

Good Faith Principle

Good faith is, in essence, a principle of “fair and open dealing”,¹ one that contemplates high standards of both commercial morality and practice. In particular, good faith requires contracting parties to exercise their rights in such a way that the parties in question may enjoy the benefits derived out of the contract.

The rationale behind the principle of good faith is to prevent parties from purporting to rely upon express contractual rights, where exercising the right would result in the party obtaining a benefit extraneous to the contract.²

To that end, the concept of “good faith” builds upon fundamental implied terms, such as:

- a) To act reasonably, honestly and fairly
- b) To do all things necessary as to co-operate in achieving the contractual aim
- c) Not to prevent, impede, fetter or hinder the other party in the performance of the contract

Good Faith in International Arbitration

In the context of international arbitration, the general principle of good faith imposes a positive obligation on parties to co-operate. More specifically, good faith applies to arbitration agreements (themselves a form of “contract”), such that parties adhere to the “obligation to act with fairness, reasonableness, and decency in the formation and performance”³ of agreements to arbitrate disputes.

Procedural Good Faith

In contract or law, good faith commands that parties co-operate in evidentiary procedure. That is, the parties must:

- a) Provide truthful responses to information requests
- b) Not use document production as a means of obstructing proceedings
- c) Produce responsive documents and witnesses following an evidence order

Good faith compels the parties to produce relevant and material information that is within their control and not subject to privilege. In fact, when parties agree to be guided by the *IBA Rules on the Taking of Evidence in International Arbitration*, they agree to be guided by good faith in evidence production.⁴

Adverse Inferences: Enforcement of Good Faith

International law ratifies an arbitrator’s inherent authority to draw adverse inferences against a party for unjustified non-compliance with an order to produce information.

Adverse inferences are considered a means of enforcing the good faith principle and, whilst a breach of procedural good faith does not propagate a separate cause of action, it opens the door to arbitral tribunal recourse. The tribunal’s authority to draw adverse inferences arises from the:

- a) Express law of the arbitral forum
- b) Arbitration rules
- c) IBA Rules

This promotes a procedurally fair and efficient arbitration while discouraging questionable conduct.⁵

Fairness

Adverse inferences can be a useful tool in filling an evidentiary gap and assisting a party in presenting its case. Case law suggests that the breach of good faith or unjustified non-co-operation must be attributable to the party against whom the adverse inference is sought.⁶ It is also understood that the party seeking to have an adverse inference made must have co-operated in good faith and been unable to produce the information.⁷

1 *Interfoto Picture Library v Stiletto Visual Programmes Ltd* [1989] 1 QB 133, per Bingham LJ.

2 Julian Bailey, *Construction Law Volume One*, Informa Law, 1st edition, 2011, 3.127.

3 Charles T. Kotuby Jr. and Luke A. Sobota, *General Principles of Law and International Due Process*, Oxford University Press, 2017, p. 88.

4 *IBA Rules on the Taking of Evidence in International Arbitration* (in force as from 29 May 2010), per paragraph 3 (Preamble) and Article 9.5.

5 Sharpe, Jeremy K., *Drawing Adverse Inferences from the Non-production of Evidence*, *Arbitration International* 22, no. 4 2006, p. 550.

6 *Copper Mesa Mining v Republic of Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, paragraph 4.8.

7 *ConocoPhillips v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Interim Decision, 17 January 2017, paragraph 70.

Efficiency

It is important for parties and arbitral tribunals to find methods to resolve their disputes in the most effective and least costly manner.⁸ A tribunal may decide not to address a potential breach of procedural good faith and any related adverse inference request if it considers that the request is unlikely to succeed or that it is unnecessary.⁹

Conclusion

The procedural good faith principle in international arbitration requires that the parties cooperate in the evidence gathering process. If procedural good faith is breached, adverse inferences are justified as a matter of general principles of law and apply in defence of the parties' obligations under the relevant arbitral agreement. To that end, subject to the tribunal's considerations of fairness and efficiency, parties to an arbitration agreement must be alive to the principle of good faith.

⁸ *Commentary on revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, p 3.

⁹ *WNC Factoring Ltd (UK) v The Czech Republic*, PCA Case No. 2014-34, Award (22 February 2017) paragraphs 394-5.

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