

COMMON LAW VS. CIVIL LAW

Good Faith

The principle of good faith (*bona fides*) is one of the fundamental legal principles that plays an important role in assessing the conduct of parties in contractual relationships and determining the scope of their contractual rights and obligations. However, the legal nature, scope, and impact of this principle on contractual relationships differ significantly between Common Law and Civil Law systems.

COMMON LAW

The approach to the principle of good faith in Common Law systems differs significantly from that adopted in Civil Law systems. While good faith constitutes a general legal principle expressly recognized by law in Civil Law systems, Common Law systems have historically been more cautious in recognizing a general duty of good faith applicable to all contractual relationships. Instead, greater emphasis has been placed on the express terms of the contract and the parties' intentions, while the concept of good faith has developed through case law and in the context of specific contractual relationships. In this respect, courts have recognized implied duties to act honestly, cooperate, or deal fairly in certain contractual relationships. This approach is particularly relevant in long term relational contracts, employment contracts, and relationships involving duties of trust and loyalty.

Similarly, legal mechanisms that prevent a party from withdrawing from a commitment relied upon by the other party, permit intervention in excessively unfair contractual arrangements, or impose duties of cooperation may produce, through more specific legal doctrines in Common Law systems, certain outcomes that would fall within the scope of the general principle of good faith in Civil Law systems.

CIVIL LAW

In Civil Law systems, the principle of good faith is one of the fundamental legal principles enshrined in national civil codes. This principle requires parties to act honestly and fairly and to take into account their mutual interests, from pre contractual negotiations through the performance of the contract and post contractual obligations. In this context, good faith is not merely a moral principle, but is regarded as a legally binding standard that may be applied by courts.

In Civil Law systems, the objective duty of good faith may affect the formation, performance, and interpretation of contracts, while also serving to prevent the abuse of rights, exploitation of the weaker party, and unjust enrichment.

At the pre contractual stage, the principle of good faith requires parties to conduct negotiations honestly and fairly and to refrain from misleading conduct. For example, under French and German law, a party that conducts negotiations in bad faith or withdraws from negotiations in bad faith may incur liability under the doctrine of pre contractual liability (*culpa in contrahendo*).



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COMMON LAW



CIVIL LAW

However, the approach to the principle of good faith is not uniform across Common Law systems. The scope, legal basis, and application of good faith may vary across England, the United States, Canada, and Australia. Under English law in particular, implied duties of honesty, cooperation, or loyalty may be recognized in certain contractual relationships, taking into account the nature of the contract and the specific characteristics of the relationship between the parties.

Under United States law, by contrast, the concept of good faith has a more explicit legal basis, particularly under the Uniform Commercial Code (the “**UCC**”). The UCC requires parties to act in good faith in the performance and enforcement of contracts in commercial transactions falling within its scope. Accordingly, when assessing the role of good faith in Common Law systems, it is more appropriate to consider the relevant jurisdiction and the nature of the contract together, rather than treating Common Law as reflecting a single and uniform approach.

In Civil Law systems, courts may interpret contracts in light of the principle of good faith and recognize additional obligations of cooperation, transparency, and loyalty between the parties. Although the judicial application of the principle of good faith varies across jurisdictions, the principle generally serves to address imbalances arising in contractual relationships, prevent the abuse of rights, and resolve ambiguities in contracts.

For example, French courts recognize that a party may not exercise its contractual rights in a manner inconsistent with honesty and fairness and may impose an obligation to act reasonably where a contract grants discretion to one party, with a view to preventing the abuse of such discretion. Italian courts, particularly in the context of consumer relationships, have developed extensive case law requiring businesses to act with loyalty and providing for unfair contractual terms to be interpreted in favor of the weaker party.

CONCLUSION

This difference in approach between Civil Law and Common Law systems is also significant in the context of M&A transactions. In a share purchase agreement drafted in the Common Law tradition, particular emphasis is placed on allocating risks between the parties, to the greatest extent possible, through the provisions of the agreement itself. Accordingly, representations, warranties, indemnities, disclosure mechanisms, and limitations of liability are regulated in detail, with the aim of ensuring that the risks assumed by each party, the circumstances in which such risks are assumed, and the extent of such risk allocation are clearly reflected in the contractual terms.

In Civil Law systems, however, in addition to the contractual allocation of risk, the general law of obligations applicable to the contract must also be taken into account. General principles relating to good faith, abuse of rights, pre contractual liability, and contractual interpretation may play a role in assessing the legal relationship between the parties, even in respect of matters that are not expressly addressed in the contract.

Accordingly, particularly in cross border M&A transactions, it should be borne in mind that the same contractual provision may produce different legal consequences under different legal systems. While the express and detailed regulation of the parties’ rights, obligations, and allocation of risk in the contractual terms plays a more determinative role in Common Law systems, contractual provisions in Civil Law systems may be considered together with good faith and other general principles of the law of obligations. This distinction may affect not only the manner in which contracts are drafted, but also the manner in which the parties may exercise their contractual rights and the obligations that may arise in circumstances not expressly addressed in the contract.