Balthasar, S., 2004, *Auslegung englischer Vertragstexte unter deutschem Vertragsstatut, Fallstricke des Art. 32 I Nr. 1 EGBGB*, NJW, 2189, p.2191.

<sup>17</sup> Cordero-Moss, G , 2011, *Does the use of common law contract models give rise to a tacit choice of law or to a harmonized, transnational interpretation?* In Cordero-Moss, G. (ed.) *Boilerplate Clauses in International Commercial Contracts and the applicable law*, Cambridge University Press, p. 37-61, p.44.

#### *4.3. Typical examples for vague clauses in international template contracts*

The PECL for example contain the vague clauses of good faith, fair dealing, certainty (in contractual relationship) and uniformity (of application) and also reasonableness in several articles. The term reasonableness is used as often as 75-times in the PECL and was also defined there in Art. 1:302 :<sup>18</sup>

##### Article 1:302: Reasonableness

Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account.

The DCFR also contains vague clauses of “good faith”, “fair dealing” and “legal certainty” as well as “reasonableness” in the field of interpretation and development of a contract concluded under those rules. An overlook of typical boilerplate clauses shows that vague terms are frequently used in those clauses as given by Cordero-Moss.<sup>19</sup> I.e. the typical hardship clause relates to an “event that was beyond a party’s reasonable control and was one which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract and that the event and the consequences could not reasonably be avoided or overcome”.<sup>20</sup>

#### *4.4. Concrete clauses taken from a FIDIC based Contract*

The vague term of reasonableness is also used in the FIDIC template about the delivery of technical goods and their long term maintenance. Reasonableness is mentioned in what can be seen as a typical clause for risk distribution between the contractor and the owner. This clause reads:

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<sup>18</sup> Rott-Pietrzyk, E. (2005) *Pojęcie rozsądku w projekcie Europejskiego Kodeksu Cywilnego*, in Ogięły, L., Popiołka, W. Szpunar, M. (ed.) *Rozprawy prawnicze, księga pamiątkowa profesora Maksymiliana Pazdana*, Kantor Wydawniczy Zakamyczy, p. 701-719.

<sup>19</sup> Cordero-Moss, G , 2011, *Introduction to part III*, in: Cordero-Moss, G. (ed.) *Boilerplate Clauses in International Commercial Contracts and the applicable law*, Cambridge University Press, p. 119.

<sup>20</sup> *Ibidem*, p.122.

If and to the extent that any of those risks (specified risks defined to be in the sphere of the owner) above results in loss or damage to the works, Goods, (as the case may be), the Contractor shall (i) without undue delay give notice to the Owner and (ii) rectify this loss or damage to the extent that the rectification is possible by **commercially reasonable means** and instructed by the Owner.

And also in the following clause:

If the Contractor suffers delay and/or incurs Cost as a result of rectifying loss or damage which was instructed by the Owner to be rectified or otherwise as a result of the occurrence of any of the matters listed above the Contractor shall give a further notice thereof to the Owner and shall be entitled to:

- (a) an extension of time for any such delay; and
- (b) payment of any such Cost, which shall be added to the Contract Price. In the case of sub-paragraphs (b), (c) and (d) above, the Contractor shall be entitled **to any such Cost plus reasonable profit.**

So in this clause reasonableness was placed in the context of commercially reasonable means and reasonable profit.

In this contract there is also a clause of commitment to amendment which provides flexibility in the contract and is interesting because more and more projects are financed by banks or financial institutions and the banks do often take a seat in the negotiations.

This clause reads:

The Parties acknowledge, and the Contractor agrees, that the Owner will partially finance the payments due under this Contract by means of the Financing that will be granted to him by the Financial Institutions. Consequently, and considering the need for the Owner to obtain the Financing in order to pay the entire Contract Price, **the Parties agree to negotiate in good faith** and make every effort to amend those provisions of this Contract, the amendment of which is expressly requested by the Financial Institutions as a condition for obtaining the necessary financing for the implementation of the project.

Here the vague term “good faith” is related to the way the negotiations should be conducted.



Another clause that is frequently found in template contracts and also in our example contract is a clause about the principle of an overall application of good faith for the execution of the contract combined with a conflict resolution clause.

The Parties **undertake to fulfil this Contract in good faith, resolving through negotiations and mutual agreements any disputes which may arise between them** regarding its application, development, fulfilment, interpretation and implementation. In the event that an amicable settlement is not reached within ten (10) days from the beginning of the dispute that stated in the following paragraphs shall apply.

These clauses are taken from FIDIC-forms of contract. FIDIC-forms of contract are embedded in the common law notwithstanding the fact that some of its features may be influenced by civil law. In fact no specific endeavors and efforts have been made to emancipate FIDIC-forms of contracts of its basic roots, which are undeniably identified as being the common law.<sup>21</sup>

#### *4.5. The need for the translation of contracts and the need for awareness of different meanings in different languages and different legal contexts*

In concluding a contract one has to distinguish between the applicable law of the contract, the original language of the contract and (convenience) translations of the contract for a better understanding of the contract for interested persons.

An international business contract often contains a choice of law clause that may be formulated as follows: *“this contract shall be governed by (i.e.) Polish law.”*

The applicable law of the contract has normally an underlying language. The language reflects the way of legal thinking, and this way of legal thinking shapes the methods of legal regulation and control, whether in legislation, case law, or even in the form of a contract.<sup>22</sup> A contract has a law that is applicable to it. If for example the applicable law to a contract is the

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<sup>21</sup> Bunni, N.G., 2005, *FIDIC forms of contract*, 3<sup>rd</sup> ed. Blackwell, Oxford p. 10.

<sup>22</sup> Döser, W.H., 2000, *Anglo-amerikanische Vertragsstrukturen in deutschen Vertriebs-, Lizenz- und sonstigen Vertikalverträgen*, NJW, p. 1451-1455, p. 1451.

Polish law, then that law is written and effective in the Polish language as that is the official language of Poland.<sup>23</sup> Although the official language of the contract doesn't need to be Polish unless the contract is a contract involving consumers or public institutions or it is a contract in the field of labor law<sup>24</sup> the Polish law and therefore the understanding of several law institutions in the Polish language are crucial for the understanding of the contract.

The same can be said about the application of any other law system, except that it is probably an exception rather than a rule that there is a statute which expressively states the applicability of a certain language to a contract completed under a certain jurisdiction.

So if a contract is formulated in English but the German law applies there is a discrepancy between the English terminology of the contract and the German legal language. This may cause confusion to the interpretation of the contract as certain terms (such as the terms examined here: "good faith / Treu und Glauben" or "reasonableness") are embedded in a certain legal surrounding that has to be mediated into different national legal spheres.

Things get even more complicated, if a contract is drafted after a common law template in English and the German law applies, either by explicit choice of German law made in the contract or because German law as the applicable law could not have been effectively excluded in certain areas of the contract provisions.<sup>25</sup> If such a contract is then dealt by a German court, the court would see the English style clauses in contracts governed by German law as a matter of contractual interpretation and therefore may use the English law as a tool to understand these clauses.<sup>26</sup> If typical English clauses and legal terms are used despite of the German applicable law, the English understanding of these terms may become relevant.<sup>27</sup> This approach is the prevailing opinion of higher courts in Germany. But German courts would tend not to use the English law for interpreting these clauses, if all other connecting

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<sup>23</sup> Art. 4 ustawa z dnia 7 października 1999 r. o języku polskim, Dz. U. 1999, no. 90, pos. 999; with later amendments.

<sup>24</sup> Art. 7 of the law of the Polish language, Ustawa o języku polskim, Dz.U.2011, Nr.43, Pos.224.

<sup>25</sup> More examples for language confusion are given in: Triebel, V., Balthasar, S., 2004, *Auslegung englischer Vertragstexte unter deutschem Vertragsstatut, Fallstricke des Art. 32 I Nr. 1 EGBGB*, NJW, p. 2190.

<sup>26</sup> Dannemann, G., *Common law-based contracts under German law*, in: Cordero-Moss, (ed.) *Boilerplate Clauses in International Commercial Contracts and the applicable law*, Cambridge University Press, p. 762-79, p. 78.

<sup>27</sup> Triebel and Balthasar, see supra note 16, p. 2193.

points of the case are German.<sup>28</sup> Even if the English text of the contract is taken from the background of the U.S. law, German courts would rather apply English law.<sup>29</sup> Vice versa the same principle doesn't apply. An English court would not judge a German contract to which the English law is applicable along with German interpretation guidelines<sup>30</sup> and also in the practice of international arbitration courts the clauses are rather interpreted neutrally along with their integral meaning.<sup>31</sup>

Even if the contract would be in English modeled along with English common law and the applicable law would be English common law, it is possible that a foreign judge decides the case. Certainly one may argue that these are rare cases, because if a contract contains a choice of law clause this is followed regularly by a choice of (secondary) jurisdiction clause, but still such cases occur. In these cases a German judge would have to apply the foreign law using the German language. Despite the progress in applying foreign law under the mediation of experts (§§ 293 ff ZPO) the basic legal understanding of the judge and his way of thinking determines the effect of a foreign law on his decision.<sup>32</sup>

Even if the translation of the contract is only for convenience, contractual provisions might be misunderstood by a contracting party who is not capable of fully understanding the original (legal) language of the contract. This may cause confusion regarding the concrete scope of contractual obligations to the persons who are responsible to execute the contract.

To overcome these difficulties it is possible to implement a contract clause that refers to the meaning of the language. The following clauses are given as:<sup>33</sup>

**1. Interpretation of a contract written only in English in accordance with German law**

This agreement and its terms shall be governed by and construed in accordance with the laws of Germany. If the English legal meaning differs from the German legal meaning of this agreement and its terms, the German meaning shall prevail.

**2. Bilingual text, English text serves only for information**

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<sup>28</sup> Dannemann, see supra note 26 p. 78; an overview of the Court decisions is available in: Triebel and Balthasar, see supra note 16, p. 2193.

<sup>29</sup> Walz, S., *Beck'sches Fb Zivil-, Wirtschafts- und Unternehmensrecht, D-E*, C. H. Beck, München., 2010, Klauseln zum Verhältnis deutschen und englischen Textes – Clauses on the relation of German and English text, annotation no 1.

<sup>30</sup> For further reference see: Triebel and Balthasar, 2010, p. 2193, supra note 16.

<sup>31</sup> Triebel and Balthasar, 2010, supra note 16, p. 2193.

<sup>32</sup> Döser, 2000, supra note 22, p. 1451.

<sup>33</sup> Examples: Walz, 2010, see supra note 29.

This text shall be governed by and construed in accordance with the laws of Germany. The English version of this text serves only for information and is not part of this legal transaction. Therefore, in the event of any inconsistency between the German and the English version, only the German version shall apply.

**3. Bilingual text, German text prevails in case of doubt**

This text shall be governed by and construed in accordance with the laws of Germany. It shall be executed in both the German and the English language. In the event of any inconsistency between the German and the English version the German version shall prevail.

The FIDIC-contract is written from the background of an approach and language that still reflects the common law, but presumably not English law alone.<sup>34</sup>

Probably in most cases FIDIC-forms of contract will be used in their original, English version, although translations do exist and FIDIC-terms of contract are often used in a Civil law context.<sup>35</sup> Despite any contradictions with the applicable law, which may exist and must be recognized as the case may be, the use of English does not mean that the parties will understand the terms and clauses as an English native speaker will do.<sup>36</sup> Instead at the outset some of the wording used by FIDIC will be either misleading or even not make sense. It is therefore critical to have prior knowledge of FIDIC's common law background in order to render it understandable to non native speakers.

Typical clauses in the FIDIC contract that have to be explained from their legal background are amongst others the term "reasonable" which we are going to discuss here or the expression "workmanlike manner". These terms are well-developed through common law case law but they are also completely unknown to civil law countries.<sup>37</sup>

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<sup>34</sup> Jaeger A.-V., Hök G.-S., 2010, *FIDIC-A Guide for Practitioners*, Springer-Verlag Berlin Heidelberg, 2010, p. 99.

<sup>35</sup> *ibidem*.

<sup>36</sup> *Ibidem*.

<sup>37</sup> *Ibidem*.

## 5. Vague terms relating to different law families

The laws of the world are systematized by scholars into different law families. We are going to discuss in our article mainly terms from civil law systems: German, Polish and – also to a certain extent relating to this law family – Chinese law. Yet for contrasting the argumentation and being aware that the English language – which is also the language of this article – is connected to a common law system, we would like to relate also to the common law family (English, U.S. law).

### 5.1. Common Law systems

Common law is the legal tradition, which evolved in England from the 11<sup>th</sup> Century onwards. This legal tradition is the basis of private law not only for England as its country of origin, but also for further States of the Commonwealth and de facto most important the US (except from Louisiana which was influenced by French law). The principles of common law appear for the most part in reported judgments, usually rendered by higher courts, in relation to specific fact situations arising in dispute, which courts have adjudicated. All in all common law rules seem to be more specific and detailed in comparison to civil law rules.<sup>38</sup>

Common law is dominated by focusing on each single case, so called ‘reasoning from case to case’. Generalizations or principles are only developed through deciding single cases which form precedents for the decision of other cases. The central role in common law is played by the judge, who thinks and decides historically, concretely, goes by facts and whose decisions are normally not taken along a dogmatic conceptual construct.<sup>39</sup>

A contract in the common law system is characterized through the fact that contract law is generally more concerned with certainty and expects parties to write their contracts around deficiencies in English law.<sup>40</sup> Therefore they attempt to combine all rules to an agreement.<sup>41</sup>

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<sup>38</sup> Lengeling, D., 2008, *Common law and civil law – differences, reciprocal influences and points of intersection*; Toronto/Siegen 2008, [pdf] available at <[http://www.consulegis.com/fileadmin/downloads/thomas\\_marx\\_08/DLengeling\\_paper.pdf](http://www.consulegis.com/fileadmin/downloads/thomas_marx_08/DLengeling_paper.pdf)> (accessed 9. 7. 2013), p. 8.

<sup>39</sup> Ibidem, p. 10.

<sup>40</sup> Dannemann, 2011, supra note 26, p. 65.

Contracts drafted under the US-law – as part of the common law – are famous for their vast amount of regulations.<sup>42</sup> Today international commercial contracts are, with only a few exceptions, drafted on the basis of common law models.<sup>43</sup> Still the PECL or the Draft Common Frame of Reference are grounded more on the civil law tradition as the majority of EU-member States belong to this tradition.

## 5.2. Civil Law systems

Civil law may be defined as a legal tradition which has its origin in Roman law, as codified in the *Corpus Juris Civilis* of Justinian, and as subsequently developed mainly in Continental Europe. The civil law legal tradition itself can be divided further into the Romanic laws, influenced by French law, and the Germanic family of laws, dominated by German jurisprudence.<sup>44</sup>

A civil law system indicates for the contracting practice that the need for discussion and documentation has been limited by the existence of a large body of statute law, regulating relationships and limiting the room for debate.<sup>45</sup>

A civil law system is a system in which regulation (by statutes and administrative acts) rather than litigation plays a stronger role in lawmaking and this influences also contracting.

As *Posner* puts it:<sup>46</sup>

Regulation and litigation tend to differ along four key dimensions:

- (1) regulation tends to use ex ante (preventive) means of control, litigation ex post (deterrent) means;
- (2) regulation tends to use rules, litigation standards;

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<sup>41</sup> *Ibidem*, p. 66.

<sup>42</sup> Döser, 2000, *supra* note 22, p. 1451.

<sup>43</sup> Cordero-Moss, introduction, *supra* note 19, p. 115.

<sup>44</sup> Lengeling 2008, *supra* note 38, p. 10.

<sup>45</sup> Cummings T., 2010, *Best Practices in commercial contracting*, Scandinavian Law, vol. 49, p. 134.

<sup>46</sup> Posner R.A., 2010, *Regulation (Agencies) versus Litigation (Courts): An Analytical Framework*; in: D.P. Kessler, (ed.) *Regulation vs. Litigation: Perspectives from Economics and Law, Conference held September 11-12, 2009*, University of Chicago Press, p. 11 - 26.

(3) regulation tends to use experts (or at least supposed experts) to design and implement rules, whereas litigation is dominated by generalists (judges, juries, trial lawyers), though experts provide input as witnesses; and

(4) regulation tends to use public enforcement mechanisms, whereas litigation more commonly uses private ones—private civil lawsuits, handled by private lawyers although the decision resolving the litigation is made by a judge (with or without a jury), who is a public official (the jurors are ad hoc public officials).

A feature of this - probably in Germany in the purest prevailing system - is the conviction that all possible legal constellations are abstract, sufficient and regulated by just one law. One would have merely to look into the Official Law Gazette to find for each case the prior regulated rule.<sup>47</sup> From this is deduced the principle that individual arrangements between the parties need to contain only the statutory basics for the *essentialia* of the case, but beyond this regulation, even if the wording of the contract leads to a different assumption, the contract can be completed by the statutory regulations which can be found for instance in s. 133 of the German civil code, s. 157 German civil code and s. 9 of the law on general terms and conditions (AGBG).<sup>48</sup>

Contracts concluded under German law (as an example for a civil law system) are “the better the shorter they are”, they are structured in a way that leads from general to specific and they are divided into sections with weighted logical subgroups.<sup>49</sup> The detailed provisions by this way will be located closest to the highest relevant superordinate topic/preamble and are formulated as abstractly as possible, so as to encompass all conceivable variations of the later following system levels.<sup>50</sup> An example for this – though not taken from a contract but from the civil code of Germany – would be the division i.e. of the first book of the civil code, which contains the general part of the code. The first division is about persons – a more general description, followed by the first title about natural persons which are consumers and entrepreneurs and then in the sections of this title there are regulated special questions concerning the beginning of legal capacity, residence, lack of full capacity etc.

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<sup>47</sup> Döser, 2000, supra note 22, p. 1541.

<sup>48</sup> Ibidem.

<sup>49</sup> Ibidem.

<sup>50</sup> Ibidem.

### 5.3. The Chinese law system

It is not an easy task to define the Chinese legal system, which has to be understood in a dynamic manner by considering its historical, political, social, economic and cultural conditions. Looking at the legal history of China, Imperial China actually established its legal system, which has existed for at least two thousand years. There was an intense debate between two main school of thoughts (Confucianism and legalism) concerning which a state should use to effect social control; eventually Confucianism prevailed (Chen, 2000).<sup>51</sup> At the turn of 20th century, China started its quest for modernisation and development, modern legal reforms, which was mainly processes of Westernisation, started by the Qing Dynasty and continued by the Nationalist Government. In 1949, the Communist party defeated the Nationalist party and established the People's Republic of China (PRC). Then China changed to a socialist system and started the process of establishing a socialist legal system. However, the Cultural Revolution (1966-1976) broke out and lasted for about ten years, which was considered a political and social disaster and undermined the nascent Chinese legal system. In 1978, the 2nd generation of leader Xiaoping Deng started to reestablish the legal system in China. Thus, in a way, it is probably fair to say that the principal development of the current Chinese legal system started since the late 1970s.

China has long labelled itself as “a social system of laws with Chinese Characteristics” (Information office of the State Council of PRC, 2011). The legal system of PRC generally has the civil law tradition, but also was influenced earlier by the Soviet Union and later by the common law tradition. It mainly has codified laws; by the end of 2010, China has established a comprehensive modern legal system with the Constitution as the head and civil, commercial laws and several other branches as the mainstay. The sources of law in China are wide, including the Constitution of PRC 1982, National People's Congress (NPC) statutory law and other legislative enactments, international treaties and so forth (Shen, 2009).<sup>52</sup> The laws issued by the NPC (China's national legislature) and the administrative regulations adopted by the State Council (China's cabinet) are important in China.

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<sup>51</sup> Chen, Albert H.Y. (2000) *Socialist Law, Civil Law, Common Law, and the Classification of Contemporary Chinese Law*. In Otto, Jan Michiel and Polak, Maurice V. and Chen, Jianfu and Li, Yuwen (Eds.): *Law-Making in the People's Republic of China*, The Hague, London, Boston: Kluwer Law International, 55 - 74.

<sup>52</sup> Shen, Zongling (2009) *Jurisprudence*, 3<sup>rd</sup> ed., Peking: Peking University Press, 263-270.



In order to integrate itself to the global rules-based trading system, China has made enormous efforts to adjust its legal system to Western Standards. China has undergone various economic reforms and legal reforms since its accession to WTO in 2001.

Legal concepts, terminology, institutions, and processes which have origin in Western countries can often be seen in Chinese laws. It is thus claimed that the development of Chinese law to a large extent is a process of legal transplantation (Chen, 2007).<sup>53</sup> However, certain external factors, such as environmental, social, economic, and cultural aspects can become barriers and have influence on the effect of legal transplantation (Kahn-Freund, 1974). But the term “legal adaptation” may be more proper to describe the phenomenon of legal reforms in China, as China usually firstly studies different models in other countries and international rules, learns ideas from them, and then adapts them to its own context. An American scholar considered Chinese legal reform as a process involving a filtering of those external influences for purpose of making the foreign elements compatible with Chinese legal and political culture (Head, 2009).<sup>54</sup> Some foreign scholars have recognized the weight that China’s past has; thus considered, the Chinese legal system seems like a western system but with the influence of its own traditions (Jones, 2003).<sup>55</sup> Some understand ‘Chinese law’ as a collective term emphasizing the plurality of legal systems (Menski, 2006).<sup>56</sup>

## 6. Problems of translating vague legal terms from a linguistic viewpoint

Legal translation theoreticians often carry out research into vagueness and fuzziness. They stress that numerous legal terms and expressions are used to refer to objects, institutions, relationships and procedures that are typical of a given legal system. *Each legal system has its own legal realia and thus its own conceptual system and even knowledge structure.*<sup>57</sup>

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<sup>53</sup> Chen, Jianfu (2007) *Modernization, Westernisation, and Globalisation: Legal Transplant in China*. Hong Kong Law Journal, (2007),37(II).

<sup>54</sup> Head, J. W. (2009) *China’s Legal Soul. The Modern Chinese Legal Identity in Historical Context*. Durham: Academic Press, 219-221.

<sup>55</sup> Jones, W. C. (2003) *Trying to Understand the Current Chinese Legal System*. In C. N. Hsu (ed.): *Understanding China’s Legal System. Essays in Honor of Jerome A. Cohen*. New York: New York University Press, 7-45.

<sup>56</sup> Menski, W. (2006) *Comparative law in a global context: The legal systems of Asia and Africa*. New York: Cambridge University Press, 3-4.

<sup>57</sup> Vanderlinden, 1995, *Comparer les droits*, Bruxelles, p. 328-337.

When talking about general clauses one shall not forget about the opinion of Šarčević (2000, p. 233) who claims that there are numerous indefinite or vague terms, such as ‘the best interests of the child’, ‘due care and attention’, and ‘good faith’, which are easily translated and already exist in most legal systems, but are interpreted differently by courts of different jurisdictions. So if they are interpreted differently, is it possible to apply general clauses at all in contracts between parties coming from different countries? It definitely requires vast knowledge going beyond legal one.

As far as translation is concerned Šarčević, opts for “measuring the degree of equivalence”. She claims that: Translators should be aware of the effects of differences of socio-political principles on interpretation. Some general clauses may have a political context and background, e.g. the Chinese syntagm “public needs/requirements” (公共利益的需要, *gōnggònglìyìdèxūyào*) should be interpreted in the light of the fact that in the Chinese People’s Republic land may not be owned by private individuals, and the arable land is only used by people who do not enjoy any legal protection against expropriation.<sup>58</sup> Those “public needs” enable the authorities to interpret legal provisions in various ways and may even constitute grounds for expropriation. So, as Cao investigating English-Chinese and Chinese-English translation, she correctly remarks: Linguistic uncertainty, whether it is ambiguity, generality or vagueness includes both intralingual uncertainty, that is uncertainty found within a language, and interlingual uncertainty, that is, uncertainty that arises when two languages are compared or when one language is translated into another language.<sup>59</sup> In such cases, words, phrases and sentences in one language may or may not be uncertain, but additional ambiguity or other uncertainty may arise when they are considered across two languages.

It should be stressed here that languages are indeterminate and the level of indeterminacy of different languages varies. Cao argues that the level of uncertainty of Chinese in comparison with English is higher. To support her thesis she refers to the opinion of *Grossfeld*, a jurist from German who considers the English legal language, ‘less concentrated’ or in other words ‘*more open-textured*’ than the German legal language. He also claims that legal concepts of the English legal system are vaguer which may pose subsequent problems.<sup>60</sup> Finally, *Cao*

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<sup>58</sup> Šarčević, S. (2000) *New Approach to Legal Translation*. The Hague: Kluwer Law, p. 233.

<sup>59</sup> Cao, D. (2008) *Translating Law*. Shanghai, Shanghai Foreign Language Education Press, p. 19.

<sup>60</sup> *Ibidem*, p. 80.

argues that in translation, new linguistic uncertainty, that is, interlingual uncertainty, may be created due to the differences in linguistic and legal systems. This sometimes is inevitable, not due to translators' mistakes, but because of the inherent nature of language. Often, the translator has to make hard decisions within the constraints of language.<sup>61</sup>

Another scholar dealing with legal language and legal translation *Tessuto*<sup>62</sup> claims that flexibility may be mostly found in syntagms<sup>63</sup> which constitute adjectival, adverbial and phrasal expressions. She also turns attention to the fact that a few terms are used to refer to such syntagms, namely the scholars write about vagueness, ambiguity, semantic indeterminacy,<sup>64</sup> or hedging.<sup>65</sup> Among such syntagms she enumerates the following ones: such as, as soon as practicable, award is appropriate, fair opportunity, the award shall be made promptly, necessary measures, as promptly as practicable, on proof satisfactory to it, good cause, good faith, reasonable costs, reasonable inquiry, any circumstance likely to give rise to justifiable doubt and adds that of these, it is telling that the abstract and broad concept of 'good faith' has become part of different legal discourses and genres in which they have no technical meaning or statutory definition either, whether or not in the US law.<sup>66</sup>

## 7. The interpretation and translation of the chosen vague terms of good faith and reasonableness under various jurisdictions

### 7.1. Common Law countries, especially England and USA

In literature on the English legal system it is stressed that there are no general clauses in the English law which would have a wide and universal scope of application--to all contractual

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<sup>61</sup> Ibidem, p. 81.

<sup>62</sup> Tessuto, Girolamo (2010) *US Commercial Arbitration Rules and Mediation Procedures: Linguistic and Discoursal Features of a Genre in Action*. in: Bhatia, V.K., Candlin, Ch.N., Gotti, M. (ed.) *The Discourses of Dispute Resolution*, Peter Lang, Bern, 2010, p. 259.

<sup>63</sup> Syntagms are combinations of two linguistics units resulting in what we understand as one word (Martinet, A. (1970) *Podstawy lingwistyki funkcjonalnej*, Warszawa, Państwowe Wydawnictwo Naukowe, p. 117-118).

<sup>64</sup> Bhatia, Vijay K., Engberg, Jan, Gotti, Maurizio, Heller, Dorothee (eds.) (2005) *Vagueness in Normative Texts*. Peter Lang, Bern, p. 12.

<sup>65</sup> Lakoff, G. 1973, *Hedges: A Study in Meaning Criteria and the Logic of Fuzzy Concepts*, *Journal of Philosophical Logic*, vol. 2; Channell, J., 1994, *Vague Language*, Oxford University Press; Hyland, K., 1998, *Hedging in Scientific Research Articles*. John Benjamins, Amsterdam.

<sup>66</sup> Tessuto (2010) see supra note 62, p. 259.

relations, for example--although the vague term “reasonableness” maybe the exception to this rule. General clauses have therefore a very limited scope of application in the English law. If a general clause appears in a given text it may be analyzed and interpreted only in reference to the statutory instrument in which it is used.<sup>67</sup> In American law, the restatement of the law of Contracts and the development of the Uniform Commercial Code in which the principle of good faith is stated as often as in over 50 code sections, the principle of “good faith” was given wider recognition.<sup>68</sup>

### 7.1.1. General rules for the interpretation of contracts

Under English law there is no canon of interpretation rules as is known under a civil law system -- as, for example in German law where the interpretation of contracts is applied as the wording, the grammatical sense, the systematic interpretation the teleological interpretation, etc.

Under English law the wording of the contract is crucial. As a starting point the meaning of the document is to be found in the document itself, so the Court tries to find the “ordinary and natural meaning” (Investors Compensation Scheme/West Bromwich Building Society<sup>69</sup>). This is because the courts do not easily accept that people have made linguistic mistakes, particularly in formal documents (Lord Hoffman in ICS, at 913). If the meaning of a contract stays unclear there are further rules of interpretation such as to reach the most commercial outcome (Rainy Sky SA and Others –v- Kookmin Bank [2011] UKSC 50). There are also rules about who should prevail, if ambiguity occurs in the contract such as the principle *in contra proferentem*.<sup>70</sup>

Still the wording of the contract is crucial in the interpretive process along with the parole-evidence-rule, in which verbal evidence is not allowed to be given ... “so as to add or

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<sup>67</sup> Rott-Pietrzyk, see supra note 11, p. 204-205.

<sup>68</sup> Farnsworth, E.A., 1995, *Duties of Good Faith and Fair Dealing under the unidroit principles, relevant international conventions and national laws*, Tulale Journal of international and comparative law, vol. 3, p. 47-63, p. 52.

<sup>69</sup> Investors Compensation Scheme v. West Bromwich Building Society [1997] UKHL 28; [1998] 1 All ER 98; [1998] 1 WLR 896 (19th June, 1997).

<sup>70</sup> Peel, 2011, *Boilerplate Clauses under English law*, in: Cordero-Moss, (ed.) *Boilerplate Clauses in International Commercial Contracts and the applicable law*, Cambridge University Press, p. 129-178 p. 133.

subtract from, or in any manner to vary or qualify the written contract”.<sup>71</sup> So any intentions of the parties not laid down written in the contract are not to be taken into account in the process.

Of course there are more implications about the interpretation of contracts from a common law approach. These interpretation rules are developed from case-based reasoning rather than deduced from a general principal.

### *7.1.2. Good Faith*

Along with the literal interpretation “good faith” might be understood as trust, belief or loyalty, an allegiance to a cause or a person, as for example "keep the faith" or "they broke faith with their investors”.

Historically the term good faith finds its origin in Roman law as the expression of *bona fides*.<sup>72</sup> It gave the judge an equitable discretion to decide the case before him in accordance with what appeared to be fair and reasonable.<sup>73</sup>

Good faith is a term that is not really originated in the English law. In the case *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd.*, judge Bingham explained this principle as follows:

“In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognize; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as ‘playing fair’, ‘coming clean’ or ‘putting one’s cards face upwards on the table.’. It is in essence a principle of fair and open dealing.

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<sup>71</sup> Triebel and Balthasar, 2004, supra note 16, p.2191.

<sup>72</sup> Whittaker, S., Zimmermann, R., 2000, *Good Faith in European Contract Law*, Cambridge University Press, p. 16.

<sup>73</sup> Ibidem.

English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus equity has intervened to strike down unconscionable bargains.”“At one level they are concerned with a question of pure contractual analysis, whether one party has done enough to give the other notice of the incorporation of a term in the contract. At another level they are concerned with a somewhat different question, whether it would in all the circumstances be fair (or reasonable) to hold a party bound by any conditions or by a particular condition of an unusual and stringent nature.”<sup>74</sup>

English law – as this quotation of the reasoning of judge Bingham JB in *Interfoto picture Library Ltd v. Stiletto Visual Programms Ltd.* shows – would rather tend to use the terms fairness and reasonableness, to explain why in certain cases a contract is not concluded or must be adjusted to fair standards.

As for “good faith” it tolerates a certain moral insensitivity in the interest of economic efficiency and values predictability of the outcome of a case more highly than absolute justice.<sup>75</sup>

From the English legal point of view there seems to be a tension between an overall principle of good faith which is understood as a principle to induce general reasoning about justice and therefore to give a judge the possibility to overrule the wording of a contract for the sake of absolute justice on the one hand; and on the other hand a non-application of such a principle and instead an interpretation of a contract along with its wording which serves the predictability of the outcome of a contract and in the overall perspective economic efficiency. Whittaker and Zimmerman express the idea that in the absence of a principle of good faith the making, performing or breaking of contracts is permitted by the law to be nasty and brutish with the parties entitled to flout all consideration of decency and fair play.<sup>76</sup>

Yet in many relevant cases the English law comes to similar results through the application of different doctrines such as equity,<sup>77</sup> the interpretation of a contract by paying regard to the

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<sup>74</sup> Bingham in: *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd.*, see also Peel, 2011, p. 134.

<sup>75</sup> Whittaker and Zimmermann 2000, see supra note 72, p. 7, with further references.

<sup>76</sup> *Ibidem*, p. 44.

<sup>77</sup> *Ibidem*.

parties' intentions,<sup>78</sup> the reasonable expectations of the parties<sup>79</sup> or "good faith" is being introduced by the law of particular contracts<sup>80</sup> and also statutory law.

One of the FIDIC contract provisions in which "good faith" is mentioned is the clause:

(...) **the Parties agree to negotiate in good faith** and make every effort to amend those provisions of this Contract, the amendment of which is expressly requested by the Financial Institutions as a condition for obtaining the necessary financing for the implementation of the project.

A clause to negotiate in good faith is a template that can be not only found in the concrete contracts we were analyzing but it is a typical boilerplate clause. It is also an underlying principle in the PECL, as sec. 3 art. 2:301: combines negative consequences in form of a liability for negotiations contrary to good faith.

#### **Article 2:301 PECL Negotiations Contrary to Good Faith**

- (1) A party is free to negotiate and is not liable for failure to reach an agreement.
- (2) However, a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.
- (3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

This is also a duty that is often formulated in boilerplate dispute regulation clauses, e.g., as follows:

If a dispute arises out of this contract, and if the dispute cannot be settled through negotiation, the parties agree **first to try in good faith to settle the dispute by mediation** before resorting to arbitration, litigation, or some other dispute resolution procedure.<sup>81</sup>

This term from an English law point of view seems to be quite problematic. A duty to negotiate in good faith has been described by the House of Lords in *Walford v. Miles* as

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<sup>78</sup> Ibidem, p.45.

<sup>79</sup> Ibidem, p. 46.

<sup>80</sup> Ibidem.

<sup>81</sup> <http://www.mccammongroup.com/services-mediation/alternative-dispute-resolution-clause.asp>, (last accessed 3. 7. 2013)

“inherently repugnant to the adversarial position of the parties when involved in negotiations’ and as ‘unworkable in practice’.<sup>82</sup> “The reason why an agreement to negotiate, (...) is unenforceable is simply because it lacks the necessary certainty. (...) How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined “in good faith”. However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a ‘proper reason’ to withdraw. Accordingly, a bare agreement to negotiate has no legal content.<sup>83</sup>

The outcome of this reasoning is especially problematic when it comes to the example of the dispute-settlement-clause given before. A mediation needs from the whole definition of the procedure good faith of the parties so that it can be successful. If such an ADR-clause under the English law would be invalid, it would have an impact on many contracts. Yet there have been other decisions about negotiations in good faith and different perception of “good faith” in other common law countries.

In the case *United Group Rail Services v Rail Corporation Of New South Wales* decided by the Australian NSW Court Of Appeal<sup>84</sup> the Court Rejected the "Walford v Miles" – Construction Of Dispute Resolution Clauses by arguing that a clause requiring senior representatives of the parties to "meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference" was not uncertain in law and was therefore valid and enforceable.

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<sup>82</sup> Whittaker and Zimmermann, 2000, see supra note 72, p. 7 with further references.

<sup>83</sup> Lord Ackner, 1992, in *Walford -v- Miles*.

<sup>84</sup> [2009] NSWCA 177.



In United States law the understanding of the principle of good faith is at least in commercial law different. The prerequisite of good faith serves as a basic overriding principle, especially in the UCC. It is essentially equitable in character. The UCC enables the jurist on several occasions to apply that equitable principle. Good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in trade (Section 2-103(1)(b)). If not especially related to merchants, good faith means honesty in the conduct or transaction concerned (Section 1-201(19)).<sup>85</sup>

### *7.1.3. Reasonableness*

In the English legal system in which precedent law dominates, reason is not only used as a criterion typical of traditional common law, but also as a general clause.

The English term ‘reason’ (*rozsądek*) according to Rott-Pietrzyk<sup>86</sup> has a wider scope of meaning than its Polish counterpart. The English term “reasonableness” (*rozsądny*) also means “just” (*śluszny*), “righteous, honest, fair” (*uczciwy*). One will not find connections between “reason” (*rozsądek*) and “rightness” (*ślusznosc*) in the Polish language as a criterion for assessments of conduct compliant with moral norms. What may be interpreted is only the connection with rationality of a specific action. In accordance with the definition formulated by Rott-Pietrzyk<sup>87</sup> “rational” (*racjonalny*) means “sensible; based on the proper thinking and effective in actions; justified, reasoned, and based on Latin *rationalis* means “reasonable” from *ratio* “account; judgment; reason, mind; method (...)”. The dictionaries of synonyms<sup>88</sup> give the following pair reasonable-rational. In the English language, in turn, “reasonable” differs from “rational” because the designate of the former, that is to say the referent, is also righteousness, which is not the designate of the latter term.<sup>89</sup> Therefore, it is assumed that “*racjonalny*” is more linked with logic and logical thinking/reasoning on the basis of a logical syllogism, whereas “*rozsądny*” refers to “practical human problems” and “remains something very close to equity”.<sup>90</sup>

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<sup>85</sup> Farnsworth 1995, see supra note 68.

<sup>86</sup> Rott-Pietrzyk, 2007, see supra note 11, p.10

<sup>87</sup> Ibidem.

<sup>88</sup> Kurzawa, Z. (ed.) 2004. *Słownik synonimów polskich*, Wydawnictwo PWN, S.A.

<sup>89</sup> Ibidem.

<sup>90</sup> Rott-Pietrzyk, 2007, see supra note 11, p. 11.

In American law being "reasonable" means to have capacity of reason, acting rationally or governed by reason. The behavior can be called "reasonable" if the activities can be valued as fair, just, or equitable. The person must be honest, moderate, sane, sensible, and tolerable. "Reasonable" implies a certain standard of valuation. It is a standard for guiding conduct. The person or his acts can be characterized as reasonable if he possesses the just-mentioned virtues. A fictitious standard is set up to evaluate human behavior.<sup>91</sup> The reasonable man test serves as a flexible concept, which needs to be interpreted by a constant shifting of the viewpoint between law and facts.<sup>92</sup>

## 7.2. Germany

### 7.2.1. General rules for the interpretation of contracts

The German contract, embedded into the completed statutory system, will be interpreted firstly by the wording, secondly out of the context, thirdly by the purpose and finally along with the history of his creation.<sup>93</sup> The premise of the interpretation of the contract is to find out the real intention of the parties and not to stick to the literal meaning of the expression (§ 133 BGB). This is a subjective-objective standard that pulls all the sources of evidence outside the contract, and that the entire contract and its individual provisions are to be interpreted in the way that good faith with regard to the common usage requires (§ BGB § 157 BGB). So this is understood as an objective standard of review that involves the environment around the contract, although it is perhaps not stated explicitly in the contract.

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<sup>91</sup>Joachim, W., 1992, *The Reasonable Man in United States and German Commercial Law*, 15 Comp.L.Yb. Int'l Bus. 1992, at 341 et seq, available under:< [www.trans-lex.org/124800](http://www.trans-lex.org/124800)>, [accessed 9. 7. 2013]. with reference to *The Rath Packing Company vs. Joseph W. Jones*, United States Court of appeals for the Ninth Circuit, 530 F.2d 1295 (1975).

<sup>92</sup> *Ibidem*, p. 360.

<sup>93</sup> Döser, see *supra* note 22, p. 1541, with further references.

## 7.2.2. Good Faith

### 7.2.2.1. The regulation

The principle of good faith (*Treu und Glauben*) literally: “fidelity and faith”<sup>94</sup> or also translated as: “faith and credit”<sup>95</sup> is regulated in the German Civil Code in different sections. The main rule is s. 242, yet it is also mentioned in s. 167, 162, 275 II, 307, 320 II and 815.

#### **Section 157, Interpretation of contracts**

Contracts are to be interpreted as required by good faith, taking customary practice into consideration.

#### **Section 242, Performance in good faith.**

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

Historically the before mentioned roman principle of *bona fides* could conveniently be blended with the indigenous notion of (*Treu und Glauben*) that can be found in a variety of medieval sources.<sup>96</sup>

### 7.2.2.2. Narrowing down the principle of good faith in German jurisdiction

In the German law systems s. 242 of the Civil Code is interpreted by the courts as an overall principle for the whole legal sphere which states that in making and carrying out his legal rights and obligations everybody should act in good faith.<sup>97</sup> The relationships in which good faith plays a role are not only obligational relations; any qualified social contact would lead to its application.<sup>98</sup> This includes relations that were founded by contract or legal regulation, relations that emerged out of a void contractual relation, contractual negotiations, long term business relations, etc.<sup>99</sup>

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<sup>94</sup> Whittaker and Zimmermann, 2000, see supra note 72, p.18.

<sup>95</sup> Farnsworth, 1995, see supra note 55, p. 68.

<sup>96</sup> Whittaker and Zimmermann, 2000, see supra note 72, p.18.

<sup>97</sup> Palandt, Grüneberg, C., 72nd ed., 2013, *Kommentar zum BGB*, C.H. Beck, München, s. 242, annotation 1.

<sup>98</sup> *Ibidem*, s. 242, annotation 5.

<sup>99</sup> *Ibidem*.

Although the principle of good faith is understood as an overall principle in many relations it has to be evaluated and concretized differently in different functional spheres.<sup>100</sup> The German courts and lawyers categorized its various fields of application and established typical ‘groups of cases’ (*Fallgruppen*) for the application of s. 242. Thus, it is generally recognized today that s. 242 operates to supplement the law (*supplendi causa*). It specifies the way in which contractual performance has to be rendered and it gives rise to a host of ancillary, or supplementary, duties that may arise under a contract: duties of information, documentation, co-operation, protection, disclosure, etc. These duties can also apply in the pre-contractual situation (*culpa in contrahendo*) and they may extend after the contract has been performed (*culpa post contractum finitum*). In the second place, s. 242 German Civil Code serves to limit the exercise of contractual rights. German commentators, in this context, very widely use the term “inadmissible exercise of a right” (*unzulässige Rechtsausübung*) as a *nomen collectivum* but they also frequently refer to “abuse of a right” (*Rechtsmissbrauch*) for instance in case someone is going against his own previous conduct.<sup>101</sup>

The general clauses of the German Civil Code (including of course the notion of “good faith”) are also a gate through which the values underling the constitutional basic rights can pass into the private law sphere. That is the core of the theory of the indirect force of constitutional basic rights provisions in private law. So with this penetrability of the public/private law barrier the private law is made more flexible to changing circumstances as, for example, a changing understanding of the human rights concept which follows social change.

From the German legal point of view the provision of the FIDIC contract “The Parties undertake to fulfill this Contract in good faith” would not need to be explicitly formulated in the contract, since it only restates the rule that is already mentioned in s. 242 BGB and this regulation is applicable to every contract.

The second clause of the FIDIC contract: “the Parties agree to negotiate in good faith“, matches with regulations already to be found under the German law. The obligation to negotiate in good faith is concretized by the principle of *culpa in contrahendo*. The mere entry into negotiations between i.e. a seller and a purchaser establishes a pre-contractual

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<sup>100</sup> Ibidem.

<sup>101</sup> Ibidem, s. 242, annotation 42; Whittaker and Zimmermann, 2000, see supra note 72.

relationship which imposes various obligations on the parties, regardless of whether or not an acquisition agreement is eventually signed. These obligations have been broadly defined to comprise duties of mutual consideration, care and loyalty resulting from the trust requested and provided by the parties. A negligent or intentional violation of pre-contractual obligations by the seller or the purchaser may result in a claim for damages by the other party, provided that it has actually suffered damage (principle of *culpa in contrahendo* or *Verschulden bei Vertragsschluss*).

Civil Code, s. 311, para. 2

(2) An obligation with duties under section 241 (2) also comes into existence by

1. the commencement of contract negotiations
2. the initiation of a contract where one party, with regard to a potential contractual relationship, gives the other party the possibility of affecting his rights, legal interests and other interests, or entrusts these to him, or
3. similar business contacts. (Negotiating the Acquisition Contract, Beinert / Burmeister/ Tries, 2009).

The rule of *culpa in contrahendo* which rooted in the thoughts of Rudolf v. Jhering<sup>102</sup> was firstly developed as a doctrine by the German Courts and was codified into the Civil Code as s. 311 only lately in the course of the reform of the law of obligations which entered into force in 2002.

Despite of the amendments of 2002 a wide body of case law defines in greater detail a number of pre-contractual obligations and is still relevant.<sup>103</sup> So each party is obliged to negotiate in good faith. Incorrect or misleading statements are likely to constitute a violation of such duty. The same holds true for the non-disclosure of material information which the party failing to disclose knows to be relevant to the other party's decision to enter into the transaction, and which a party negotiating in good faith would normally disclose.<sup>104</sup>

The pre-contractual obligation to negotiate in good faith does not, as such, require any party to sign the acquisition agreement and close the transaction. As long as no binding

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<sup>102</sup> Farnsworth, 1994, see supra note 68, p. 68 with further references.

<sup>103</sup> Beinert, D., Burmeister, F., Tries, H-J, 2009, *Mergers and Acquisitions in Germany*, C.H. Beck, München,

<sup>104</sup> Ibidem.

commitment has been made, either party may, in principle, walk away from the negotiations without becoming liable for damages.<sup>105</sup> Also a delay in the negotiations of the contract and the signing of the contract causes normally no liability.<sup>106</sup> However, where a party has caused the other party to believe that the contract will definitely be signed, in particular when agreement has been reached on all terms and conditions, breaking off negotiations without reasonable cause may give rise to a claim for damages by the other side. The damage to be compensated along with the principle of *culpa in contrahendo* would be comprised of any damages suffered in reliance on the completion of the contract, e.g., out-of-pocket expenses and damages suffered by not pursuing a realistic alternative transaction, but would not include lost profit under the contract in question.<sup>107</sup>

So in the stated FIDIC-Clause the overall obligation to undertake to fulfill the contract in good faith and the agreement to negotiate in good faith are somewhat repetitious of the obligations already valid under the civil code. Still the judiciary under the civil code has interpreted good faith for a long time and put it into certain case groups so that when incorporating this obligation into a contract one must bear in mind the meaning given to the term by the German judiciary.

### 7.2.3. Reasonableness

In German the legal equivalent for „reasonable man“ (literally translated: „*vernünftiger Mensch*“) would be: „*der verständige Rechtsgenosse*“.<sup>108</sup> In German law the reasonable man is adapted to various kinds of roles or professions, e.g., the reasonable consumer, the reasonable car driver, whose actions and opinion i.e. serve to judge which expenses as a result of a traffic accident are reasonable; the reasonable house owner, or the reasonable traveler, who carefully looks after his insured belongings.<sup>109</sup>

Beyond the question of the reasonable behavior of a person in a certain situation, human behavior in general will be evaluated in the sense of whether it is to be qualified as reasonable or not, when it comes to the definition of negligence. S. 276 (1) of the German

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<sup>105</sup> Ibidem.

<sup>106</sup> Palandt / Grüneberg, 2013, see supra note 97, s 311, annotation 35.

<sup>107</sup> Beinert / Burmeister / Tries, 2009, see supra note 103.

<sup>108</sup> Joachim, 1992, see supra note 91, p. 351.

<sup>109</sup> Ibidem, p. 352.

Civil Code states: “someone acts negligently, if he disregards due care”. To decide whether parties in a contractual or tortious situation (from the German point of view an obligation) acted with due care or not, the judge often calls on the hypothetical behavior of a reasonable man to obtain a sound platform for that decision.<sup>110</sup> To get to a result whether behavior is reasonable in a concrete situation, the flexible term of reasonableness has to be defined in more detail.<sup>111</sup>

Consider the FIDIC-Clause containing reasonableness:

“If and to the extent that any of those risks (specified risks defined to be in the sphere of the owner) above results in loss or damage to the works, Goods, (as the case may be), the Contractor shall (i) without undue delay give notice to the Owner and (ii) rectify this loss or damage to the extent that the rectification is possible by **commercially reasonable means** and instructed by the Owner.

Under German Law, this clause would be interpreted as follows: The interpreter would look for an objective standard of conduct in a given professional area. And in this case it might well be understood as a reasonable use of the rights from the contract, taking commercial standards into account.”

### *7.3. Poland*

#### *7.3.1. General rules for the interpretation of contracts*

The general clause for the interpretation of contracts is Art. 65 of the Polish Civil Code. It reads as follows:

Art. 65. Interpretation.

§ 1. A declaration of intent should be interpreted in view of the circumstances in which it is made as required by **principles of community life and established custom** (*zasady współżycia społecznego oraz ustalone zwyczaje*).

§ 2. In contracts, the common intention of the parties and the aim of the contract should be examined rather than its literal meaning.

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<sup>110</sup> Ibidem.

<sup>111</sup> Ibidem, p. 353.

The criteria for the interpretation of intentions or subjective wills are in line with the objective concepts to understand the content of declarations. The meaning of the will can be reconstructed on the basis of external, verifiable semantic rules associated with the context in which it comes to the expression of the will. It has to reconstruct the unanimous intentions of the parties.<sup>112</sup> The interpretation is based on objectified criteria and not on the subjective intent of the parties. Important is the matching intent of the parties and the purpose of the contract which is also evident based on objective, verifiable, external criteria.<sup>113</sup>

There are some special rules of interpretation for contracts. In the case of ambiguity or vagueness of a will in the form of a written paper, doubts should be resolved in favor of the person who has not edited the content (principle of *in dubio contra proferentem*).<sup>114</sup> This is concluded from the Decision of the Supreme Court from 18.3.2003 (IV CKN 1858-180). In this case the Supreme Court held that the principle of social coexistence, as an interpretation directive supports the thesis that the interpretation of unclear provisions of the general conditions of an insurance company must be interpreted against the insurance company rather than the insured person. Still the majority opinion rejects a generalization of that position. The facts of the judgment contained two important factors that influenced the decision: the person drafting the document was a professional, and the other party to the contract was a consumer and the document itself was a standard form, so this rule cannot be generalized.<sup>115</sup> In the Civil Code there are included a number of special rules of interpretation. Thus art. 71 specifies that an *invitation ad oferendum* in case of doubt has no binding force. Other rules of interpretation are regulated in art. 394 s. 1, 97, 544 s. 1 and art. 674.<sup>116</sup>

### 7.3.2. Good Faith

The term ‘good faith’ (*dobra wiara*) may be used in a subjective and objective sense. In the Polish Code of Contracts and Other Obligations (*Kodeks zobowiązań*) of 1933 the concept of good faith was used in both senses. In the objective sense, similarly to high morals, it

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<sup>112</sup> Safjan, M., in Pietrzykowski, K. (ed.), 5th. ed., 2008, *Kodeks cywilny, Tom I*, C.H.Beck Warszawa, Art. 65, annotation 2.

<sup>113</sup> Liebscher, M., Zoll, F., (ed.), 2005, *Einführung in das polnische Recht*, Schriftenreihe der Juristischen Schulung, C.H. Beck, München, p. 115.

<sup>114</sup> Ibidem.

<sup>115</sup> Osajda, K., 2012, Osajda, K., ed. *Kodeks cywilny. Komentarz*, C.H. Beck, Warszawa, Art. 65, annotation 8.

<sup>116</sup> Ibidem.



constituted a criterion of assessments of someone's conduct. For instance Article 189 of the Civil Code stated that 'the parties shall perform their obligations in accordance with their content, in a manner consistent with the requirements of good faith (...)'<sup>117</sup>. In the subjective sense, in turn, good faith refers to a psychological state of a given person who erroneously but due to justifiable reasons considers a law, a right or a legal state to exist. In that second sense the good faith is used especially in family law, law of succession and law of rights in rem. As far as the standards of conduct of persons concluding contracts are concerned, only the concept of good faith in the objective sense may be applied.<sup>118</sup>

In the applicable Polish Civil Code from 1964 that was generally amended during the transformation process in 1990, "good faith" is mentioned in Art. 7:

Art. 7. Presumption of good faith. If the law makes legal effects contingent upon good or bad faith, good faith is presumed.

Art. 7 hasn't been altered since 1964. Here we have an example of understanding good faith in the subjective sense, as a presumption on facts.

The general clause for the interpretation of contracts is Art. 65 of the Civil Code (stated above).

There are more places in the Polish Civil Code with reference to the mentioned vague phrases. These are the following:

Art. 5. Abuse of right. One cannot exercise one's right in a manner contradictory **to its social and economic purpose or the principles of community life** (*ze społeczno-gospodarczym przeznaczeniem tego prawa lub z zasadami współżycia społecznego*). Acting or refraining from acting by an entitled person is not deemed an exercise of that right and is not protected.

Art. 56. Effects of legal acts. A legal act gives rise not only to the effects expressed therein but also to those which stem from the law, **principles of community life** (*z zasadami współżycia społecznego*) and established custom.

Art. 58. Unlawfulness of an act.

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<sup>117</sup> *Strony winny wykonywać zobowiązania zgodnie z ich treścią, w sposób, odpowiadający wymaganiom dobrej wiary.*

<sup>118</sup> Rott-Pietrzyk, 2007, see supra note 11, 86-87.

§ 1. A legal act which is contrary to the law or which is designed to circumvent the law is invalid unless a relevant regulation envisages a different effect, in particular that the invalid provisions of the legal act be replaced with relevant provisions of the law.

§ 2. A legal act **contrary to the principles of community life** (*sprzecznna z zasadami współżycia społecznego*) is invalid.

§ 3. If only a part of a legal act is affected by invalidity, the remaining parts of the act continue to be effective unless it follows from the circumstances that without the invalid provisions, the act would not have been performed.

The adoption of these provisions was in 1964 a change from the legal situation in the inter-war period as the overall (objectively used) principle of good faith was replaced by the principle of social coexistence.

Difficulties connected with the interpretation (construction), translation and application of general clauses in contracts may lead to a situation in which they have different meaning depending on economic and regime-related laws in force in a given territory at a given time.

The clause of “*zasady współżycia społecznego*” that was taken directly from the (soviet) Russian civil law system replaced the traditional terms of reasonableness and good faith in 1964.<sup>119</sup> Art. 65 of the Polish Civil Code stayed unaltered until today, giving room to be interpreted along with truly most opposite state concepts.

During the communist time the principles of community life (*zasady współżycia społecznego*) were to be understood as moral rules and principles regulating inter human relations which are commonly accepted in a given period of time. During the communist regime the principles of community life were also guaranteed in art. 78 Polish Constitution.<sup>120</sup> Shortly after the entering into force of the Polish Civil Code there was a debate whether these principles of community life could overrule also binding provisions (*jus cogens*) of the Civil Code such as the record of a notary for the sales of land or termination of obligations.<sup>121</sup> The majority opinion rejected this notion. In the period after the rendering into force of the Civil Code they were interpreted by the Polish Supreme Court as norms of morals consistent with

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<sup>119</sup> Safjan M. 1990, *Klauzule generalne w prawie cywilnym (przyczynek do dyskusji)*, PiP vol. 11, p. 48.

<sup>120</sup> Gralla, E., 1966, *Die Generalklauseln im polnischen Zivilgesetzbuch*, JOR, vol.VII, 1966, p. 183-197, p. 190.

<sup>121</sup> Gralla, ibidem; Wolter, A., 1964, *Zasady współżycia społecznego w nowych kodeksach*, in: *Nowe Prawo*, vol. 11, p 1031-1042. p. 1031.

the opinion of the leading group of the society<sup>122</sup> which was a synonym for the communist party.<sup>123</sup> The Polish Supreme Court developed special principles grounded on the provisions of the Constitution such as the goals of the state, all constitutional principles or the prohibition of the abuse of rights and others.<sup>124</sup> These principles were meant to transform and to complete reality, to adopt the legal provisions to the new ideological and political needs.<sup>125</sup> So they were constructed to actively open up space for interpretation by the judges to give a wider scope of communist ideology into private law.

The role of the general clauses was seen as quite major in shaping the relation between the individual rights and the interest of the state.<sup>126</sup> The Polish legal concept of the principle of social co-existence/principle of community life (*zasady współzycia społecznego*) referred to in the Polish Civil Code is now again interpreted as the equivalent to the principle of “good faith” in the objective sense. After the transformation of the communist system into a democratic system the provision stayed the same but the interpretation along with the communist ideology was discontinued.

The clause of public policy as shaped by the communist legal system in Poland is still associated with a socialist moral doctrine despite the fact that it is used now in different circumstances and in a different reality and its content has also changed. It may be found in numerous provisions as an element that makes the content of particular institutions of civil law more flexible. It helps qualify some events leading to the creation of legal relations, for instance when interpreting declarations of will to prevent the occurrence of legal consequences which would be morally unacceptable (disapproved of and condemned) due to the particulars of the context.

Taking under regard the interpretation of the stated FIDIC-clauses it comes clear that under Polish law there exists an overall principle to interpret contracts and wills in accordance with the principle of social co-existence that is actually understood as “good faith”. Concerning the clause about negotiations in good faith it has to be mentioned that already during the

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<sup>122</sup> Decisions of the Polish Supreme Court of 13.12.1952 and 27. May 1962 published in: *Nowe Prawo* 1963, 7, 8-9)

<sup>123</sup> Gralla, E., 1966, *ibidem*, p. 195.

<sup>124</sup> *Ibidem*.

<sup>125</sup> Safjan, 1990, see *supra* note 101, p. 49.

<sup>126</sup> *Ibidem*, p. 48.

preparatory works for the law of obligations from 1933 it was stated that the general duty of loyalty and care in contract negotiations cannot be seen as a principal contractual obligation but merely as a supporting obligation.<sup>127</sup> But still the duty to negotiate in good faith was affirmed. In the actual Civil Code art. 72. s. 2 is the corresponding regulation:

Art. 72 (...)

§ 2. A party which enters into or conducts negotiations in breach of good custom, in particular without intending to execute a contract, is obliged to remedy any damage which the other party suffers by the fact that it was counting on the contract being executed.

Here again the general term of good custom is used but as stated before in a very similar interpretation as good faith.

### 7.3.3. Reasonableness

As said before the term “reasonable” (*rozsądny*) is in polish law not used in the sense of “rightness” (*słuszność*). It is rather interpreted as in connection with rationality in a specific way. The term reasonable (*rozsądny*) is not often used in polish law. It is used in the Civil Code i.e. in

art. 84. (Error)

§ 2. An error can only be relied on if it justifies the supposition that, if the person making the declaration of intent had not acted under the influence of the error and **had judged the case reasonably**, he would not have made such a declaration (material error).

and

art. 760<sup>2</sup> (Principal's obligations)

§ 2. The principal is obliged to notify the agent **within a reasonable time** of the acceptance or refusal of any proposal to execute a contract and of the non-performance of any contract executed with the agent's intermediary or which the agent has executed on the principal's behalf.

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<sup>127</sup> Cierpiał R., *Die polnische Regelung der Haftung aus Culpa in Contrahendo im Vergleich zu Deutschland und Österreich*, 2010, in Bachner, Th., Cierpiał, R., Lemanska, E., Liebscher, M., ed., Nomos, Baden Baden, p. 41-58, p. 48, with further reference.

§ 3. The principal is obliged to notify the agent **within a reasonable time** that the number of contracts the principal expects to be executed or their value will be significantly lower than that which the agent could normally have expected.

The examples show that the term is used in specific ways. In art. 84 the term “reasonable” is part of the legal definition of a material error. Reasonableness is important to distinguish the objective significance of the error, i.e. that a reasonable person who is familiar with the true state of the matter would not have submitted his declaration of intent to this effect.<sup>128</sup> So along with this definition an objective assessment of the significance of error will be considered. Here the reasonable person again is viewed as an average person who rationally decides how to act.

As regards the notion of “reasonable time” in art. 760<sup>2</sup> of the Civil Code, the law provides for the principal some flexibility in deciding how far in advance he has to inform the agent about a change of circumstance (in reasonable time).<sup>129</sup>

#### *7.4. China*

China enacted the Uniform Contract Law (UCL) in 1999, which intended to bring Chinese business practices into conformity with general Western practices. The UCL provides a supportive legal framework for international business transactions. Besides the UCL, the judicial interpretations from the SPC are important to the application of contract law in legal practice. The SPC issued Interpretation I, which came into effect on 29 Dec. 1999; and the Interpretation II, which became effective on 13 May 2009.

##### *7.4.1. Contract Interpretation*

Art. 125 of the UCL concerns contract interpretation and language versions. This is the first time that Chinese contract law introduced the system and principles of contract interpretation. This is essential to maintain freedom of contract, materialize contract justice, guarantee the

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<sup>128</sup>Judgement of the Supreme Court of 31.08.1989, III PZP 37/89, OSN 1990, No. 9, item. 108.

<sup>129</sup>Mikłaszewicz, P., 2012, Osajda, K., ed., 6th ed. *Kodeks cywilny. Komentarz*, C.H. Beck, Warszawa. 2012, art. 760<sup>2</sup> annotation 3.

will of parties and protect parties' contract purposes. There are certain rules and approaches towards contract interpretation; but eventually judges or arbitrators have the right to decide if there is any dispute between parties.

Art. 125 states that “in case of any dispute between the parties concerning the construction of a contract term, the true meaning thereof shall be determined according to the words and sentences used in the contract, the relevant provisions and the purpose of the contract, and in accordance with the relevant usage and the principle of good faith.”

It also provides that “when a contract was executed in two or more languages, and it provides that all versions are equally authentic, the words and sentences in each version are construed to have the same meaning. In case of any discrepancy in the words or sentences in the different language versions, they shall be interpreted in light of the purpose of the contract.”

From this provision, we can identify that UCL adopts the “Plain meaning” rules; “purpose” construction approach; custom, the principle of good faith; and the principle of “being interpreted as a whole”.<sup>130</sup> However, the provision has been criticized as too simple, omitting concrete elements applying to each interpretation approach. Such method may lead to controversy and increased uncertainty for transacting parties.<sup>131</sup>

In addition, art. 41 prescribes for disputes concerning the construction of a standard form, the terms shall be interpreted in accordance with common sense. If a standard term is subject to two or more interpretations, the interpretation that is unfavorable to the party that supplies it shall be adopted. If a discrepancy exists between the standard term and a non-standard term, the non-standard term prevails. Although art. 41 particularly concerns construction of standard terms, it actually points out the typical contract interpretation approach of “common sense” and also one special “unfavorable explanation rule” regarding standard terms.

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<sup>130</sup> Liang, Huixing (2001), *Contract Interpretation Method and the so-called “Right of Final Interpretation”*, Institute of Law, Chinese Academy of Social Scientist, available at <http://www.iolaw.org.cn/shownews.asp?id=1484>, accessed 15 Mar. 2013. (In Chinese language).

<sup>131</sup> Qiao, Xincheng (2001) *Discussion on Contract Interpretation*, published on 30 Nov. 2001, available at <http://www.people.com.cn/GB/guandian/29/173/20011130/616647.html>, accessed 14 Mar. 2013. (In Chinese language).

#### 7.4.2. Good Faith

Good faith, freedom of contract, and fostering transactions are three fundamental and guiding principles in Chinese contract law. In the UCL, “the principle of good faith” in Chinese language refers to the term “*chengshixinyong*” (literally “honesty and trustworthiness”, often abbreviated into “*chengxin*”). This principle requires parties to conduct themselves honorably, to perform their duties in a responsible manner, to avoid abusing their rights, to follow the law and common business practice, and so forth.<sup>132</sup>

UCL recognizes this principle at every stage of a transaction (contract formation, after contract formation and before contract performance, contract performance, termination of a contract). For example, art. 6 provides this principle of good faith in general, and requires the parties to abide by the principle in exercising their rights and performing their obligations. Art. 42 states the pre-contract liabilities for damages that a party may bear, if in the course of concluding a contract, the party engaged in some conducts that caused loss to the other party. The circumstances of such conducts are (i) negotiating in bad faith under the pretext of concluding a contract; (ii) intentionally concealing a material fact relating to the conclusion of the contract or supplying false information, (iii) any other conduct which violates the good faith principle. Art. 60 concerns that the parties shall abide by the principle of good faith, and perform obligations in light of the nature and purpose of the contract, and in accordance with the relevant usage. Art. 92 refers to the principle of good faith upon discharge of the rights and obligations under a contract.

Concerning translation, it seems that there are two different English translations (principle of good faith, and “honesty and trustworthiness”) for the Chinese phrase “*chengshixinyong*”. However, Cao claimed that different translations may have different implications; and this also exemplifies the problem in translating Chinese law into English.<sup>133</sup> In the Chinese contract law, the phrase “*chengshixinyong*” was actually translated from the English “good faith” under common law; thus when the Chinese phrase was translated back to English, its meaning seems equivalent to the English “good faith”.<sup>134</sup> But Chinese phrase

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<sup>132</sup> Wang, Liming and Xu, Chuanxi (1999) *Fundamental Principles of China's Contract Law*, 13 Columbia Journal of Asian Law, (1999), Issue 13, 16.

<sup>133</sup> Cao, Deborah. (2004) *Chinese law: A Language Perspective*. Hants, England: Ashgate Publishing Limited, 12-13,

<sup>134</sup> *Ibidem*.

“*Chengshixinyong*” or “*Chengxin*” also has its own root in the Chinese cultural tradition, which refers to Confucianism, Mohism, Taoism, Legalism, and Buddhism.<sup>135</sup> Accordingly, to apply and interpret “*chengxin*” or other contract law terms in a proper manner may require the consideration of current Chinese legal practice.<sup>136</sup>

#### 7.4.3. Fair dealing or “fairness”

Fairness, in Chinese terms, refers to “*gongping*”. However, the Chinese concept of “*gongping*” can have different meanings or translations in English language such as “unbiased”, “equitable”, “impartial”, “reasonable”, or “rational”. The UCL recognizes the fairness principle, which refers to article 5 requiring the parties to abide by such principle in prescribing their respective rights and obligations. The principle is also applied in standard terms provisions (art. 39 requires the party supplying the standard terms to obey such principle in prescribing the rights and obligations of the parties). Sometimes, the adjective word “fair”, which describes a certain manner or way, is used. For example, art. 271 concerns the tendering process in construction project, and requires the tender to be conducted in an open, fair and impartial manner according to relevant laws.

The application of the principle “fairness” can be closely connected with “good faith”. For example, a letter from the SPC in 1992 (No. 27), concerned a contract dispute on sales of gas meter spare parts. The contract price of the main component material was 4400 RMB per ton, but later the price increased to 4600, and then to 16000 RMB. The SPC considered that this was a kind of change of circumstances that the parties could not foresee and could not be avoided, during the performance of the contract. Hence it would be “unconscionable” or very unfair to the sales party to perform the contract according to the original contract price. Some commented that this case represented that the SPC had accepted the concept of “unconscionability” and the principle of “changes of circumstances”. Some considered that the principle of change of circumstances is a specific case of application of “good faith” in contract law.<sup>137</sup>

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<sup>135</sup> Cao, Deborah. (2004), 169.

<sup>136</sup> *Ibidem*.

<sup>137</sup> Zheng, Qiang (2000) *A Comparative Study of Principle of Good Faith in Contract Law*, Journal of Comparative Law, (2000), Issue No. 1. (In Chinese language).



Nowadays the principle of change of circumstances is clearly recognized in China. The recent Judicial Interpretation II of Contract law in 2009, art. 26, particularly specifies the principle of change of circumstances. According to this provision, if any major change occurs which is unforeseeable when the parties concluded a contract; is not a business risk and is not caused by force majeure occurs after the formation of the contract; if the continuous performance of the contract is obviously unfair to the other party or cannot realize the purposes of the contract; and a party files a request for the modification or rescission of the contract with the court, then the court shall decide under the principle of fairness and in light of the facts of the case.

#### *7.4.4. Reasonableness*

Reasonableness in Chinese language usually refers to “*heli*”. Interestingly, the Chinese phrase “*heli*” can be understood as “rational”, “reasonable”, “fair”, “equitable” in English language. Considering the overlap of the meanings of concepts of “fairness” and “reasonableness” in Chinese language, there can be problems of choosing a proper phrase when doing the translations.

Looking at the UCL, one can find phrases containing “reasonable”, such as “reasonable time”, “reasonable period”, “reasonable manner”, “be shared in a reasonable manner” in many articles. The usage of “reasonable” can be classified in two ways. Firstly, it is used to describe “period”, or “time limit”. For example, art. 23 provides if the offer does not prescribe a period for acceptance, and if the offer is made in a non-oral manner, the acceptance shall reach the offeror within a reasonable time. Similarly, art. 69 states that “after performance was suspended, if the other party fails to regain its ability to perform and fails to provide appropriate assurance within a reasonable time, the suspending party may terminate the contract”.

Secondly, it is used as a modifier of a noun or a verb according to the specific requirements of concrete provisions. The use of “reasonable” or “reasonably” limits or defines the degree and scope of using, understanding or grasping the noun or verb. Art. 289 requires that a common carrier may not deny any normal and reasonable carriage requirement by a passenger or consignor. According to art. 332, a developer in commissioned development

shall use development funds in a reasonable manner. Such expressions can also be seen in business contracts in China.

It is generally accepted that legal provisions should use precise wording to ensure the clear meaning. And vague words should be avoided, because vague or ambiguous phrases cause misunderstanding and difficulties of application. But then a question arises: would the word “reasonable” used in contract law and contracts lead to disputes, and thus be avoided?

One Chinese scholar has written that the use of “reasonable” in contract law can be positive from four perspectives. First, the term to some extent makes up for limitations on predictability of legislation; secondly, the frequent use of the term reflects party autonomy; thirdly, the word implies compliance with public order and good morals and respect towards trading custom or habits between parties in certain industries; finally, it reflects the application of the good faith principle.<sup>138</sup> We also understand the reason and advantages of employing the term “reasonable” in contract law. However, we still would recommend that business parties specify concrete time periods, and try to avoid the usage of the term in contract documents in practice, if they can.

## 8. Summary

Flexibility in contracting can be achieved by using vague terms. There are some vague terms that are well known in the laws of given countries and international contract templates. The examples chosen here, the terms good faith and reasonableness, relate to different law families. As the term “good faith” can be understood as the translation of the original roman term “*bona fides*” and the term “*Treu und Glauben*” that is deeply rooted in German legal history, this term actually originates from the civil law family. As the examples of the laws of Germany, Poland and China show, they establish an overall principle that is not only relevant to the interpretation of contracts and the concretization of secondary obligations of a contract, but concern also the way the negotiation of the contract shall be conducted. The term “good

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<sup>138</sup> Xu, Lingjie (2001) *Rationality of Rationalization in the Contract Law*, Journal of Yunan University (Law Edition), (2001), Issue 4. (In Chinese language).

faith” though often explicitly referred to in boilerplate clauses that are part of a business contract, is in these countries also part of the civil code.

On the contrary in common law countries generally, there is no overall principle applying contracts with ”good faith”. Under a common law system the notion of ”good faith” in a contract makes sense to complete the general obligations arising from the contract, but even this may not be completely observed in English case law.

This position, however, points to only one of the opposite ends regarding the application of ”good faith” under a common law family law system. The other end is marked by the US law where in the restatements and in the UCC the term ”good faith” is frequently used.

When it comes to the term of ”reasonableness” it is rather the other way around. This term originates rather in common law but has been adopted in the civil law systems. While in the common law the term ”reasonableness” seems to have a general meaning, in the state laws of the civil law system such as Poland the term is used in a narrower sense.

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