CONTRACT NEGOTIATION: LEGAL ANALYSIS OF THE DUTY OF GOOD FAITH AND ROLE OF INTERNATIONAL ARBITRATION

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Abstract

This paper examines the research problem of how the doctrine of good faith and international arbitration shape negotiation dynamics in international contracting. The purpose of the research is to determine the extent to which these principles provide guidance on the behavior of the contracting parties, protect their expectations, and ensure the enforceability of contracts in different legal systems. Using the comparative doctrinal methodology, the paper contrasts civil law systems, where good faith is a binding obligation throughout the process of negotiations, with the common law systems, where good faith is traditionally circumscribed. The findings suggest that properly formulated good faith clauses and extensive arbitration agreements reduce negotiation failures, enhance contractual certainty, and support efficient dispute avoidance and resolution. The conclusion underlines that integrating both principles into the negotiation process minimizes disputes and strengthens commercial relationships. The contribution of this paper is the connection between the theoretical doctrines of good faith and the practical functions of arbitration, offering insights for more effective and harmonized international trade practices (Cordero-Moss, 2014).

Keywords: Contract Negotiation, Good Faith, International Arbitration, Comparative Law, Dispute Resolution, Enforceability

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1. INTRODUCTION

In today's globalized world economy, negotiations play a pivotal role in shaping the successful international business transactions (Zhang, 2024; Chainais et al., 2008; Cordero-Moss, 2014). Successful negotiations enhance legal certainty and commercial predictability, decrease transaction costs, and promote the resilience of cross-border contracts. In the contemporary international economy — characterized by varied legal traditions, power imbalances, and conflicting commercial customs — negotiation has become an essential mechanism through which parties create stable cooperation and manage uncertainties. The understanding of good faith and international

arbitration interaction is vital in the optimization of the negotiation process and stability in cross-border business agreements.

Among the numerous legal constructs relevant to negotiations, two of them in particular can be distinguished by their systemic impact: "the duty of good faith" and international arbitration. Good faith has typically been employed as a normative model for honesty and fair dealing in commercial agreements (Chainais et al., 2008; DiMatteo et al., 2021; Dauti, 2023b). Article 1.7 of the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts states that: "Each party must act in good faith and fair dealing in international trade" (UNIDROIT, 2016). While Article 7(1) of the United Nations Convention on the International Sale of Goods (CISG) provides that: "in the interpretation of this Convention, good faith should consider, but does not enforce a duty of good faith" (United Nations, 1980). However, the CISG is widely considered the most successful attempts at harmonizing international commercial law and serves as the foundation for the development of UNIDROIT Principles (Cordero-Moss, 2014). International commercial arbitration is a complementary approach to this framework because it offers a neutral, efficient, and flexible mechanism for resolving disputes (Moses, 2012; Zhang, 2024; Born, 2021). It is an inseparable part of a modern transnational contracting system due to the autonomy and enforceability of its procedures. This research uses a comparative, doctrinal, and practice-based framework to analyze the relationship between good faith and international arbitration in international contract negotiation.

In spite of the voluminous literature on good faith and international arbitration, a gap remains concerning how these two concepts interact with one another in the negotiation phase of international contracts. Most studies have analyzed good faith from either a doctrinal or ethical perspective, while arbitration has been studied mainly from a procedural perspective. Few studies connect the two as mutually complementary devices that, working together, may prevent the occurrence of conflicts altogether. It is crucial to fill in this gap in order to enhance the contractual stability, equity, and efficiency of cross-border commercial relations.

This research investigates the relationship between good faith and international arbitration in the context of international contract negotiations. It adopts a comparative and practice-oriented approach, contrasting the position in those civil law systems where good faith is a binding pre-contractual obligation with that in common law jurisdictions where, traditionally, the rule is more restricted (Cordero-Moss, 2014; Long, 2024). The findings suggest that properly formulated good faith clauses and extensive arbitration agreements reduce negotiation failures, enhance contractual certainty and support efficient dispute avoidance and resolution (Baker McKenzie, 2024). From a practical standpoint, the findings underscore the need for parties to draft detailed negotiation frameworks, include well-constructed arbitration clauses, and expect tribunals to be able to use fair dealing standards in resolving disputes that arise as a result of unsuccessful negotiations (Okoli & Yekini, 2023; Vlavianos & Michalopoulos, 2023). The analysis based on international case law and empirical arbitration practices will determine how such principles impact the negotiation process and the agreements' enforceability.

This research aims at: clarifying the theoretical foundations of good faith and international arbitration; assessing the implications of good faith and arbitration in practise in regards to negotiations, contract drafting and dispute avoidance; and assessing the potential to promote fairness and stability in international trade. The main research questions are:

RQ1: What are the theoretical foundations of good faith and international arbitration in the context of international contract negotiation?

RQ2: How do these principles affect negotiating strategies, contract drafting, and dispute avoidance?

RQ3: To what extent will these principles contribute to fairer, more predictable, and more sustainable international commercial relations?

To guide the reader through this inquiry, the rest of the paper is structured as follows. Section 2 provides an overview of the available scholarly literature and contextualizes the research in the greater academic discussion. Section 3 elaborates on the methodological design, which outlines the method of analysis, as well as the criteria used to conduct a comparative evaluation. Section 4 presents and discusses the empirical and doctrinal results of the research. Section 5 provides a critical commentary of these findings and how they relate to a wider interpretation and application of good faith in cross-border business practice. Section 6 is a conclusion that will be a recap of the key findings and outline the possible future research directions.

2. LITERATURE REVIEW

In civil law jurisdictions, such as France, "good faith" (*bonne foi*) is codified in Article 1134(3) of the French Civil Code[1] which states that agreements must be performed in good faith (Chainais et al., 2008; Dauti, 2023b). In civil law systems, scholars have consistently emphasized the presence of a general duty of good faith in pre-contractual relations and in performance of contracts (Mepharishvili, 2025).

While in German law, "good faith" (*Treu und Glauben*) is laid down in Section 242 of the German Civil Code (Bürgerliches Gesetzbuch, BGB)[2]. Civil law doctrine further elaborates concepts such as *culpa in contrahendo* (fault in contracting), which holds parties liable for damages caused by breaking off negotiations in bad faith or without reasonable justification (Markesinis et al., 2006; Dauti, 2023a).

Building on classical studies of good faith in civil as well as common law (Chainais et al., 2008; Atiyah, 1979), recent studies (Mohanty & Tangara, 2022; Arzandeh, 2024; Wang, 2024) have examined its practical implications for arbitration and negotiation.

By contrast, the common law tradition has been more cautious and skeptical toward the principle of good faith. English contract law is founded on

[1] https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006436298/1804-03-21

[2] https://www.gesetze-im-internet.de/bgb/__242.html

the notion of freedom of contract, prioritizing certainty and predictability over potentially vague moral imperatives (Atiyah, 1979). Courts in England generally confine improper conduct during negotiations to narrowly defined doctrines, such as estoppel, mistake, misrepresentation, or undue influence, rather than recognizing a broad duty of good faith (Peel, 2007).

Nevertheless, comparative studies observe gradual changes. The Australian case Renard Constructions (ME) Pty Ltd v. Minister for Public Works, recognized obligations of good faith in certain contracts, particularly in construction contracts, marking a shift from traditional common law resistance (Cua, 2013; Courtney, 2019; Renard Constructions (ME) Pty Ltd v. Minister for Public Works, 1992).

Canadian jurisprudence has progressed further; in the case of Bhasin v. Hrynew, the Supreme Court of Canada articulated good faith as a general organizing principle in employment, insurance, and partnership contracts (Viven-Wilksch, 2020; Giliker, 2022; Bhasin v. Hrynew, 2014).

In the arbitral context, arbitrators have relied on transnational norms, such as the UNIDROIT Principles, in their decisions (Bonell, 2010). The jurisprudence of arbitral tribunals has demonstrated that arbitration clauses should be drafted as comprehensively as possible in contracts. In particular, in the International Chamber of Commerce (ICC) Arbitration Case No. 9978 of March 1999 (Penalty clause case), "the tribunal rejected the claimant's claim on the basis of Article 74 of the CISG, noting that the contract had a penalty clause for non-delivery which restricted the claimant's right to damages" (ICC, 2000, p. 118).

The recent literature further expands the theoretical and practical insights on the concept of good faith in international trade. Mohanty and Tangara (2022) argue that good faith is a stabilizing norm in arbitration, and they explain how it is used by arbitrators to determine the conduct of negotiations and pre-contractual relations. Their results point to the increasing willingness of arbitral tribunals to invoke transnational norms when assessing fairness in contract formation.

Arzandeh (2024) examines how explicitly and carefully drafted arbitration clauses in cross-border contracts help determine the parties' preferred modes of dispute resolution, particularly in contracts with potentially conflicting jurisdiction or arbitration clauses. The analysis emphasizes that precise drafting is essential to ensure that the parties' intentions regarding dispute resolution are clearly reflected.

Aldmour et al. (2024) single out new challenges that digital contracting presents, especially when using instant messaging platforms. Even though they do not specifically address the concept of good faith, their study demonstrates the ways in which digital communication sets a challenging precedent in the evidentiary standards of contract negotiations, raising questions about of pre-contractual relations and the bad-faith practices in the cross-border context.

Wang (2024) highlights the fact that there is increasing scholarly attention to the practical challenges of applying the good faith principles in commercial arbitration. Wang (2024) maintains that inconsistent definitions of good faith across legal systems frequently provide an interpretative ambiguity. These results are supported by the findings presented in the literature that good faith is a disjointed and evolving principle, although it is globally relevant.

Overall, three key themes emerge from the literature. First, in civil law jurisdictions, good faith is deeply embedded within negotiation and performance. Second, in common law jurisdictions, the concept is cautiously expanding through gradual judicial recognition. Third, in arbitral practice, good faith functions as a bridging mechanism, drawing upon transnational norms to enhance trust and cooperation in international commerce. These dynamics underscore the importance for negotiators and drafters to carefully navigate the intersection of domestic legal systems, international principles, and arbitral practice when shaping cross-border agreements. Yet, despite these overlapping domains, there is a gap in the literature: there is limited empirical and doctrinal research that investigates how good-faith obligations during negotiation influence the drafting, enforcement, and design of arbitration clauses in international contracts. This gap is particularly significant since cross-border agreements are exceptionally complex, involving many different legal systems and with continually evolving dispute-resolution approaches.

By extending the literature to encompass recent developments (2021–2025) and by emphasizing the interplay between negotiation, good faith, and international arbitration, this paper aims to contribute to closing that gap and provide a more integrated framework for understanding contract negotiation in a globalized economy.

3. RESEARCH METHODOLOGY

This research utilizes a comparative doctrinal methodology, widely used in legal research to examine and compare how different jurisdictions deal with similar issues, both contractual and procedural (Majeed & Hilal, 2022). Comparative doctrinal analysis enables a systematic examination of statutory provisions, case law, arbitral awards, and soft law instruments, which enables scholars to pick up on convergences, divergences, and emerging trends in the application of the principles of good faith and the interpretation of arbitration clauses (Hutchinson & Duncan, 2012; Majeed et al., 2023). This methodology is especially appropriate to the aims of the research, as it attempts to explain the theoretical foundations of the good-faith obligations, assess their practical impact on the negotiation strategies, and determine the role of arbitration as the dispute resolution mechanism.

The research primarily uses comparative doctrinal legal analysis. Within civil law jurisdictions, the focus lies on legal codes, including the French Civil Code and the German Civil Code, which regulate negotiation practices, providing the framework for understanding how obligations are formalized and enforced during pre-contractual relations and in performance of contracts (Zimmermann & Whittaker, 2000; Mepharishvili, 2025; Long, 2024). Civil law doctrine further elaborates concepts such as *culpa in contrahendo*, which holds parties liable for damages caused by breaking off negotiations in bad faith or without reasonable justification (Markesinis, 2006; Dauti, 2023a).

By contrast, the common law jurisdictions where judicial precedent serves as the primary source of contractual regulation are evaluated by the methodology. The case of Walford v. Miles (1992) and recent jurisprudence in countries such as Canada and Australia have begun to recognize implied duties of good faith in commercial transactions (Viven-Wilksch, 2020; Giliker, 2022; Enman-Beech, 2019; Cua, 2013; Courtney, 2019). Through these comparisons, the study determines the extent to which the convergence of common law reasoning with wider international patterns towards the principle of good faith is achieved or impeded in cross-border commercial practice.

The methodology also includes the analysis of international and transnational instruments. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention), the CISG and the UNIDROIT Principles are reviewed in order to understand their contribution to the development of harmonized standards of good faith and enforceability of arbitration in cross-border transactions (Poorooye & Feehily, 2017; Helmer, 2003; Cordero-Moss, 2014; Bonell, 2010; Baker McKenzie, 2024). These instruments offer fundamental normative frameworks that influence both domestic courts and arbitral tribunals.

In addition to doctrinal comparison, empirical data are integrated into the analysis. Information concerning the frequency of arbitration clauses, preferred seats of arbitration, and the types of disputes typically arising from failed negotiations provides quantitative support to the doctrinal discussion. Such data are drawn from institutional sources, notably the annual reports of the ICC, and enrich the discourse of the doctrine with practical evidence related to how arbitration functions in international trade (ICC, 2021).

Representative case studies of arbitral and judicial decisions further supplement the analysis. These examples illustrate the practical implications of ambiguous contractual drafting or poorly structured arbitration provisions, thereby showing how legal systems operate in real-world negotiation contexts without merely reiterating theoretical discussions presented in the literature review (ICC, 2000; Bonell, 2010).

Finally, the research takes into consideration alternative methodologies that could have been used:

- Qualitative interviews with arbitrators, commercial lawyers, and corporate negotiators might have enriched the research by providing practitioner-based insights, but this method was not feasible due to resource and access constraints.
- Quantitative statistical analysis of datasets of arbitral awards could have contributed to more generalizable conclusions; yet access to comprehensive arbitration databases is limited, because many awards remain confidential.
- Socio-legal or behavioral approaches could have been used to examine the psychology of negotiation or the behavioral dynamics between the parties, but these approaches are beyond the legal-doctrinal scope of the current research.

Nevertheless, the potential application of these methods is recognized as a path for future research, in particular, for studying negotiation behavior or the economic impact of good-faith obligations (Aldmour et al., 2024; Mohanty & Tangara, 2022). A doctrinal-comparative method is still the most adequate choice for the achievement of the research aims, as it provides a coherent and legally grounded analysis of transnational contractual principles while incorporating empirical data where they are available.

By combining doctrinal comparison, procedural analysis, empirical findings, and illustrative case studies, this methodology provides a comprehensive framework for assessing the impact of good faith obligations and arbitration mechanisms on international contract negotiations.

4. RESULTS

The findings are analyzed across three levels: 1) a doctrinal comparison of civil and common law jurisdictions; 2) an examination of the role of international arbitration in mitigating legal divergences; and 3) an assessment of empirical evidence concerning the growing use of arbitration clauses in international contracts.

4.1. Comparative summary of the duty of good faith during negotiations

Table 1 provides a summary of how various jurisdictions treat good faith obligations during negotiations.

Table 1. Comparative overview of the duty of good faith during negotiations

Jurisdiction	*Duty of good faith during negotiations*	*Illustrative sources*
France	Strong, explicit obligation under *rupture abusive des pourparlers* (wrongful termination of negotiations), with liability for breaking off negotiations.	Zuloaga (2019)
Germany	Good faith (*"Treu und Glauben"*, § 242 of BGB) is one of the leading principles that influences negotiations and pre-contractual liability.	Zweigert and Kötz (1996)
England	There is no general requirement of good faith in negotiations, and the freedom to withdraw is generally approved by the court.	Atiyah (1979)
Canada/Australia	The obligation of good faith is being gradually acknowledged by courts, especially in relational or long-term negotiations.	Enman-Beech (2019)
International Arbitration	In their adjudication, tribunals invoke the UNIDROIT Principles and the *lex mercatoria* (law of commerce) norm and more often impose implied good-faith obligations.	Bonell (2010)

In civil law, for example, in France and Germany, the doctrine of good faith has deep roots in the statutory framework and in judicial doctrine. The liability of breaking off negotiations (*rupture abusive des pourparlers*) is expressly recognised by French law in the new Article 1112 of the Civil Code (Zuloaga, 2019). Similarly, section 242 of the German Civil Code incorporates the concept of good faith (*"Treu und Glauben"*) as a pervasive norm. This principle operates as one of the leading foundations

of negotiation and pre-contractual liability, deterring abrupt withdrawals that could inflict unfair harm on the counterparty (Zwigert & Kötz, 1996).

By contrast, common law jurisdictions such as England emphasize party autonomy and contractual certainty (Atiyah, 1979). Nonetheless, subtle variations can be observed in other common law systems. Courts in Canada have gradually implied duties of honesty and fair dealing, particularly in long-term or relational negotiations (Enman-Beech, 2019). Similarly, Australian courts have recognized obligations of good faith in certain contracts, especially in construction contracts, marking a cautious but significant shift toward standards grounded in good faith (Cua, 2013; Courtney, 2019).

The comparative analysis also demonstrates that international arbitration serves as a harmonizing mechanism, bridging divergent domestic approaches by relying on transnational norms such as the UNIDROIT Principles and the *lex mercatoria* (Bonell, 2010). Another significant sign of the harmonization movement in the field of international commercial arbitration is the almost universal adoption of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ("Model Law") (Helmer, 2003; Vlavianos & Michalopoulos, 2023).

4.2. Empirical trends in arbitration

Empirical evidence highlights the growing reliance of arbitration mechanism in international contracts. The use of arbitration clauses is higher in international supply contracts; as Table 2 indicates, more than half (55.4%) of the contracts in the sample of this study contained arbitration clauses (Coyle & Drahozal, 2021).

Table 2. Dispute resolution clauses in international supply contracts

Dispute resolution clause	*Number of clauses, %*
Arbitration	87 (55.4%)
Exclusive forum selection	41 (26.1%)
Nonexclusive forum selection	15 (9.6%)
None	14 (8.9%)
Total	**157**

4.3. Findings summary

Overall, the findings of this paper suggest that, although significant doctrinal differences remain between common law and civil law systems regarding the role of good faith in negotiations, the growing prominence of arbitration and the influence of transnational principles are gradually steering international commercial practice toward wider acceptance of good faith standards (Long, 2024; Sheppard, 2021; Okoli & Yekini, 2023). The results further underscore the strategic importance of expressly including good faith and arbitration clauses in cross-border contracts, as such provisions provide a practical foundation for minimizing disputes, enhancing predictability, and strengthening enforceability (Baker McKenzie, 2024; Vlavianos & Michalopoulos, 2023).

5. DISCUSSION

5.1. Duty of good faith in comparative perspective

One of the most debated issues in international contract negotiations is the duty of good faith. Its normative status is firmly entrenched in civil law jurisdictions, where systems such as French and German law require parties to act in good faith in pre-contractual relations and contract performance, imposing liability for breaking off negotiations (Mepharishvili, 2025; Zuloaga, 2019; Long, 2024).

In contrast, common law jurisdictions have traditionally rejected the notion of a general duty of good faith. Instead, they emphasize party autonomy and the primacy of clearly expressed contractual terms (Atiyah, 1979). Nevertheless, recent jurisprudence in countries such as Canada and Australia has begun to recognize implied duties of good faith in commercial transactions (Viven-Wilksch, 2020; Giliker, 2022; Enman-Beech, 2019; Cua, 2013; Courtney, 2019). This development suggests an increasing convergence between civil law and common law traditions and highlights a growing recognition of good faith as an emerging transnational principle in cross-border commercial practice (Long, 2024).

5.2. The transformative role of arbitration in negotiations

Arbitration is not merely a dispute-resolution mechanism; it also plays a transformative role in shaping how parties conduct their negotiations. The choice of arbitral seat, the applicable procedural rules, and the relevant enforcement regimes directly influence how parties evaluate risks and formulate their bargaining strategies (Born, 2021).

A clear example of this impact is the ratification of the New York Convention, which has substantially reduced uncertainty regarding the enforceability of arbitral awards (United Nations, 1958). As a result, companies are increasingly encouraged to include arbitration provisions in their contracts as a proactive tool for managing risk (Baker McKenzie, 2024).

Beyond enforceability, arbitration provides a neutral forum that mitigates power imbalances between parties of different nationalities, thereby fostering more balanced and effective negotiations. Arbitration clauses also exert an indirect influence on the substantive outcomes of contracts even before disputes arise, as they establish the procedural framework that will govern any future resolution. In this way, arbitration not only ensures fairness ex post, when disputes occur, but also structures and stabilizes contractual relations ex ante, at the negotiation stage.

5.3. Emerging challenges and trends

The divergent definitions of good faith across jurisdictions create ambiguity in contractual bargaining, as parties may contest the scope of their pre-contractual obligations. Although arbitration has enhanced enforceability, persistent concerns regarding high costs, procedural delays, and limited transparency have generated ongoing debate about the need for reform (Baker McKenzie, 2024; Vlavianos & Michalopoulos, 2023). Recent trends

such as the adoption of expedited arbitration procedures, the growing reliance on soft-law instruments, and the codification of good faith norms in international frameworks illustrate the continuous evolution of international negotiation practices. These developments collectively point toward a gradual harmonization of legal cultures, even though complete convergence has yet to be achieved.

5.4. Implications for international trade

The dual reliance on good faith and arbitration highlights to both practitioners and policymakers the necessity of developing negotiation strategies that are legally sound as well as commercially viable. Awareness of the doctrinal divergences surrounding good faith enables parties to better anticipate potential liabilities, while the careful drafting of arbitration clauses minimizes ambiguity in dispute resolution. Together, these mechanisms strengthen contractual enforceability, foster predictability, and promote trust and cooperation in cross-border transactions.

6. CONCLUSION

This study has examined the interaction of good-faith obligations and international arbitration in the context of international contracts negotiations. The comparative analysis indicates that civil-law jurisdictions impose extensive pre-contractual and contractual good-faith obligations, whereas the common-law jurisdictions utilize a much more specific approach that relies on explicit contractual terms.

At the same time, international arbitration, which is supported by international rules like the UNIDROIT Principles, serves as a harmonizing mechanism that promotes fairness, transparency, and cooperation among the various legal frameworks. The findings suggest that properly formulated good-faith clauses and extensive arbitration agreements reduce negotiation failures, enhance contractual certainty, and support efficient dispute avoidance and resolution.

From a theoretical perspective, the study contributes to a clearer understanding of how domestic doctrines, transnational principles, and arbitral practices interactively determine the normative expectations of the negotiating parties. It shows that good faith has not been just a mere civil-law notion, but it has become an important guiding principle in global commerce. From a practical standpoint, the findings underscore the need for parties to draft detailed negotiation frameworks, include well-constructed arbitration clauses, and expect tribunals to be able to use fair dealing standards in resolving disputes that arise as a result of unsuccessful negotiations.

Despite its major contributions, this study has several limitations. The comparative analysis is focused mainly on civil and common law jurisdictions, and therefore does not fully capture the variety of global contractual practices. The empirical component is based on arbitration reports that are publicly available and which provide valuable, but inherently limited, quantitative data, given that a significant number of arbitral proceedings remain confidential. Furthermore, the doctrinal sources used reflect the developments up to 2025, and future reforms in contract law and arbitration practices may go beyond the scope of this research.

Future research may expand on these findings by examining more jurisdictions, including hybrid or mixed legal systems. Empirical studies based on interviews with negotiators, arbitrators, or in-house counsel would provide a deeper understanding of the nature of how good faith is applied in a real negotiation context. Moreover, investigating the growing influence of digital contracting, artificial intelligence-assisted negotiation, and online dispute resolution could also provide a better understanding of how good faith and arbitration will evolve in the next decade.

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