**Concepts of virtue, honourable conduct and good faith: comparisons and economic reflections**

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**Abstract**:

Lawmaking in ancient Rome has produced remarkable legal solutions to omnipresent problems. Cicero’s concepts of virtue, honourable conduct and good faith appear as the most fundamental ones and yet as ones whose nature and contents are still ill-understood. This paper explores the common foundation of the good faith duty in the contract law of ancient Roman law and its modern comparative materializations in the French, Belgium and English law of contracts. More particularly, while focusing on the famous Cicero decisions related to good faith, paper attempts to trace, with the help of behavioural and economic tools, the underlying common structure of the good faith obligations as originally designed by ancient Roman jurists. Paper seeks to shed additional light on the boundaries of the good faith concept and whether such common structures may be invoked in enhancing our understanding of the modern decisions which invoke good faith. Paper argues that the duty of good faith serves as a multi-functional legal mechanism that ex post regulates the optimal amounts of different social behaviours, lowers transaction costs, fosters efficient reliance, addresses information asymmetries, enables sequential exchanges and is essentially a risk-allocation and risk-sharing mechanism. Furthermore, this paper overcomes an old legal and moral crux and examines good faith standard in the ancient Roman law and in particularly the famous Cicero concepts of virtue and honourable conduct in daily contracting.

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**1. Introduction**

The ancient contractual principle duty of good faith may be one of the most elusive concepts of contract law, which precise description of its scope and meaning represent an extraordinarily scholarly difficulty. Often, descriptions of the concept of good faith employ tautologies or use terms that are as vague as the concept being described. For example, it is often stated that the requirement of good faith implies a duty to comply with *“community standards of decency, fairness or reasonableness”.*[[1]](#footnote-1) Yet, the exact characterization of the elements that compose such standards is still out of sight. This duty of good faith provides an important judicial tool, for the control of contractual terms and its applications[[2]](#footnote-2) and has long been recognized in civilian legal systems as a vitally important ingredient for modern law of contracts.[[3]](#footnote-3) It has also been gradually absorbed in some of the common law jurisdictions,[[4]](#footnote-4) whereas some other legal systems (e.g. English law) perfectly cope without it.[[5]](#footnote-5) In addition, several international instruments including Unidroit principles contain general provisions according to which in exercising her rights and performing her duties each party must act in accordance with good faith and fair dealing.[[6]](#footnote-6)

One has to note that the notion of good faith, or bona fides, originates in Roman law in relation to *“iudicia strictii iuris*” and which ultimately (via the “*exceptio doli*” clause) gave the Roman judge an equitable discretion to decide the case before him in accordance with what appeared to be fair and reasonable.[[7]](#footnote-7) This, as argued by Zimmerman and Whittaker, represented one of the cornerstones of the Roman law of contracts and was also one of the most fertile agents in the development of Roman contract law.[[8]](#footnote-8) The questions on how to define “*good faith,”* what (if any) is its usefulness and desirability have fascinated scholars in philosophy, law and history from ancient times and has produced an impressive amount of literature, decisions and comments.[[9]](#footnote-9) Most recently, it has also gained extensive attention among prominent economics scholars investigating the legal and economic system of ancient Rome. For example, recent studies illustrate a fruitful potential of legal-economic theory for shedding light on the institutions of the ancient world, and in particular for enhancing our understanding of the legal and economic arrangements found in the Roman Empire.[[10]](#footnote-10) Abatino and Dari-Mattiacci argue that good faith remedies provided by Roman law might be efficient in their sphere of application[[11]](#footnote-11). In addition, the good faith duty is, among many comparative legal scholars, widely used as an illustration of the current deep, sharp common/civil law division, which origins could be traced back to ancient Roman law.[[12]](#footnote-12)

This paper joins this debate and explores the common foundation of the good faith duty in the contract law of ancient Roman law and its modern comparative materializations. More particularly, while focusing on the famous Cicero decisions related to good faith, paper attempts to trace, with the help of behavioural and economic tools, the underlying common structure of the good faith obligations as originally designed by ancient Roman jurists. We seek to uncover whether this underlying logic might shed additional light on the boundaries of the good faith concept and whether such common structures may be invoked in enhancing our understanding of the modern decisions which invoke good faith, or at least in the best motivated amongst them, without the deciding authority necessarily articulating them. Moreover, this paper resonates on this ancient Cicero decisions and provides its modern applications, reflections for the comparative law and economics scholarship of the duty of good faith.

It is also worth noting, particularly from the English common law perspective, that the recent modernisation of the French Code civil introduced a strong protection given to contracting parties by the general duty of good faith (also during pre-contractual negotiations).[[13]](#footnote-13) Unlike in ancient Rome, Germany, US, Netherlands, France or Belgium, English law has no general duty of good faith. The only similar doctrine which may resemble such duty of good faith is the doctrine of promissory estoppel which has been one of the most discussed doctrines in English law[[14]](#footnote-14) and its theoretical basis remains a matter of difficulty.[[15]](#footnote-15) In this respect, a comparative law and historical analysis of the rules developed in the civil law jurisdictions might provide additional insights and might help to clarify the structure of the good faith duties.

We suggest that the good faith standard as originally envisaged by ancient Roman jurists can be seen as a mechanism that *ex post* regulates the optimal amounts of different social behaviours, lowers transaction costs, fosters efficient reliance and information disclosure, enables sequential exchanges and is essentially a risk-allocation (risk-sharing) mechanism.[[16]](#footnote-16) Of course, such broad duty might not have merely positive effects but may also generate uncertainty, since its enforcement depends on the judicial quality, institutional stability and on the moral norms and standards of the society which may be in unstable institutional environments prone to abrupt change. We test our proposition on a small set of decisions from various legal systems dealing with commercial transactions.[[17]](#footnote-17) Since legal scholarship has established that even in civil law systems, good faith requirements have developed into a number of more specific institutions,[[18]](#footnote-18) such as fraud and mistake as defects of consent, latent defects in sale, duties of loyalty and co-operation in the law of mandate (agency), we explore merely general and particular precontractual duties (to provide information) of good faith.

The employed analysis presented here is both positive and normative. It is positive to the extent that the paper seeks to explain the incoherent nature of assessed doctrines. In this respect, the paper argues that the rules on liability for bad faith behaviour do have to address multiple sources of socially harmful behaviour and legal systems need rules to address each of them individually in order to tune the operation of the social fabric.[[19]](#footnote-19) At the same time it takes a normative stand, as it attempts to show how such rules should look like in order to offer optimal remedies to the said social acts.

Moreover, the analytical approach employs inter-disciplinary comparative and historical analysis.[[20]](#footnote-20) Since there must be a minimum level of difference between compared systems to make any comparative enquiry worthwhile, and since compared legal systems should at least be at a similar stage of development, English law has been chosen to represent common law systems, while Belgian and French law to represent civil law systems.[[21]](#footnote-21) Further, for reasons of scholarly curiosity this paper also provides a comparative analysis of good faith in ancient Roman law. The research question is structured as a universal concrete problem and, as such, together with the three chosen legal systems forms the *tertia comparationis*. However, it has to be emphasized that this paper deals only with contractual good faith, leaving aside good faith in property law, where it applies, for instance, to the purchaser of stolen goods and to the possessor non-owner of goods who acquires ownership through prescription.

This paper is structured as follows. The first part of the paper (Section 2) explores the ancient Roman law concept of good faith, particularly focusing on the decisions of the ancient Roman jurist Cicero and then offers an economic reflection of this concept as originally envisaged by Roman jurists. The second part test our proposition on a set of decisions in sale of good contracts and against more specific legal concepts derived from good faith in French, English and Belgian law of contracts (Section 3). A conclusion is provided in Section 4.

**2.** **Ancient Roman law, *bona fides* and Cicero’s standard of virtuous behaviour**

The origin of the doctrine of good faith, a central principle of the continental European legal tradition, can be found in the Roman concept of bona fides.[[22]](#footnote-22) It is a social-normative moral concept, which had already influenced classical Roman law.[[23]](#footnote-23) Two particularly prominent documents in the development of Roman law in antiquity are the Law of the Twelve Tables (c 450 BC) and the Corpus Juris Civilis (AD 528–534).[[24]](#footnote-24) Moreover, Roman jurists developed a large number of legal concepts, rules and institutions, which they constantly attempted to coordinate, and intellectually to relate to each other.[[25]](#footnote-25) They thus created a kind of ‘open’ system that combined consistency with a considerable degree of flexibility. In the process, the Roman jurists were guided by a number of fundamental values, or principles, such as liberty, bona fides, humanitas and the protection of rights that have been acquired, particularly the right of ownership.[[26]](#footnote-26)

Translation of the good faith concept into Romanic languages, such as bonne foi, buona fede and buena fe, contain a linguistic ambivalence due to the fact that they also refer to the subjective good faith (eg of the possessor).[[27]](#footnote-27) Bona fides is a Roman legal term that was probably first used in certain formulae of the Praetorian edict and in Classical law, the term assumes both a subjective and an objective meaning.[[28]](#footnote-28) Ranieri suggests that the historical development of the doctrine of good faith[[29]](#footnote-29) has its starting point in the formulary procedure concerning the *obligatio dandi certam rem.[[30]](#footnote-30)* It was *an actio stricti iuris*. Already at an early stage, Roman law provided for strict objective liability for debtors in default. However, as Schermaier notes, this very formal procedural restrictions were mitigated by measures taken by the officers responsible for the administration of justice.[[31]](#footnote-31) The main instrument used to mitigate this strictness was the *exceptio doli*. On the one hand, *the exceptio doli praeteriti* constituted a defence for the defendant, whereby he could assert certain circumstances, eg an intentional deceit, in order to request the dismissal of the claim.[[32]](#footnote-32) Thus, the *exceptio doli praeteriti* referred to the past, ie to the time of the event giving rise to the proceedings. The *exceptio doli praesentis*, on the other hand, served as a defence against the bringing of the lawsuit itself. Therefore, it benefited those defendants who were sued in spite of the fact that the claimant knew that these proceedings were abusive. It was in the latter sense that the *exceptio doli* found its main application in Roman law.[[33]](#footnote-33) The Roman jurists used it as a procedural means to moderate the severity of the ius civile in verbally binding transactions (eg stipulations) and to correct inequitable legal consequences.[[34]](#footnote-34)

The legal position for consensual contracts (which counted among the *iudicia bonae fidei*) was different. Here the exact content of the debtor’s obligation first had to be judicially ascertained according to the standard of bona fides (*dare facere oportet ex fide bona*). This bona fidei judicia required the debtor to perform in such a way as good faith demanded.[[35]](#footnote-35) Thus, the debtor not only had to render the performance he had promised but he also had to do all that was necessary to achieve the purpose of the contract as well as to refrain from everything that would prejudice this purpose. The criterion of bona fides became the cornerstone of the procedural implementation of *iudicia bonae fidei* and, indirectly, therefore also of the law relating to consensual contracts. In the case of consensual contracts, such as contracts for sale, the exceptio doli did not have to be formally raised within the legal proceedings. Instead the *exceptiones doli, metus, pacti* etc were regarded to be inherent in *iudicia bonae fidei* (Pomponius D. 19,1,6,9).

One of the most insightful examples of the Roman concept of bona fides may be found in the writings of the famous Roman jurists Cicero.[[36]](#footnote-36) In his De Officis Cicero argues that the primary function of justice is to ensure that no one harms his neighbours unless he has himself been unjustly attacked. The foundation of justice is, in Cicero words, good faith – “truthfully abiding by our words and agreements” (Book I., para 23). Cicero in his De Officiis actually aims to show that the work of jurists should led to the ideal of the *vir bonus*, who would not use deceit to gain a contractual advantage, being incorporated into the administration of justice.[[37]](#footnote-37) In his time the contractual relationships that has been subject to good faith included guardianship (*tutela*), partnership (*societas*), trusts (*fiducia*), mandate (*mandatum*), contracts of sale (*emptio venditio*) as well as hire of a thing or of services and contracts for the piece of work to be done (*location conductio*).[[38]](#footnote-38)

Scholars have also very little information on the legal development of good faith doctrine before Cicero’s time, yet Wieacker estimates that emergence of the good faith doctrine can be placed into the second half of the second century BC.[[39]](#footnote-39) From that time on good faith had ceased to be a merely ethical yardstick of contractual liability and had been instead incorporated into the praetorian law (ius honorarium).[[40]](#footnote-40) It formed a new source of obligations, supplementing the old civilian *oportere* and giving the Roman judge a tool to assess the standard of performance required.[[41]](#footnote-41) Some of the scholars even argue that procedural formula[[42]](#footnote-42) containing good faith requirement was conceived *in ius*, describing the obligation of the plaintiff as *dare facere oportere*, where it may be assumed that the praetor regarded good faith as a new source of obligations.[[43]](#footnote-43) Thus, claims based on good faith could only be enforced via the formulary procedure as they had no statutory basis.[[44]](#footnote-44) Moreover, this brilliant development of Roman law allowed Roman judge to consider both parties’ claims and the good faith principle was a conscious creation of praetors (including Cicero) covering several types of contracts which was the result of critical reflection and policy interests.[[45]](#footnote-45) Good faith principle enabled expansion of judicial discretion in assessing the merits of a case and required Roman judges to consider all arrangements between plaintiff and defendant in assessing defendant’s duty to perform.

However, one may wonder why such a broad judicial discretion did not lead to uncertainty, opportunism, moral hazard and arbitrariness? Scholars suggest that such judicial behaviour was deterred by a concrete and uniform understanding of what accorded with bona fides.[[46]](#footnote-46) Faithfulness to one’s words was regarded as a precondition of any transaction. Cicero actually describes it as *fundamentum iustitiae*.[[47]](#footnote-47) In other words, good faith tool (*bonae fidei iudicia*) was predominantly used as an ex post judicial mechanism to deter (via sanction) fraudulent behaviour and Cicero himself describes the good faith standard as the notion of *bene agere*.[[48]](#footnote-48) However, one has also note that Roman jurists were in a sort of self-restrictive application very careful not to extend the concept of good faith beyond the sphere of the *bonae fidei iudicia*.[[49]](#footnote-49)

Cicero in De Oficiis and his other writings[[50]](#footnote-50) is evidently also very concerned with the ethical dimension of good faith[[51]](#footnote-51) and provides a serial of examples that may serve as illustrations of the central role that good faith (bona fides) occupied in the ancient Roman law.[[52]](#footnote-52) For example, he imposes a triggering question of what a judge should do with parties that tell lies during their commercial exchanges. Gaius Canius[[53]](#footnote-53) came to Syracuse where he wanted to buy a small estate to which he could invite friend and enjoy himself without people bothering him.[[54]](#footnote-54) Phyrus, a banker at Syracuse, told him that he owned an estate which was not for a sale, but that Canius could use is for a while. When Canius arrived at this seaside estate, Phyrus gathered fishermen and instructed them to fish in front of the estate and then to bring fishes[[55]](#footnote-55) and throw them at Pythius’ feet. Cicero reports that when this happened Canius said:

*“Tell me, Pythius, what is going on? Why all these fish and all these boats?” “That’s no surprise,” replied Pythius. “Syracuse gets all its fish and its fresh water from here. The locals can’t get along without this residence of mine.” Canius was fired with greed, and pressed Pythius to sell it to him. At first the banker played hard to get. Need I say more? Canius goot his way. The greedy man had plenty of money, and bought the estate at the price Pythius asked, together with all the furniture. Pythius entered the details in a ledger, and completed the transaction.”*

Of course, as one may anticipate, when Canius on next day invited his friends there was not so many fishermen in sight. He then asked his neighbour if it was a fishermen’s holiday, because there were none of them in sight. “Not so far as I know,” the neighbour replied, “but none of them usually fish here. So, I was quite surprised yesterday at what happened.”[[56]](#footnote-56)

Cicero then mentions that his colleague in the praetorship Gaius Aquilius defined such behaviour was done in bad faith (also constituting dolus malus – malicious fraud) and that “Pythius, and all who do one thing while pretending to do another, are treacherous, wicked, and wilful; and all what they do is disfigured by numerous vices.”[[57]](#footnote-57) Good faith standard also means that “all falsehood must be excluded from business transactions. A seller must not introduce a bogus bidder, nor a buyer someone who bids low against him.”[[58]](#footnote-58) As an explicit rule, Cicero notes that Roman “civil legislation stipulates that when properties are sold, any defects known to the vendor must be declared.”[[59]](#footnote-59) Cicero as an example of this offers a case that happened when the augurs proposed to observe an augury form the citadel.

*“The ordered Titus Claudius Centumalus, who had a residence on the Caelian hill, to demolish those parts of the building whose height obstructed observation of the birds. Claudius advertised the block for sale, and Publius Calpurnius Lanarius purchased it. The same notice was then served on him by augurs. So Calpurinus dismantled it, and having ascertained that Claudius had advertised the building for sale after having received the order for demolition from the augurs, he summoned Centumalus before the arbitrator for a decision on what restitution he should make to him on the basis of good faith.”[[60]](#footnote-60)*

Marcus Cato as a presiding judge found a breach of good faith standards and declared that since Claudius when selling had known the circumstances and failed to report them, he must make good the loss to the buyer.[[61]](#footnote-61) Thus, Roman law was clearly on the position that a defect known to the vendor should be made known to the purchaser as a mark of good faith.[[62]](#footnote-62)

Cicero, however, does not stop there and in a further case[[63]](#footnote-63) shows that any provision derived from the concept of good faith itself becomes inflexible and unjust if it is not continually tested against the standard of good faith (*bona fides*).[[64]](#footnote-64) Namely, this case suggests that Roman jurists did not conceptualize every non-disclosure as a breach of good faith standard. Namely, as this case shows if the information (facts, defect) had been known to the buyer (he was aware of it) then there had been no duty to disclose this information and there was no breach of good faith standard.[[65]](#footnote-65)

Finally and insightfully, Cicero also argues that not all promises should be kept and that sometimes a breach of a promise (or a contract) does not amount to a bad faith behaviour. He invokes several examples and one of them being the one where a person left a sword with one person when he was of sound mind and asked for it back when he had gone mad. In such case, Cicero argues that it would be a sin to give it back, and person’s obligation would actually be not to do so.[[66]](#footnote-66) Thus, in certain conditions a breach of a contractual promise may not be regarded as a breach of good faith standard. He goes even further and emphasizes that “there are many actions which appear honourable by nature, but which cease to be honourable in certain contingencies.”[[67]](#footnote-67)

2.1 Economic reflections on Roman concept of *bona fides* and Cicero’s standard of virtuous behaviour

This sub-section discusses the general principles of comparative contract law and economics relating specifically to good faith instrument and applies these to the previously discussed Roman concept of *bona fides* (good faith). It compares and contrasts them to Cicero’s ethical reasoning and derives a number of suggestions for the economic assessment of Roman law on good faith.

In the early days of law and economics scholarship good faith duty has been completely assumed away via a narrowly defined rationality assumption and hence any interference into the freedom of contracting can only be based on paternalism and not on economic grounds.[[68]](#footnote-68) Yet, during the last 30 years, several law and economics scholars have addressed problems related to the good faith standard from a broad variety of perspectives.[[69]](#footnote-69) For example, some economic analysts have focused on the goal of enforcement in efficiently protecting the contractual reliance of the parties,[[70]](#footnote-70) while others centred on the goal of minimizing the joint costs of exchanges.[[71]](#footnote-71) Law and economics generally considers the obligation of good faith as an implied contractual term that prohibits opportunistic behaviour, decreases transaction costs, provides incentives for optimal reliance and regards it as an information disclosure mechanism.[[72]](#footnote-72)

First, the problem of positive transaction costs might indeed be a reason for the emergence of the good faith doctrine. From the economic perspective one may argue that Roman jurists actually created good faith (bona fidei) standard in order to mitigate the notorious problem of positive *ex ante* transaction costs, which are hindering the optimal functioning of the system of economic exchanges.[[73]](#footnote-73) Examined Roman doctrine and described cases of contractual good faith have been employed in order to promote the early formation of contractual liability which implies an *ex ante* decrease in transaction costs.[[74]](#footnote-74) Namely, the notion that the welfare of a human society depends on the flow of goods and services, and this in turn depends on the productivity of the economic system can hardly be overstated.[[75]](#footnote-75) The productivity of the economic system depends on specialization which is only possible if there is an exchange of goods and services. Such an exchange, a voluntary transaction is beneficial to both parties, but transaction costs than reduce the value of an exchange and both contracting parties will want to minimize them. In other words, the amount of that exchanges which spur allocative efficiency depends, as Coase[[76]](#footnote-76) and North[[77]](#footnote-77) argue, also upon the costs of exchange[[78]](#footnote-78) – the lower they are the more specialization there will be and the greater the productivity of the system.[[79]](#footnote-79) In a world of zero transaction costs parties would always produce economically efficient results without the need of legal intervention. However, since transaction costs[[80]](#footnote-80) are imposed daily, intervention becomes necessary and the legal rules, such as Roman good faith, by reducing transaction costs imposed upon an exchange can improve allocative efficiency and thus maximize social welfare.

This said, paper argues that existence of positive transaction costs might be an economic reason for emergence of the good faith doctrine. We argue that this legal institution may be designed as mechanism that should mitigate the notorious problem of positive *ex ante* and *ex post* transaction costs which are hindering the optimal functioning of the system of economic exchanges. Since in reality these transaction costs[[81]](#footnote-81) are imposed daily and are not trivial, intervention becomes necessary and the legal rules by reducing such transaction costs imposed upon daily exchanges can maximize social welfare. The introduction of discussed legal institution of good faith into the legal systems of ancient Rome (by Cicero), and as we will show later on also into the law of France and Belgium might have indeed been, though this is a largely untested hypothesis at this point,[[82]](#footnote-82) from the transaction costs perspective one of the contributing factors, mechanisms of economic growth.

As an illustration, suppose that parties, while being in position to enter into exchange, must undertake the expense of searching for potential trading partners. Such expenses include searching, acquiring information on the possible value of exchange, advertising, correspondence, information processing, travel, and the parties’ time (opportunity costs). Wealth maximization principle calls for parties to undertake such eﬀorts up to the point where the marginal costs of additional search outweigh its expected marginal value.[[83]](#footnote-83) While search can be modelled in various ways,[[84]](#footnote-84) under plausible assumptions, the value of an additional unit of search lessens as the quality of the bargain in hand increases. This stopping point will depend on the transaction costs (i.e. on the cost of search, the distribution of information). The level of search that is privately proﬁtable for an individual party, however, is not necessarily the same as the level that would be socially optimal.[[85]](#footnote-85) Examined doctrines of good faith are then employed in order to promote the early formation of contractual liability which implies an *ex ante* decrease in transaction costs.

Namely, from an *ex ante* perspective, reduced transaction costs enable additional cooperation and may increase certainty of exchanges since parties may be more willing to undertake the cost of search if they are assured that trading partners they ﬁnd will stick with their deal. In other words, parties entering in subsequent similar bargains will adjust their behaviour in light of the newly announced legal rule. Such rule than serves also as an *ex ante* screening device. From the *ex post* perspective of parties who have successfully cooperated and transacted, such rules reduce uncertainty, defensive expenditures and deters opportunistic breach of binding commitments.

Second, the notorious asymmetric information problem is one of the significant causes of market failure and indeed it may be argued that almost every fundamental legal and economic problem is an asymmetric information problem.[[86]](#footnote-86) Information is the essential ingredient of choice, and choice among scarce resources is also the central question of economics.[[87]](#footnote-87) Lack of information impairs one's ability to make decisions of the fully rational kind postulated in economic discourse, thus they must be made in the presence of uncertainty.[[88]](#footnote-88) This uncertainty causes parties to make decisions different from what they would have made under conditions of abundant information. Such decisions may then entail a loss or failure to obtain a gain that could have been avoided with better information.[[89]](#footnote-89) Uncertainty is thus generally a source of disutility, and information is the antidote to it.[[90]](#footnote-90)

At different contractual stages parties have an opportunity to exchange information and general contract law offers many rules that generate incentives to disclose information.[[91]](#footnote-91) In this respect, duty of good faith should be from economic perspective regarded as mechanism for addressing the notorious asymmetric information problem. Namely, previous discussion of ancient Roman law actually shows that good faith obligation was essentially an information disclosure mechanism since good faith duty implied that for example sellers were obliged to disclose all relevant information about the goods that they have been selling and not to misinform other contracting parties. Recall, that every such non-disclosure of information has been regarded as a bad faith behaviour.

Consider for example an economic insight that in contractual exchanges there should be (during the entire contractual exchange) a duty for party A to inform party B if all the following conditions are fulfilled: (a) A is the cheaper cost producer of this information; (b) the information is valuable to B (i.e. the value is higher than the information and communication costs); (c) it is unlikely that B possesses the information already; (d) the information is not entrepreneurial; (e) the information does not consist of mere opinions and other non- falsifiable statements.[[92]](#footnote-92) This economic rule of thumb perfectly fits the Roman concept of good faith and provides an economic justification for the introduction of such concept into the ancient Roman law.

Third, the notion of optimal and timely reliance may be invoked as another economic justification for the good faith doctrine. Namely, according to the traditional (old fashioned) *“aleatory view*” of contractual exchanges, the parties are free to retreat from the initiated exchange at any time,[[93]](#footnote-93) so that each party bears the risk that her investment (reliance) will be wasted.[[94]](#footnote-94) Reliance may indeed be beneficial (for one party or for both) because it can increase the size of a pie.[[95]](#footnote-95) Such reliance investments are usually relation-specific and may be wasted if contractual exchange fail. Law and economics scholars emphasize that the risk of losing the investment might lead to an incentive to underinvest and hence foregoing the opportunities to maximize the surplus obtainable from transactions.[[96]](#footnote-96) By altering the costs and benefits of reliance, argues Katz, good faith doctrines actually influence parties’ decisions to make offers and to rely on them at the proper time and a proper amount.[[97]](#footnote-97)

However, the complete protection of contractual investments might not be appropriate, since such a protection might lead to excessive reliance. Optimally, the parties should take the risk of wasted investment into account before making them.[[98]](#footnote-98) The rules governing contract formation and performance accordingly, should ideally be designed to promote reasonable reliance at the optimal time, balancing the beneﬁts of productive investment against the costs of waste.[[99]](#footnote-99) In general, persons without bargain power will be reluctant to enter contractual relationships requiring specific investments, for fear that their investments will be expropriated. The proper legal rule should thus provide them with the “reasonable reliance” protection in form of reliance damages and induce them to enter into the economic exchanges. This said, we argue that the Roman good faith concept actually induced reasonable reliance, since parties has been shielded from potential expropriation of their investments. Namely, as shown good faith tool (*bonae fidei iudicia*) was predominantly used as an ex post judicial mechanism to deter (via sanction) fraudulent behaviour and Cicero himself describes the good faith standard as the notion of *bene agere*.[[100]](#footnote-100) Such judicial ex post mechanism mitigating fraudulent behaviour then functioned as an ex ante assurance to contracting parties that their relation-specific investments will not be appropriated by a fraudulent party.[[101]](#footnote-101)

Fourth, good faith may also function as mechanism that enables sequential exchanges. Namely, good faith deters fraudulent behaviour among contracting parties and hence also increases mutual trust. Such increased mutual trust, backed by judicial enforcement of good faith, consequently triggers the transformation from spot (or arms-length) transactions to the system of sequential exchanges,[[102]](#footnote-102) boosting economic activity[[103]](#footnote-103) and spurring social wealth and progress of Roman republic. Good faith then also fosters enduring relationships, which in effect solve the problem of cooperation with less reliance on the courts to enforce contracts. Moreover, from game theoretical perspective the general duty of good faith also enables individuals to cooperate by converting games with non-cooperative solutions into games with cooperative solutions.[[104]](#footnote-104)

Fifth, good faith doctrine can be from economic perspective also conceptualized as an effective allocation of risk. Namely, previous discussion of Roman cases shows that ancient jurists also allocated risk in line with economic principles to the so-called superior risk bearer. Economic efficiency demands that in the absence of any express contractual provision to such effect,[[105]](#footnote-105) risk should be assigned to the superior risk bearer*.* The party is the superior risk bearer either because he is in a better position to prevent the risk from materializing or because he is better able to insure against the risk (the superior insurer), as a result of lower risk-appraisal and transaction costs, through self- or market insurance.[[106]](#footnote-106) For example, when Cicero argues that good faith requires sellers to disclose material defects in goods he employs an example where a wise man inadvertently obtains counterfeit coins instead of genuine ones. When he becomes aware of this good faith requires not to pass them off as genuine in payment to creditor.[[107]](#footnote-107) Economically speaking such rule beside information disclosure duty also allocates risk of mistake to a seller, since he can prevent materialization of that risk at lower cost than a buyer and this then makes seller a superior risk bearer. Moreover, also buyers, if they possess information and if they can disclose them at lower costs then can be superior risk bearers. Insightfully, Cicero provides an example of such case where a person imagines that it is selling brass when it is actually gold.[[108]](#footnote-108) In such instance, Cicero argues, good faith require buyer to inform seller that it is gold.[[109]](#footnote-109) Remarkably, such Cicero’s interpretation is perfectly in line with economic suggestions, since buyer is in these circumstances as least cost information gatherer also a superior risk bearer[[110]](#footnote-110) and she can prevent materialization of that risk at lower cost than a seller.[[111]](#footnote-111) Thus, the risk of mistake is in this case correctly allocated upon the buyer as superior risk bearer.

However, if it unfeasible to find a superior-risk bearer then a risk sharing is the most effective solution.[[112]](#footnote-112) This is actually a key insight from recent insurance economics literature[[113]](#footnote-113) which suggest that in the absence or a superior risk bearer, risk sharing represents an optimal allocation of risk.[[114]](#footnote-114) Now, one may wonder how a good faith could actually achieve risk-sharing among contracting parties. Remarkably, Cicero also provides illustrations of such risk-sharing mechanism when he is arguing that promises need not be kept if they are not useful to the people who exacted them.[[115]](#footnote-115) Keeping promises, observing agreements, returning deposits may become dishonourable (bad faith) and hence good faith requires that such contract should be discharged (not enforced).[[116]](#footnote-116) Economically speaking, such good faith driven discharge of a contract also implies that both contracting parties actually forgo their expected profits which they would realize if the contract were performed as initially expected, and they both also bear the loss of their reliance (relation-specific investments). Hence, such discharge is essentially a risk-sharing mechanism of such an unpreventable, uninsurable risk, which cannot be better pooled by either of contracting parties. In other words, Cicero’s concepts of virtue, honourable conduct and good faith also encompassed an effective *ex post* risk sharing mechanisms which contributed to financial stability of Roman republic by spreading risks across different parties and promoting resilience in the face of unexpected events. Cicero’s risk sharing mechanisms may also promoted social equity by ensuring that the burden of risks was distributed fairly among individuals and institutions, rather than disproportionately affecting certain groups or communities.

*2.2. Irredeemable acts and the duty of good faith*

We have emphasized that the obligation of good faith may be economically interpreted as an implied contractual term that prohibits opportunistic behaviour and enables trust between parties.[[117]](#footnote-117) The more productive such trust is, the more valuable it becomes for the members of a society and therefore the more frequently it is made use of and for this reason trust must be protected both in contracts and in pre-contractual relationships.[[118]](#footnote-118) In contractual setting a duty of good faith implies that the contracting partners are acting in an honest way and can therefore be said to have reasonable expectations that relevant facts will be revealed to them in order that they can make their decision. Hence, one of the main functions of the Roman duty of good faith was essentially to boost information disclosure. Economic analysis of Roman good faith concept could be concluded with this observation and the introduction of previously discussed duty-to-inform-doctrine would be the only normative suggestion.

However, what if a good faith has another significant function of defining the optimal amounts of different behaviours. Namely, if one employs a good faith standard, the triggering question is what kind of social behaviour should be regarded as bad faith behaviour and what should be the optimal amount of such behaviour?[[119]](#footnote-119) Should this be zero or non-zero?

In this respect, Raskolnikov introduced an interesting distinction between two types of socially undesirable behaviour: irredeemably inefficient acts and contingently inefficient acts.[[120]](#footnote-120) Irredeemable acts are according to Raskolnikov acts that are always socially undesirable, whereas contingently inefficient acts are acts that are sometimes undesirable but sometimes desirable.[[121]](#footnote-121) *“Irredeemable acts always reduce welfare, they reduce social welfare no matter what the legislator does in any form and at any level, because they are inefficient at their core. They are private, intentional, non-consensual transfer of wealth*.”[[122]](#footnote-122) They are socially undesirable in any form and at any level because though the money transfer is generally welfare neutral, transferors and transferees waste real resources to make sure that this transfer does occur.[[123]](#footnote-123) Such acts produces no net social benefit, yet they are giving rise to a variety of social costs.[[124]](#footnote-124) They must also be intentional and non-consensual.[[125]](#footnote-125) All of the provoked actions are unproductive, no value is created and such activities give rise to social (and private) costs.[[126]](#footnote-126) Hence, irredeemable acts should be strictly deterred, forbidden and legislated as unlawful.

However, the standard law and economics suggests that such an inefficient behaviour might be converted into efficient behaviour by forcing parties to internalize the external harm of their decisions. Yet, standard law and economics insights might be misplaced, since for such irredeemable acts such a conversion is impossible or may even lead to over deterrence.[[127]](#footnote-127)

Contingently inefficient acts, on the other hand, may or may not be socially undesirable depending on the magnitude of costs that need to be balanced. They represent all kind of socially harmful acts (speeding, issuing misleading forecasts) that are undesirable in some form or at some level, but are socially desirable in a different form or at different level.[[128]](#footnote-128) They may be inefficient, even highly inefficient, but they are only contingently inefficient. The optimal regulation of contingently inefficient acts should depend upon finding the efficiency-maximizing trade-off between costs and benefits.[[129]](#footnote-129) In addition De Geest, introduces a further distinction with three sub-types of contingently inefficient acts: a) those that can be cured by telling parties what to do (through duty to disclose information); b) those that can be cured by letting the party internalize harm (through reliance damages); and (c) those that are too hard/costly to cure and therefore given up on by the legal system.[[130]](#footnote-130)

The irredeemable acts, as for example purely opportunistic contractual relationships (entering into contracts with sole purpose of stealing others person trade secrecy, know-how ect.), must be simply forbidden and this is exactly what ancient Roman law did. Such contracts have been by Roman jurists regarded as dishonourable and not in good faith. In instances of contracting acts (contingently inefficient acts) for which the legal system can identify the inefficient cases (for example when one party in negotiations misled the other party with respect to his chances or to amount at stake) a system of liability for negligence should be established (via the duty to inform). This is exactly what Roman concept of good faith actually achieved, where it obliged sellers to disclose all relevant facts to buyers. In the second subcategory where legal system cannot identify the inefficient cases of braking off contracts, since the legal system does not know which termination is good or bad, it can induce the party to choose only good terminations by letting the party to internalize the harm (reliance damages) and such party will opt for only desirable terminations. In the third example where the legal system cannot identify the inefficient braking offs from efficient breaking offs and for which the harm internalization is not feasible, legal system may simply either ban all contractual’ s termination or simply permit it. These four categories also explain very well the seemingly different Cicero’s applications and interpretations of what good faith is and what it ought to be.

Furthermore, Raskolnikov makes another insightful observation, that actually irredeemable acts are a subset of rent-seeking and directly unproductive profit-seeking activities.[[131]](#footnote-131) Contracting parties can hence dissipate resources through various types of rent-seeking behaviour.[[132]](#footnote-132) One way to deter such behaviour is through substantive legal doctrines such as good faith that limit the kinds of bargains that can be enforced, and thus lessen the temptation for overreaching. Contract law may indeed via duties of good faith actually deter such a harmful behaviour and impose the cost of lost bargains on parties who cause them through excessive rent-seeking activities.[[133]](#footnote-133) This said, good faith standard may thus be interpreted also as a mechanism for optimal policing of irredeemable inefficient acts and contingently inefficient act.

2.3 Good faith and behavioural law and economics

At the core of previous discussion lies the notion that good faith doctrine may be a tool that helps parties overcome prisoner’s dilemma, induce mutual trust and achieve mutually beneficial cooperation. Behavioural law and economics literature adds another aspect and describes people’s perceptions of contracts as involving a moral duty to fulfil promises (as well as people’s trust and trustworthiness).[[134]](#footnote-134) Wilkinson-Ryan and Hoffman have for example argued that the norms of promise-keeping and trust can lead to the adversarial attitudes of caution that characterize negotiation to be substituted by a cooperative attitude at the performance stage.[[135]](#footnote-135) Namely people who no longer view their obligation via the prism of cost-benefit analysis may assume that the other people share their perspective and such stand then induce cooperative attitude toward each other once formation of contract is completed.

These findings have also implications for understanding of the behavioural effects of the duty of good faith and its role in the law of contracts. As will be shown later on, such a duty originates in ancient Roman law and is widely recognized in civil law systems.[[136]](#footnote-136) Although the precise scope and the meaning of the good faith requirement is still out of scope in addition to classic law and economics insights behavioural findings support the imposition of a legal duty to perform contracts in good faith.[[137]](#footnote-137) Zamir and Teichman suggest that this duty can be seen as a regulator of the norms of commitment and trust that govern contractual conduct.[[138]](#footnote-138) As they emphasize, while *“behavioural research suggest that these norms have been internalized by many, there will always be individuals who will deviate from them (prisoner’s dilemma effect) and try to abuse the trust generated by the norm to further their own payoffs at the expense of others”.*[[139]](#footnote-139) Here the doctrine of good faith (or any other similar doctrine) then prevents such behaviour, and prohibits attempts to exercise contractual rights in an antisocial manner.[[140]](#footnote-140)

Thus, the brilliant ancient Roman legal innovation can be justified also from a behavioural perspective, since it effectively (and socially beneficially) regulates the social norms of trust and commitment. Moreover, economic discussion of Cicero’s concept of virtue, ethics and good faith as embodied in famous De Officiis reveals that his concepts could be from the law and economics perspective regarded as the first, in human history, recorded examples of a brilliant economic tools designed to address the problem of positive transaction costs, information asymmetries, risk allocation, reliance, cooperation and opportunism.

**3. A comment on French, Belgian and English contract law**

This section tests our proposition on a small set of decisions from various legal systems dealing with commercial transactions and comments on parts of certain articles in French, Belgian and English contract law.

*3.1. French Law (rectitude et loyauté)*

In French law the duty of performance in good faith can be found in art. 1134 al. 3 and in art. 1135 of the French Civil Code, which provides that contracts’ obligate a party not only as to what is there expressed, but also to all the consequences which equity, custom and the law give to the obligation according to its nature.[[141]](#footnote-141) New art. 1104 of the Civil Code[[142]](#footnote-142) expressly provides that contracts must be negotiated, concluded and performed in good faith by parties and before 2016 this principle had already been extended by judges to pre-contractual negotiation.[[143]](#footnote-143) Steiner argues that with the 2016 reform good faith has become an all-pervasive principle of contract law.[[144]](#footnote-144) It has also become generally accepted that good faith in performance has acquired two particular expressions in the case law. First is a *duty of loyalty* (which sanctions bad faith) which can be for example seen in a decision of the Cour de cassation in 1999[[145]](#footnote-145) where it has been held that previous court failed to consider whether in circumstances reliance on the power of termination shows a lack of good faith.[[146]](#footnote-146) Second is a *duty of cooperation*. (which is a duty to ensure the greatest effectiveness of a contract to the benefit of both parties).[[147]](#footnote-147) Bell et al. suggest that example of such a duty to cooperate may be found in the case of a party to a contract taking advantage of the other party’s failure to claim for essential services render under it or where a person who has granted by contract an exclusive concession to another person deprives the latter of the means of operating the concession at competitive rates.[[148]](#footnote-148) This extends to an obligation to keep each other informed of developments which may affect performance of the contract. French case law confirmed that negotiating parties must act fairly, particularly when negotiations reach an advanced stage and if one party then breaks off negotiations without a legitimate reason, the court will award damages to the innocent party.[[149]](#footnote-149) For example in French case law a vendor is free to conduct parallel negotiations with other parties.[[150]](#footnote-150)

Moreover, Civil Code and French courts also impose duty to provide information (*obligations d’information*) on one party to a contract to the other and the courts are imposing such information duty in a wide range of situations.[[151]](#footnote-151)

As a result of 2016 reform liability may now also arise from breaking-off negotiations if done in bad faith.[[152]](#footnote-152) Namely, under the new art. 1112-1,[[153]](#footnote-153) during a pre-contractual negotiations, a party who is aware of an information which is critical enough to determine the other party to enter into contract must inform her as long as she is legitimately unaware of such information or relies on her contracting.[[154]](#footnote-154) Article 1112-1 imposes a general duty to provide information[[155]](#footnote-155) and actually states that where a party knows information that is decisively important to the other’s consent he must disclose it wherever the other party is legitimately ignorant or relies on him.[[156]](#footnote-156) Non-disclosure may results in damage liability and there is even a scope for a contract to be annulled, if the information was withheld with an intention to deceive.[[157]](#footnote-157)

According to commentators modern French law establishes the following duties in the pre-contractual formation of contracts: a) the duty to inform in an honest manner the other party to the contract; b) the duty to grant other party a reasonable time to think about it; c) the duty to attempt to reach an agreement; and e) the duty not to seek to introduce unacceptable conditions or dilatory measures.[[158]](#footnote-158) Good faith in French law now governs the execution as well as the formation of contracts and amount to each party not betraying the confidence created by the willingness to enter into a contract.[[159]](#footnote-159) More generally, Steiner suggests that under the principle of good faith, individual parties to a contract “may be prevented from insisting on the application of the strict terms of the contract in their favour when adherence to this may result in what can be constructed as unfair treatment to the other party.”[[160]](#footnote-160)

Having considered the content of French rules and their genesis, the paper turns to a comparative assessment. It is evident from the previous legal survey that the current French law in relation to the good faith principle corresponds with ancient Roman good faith concept and with related economic insights. Moreover, also the unilateral cancellation of negotiations generally corresponds with previous, economically inspired, discussion. Obviously, also French good faith principle performs the same economic functions as the ancient Roman rule and may be from an economic perspective seen as mechanism that decreases transactions costs, fosters sequential exchanges, boost trust and cooperation, allocates risk to the superior risk bearer (and even achieves risk sharing when circumstances demand such a solution) and also polish socially undesirable irredeemable inefficient acts and contingently inefficient act.

Moreover, it requires information disclosure, minimizes transaction costs, protects reasonable relation-specific investments and by assigning reliance damages (in bad faith breaches of negotiations) induces efficient level of reliance. However, having said this, four reservations should be made. First, as has been mentioned there should indeed be a duty to provide information but not a general one requiring disclosure of all information that is decisively important to the other’s consent. Recall, that ancient Roman rule did not demand disclosure of all information and consequently every non-disclosure as a breach of good faith. Namely, if the information (facts, defect) had been known or should have been known to the buyer (he was aware of it or should be aware of it) then there had been no duty to disclose this information and there was no breach of good faith standard.[[161]](#footnote-161)

As discussed, from economic perspective (and in line with Roman rule) French concept may be refined further by conceptualizing that good faith requires that there is a duty for party A to inform party B if all the following conditions are fulfilled: (a) A is the cheaper cost producer of this information; (b) the information is valuable to B (i.e. the value is higher than the information and communication costs); (c) it is unlikely that B possesses the information already; (d) the information is not entrepreneurial; (e) the information does not consist of mere opinions and other non- falsifiable statements. It may be noted that current broad disclosure duty might be excessive, counterproductive, might open doors to opportunism and moral hazard and may even deter deliberate generation of productive information.

Second, modernised French Code Civil does not contain any definition of good faith, does not give any guidance on this key concept and does not differentiate among irredeemable and contingently inefficient acts. This leaves considerable leeway for interpretation.

Third, previous discussion on irredeemable acts actually points to the “intention” requirement, which is for example missing in the “*Monoprix*” case. Providing guidance on key concept of pre-contractual good faith standard would not eliminate all vagueness and uncertainty but would have been a step towards increased predictability and transactional certainty.

3.4 Belgian Law: Subjective and Objective Good Faith (Amelie)

In Belgian civil law there is a fundamental division between subjective good faith and objective good faith (memorandum on article 1.9 Burgerlijk Wetboek). Subjective good faith relies to the knowledge of a party. The legislator has not defined subjective good faith but the law does state that subjective good faith is presumed and gives a definition of subjective bad faith instead (article 1.9 Burgerlijk Wetboek, freely translated: *“A person is acting in bath faith, when they knew or, under the given circumstances, should have known the facts or legal actions to which their good faith must relate*”). Objective good faith on the other hand imposes a standard of conduct (memorandum on article 1.9 Burgerlijk Wetboek). For the relevance of this paper, the focus shall be on the latter, the imposed conduct by the objective good faith.

*Good faith and the freedom of negotiation*

Article 5.15 Burgerlijk Wetboek states that parties are free to initiate, conduct, and terminate pre-contractual negotiations and that in doing so, they shall act in accordance with the requirements of good faith. The memorandum clarifies that this article was inspired on the French article 1112 Code Civil (as discussed above) and explains that freedom to negotiate is affirmed and remains the principle and that exceptions must be applied with great restraint.

Legal doctrine gives substance to this with the criterion of the normal careful person, whereby breaking off precontractual negotiations is only considered wrongful if the behavior of the party who broke off the negotiations deviates from how a normal and careful person would have acted under the same circumstances[[162]](#footnote-162).

Exercising the right to contract requires the intention to reach an agreement throughout the entire negotiation period, in the absence of which, the holder does not exercise a subjective right and acts with other purposes[[163]](#footnote-163). Rightfully it is argued that this is the case when negotiating with the purpose of causing damage or with the purpose of obtaining confidential information[[164]](#footnote-164). From an economic analysis this can only be supported, since such an act is irredeemable inefficient. It fits the by RASKOLNIKOV argued acts that are always social undesired, reduce social welfare, and should be strictly deterred as they are private, intentional, non-consensual transfers of wealth[[165]](#footnote-165). Entering negotiations with the only purpose of obtaining otherwise confidential information creates no social benefit, as the only private benefit is the wrongful terminator’s gain from the obtained information and that gain is then inevitably and fully offset by the other party’s loss. It is therefore in Belgian doctrine rightfully argued that this behaviour is always wrongful.

More often the situation will be less clear. In trying to obtain legal certainty, scholars are listing relevant circumstances to navigate between rightful and wrongful termination of contracts. It is however the task of the courts to judge each specific case, taking into account all the concrete circumstances and particularities of the case. As HEIJMANS argued the rule of good faith does not align with complete legal certainty, favoring just law over certain law and those who desire the former must be willing to forego the latter[[166]](#footnote-166).

Regarding the precontractual liability due to wrongful termination of negotiations the Belgian law regulates the compensation in article 5.17 Burgerlijk Wetboek, stating that, freely translated, “*this liability entails placing the injured party back in the position they would have been in if negotiations had not occurred. When legitimate trust has been established that the contract would be concluded without any doubt, this liability may include the restoration of the loss of expected net benefits from the unexecuted contract.*“ The memorandum specifies “*contra: art. 1112 C. civ. fr.”*) but does not itself clarify why it decided in contradiction to the French article on this point. French lawmakers have chosen that a fault during negotiations can never aim to cover the loss of expected benefits from the contract not concluded or the loss of the opportunity to obtain those benefits (expectation interest excluded) as mentioned above. In Belgian law this is the basic principle (it does not state that expectation interest is excluded, but that the reliance interest is of relevance), but the exception has been provided in the case where legitimate trust has been established that the contract would be concluded without any doubt, in which case the restoration of the loss of expected net benefits from the unexecuted contract shall take place (expectation interest). Belgian law hence provides larger compensation possibilities. Belgian law hence promotes reasonable reliance at the optimal time, balancing the benefits of productive investment against the costs of waist. The tipping point in Belgian law, the point where there is legitimate trust that the contract would be concluded without any doubt, allows parties to make specific investments without the fear that their investment will be expropriated. The French law, protecting only the reliance interest, will less induce parties to enter in to the economic exchanges then the Belgian law.

It could however be argued from a law and economics perspective that also for irredeemable inefficient acts, the expectation interest should be compensated, as to restore the non-consensual transfer of wealth. However, there is a Belgian case where, in the specific circumstances of the case, it was stated that the benefit that would result from the pursued contract cannot be claimed, because according to the plaintiff's allegations, the defendant would have conducted the negotiations solely to extract information, which implies that, according to the plaintiff's standpoint, it was never the defendant's intention to conclude a contract[[167]](#footnote-167). Depending on the circumstances however, it might even be argued that this specific situation could fall under article 496 Strafwetboek, the Belgian criminal code. The article stipulates (among other things) that he who, with fraudulent intent, seeks to obtain an unlawful economic advantage for himself by employing deceitful tricks to create belief to make others expect a successful outcome, or to otherwise exploit trust, shall be punished with imprisonment and a fine. Under these conditions, full compensation for the expectation interest would be desirable from a law and economics perspective. It is regrettable that this situation is not explicitly entailed in the law. The only potential remedy appears to lie in the interpretation of what constitutes a "*legitimate trust that the contract would be concluded without any doubt*."

*Good faith and information obligations*

In article 5.16 Burgerlijk Wetboek, Belgian law imposes a conduct on parties regarding to information obligations, stating freely translated “*The parties provide each other, during the pre-contractual negotiations, with the information that the law, good faith, and customs, in light of the nature of the parties, their reasonable expectations, and the subject matter of the contract, require them to disclose.”.* The violation of an information obligation can lead to precontractual liability, but also to the nullity of the contract if certain other requirements (5.33 BW) are met. The paper will focus on the violation of information obligations which causes damage, but have not as a consequence that the contract would not have been concluded. The memorandum expressly clarifies that this article was inspired on article 1112-1 C. cv. Fr. (as discussed above). The Belgian memorandum reminds that there is no general duty of disclosure under general law, stating that the parties are not obligated to provide each other with all the information they possess. Information must only be disclosed in the cases specified in this provision, particularly when good faith requires it. This can be supported from a law and economics perspective, as a general obligation to disclose information is, as mentioned above, not desired. Belgian law does not define the good faith concept used in these articles so that the reservation made about this point under the French law remains valid for Belgian law. There is no clear guidance on this key concept. Scholars analyze case law to clarify the conditions for existence and the content or subject of that obligation in order to create more legal certainty[[168]](#footnote-168). One of the above mentioned desired criteria for an obligation for party A to inform party B is that party A is the cheaper cost producer of this information. In an interesting case in that respect, it was ruled that, when the seller of a plot of building land is aware of the presence of construction waste in the subsoil that could delay or hinder the buyers' intended construction activities and incur additional costs, good faith requires that he voluntarily discloses this information to the buyers, as he knew or should have known that this information could be important to them. The buyers cannot be expected to conduct or commission a thorough, time-consuming, and costly investigation into the presence of waste materials, as the correct information could have been provided promptly, quickly, and cheaply by the seller [[169]](#footnote-169).

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*3.4. English Law*

While good faith as a principle has been adopted by civil and other common law systems[[170]](#footnote-170) in English contract law there is no such general requirement, despite positive developments towards the recognition of such a principle in case law.[[171]](#footnote-171) Scholars invoke numerous sceptical arguments and one may notice that reluctance of a number of English lawyers to adopt such a principle lies in the fact that there is no one clear definition of what good faith might be; such a lack of definition can only have the effect of undermining the stability and predictability of transactions.[[172]](#footnote-172) Further, imposing a duty of good faith on negotiating parties has also been rejected as undermining the principle of freedom of contract.[[173]](#footnote-173)

Thus, to this day, the English common law does not recognize a general duty of the parties to a contract to act in good faith.[[174]](#footnote-174) Good suggests that ‘We in England find it difficult to adopt a general concept of good faith … . The predictability of the legal outcome of a case is more important than absolute justice. … The last thing that we want to do is to drive business away by vague concepts of fairness which make judicial decisions unpredictable, and if that means that the outcome of disputes is sometimes hard on a party, we regard that as an acceptable price to pay in the interest of the great majority of business litigants.’[[175]](#footnote-175)

The Roman idea of bona fides appears to have had no influence in the history of the common law.[[176]](#footnote-176) An opportunity to introduce the doctrine existed in the 18th century.[[177]](#footnote-177) Namely, Lord Mansfield tried to establish it in contemporary English commercial law. Notably, his opinion in the insurance case Carter v Boehm [1766] 97 ER 1162 became famous. However, the English common law has not developed the suggestions of Lord Mansfield beyond the use of good faith (referred to as uberrima fides) to establish duties of disclosure in insurance contracts.[[178]](#footnote-178) Nevertheless, English law has, in many cases, reached conclusions similar to those based on the continental doctrine of good faith by using different legal instruments.[[179]](#footnote-179)

More recently, Giliker argues that in England and Wales and the common law of Canada, case-law in the last 10 years has indicated a movement towards acceptance of express and implied duties of good faith in relation to contractual performance.[[180]](#footnote-180) For example, the common law accepts that certain types of contract e.g. involving fiduciaries and contracts classified as *uberrimae fidei* such as insurance contracts may require “good faith”.[[181]](#footnote-181) Moreover, duties to perform in good faith have long been accepted in specific types of contracts such as partnership, insurance, commercial agency and employment.[[182]](#footnote-182)

Furthermore, the legal concept of promissory estoppel and estoppel by acquiescence, according to which a person is bound to a legal position previously adopted, corresponds to pre-contractual good faith and the doctrine of *venire contra factum proprium* in continental law.[[183]](#footnote-183)

In this regard promissory estoppel being one of the most discussed doctrines in English law[[184]](#footnote-184) has been described as a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence.[[185]](#footnote-185) The legal principle of *promissory estoppel[[186]](#footnote-186)* is indeed one of the most extensively debated question in the English law of contracts and in essence means preventing or estopping a person from going back on his word or repudiating his previous conduct when someone else has relied upon it. English law, as his French and German counterparts, recognise that someone cannot change his mind unilaterally in commercial dealings whenever he pleases, but here the application of this elementary rule is complicated further by the requirement of consideration.[[187]](#footnote-187)

However, generally courts nevertheless still remain reluctant to recognise a duty of good faith in all commercial contracts and there is for example no general principle in English law that a negotiating party can be made to fulfil or otherwise compensate the other’s party disappointed expectations, even where he has caused those expectations and knows of the other party’s reliance.[[188]](#footnote-188) However, there are some other forms of redresses – e.g. misrepresentation.[[189]](#footnote-189) Under the English doctrine of promissory estoppel a person who makes a precise and unambiguous representation of fact may be prevented from denying the truth of the statement if the person to whom it was made was intended to act on it, and did act on it to his detriment.[[190]](#footnote-190) The principle of promissory estoppel has been in English law actually conceptualized some 50 years after the German doctrine of *culpa in contrahendo*, in the famous *Central London Property Trust v. High Trees House[[191]](#footnote-191)* case, which, due to the fundamental question on the claimed arrears, became one of the most debated cases in English contract law.[[192]](#footnote-192) Lord Denning purported to find the foundation for his decision in the judgement of the House of Lords in *Hughes v. Metropolitan Railway Company[[193]](#footnote-193)* which was decided some seventy years before *High Trees* but it had fallen into obscurity prior to its rescue.[[194]](#footnote-194) In *High Trees* the landlord actually unilaterally reduced the rent and encouraged the tenants to stay and adjust their incomes accordingly, but then he went back on his word and demanded (unilaterally, after the war ended) arrears to cover his previously lost rents. Since tenants gave no consideration for that previous reduction (during WWII) and since there was then no bargain[[195]](#footnote-195) it should have followed (from at that time valid English contract law) that the landlord’s promise to reduce the rent was unenforceable (no contract was ever concluded) and hence tenant’s reliance upon such a promise would be an irrelevant one. The case came before Lord Denning and he then, with all due reference and deference to precedent established the doctrine of “equitable” or “promissory” estoppel. Lord Denning actually extended the existing common rule on representation of facts to make it cover promises as to future conduct (landlords’ promise to reduce the rent)[[196]](#footnote-196) and stated: “*If a person by words or conduct makes a promise or representation which he intends another person to act upon, and that other person does act upon it as intended, then the promisor or representor cannot deny his promise or representation if it would be unfair to do so. The landlord intended the tenants to believe him and to stay in the property; they did believe him and stayed; he could not than renounce his promise – at least as regards the tenant’s past reliance upon it. He might be free to restore or change the terms of their relationship for future.[[197]](#footnote-197)* In the following *Combe v. Combe[[198]](#footnote-198)* case Lord Denning rejected the claim for breach of contract[[199]](#footnote-199) and reaffirmed the basic rule that a plaintiff could only enforce a promise if he or she had given consideration for it.[[200]](#footnote-200) In his words an estoppel is a “shield but not a sword” and hence estoppel by itself cannot give rise to cause an action (a right to sue) but merely a right to defence where promisee could not sue on an estoppel, but could stop himself from being sued.[[201]](#footnote-201) Estoppel in English law cannot apply to statements made under duress or deception by the other side.[[202]](#footnote-202) However, the rule that estoppel is only “a shield and not a sword” has already been widely criticized and in *Crabb v. Arun District Council[[203]](#footnote-203)* court held that if for example A leads B to believe that he has rights in or over A’s land, and B incurs expenditure in reliance on that assurance, B can sue to protect his interest even though he gave no consideration for it.[[204]](#footnote-204)

In *Box v. Midland Bank[[205]](#footnote-205)* court granted tortious relief for damages which plaintiff suffered in reasonable reliance on assertions by the defendants’ branch office that a loan agreement would go through without problems, while it was ultimately rejected by the head office. Such case would for example in German law, according to commentators,[[206]](#footnote-206) be a classic case of *culpa in contrahendo*.[[207]](#footnote-207)

English law, hence, allows for recovery in many situations that Roman, French and Belgium law would consider as a breach of good faith standard. Damages will be awarded only if the defendant led the plaintiff to believe that the contract would certainly go through.

Moreover, some commentators[[208]](#footnote-208) still argue that the current formulation of the doctrine, especially in the light of recent Court of Appeal’s decision in *Collier v. P&MJ Wright Holdings Ltd.*[[209]](#footnote-209) is incoherent and that the most difficult problems with the doctrine of promissory estoppel actually lie with the doctrine of promissory estoppel itself and that should be actually seen as consisting of at least three distinct principles, none of which is the exclusive preserve of promissory estoppel.[[210]](#footnote-210)

Scholarly literature summarizes promissory estoppel’s ingredients as following:[[211]](#footnote-211)

1. A clear and unequivocal promise: in the first place, the promise must be clear an unequivocal, although the need not be express and may be implied from words or conduct. No estoppel can arise if the language of the promise is indefinite or imprecise and silence and inaction for example the absence of protest about the breach will not normally estop a party from relying on the breach. If the language is clear, no questions arises of any particular knowledge.[[212]](#footnote-212)
2. Inequitable to go back on promise: It must be inequitable for the promisor to go back on the promise and insist on the strict legal rights under the contract. This will not be so where the promise has been induced by intimidation by the promise. Lord Denning saw the *D&C Builders Ltd. v Rees[[213]](#footnote-213)* case as turning on promissory estoppel. He took the view that is was not equitable for D&C to go back on his promise, the settlement was not truly voluntary as MR and Mrs Reeds had improperly taken advantage of D&C’s weak financial situation. They have been hence held liable for the balance.[[214]](#footnote-214)
3. Alteration of position: the promise must have altered his position in reliance on the promise made. The person must act detrimentally in reliance upon the representation. If the promise is revoked the promisee must be in in a worse position that if the promise had never been made.[[215]](#footnote-215)
4. Suspensive or extinctive: Promissory estoppel only serves to suspend and not to wholly to extinguish, the existing obligation; the promisor may, on giving due notice, resume the right which have been waived and revert to the original terms of the contract.[[216]](#footnote-216)
5. Doctrine is not a cause of action: it operates only by way of defence and not as a cause of action.[[217]](#footnote-217)

Hence, where one negotiating party gives false information to the other, by words or conduct, then if he was fraudulent (not holding an honest belief in the truth of the information) he is liable in the tort of deceit to compensate the other for the loss that he suffered by relying on it.[[218]](#footnote-218) The party who is in a position to know the accuracy of the information may owe a duty to take reasonable care to the other to whom he provides the information, and therefore be liable in the tort of negligence if he failed to take care and the other party suffered loss in reliance on it.[[219]](#footnote-219)

However, other representations (e.g. assurances by one negotiating party that he will in due course go ahead with the contract) do not themselves give rise to liability unless they take a form of contractual promise (or in a quasi-contract).[[220]](#footnote-220) English law has not adopted the approach of the High Court of Australia, which has extended the doctrine of promissory estoppel to impose liability in damages on the party seeking to withdraw from negotiations.[[221]](#footnote-221)

Furthermore, McKendrick argues that the basic choice that has to be made is between a model that aims to protect detrimental reliance and one that aims to fulfil the expectations engendered by the promise.[[222]](#footnote-222) English courts have inclined to the view that the measure of recovery is prima facie the expectation measure but that the courts have discretion to depart from it in certain circumstances.[[223]](#footnote-223)

In short, although English law does not recognize a general underlying principle of good faith or pre-contractual liability, nor a general rule that the one party must fulfil or otherwise compensate the expectations created in the other party during negotiations which do not come to fruition in a contemplated contract, there are a range of circumstances in which English courts have given some legal effect to such expectations through the law of contract (promissory estoppel, misrepresentation), tort and restitution.[[224]](#footnote-224)

General comparison with previous comparisons might be misleading, since it shows substantial departures from old Roman, French, US or Belgium law of contracts. The doctrine of promissory estoppel is analytically speaking, due to the fact that it requires that promisor intends his promise to be binding, not a very useful tool for addressing the potential sources of moral hazard or for polishing social desirability of irredeemable and contingently inefficient acts. However, the analysis of cases shows that tort of fraudulent or negligent misrepresentation are actually invoked in instances of bad faith behaviour or pre-contractual liabilities. These pre-contractual liabilities *de facto* impose an information disclosure duty, which is very similar to the one found in ancient Roman law, embedded in Cicero’s concepts of virtue and honourable dealing or in law of France and Belgium and which induces optimal contractual reliance, minimizes transaction costs, allocates risk to the superior risk bearer, descrases transaction costs, boost sequential exchanges and also provides incentives for deliberate generation of productive information. However, it is debatable whether English courts consciously also address the actual social desirability of irredeemable and contingently inefficient acts and impose liability in instances where such a behaviour represents socially harmful acts and where optimal level of such a behaviour is zero, or whether the social desirability was never considered by the English courts.

Moreover, case law survey offers hints that English jurisprudence de facto differentiates between three types of contingently inefficient acts. Namely, the ones that can be cured by telling parties what to do through the duty to disclose information, the ones that can be via reliance damages cured by letting parties to internalize harm, and the ones that are too costly to cure and therefore given up on by the legal system. To sum up, through the doctrine of promissory estoppel, by limiting possible abuses of strict contractual rights, English contract law gradually converges with its Belgium and French counterparts. Nevertheless, as Gilliker notes “if we examine the recent cases, we can identify a number of overlapping elements which judges seem to regard as indicative of the content of the proposed duty to perform in good faith where the parties have a relationship based on mutual trust and confidence,” and those are in her words “a) to act honestly, with fidelity to the parties’ bargain and reasonably in the spirit

of fair dealing, i.e., refrain from conduct which, in the relevant context, would be regarded as commercially unacceptable by reasonable and honest people; b) to be loyal (importantly not to the other party but to the agreement itself); c) to communicate with the other party and perform predictably; and d) to collaborate with the other party in the performance of the contract, acting

with integrity and in a spirit of co-operation.”[[225]](#footnote-225)

In addition, Mindy Chen-Wishart and Victoria Dixon notice that contrary to previously described orthodoxy, good faith is no stranger to English law.[[226]](#footnote-226) Properly understood, we have been “speaking prose all our lives without knowing it.” The debate over whether to introduce a doctrine of good faith is therefore misconceived and rather more salient questions should be imposed: (i) How can a good faith requirement be justified; (ii) What role should it play in the evolution of English contract law?; (iii) What does good faith require?; and nd, (iv) how can we start to taxonomize its demands in order to stabilize its requirement?”[[227]](#footnote-227) They support a humble role for good faith as an attitude of honesty, fair dealing, and fidelity to the contractual purpose that is, in turn, constitutive of the activity of contracting.[[228]](#footnote-228) As we show these three aspects may be derived from the ancient concepts of Roman jurists and in particular in Cicero’s concepts of virtue and honourable conduct and are manifest in contract law rules of Belgium, US, Germany and France that apply with different intensity and effect to those categories of contracts. Moreover, these concepts also have economic and behaviour purpose and may be an essential element in achieving prosperity and progress.

**4. Conclusions (to be completed at the end)**

Assessing ancient Roman, English, French and Belgian law of contracts, this paper expresses the view that the good faith standard is employed also to differentiate between irredeemable inefficient acts and contingently inefficient acts. The former are due to their total social undesirability always strictly forbidden, whereas the later may or may not be socially undesirable. The optimal regulation of such contingently inefficient acts should than depend upon finding whether such acts are harmful in some form or are socially desirable in a different form and level.

1. See e.g. Summers Robert, ‘The General Duty of Good Faith – Its Recognition and Conceptualization,’ 67 Cornell Law Review 810, 1982; Whittaker Simon and Reinhardt Zimmerman, ‘Good Faith in European Contract Law: Surveying the Legal Landscape,’ in Zimmerman Reinhardt and Simon Whittaker (eds.), Good Faith in European Contract Law, 2000. [↑](#footnote-ref-1)
2. Beatson Jack and Daniel Friedman, “Introduction: From Classical to Modern Contract Law,” in Beatson Jack and Daniel Friedman (eds.), “Good Faith and Fault in Contract Law,” Oxford: Clarendon Press, 2002, p.14. [↑](#footnote-ref-2)
3. Ebke and Steinhauser describes it as *“a legislative acorn into a judicial oak that overshadows the contractual relationships of private parties”,* Ebke Werner and Bettina Steinhauer, ‘The Doctrine of Good Faith in German Contract Law,’ in Beatson jack and Daniel Friedmann (eds.), Good Faith and Fault in Contract Law, 1995, pp. 171. [↑](#footnote-ref-3)
4. See e.g. USA Restatement of Contract 2nd §205. See also Calamari and Perillo, The Law of Contracts, (3rd ed., 1987) p. 406; and Eisenberg Melvin, “The Bargain Principle and its Limits,” 95 Harvard Law Review 741, 1982. Litvinoff offers a broad survey of a range of national legal systems showing how widely the notion of good faith is employed; Litvinoff, Saul, “Good Faith”, (1997) 71 Tulane Law Review 1645-1674. [↑](#footnote-ref-4)
5. Beatson and Friedman argue that English law has declined to adopt a general principle of good faith but was able to offer specific solutions to a wide range of issues which involve the question of unfairness; Beatson and Friedman, supra note 2 at 14. See Interfoto Picture Library Ltd v Stiletto Visual Programmers Ltd (1989) QB 433, at 439, at 445 per Bingham LJ. See also Collins Hugh, ‘Good Faith in European Contract Law,’ 14 Oxford Journal of Legal Studies 229, 1994; and Beale Hugh, ‘Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts,’ in in Beatson jack and Daniel Friedmann (eds.), Good Faith and Fault in Contract Law, 1995, pp. 231. [↑](#footnote-ref-5)
6. See Zimmerman, 1995; and Basedow, 1998. See article 1.7 Unidroit Principles of International Commercial Contracts 2016 (“*Each party must act in accordance with good faith and fair dealing in international trade. The parties may not exclude or limit this duty”).* See also Storme Matthias, “Good faith and contents of contracts in european private law,” Bases De Un Derecho Contractual Europeo 2002; Viglione Filippo, “Good Faith and Reasonableness in Contract Interpretation: A Comparative Perspective,” European Business Law Review, 2009; Christie David, 'Splendid, but what does it actually mean?' Good faith and relational contracts in the UK

   construction industry. Journal of Commonwealth Law [online], 1(1), 2019, pp. 403-442; and Magnus Ulrich, “Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of Institute for the Unification of Private Law, Principles of International Commercial Contracts International Commercial Contracts,” 10 Pace International Law Review 4, 1998. [↑](#footnote-ref-6)
7. See Zimmerman Reinhardt, ‘The Law of Obligations: Roman Foundations of the Civilian Tradition,’ 1996, pp. 667. [↑](#footnote-ref-7)
8. Zimmerman and Whittaker (n 11), 16 et seq. [↑](#footnote-ref-8)
9. For en excellent comparative and economic analysis see e.g. Mackaay, Ejan and Violette Leblanc, “The Law and Economics of Good Faith in Civil Law of Contracts,” In proceedings of the European Association of Law and Economics. Conference; Nancy (France), 2003-09-18 - 2003-09-20. [↑](#footnote-ref-9)
10. G. Parsons Miller, *Rome and the Economics of Ancient Law II*, in G. Dari-Mattiacci, D.P. Kehoe (eds.), *Roman Law and Economics*, Vol. II (Oxford: Oxford University Press, 2020), 1. [↑](#footnote-ref-10)
11. B. Abatino, G. Dari-Mattiaci, *The Dual Origin of the Duty to Disclose in Roman Law*, in Dari-Mattiacci, Kehoe, *supra* note 1, 401-427.   [↑](#footnote-ref-11)
12. For a synthesis see Beaston Jack and Daniel Friedman, “Good Faith and Fault in Contract Law,” Oxford: Clarendon Press, 2002. [↑](#footnote-ref-12)
13. Articles 1112 and 1112-1 of the French Code Civil, Ordonance no 2016-131 du 10 février 2016 portant réforme du droit des contracts, du régime général et de la preuve des obligations, JORF no 0035 of 11 February 2016. [↑](#footnote-ref-13)
14. Burrows Andrew, “A Restatement of the English Law of Contract,” Oxford University Press, 2016, pp.76. [↑](#footnote-ref-14)
15. McKendrick, Ewan, “Contract Law: Text, Cases and Materials,” 7th ed., Oxford University Press, 2016, pp. 238 et seq. [↑](#footnote-ref-15)
16. Namely, if one indeed employs a good faith standard, the triggering question is what kind of socially undesirable behaviour should be ex post regarded as bad faith behaviour and what should be the optimal amount of such behaviour - zero or non-zero? [↑](#footnote-ref-16)
17. We explore those elements composing the common foundation of good faith in the decisions and the scholarship which have shaped out these concepts in th modern jurisprudence. [↑](#footnote-ref-17)
18. See e.g. Cordeiro, Menezez, “La bonne foi à la fin du vingtième siècle”, (1996) 26 Revue de Droit de

    l'Université de Sherbrooke 223-245, p. 240; Schoordijk, H.C.F., De privaatrechtelijke rechtscultuur van de twintigste eeuw in context (Private law culture at the end of the 20th century), Amsterdam, Koninklijke Nederlandse Akademie van Wetenschappen, 2003, p. 42 ; and Ebke Werner and Bettina Steinhauer, « The Doctrine of Good Faith in German Law of Contract,” in Beatson Jack and Daniel Friedman (eds.), “Good Faith and Fault in Contract Law,” Oxford: Clarendon Press, 2002, pp. 171-191. [↑](#footnote-ref-18)
19. We should emphasize that by employing the term multi-functional agent we are not referring to the so called »multi-tasking« agent as used in the principal-agent literature to mean that if you put too many incentives on one particular task, there may be distortions with respect to other tasks (multi-tasking agent is in this literature used a s synonym for serious inefficiencies). Our suggestion is actually in line with De Geest’s proposal that “N problems require N solutions;” De Geest, Gerrit,”N Problems Require N Instruments,” International Review of Law and Economics, Vol. 35, 2013. [↑](#footnote-ref-19)
20. For a synthesis on interdisciplinary micro-comparison, see Markesinis, Basil, S., “Foreign Law and Comparative Methodology: A Subject and a Thesis,” Hart Publishing, 1997; Zweigert, Konrad and Hein Kötz, “Introduction to Comparative Law,” 3rd ed., Clarendon Press, 1998, and J.M. Smits, “Elgar Encyclopaedia of Comparative Law,” 2nd ed., Edward Elgar, 2013; Ralf Michaels, “The Functional Method of Comparative Law,” The Oxford Handbook of Comparative Law 339-382, 2006; Ralf Michaels, “Comparative Law,” in Oxford Handbook of European Private Law (Basedow, Hopt, Zimmermann eds., Oxford University Press, forthcoming. For a synthesis of law and economics scholarship, see De Geest, Gerrit, “Contract Law and Economics – Encyclopaedia of Law and Economics, Volume 6,” 2nd ed., Edward Elgar Cheltenham, 2011. Also see R.A. Posner, “Economic Analysis of Law,” 8th ed., Wolters Kluwer Law Publishers, 2011. [↑](#footnote-ref-20)
21. See e.g. Sacco Rodolfo, “Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II),” 39 The American Journal of Comparative Law 1, 1991, pp. 1-34 [↑](#footnote-ref-21)
22. See for example Fritz Schulz, Principles of Roman Law (1936); Fritz Schulz, Classical Roman Law (1951) (reprinted 1992); Fritz Schulz, History of Roman Legal Science (2nd edn, 1953); Paul Koschaker, Europa und das römische Recht (4th edn, 1966); Max Kaser, Das römische Privatrecht (2nd edn, vol I 1971, vol II 1975); Franz Wieacker, Römische Rechtsgeschichte, vol I (1988), vol II (2006); Tony Weir (tr), Franz Wieacker, A History of Private Law in Europe (1995); Max Kaser and Karl Hackl, Das römische Zivilprozeßrecht (2nd edn, 1996); Reinhard Zimmermann, The Law of Obligations: Roman Foundations of the Civilian Tradition (1996). [↑](#footnote-ref-22)
23. Zimmerman, Reinhardt, ‘Roman Law,’ in Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmermann, and Andreas Stier (eds.), “Max Planck Encyclopedia of European Private Law," Oxford University Press, 2012. See also S Riccobono, J Baviera, C Ferrini, J Furlani and V Arangio-Ruiz, Fontes Iuris Romani Ante-iustiniani, 3 vols (reprinted 1968–69); MH Crawford, Roman Statutes, 2 vols (1996); H Heumann and E Seckel, Handlexikon zu den Quellen des römischen Rechts, 1907 (11th edn, 1971). [↑](#footnote-ref-23)
24. Zimmerman argues that the following characteristics were particularly important for the impact of Roman law in European legal history: (a) Roman law had a highly developed jurisprudence, that is, a specific branch of knowledge developed and sustained by lawyers. That was unique in the world of classical antiquity; (b) Closely related to it was the isolation of law vis-à-vis religion, morality, politics, and economics: the separation of the law from non-law; (c) a strong emphasis on private law (and civil procedure); criminal law and the administration of the state, on the other hand, appear to have been regarded by the Roman lawyers as something not subject to specifically legal criteria; (d) Roman private law was very largely Juristenrecht: it was not laid down in a systematic and comprehensive enactment, but was applied and developed by lawyers with great practical experience; and (e) Roman law is characterized by great realism and its focus on practical problems rather than abstract theory; Reinhardt Zimmerman, supra note 83. [↑](#footnote-ref-24)
25. Ibid. [↑](#footnote-ref-25)
26. Ibid. [↑](#footnote-ref-26)
27. Ranieri Fillipo, ‘Good Faith,’ in Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmermann, and Andreas Stier (eds.), “Max Planck Encyclopedia of European Private Law," Oxford University Press, 2012. [↑](#footnote-ref-27)
28. In the subjective sense, bona fides describes the mistaken but excusable belief that somebody who alienates property is also its owner; Schermaier, Martin and Dedek, Helge, “Bona Fides,” in Roger Bagnall, Kai Brodersen, Craige Champion, Andrew Erskine, Sabine Huebner, (eds.), Encyclopedia of Ancient History, Oxford: Wiley & Blackwell, 2011. See also Fiori, R. (2008) “Fides e bona fides. Gerarchia sociale e categorie giuridiche.” In R. Cardilli et al., eds., Modelli teorici e metodologici nella storia del diritto privato, vol. 3: 237–57. Naples; Hausmaninger, H. (1969) Die bona fides des Ersitzungsbesitzers im klassischen ro¨mischen Recht.

    Munich; and No¨rr, D. (1990) Die fides im ro¨mischen Vo¨lkerrecht. Heidelberg. [↑](#footnote-ref-28)
29. Bona fides in this subjective sense first appears in the Justinianic legal sources and in writings of the medieval glossators; ibid. [↑](#footnote-ref-29)
30. The duty, based on a stipulation, to hand over a certain object; ibid. [↑](#footnote-ref-30)
31. They have been established by the *praetor* in his yearly edict (ius honorarium) and as Papinian writes, supplemented and corrected the *ius civile* for the good of all (D. 1, 1, 7, 1: *Ius praetorium est, qoud praetors introduxerunt adiuvandi vel supplendi vel corrigenda iuris civilis gratia propter utilitatem publicam*); Schermaier Martin Josef, “Bona Fides in Roman Contract Law,” in Zimmerman Reinhardt and Simon Whittaker, “Good Faiith in European Contract Law,” Cambridge: Cambridge University Press, 2000, p. 65. [↑](#footnote-ref-31)
32. Ibid. [↑](#footnote-ref-32)
33. Zimmerman, supra note 83. [↑](#footnote-ref-33)
34. For example exceptio pacti seu doli, Ulpian D. 2,14,7,7; Ulpian D. 2,14,16 pr.. [↑](#footnote-ref-34)
35. See Senn D. Pierre, “Buona Fede nel Diritto Romano,” in Digeste delle Discipline Privatistiche, sez. Civile, vol. II, 1993; Tafaro Sebastiano, “Critero di Imputazione della Responsibilita Contrattuale e Bona Fides : Brevi Riflessioni sulle Fonti Romanae e sul Codice Civile Italiano,” in “Studi in Honore di Arnaldo Biscardi VI, 1987; and Catresana Amelia, “Fides, Bona Fides: Un Concepto Para la Creacion del Derecho,” 1991. [↑](#footnote-ref-35)
36. Cicero, De Officiis. [↑](#footnote-ref-36)
37. Schermaier, supra note 31, at p. 68. [↑](#footnote-ref-37)
38. Cicero, De Officiis 3, 70. See also Waldestein Wolfgang, “Entscheidungsgrundlagen der Römischen Juristen,“ in Aufstieg und Niedergang der Römischen Welt II (Principati), vol. XV, 1976, p. 76 et seq. [↑](#footnote-ref-38)
39. Wieacker Franz, “Zum Urspriung der Bona Fidei Iudicia,‘ 1963, 80 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung 1, p. 1-41. However, Lombardi argues that good faith doctrine actually emerged in the time of the cases that Cicero described in his De Officiis 3, 66 ff. [↑](#footnote-ref-39)
40. Schermaier supra note 31, at p. 74. [↑](#footnote-ref-40)
41. Wieacker, supra note 39, at p. 23. [↑](#footnote-ref-41)
42. Praetor each year issued a procedural formula to which both defendant and plaintiff have been strictly confined. Praetor also established the programme of litigation and appointed a judge to determine dispute. This judge has to examine the facts of the case as described in the formula and formula also contained instructions as to the judgement should the plaintiff’s assertions prove correct; Kaser Max and Karl Hackl, “Das Römische Zivilprozessenrecht,” 2nd ed., Munich: C. H. Beck, 1996, p. 435. [↑](#footnote-ref-42)
43. See e.g. Watson Alan, “The Law of Obligations in the Later Roman Republic,” Oxford: Clarendon Press, 1965, p. 172; and Noordraven Gisbert, “De Fiducia in het Romeinse Recht,” Amsterdam: Kluwer, 1988, p. 349. [↑](#footnote-ref-43)
44. See e.g. Cicero De Officiis 3, 61; Kaser Max, Oportere und Ius Civile, 83 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung 1, 1966, pp 1-46, p. 27; Kaser Max, "Ius honorarium" und "ius civile," 101 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung 1, 1984, pp. 1-114, p. 24; and Schermaier, supra note 31 at p. 76. [↑](#footnote-ref-44)
45. See e.g. Wieacker supra note 39, at p. 40. [↑](#footnote-ref-45)
46. Schermaier for example suggests that this central understanding was rooted in Roman social ethics recognising comprehgensive duties of fidelity and faithfulness that encompassed both Roman cizizens and non-citizens; Schermaier, supra note 31, at p. 77. See also Nörr Dieter, “Die Fides im Römischen Völkenrecht, Heidelberg: C.F. Müller, 1991, p. 43. Cicero himself emphasizes that what society needs for a whell functioning judicial system is “a competent judge to lay down what one party should make good to the other, especially as in many of them opposing assessments were voiced;” Cicero De Officiis, Book 3, ff 70. [↑](#footnote-ref-46)
47. Requiring parties to act honestly; Cicero, De Officiis, 3, 104. [↑](#footnote-ref-47)
48. As the conceptual opposite of fraudulent behaviour; Cicero De Officiis 3, 61. See also Schermaier, supra note 31 at p. 86. [↑](#footnote-ref-48)
49. Ibid, at p. 87. [↑](#footnote-ref-49)
50. See for example Cicero, Marcus Tullius, De Natura Deorum (On the Nature of the Gods), trans. Francis Brooks (London: Methuen, 1896)., Book 3, p. 74. [↑](#footnote-ref-50)
51. Cicero suggests that chorus of virtues (propriety, restraint, moderation, self-control and temperance) is a foundation of good faith principle, which should govern our daily honourable behaviour; Cicero, De Officiis, Book 3, ff 116. [↑](#footnote-ref-51)
52. For an economic discussion of the Famine at Rhodes case see Callewaert Margot and Mitja Kovac, “Does Cicero's Decision Stand the Test of Time? Famine at Rhodes and Comparative Law and Economics Approach,”

    12 Comparative Law Review 1, 2023. [↑](#footnote-ref-52)
53. “A Roman knight not devoid of native wit and quite well-read; Cicero, De Officiis, Book 3, ff 58. [↑](#footnote-ref-53)
54. Ibid. [↑](#footnote-ref-54)
55. In reality fishes have been caught elsewhere since this part of the sea was known by the locals as a very bad fishing location. [↑](#footnote-ref-55)
56. Ibid. Book 3, ff 59. [↑](#footnote-ref-56)
57. In Cicero’s words, “pretence and dissembling are to be entirely excluded from our lives and the good man will not indulge in pretence or dissimulation to gain a better bargain in buying or selling; ibid, Book 3, ff. 60. Cicero then also stresses out that examples of what constitutes a good faith standard demand in judgements on a “wife’s property, fairer and better; in the transfer of property in trust, honest negotiation as between honest parties; ibid, Book 3, ff 61. [↑](#footnote-ref-57)
58. If it comes to naming a price, each side must state his terms only once; ibid, Book 3, ff 61. [↑](#footnote-ref-58)
59. Roman legal experts actually established “a penalty for failure to declare them; for they have specified that any defect in estate, if known to the vendor and not expressly stated, must be made good; ibid, Book 3, ff 65. [↑](#footnote-ref-59)
60. Ibid, Book 3, ff 66. [↑](#footnote-ref-60)
61. Ibid, Book 3, ff 67. [↑](#footnote-ref-61)
62. Schermaier suggests that this claim was based not on the strict law but was conceived as a *bonae fidei iudicium*, therefore requiring the judge to decide the extent of Claudius duties as seller; Schermaier, supra note 31, p. 67. [↑](#footnote-ref-62)
63. In this case “Marcus Marius Gratidianus has sold to Gaius Sergius Orata a house which he had purchased from him a few years previously. Other parties had rights on the estate, but Marius had not declared this at the rime of sale. Crassus (the represented Orata) pressed the letter of the law and argued that the vendor ought to make good the defect of which he was aware and which he failed to declare; Cicero, Book 3, 67. [↑](#footnote-ref-63)
64. Schermaier, supra note 31, p. 68; and Cicero, ibid. [↑](#footnote-ref-64)
65. “Since the defect had not been news to Sergius (for he had sold the property earlier), there had been no need to declare it; Sergius had not been misled, because he could remember the legal rights on the property which he had bought; Cicero, De Officiis, Book 3, 67. [↑](#footnote-ref-65)
66. Another two examples are from popular stories of Sun’s son Phaethon and of an heir that should, before he claims the inheritance, dance openly and in the day light in the forum. [↑](#footnote-ref-66)
67. “Keeping promises, observing agreements, returning deposits may become dishonourable if they cease to be useful;” Cicero, Book 3, 95. [↑](#footnote-ref-67)
68. In essence the idea was that if we have to assume that parties are rational, we also have to assume that the contracts they sign and how they behave during negotiations for contracts are Pareto improvements and hence any regulation, interference in to the freedom of contracting can only be based on the paternalism. [↑](#footnote-ref-68)
69. For an excellent synthesis of law and economics literature on good faith see Mackaay, Ejan, Good Faith in Civil Law Systems – A Legal-Economic Analysis (December 3, 2011). Cirano Scientific Series 2011s-74, published in: Vrank en vrij - Liber amicorum Boudewijn Bouckaert, Jef De Mot (ed.), Brugge, die Keure - Juridische Uitgaven, 2012, pp. 105-134. See also Melato, C. Eleonora, “Precontractual Liability,” in De Geest Gerrit (ed.), “Contract Law and Economics, Vol. VI. Encyclopaedia of law and economics,” 2nd ed., 2011. [↑](#footnote-ref-69)
70. See e.g. Bebchuk, L. Ayre and Omri Ben-Shahar, “Precontractual Reliance,” 30 J. Legal Stud. 423, 2001; Craswell Richard, “Offer, Acceptance and Efficient Reliance,” 48 Stan. L. rev. 481, 1996; and Kostritsky, P. Juliet, “Bargaining with Uncertainty, Moral Hazard and Sunk Cost: A Default Rule for Pre-Contractual Negotiations,” 44 Hastings L.J. 621, 1993. [↑](#footnote-ref-70)
71. See e.g. Goetz J. Charles and Robert E. Scott, “Enforcing Promises: An Examination of the Basis of Contract,” 89 Yale L. J. 1261, 1981. [↑](#footnote-ref-71)
72. See e.g. Melato, C. Eleonora, “Precontractual Liability,” De Geest Gerrit, “Contract Law and Economics: Encyclopedia of law and Economics, 2nd ed., Edward Elgar pp. 23 et seq.; and Johnston, J.S., “Investment, Information and Promissory Liability,” University of Pennsylvania Law Review 152, 1923. [↑](#footnote-ref-72)
73. Encompassing negotiating costs; searching costs for contracting partners and for preferable resources; acquiring, generating and disclosing costs on the value of exchange; information processing costs; risk costs; information costs ect. [↑](#footnote-ref-73)
74. Namely, from an ex ante perspective, reduced transaction costs enable additional cooperation and may increase certainty of exchanges since parties may be more willing to undertake the cost of search if they are assured that trading partners they ﬁnd will stick with their deal. In other words, parties entering in subsequent similar bargains will adjust their behavior in light of the newly announced legal rule. Such rule than serves also as an ex ante screening device. From the ex post perspective of parties who have already found each other, such rules reduce uncertainty, defensive expenditures and deters opportunistic breach of binding commitments. [↑](#footnote-ref-74)
75. Coase, Roland, ‘The Firm, the Market and the Law’, Chicago: University of Chicago Press, 1988. [↑](#footnote-ref-75)
76. *Ibid*. [↑](#footnote-ref-76)
77. North, C. Douglas, ‘Institutions, Institutional Change and Economic Performance’, New York: Cambridge University Press, 1990. [↑](#footnote-ref-77)
78. The costs of exchange actually depend on the institutions of a country: its legal system, its political system, its social system, its educational system its culture and so on; Coase, *supra* note 60. [↑](#footnote-ref-78)
79. Transaction costs, in the original formulation by Coase, are defined as ‘the cost of using the price mechanism’ or ‘the cost of carrying out a transaction by means of an exchange on the open market;’ Coase Ronald, ‘The Nature of the Firm’, Economica, 4: 386-405, 1937. As Coase (1961) explains, ‘In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on;’ Coase Ronald, ‘The Problem of Social Cost’, Journal of Law and Economics, 3: 1-44, 1961. [↑](#footnote-ref-79)
80. It should be emphasized that transaction costs are actually an aggregate of ex ante search, negotiation, decision, persuasion and ex post monitoring and enforcement costs. [↑](#footnote-ref-80)
81. Encompassing negotiating costs; searching costs for contracting partners and for preferable resources; acquiring, generating and disclosing costs on the value of exchange; information processing costs; risk costs; information costs ect. [↑](#footnote-ref-81)
82. But which nevertheless follow from the previous observations. [↑](#footnote-ref-82)
83. Hermalin, E. Benjamin, Katz, W. Avery and Richard Craswell, “Contract Law,” in Polinsky, A. Mitchell, and Steven Shavell (eds.), “Handbook of Law and Economics,” Volume 1, North-Holland, 2007, pp. 3-138. [↑](#footnote-ref-83)
84. See e.g. Diamond Peter, “Consumer Differences and Prices in a Search Model,” 102 The Quarterly Journal of Economics 2, 1987, pp. 429-436. [↑](#footnote-ref-84)
85. As Hermalin et all argue, in markets with bilateral search, each person’s search eﬀorts provide a positive externality that reduces the search costs of others; and secondly, to the extent that there are economic rents associated with trading (i.e., if parties buy or sell at prices that diverge from their reservation prices), some amount of search is motivated by the desire to ﬁnd a better distributional outcome. These eﬀects work in opposite directions, so it is diﬃcult to generalize about what public policies would be optimal in this regard, but it is possible in principle that enlightened regulation could improve social welfare; Hermalin et al, *supra* note 66. [↑](#footnote-ref-85)
86. Term information is used here in a very broad, general sense, encompassing ‘data,’ ‘knowledge’ and ‘information.’ [↑](#footnote-ref-86)
87. For an excellent treatise on economics of information see Hirschleifer, Jack and Riley, G. John, ‘The Analytics of Uncertainty and Information,’ Cambridge University Press, 3rd reprint, 1995; for a treatise on information, relation-specific investments and pre-contractual liability in preliminary agreements see however Schwartz, Alan, Scott, E. Robert, ‘Precontractual Liability and Preliminary Agreements,’ 3 Harvard Law Review 120, 2007. [↑](#footnote-ref-87)
88. Mackaay, Ejan, ‘Economics of Information and Law,’ Kluiwer Nijhof Publishing, 1982, at 107. [↑](#footnote-ref-88)
89. *Ibid*, p. 108. [↑](#footnote-ref-89)
90. In most instances efficiency will be enhanced by moves that improve the flow of information in society. [↑](#footnote-ref-90)
91. E.g. doctrines of mistake, fraud, misrepresentation and warranties. [↑](#footnote-ref-91)
92. See e.g. De Geest, Gerrit and Mitja Kovac, “The formation of contracts in the Draft Common Frame of Reference – A Law and Economics perspective,” 17 European Review of Private Law, 2009, 113-132. [↑](#footnote-ref-92)
93. The so called efficient breach concept in which the breaching party finds it cheaper to pay damages than to perform under the contract. Unlike accidental breaches of contract, efficient breaches are intentional decisions not to uphold one party's end of an agreement. See e.g. Goetz, Charles J.; Scott, Robert E. (1977). "Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach". Columbia Law Review. 77 (4): 544. [↑](#footnote-ref-93)
94. Farnsworth, supra note. [↑](#footnote-ref-94)
95. Parties investments that increase the net private surplus of the transaction in the event of a negotiations successfully leading to a binding contract; Craswell, Richard, “Offer, Acceptance, and Efficient Reliance,” 48 Stanford Law Review 481, 1996. [↑](#footnote-ref-95)
96. Thus, contract law should encourage relation-specific investments by awarding verifiable reliance costs to a party if a counter party has strategically delayed investment; Schwartz, Alan and Robert E. Scott, “Precontractual Liability and Preliminary Agreements,” 120 Harvard Law Review 120, 2007. Kostrisky shows that plaintiffs tend to win claims (in US) when a positive result would enhance an efficient outcome and to lose cases in which enforcement would have negative welfare effects; Kostrisky, P. Juliet, “The Rise and Fall of Promisorry Estoppel or is Promisorry Estoppel Really as Unsuccessful as Scholars say it is: A new Look at the Data,” 37 Wake Forest Law Review 101, 2002. [↑](#footnote-ref-96)
97. Katz, Avory, “When should an offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations, 105 Yale Law Journal 5, 1996. [↑](#footnote-ref-97)
98. Ibid. [↑](#footnote-ref-98)
99. Katz proposes a simple rule of thumb: the party with a bargain power that captures the bulk of the gains from reliance should also be made to bear the costs of reliance, including the costs of waste when the exchange cannot be completed – in that way this party will have the proper incentives to weight costs against benefits. Ibid. [↑](#footnote-ref-99)
100. As the conceptual opposite of fraudulent behaviour; Cicero De Officiis 3, 61. See also Schermaier, supra note 31 at p. 86. [↑](#footnote-ref-100)
101. Such assurance then provided incentives in commercial exchanges for an optimal amount of reliance. [↑](#footnote-ref-101)
102. Sequential exchanges are needed to obtain the benefits of specialization in the tasks of principals and agents. However, they give rise to substantial transaction costs, because third parties suffer information asymmetry with respect to the previous originate contract. By protecting innocent/good faith parties from suffering from such information asymmetries, good faith standard then serves as an ex post mitigating factor targeting/correcting those ex ante informational asymmetries and consequently boosting sequential exhanges. [↑](#footnote-ref-102)
103. On the importance of sequential transaction see e.g. Arrow J. Kenneth and Frank Hahn, “Notes on Sequence Economies, Transaction Costs, and Uncertainty,” 86 Journal of Economic Theory 2, 1999, pp. 203-218. [↑](#footnote-ref-103)
104. On the importance of such conversion see e.g. Magen Stefan, “Game Theory and Collective Goods,” in Towfigh Emanuel and Niels Petersen (eds.), “Economic Methods for Lawyers,” Cheltenham: Edward Elgar, 2015, pp. 61-96. [↑](#footnote-ref-104)
105. ˝…if the parties have expressly assigned the risk to one of them, there is no occasion to inquire who is the superior risk bearer. The inquiry is then merely an aid to interpretation: Posner, A. Richard and Andrew M. Rosenfield, ˝Impossibility and Related Doctrines in Contract Law: An Economic Analysis,˝ 6 J. Leg. Stud. 88, 1977, at pp. 90-91. [↑](#footnote-ref-105)
106. The core of the concept of superior insurer lies in the fact that risk is a cost, and that insurance is an alternative method to prevention of reducing the costs associated with the risks that performance of a contract may be costlier than anticipated. The question of which party is the superior insurer is also the question of who is the cheaper insurer. In cases where good opportunities for diversification exist, self-insurance would often be cheaper than market insurance. A party who can self-insure would often be the cheaper insurer. Risk-appraisal costs are the costs of determining the probability that the risk will materialize and the magnitude of the loss if risk materializes. Transaction costs are the costs involved in eliminating or *supra* minimizing the risk through pooling it with other uncertain events; ibid. See also Bruce, L. Christopher, ‘An Economic Analysis of the Impossibility Doctrine,’ 11. J. Leg. Stud. 311, 1982; Schäfer, Hans Bernd and Claus Ott, ‘Lehrbuch des Ökonomischen Analyse des Zivilrechts,’ 250-58, 1986, and to some extent: Joskow, L. Paul, ‘Commercial Impossibility, the Uranium Market and the Westinhgouse Case,’ J. Leg. Stud. 6, 1977. [↑](#footnote-ref-106)
107. There are also other similar cases that Cicero quotes illustrating the same super risk bearer allocation. Namely good faith requires that sellers have to disclose when selling wine that this wine has gone off; sellers have to disclose all details when selling slaves; Cicero, De Officiis, Book 3, ff 91. [↑](#footnote-ref-107)
108. Ibid, ff. 92. [↑](#footnote-ref-108)
109. Ibid. [↑](#footnote-ref-109)
110. Due to the fact that he possesses information on gold he can prevent the risk of mistake at lower costs than seller. [↑](#footnote-ref-110)
111. Namely, information should be produced and communicated by buyer if the buyer‘s information production costs plus the communication costs are lower than the value of that information to the seller. [↑](#footnote-ref-111)
112. For example Roman rule that sellers have to disclose all the material defects of goods also implies allocation of risk upon the seller since she is in a clearly better position to prevent the risk from materialization. Good faith then serves also as an effective risk allocation mechanism. [↑](#footnote-ref-112)
113. See e.g. Nicolas Ettlin, Walter Farkas, Andreas Kull, Alexander Smirnow, “Optimal risk-sharing across a network of insurance companies,” 95 Insurance: Mathematics and Economics 1, 2020, pp. 39-47; and [↑](#footnote-ref-113)
114. See e.g. Aria de Lourdes Centeno, “Measuring the effects of reinsurance by the adjustment coefficient in the Sparre Anderson model,” 30 Insurance: Mathematics and Economics 1, 2002, pp. 37-49; and Alessandro Barattieri, Maya Eden, Dalibor Stevanovic, “Risk sharing, efficiency of capital allocation, and the connection between banks and the real economy,” 60 Journal of Corporate Finance 1, 2020, 101538. [↑](#footnote-ref-114)
115. Moreover, such Cicero’s interpretation of good faith is also in line with the economic theory on the efficient breach; Cicero, De Officiis, ff. 94. [↑](#footnote-ref-115)
116. Cicero provides numerous examples, one being a case of a man who had left money with another person B to make war on his native land and asks whether that person B should return what first person had entrusted to B. Cicero argues that good faith requires that B should not return the money, hence such contract should be discharged; Cicero, De Officiis, ff. 93. [↑](#footnote-ref-116)
117. See e.g. MacKaay, Ejan, “The Civil Law of Contract,” in De Geest Gerrit (ed.), “Contract Law and Economics, Vol. VI. Encyclopaedia of law and economics,” 2nd ed., 2011; Posner A. Richard, “Economic analysis of Law,” 6th ed., 2003; Goldberg, P. Victor, “Reading in the Economics of Contract Law,” Harvard University Press; Williamson, Oliver, “Transaction costs: The Governance of Contractual relations,” 22 J.L. & Econ. 233, 1979. [↑](#footnote-ref-117)
118. Schaefer, Hans-Bernd and Claus Ott, “The Economic Analysis of Civil Law, Edward Elgar, 2004. [↑](#footnote-ref-118)
119. This question was also imposed by Cicero yet it remained unanswered…”But a big question is raised by who are those honest men and what is honourable dealing;” Cicero, De Officiis, Book 3, 70. [↑](#footnote-ref-119)
120. Raskolnikov, Alex, “Irredeemably Inefficient Acts: A Threat to markets, Firms and Fics,” 102 Geo, L. J. 1133, 2014. [↑](#footnote-ref-120)
121. Ibid. [↑](#footnote-ref-121)
122. Ibid. [↑](#footnote-ref-122)
123. Ibid. [↑](#footnote-ref-123)
124. The social benefit is non-existent because the only private benefit of for example theft is the thief’s gain from the stolen money and that gain is then inevitably and fully offset by the victim’s loss; ibid. [↑](#footnote-ref-124)
125. People resist when others intentionally take what does not belong to them without obtaining the owner’s consent. By being aware of provoked resistance (due to intention and non-consensual character of act) thieves will try to overcome that resistance by concealing their actions – all actions are completely unproductive; ibid. [↑](#footnote-ref-125)
126. These costs are actually transaction costs because they inevitably accompany mere transfers of wealth. Given the sheer absence of any net social benefit the transaction costs make actually such behaviour (e.g. theft) irredeemably inefficient. The same holds also for all other private, intentional, non-consensual transfers of money, that is, of all other irredeemably inefficient acts. Hence, in the world of zero transaction costs such acts would represent a zero-sum game and hence would not be irredeemable, would not reduce social welfare. Transaction costs might also represent source of socially undesirable behaviour and opportunism. With such irredeemable inefficient acts there is no trade-off between the marginal costs and benefits central to the optimal deterrence, actor’s intent is central factor and this intent is also the only factor that distinguishes socially desirable and undesirable conduct. [↑](#footnote-ref-126)
127. Irredeemable acts might be over deterred: a) if enforcement increases the costs of irredeemable acts that remain undeterred, or b) enforcement burdens efficient conduct that yields outcomes indistinguishable from those produced by irredeemable acts; De Geest, Gerrit, “Irredeemable Act, Rent Seeking, and the Limits of the Legal System: A response to Professor Raskolnikov,” 103 Georgetown Law Journal 23, 2014. [↑](#footnote-ref-127)
128. The appropriate response is surely not to eliminate all speeding and forecasts issuing since driving and corporate disclosure are productive activities that give rise to costs as well as benefits; ibid. [↑](#footnote-ref-128)
129. In many case, efficiency is maximized if private actors are forced to take accounts of the external harms (and benefits) of their acts; ibid. [↑](#footnote-ref-129)
130. De Geest, Gerrit, “Irredeemable Act, Rent Seeking, and the Limits of the Legal System: A response to Professor Raskolnikov,” 103 Georgetown Law Journal 23, 2014. [↑](#footnote-ref-130)
131. Ibid. [↑](#footnote-ref-131)
132. From an economic viewpoint we define rent as a profit that would not have been made in a perfect market. Because prices in a perfect market reflect only the true costs, a rent is then part of the price that exceeds the true costs. Hence, purely opportunistic contracting acts are irredeemable acts, since they generate profit for the wrongdoer that could not have been earned in a perfect market (form of a market failure). [↑](#footnote-ref-132)
133. Hermalin et al, supra note 24. See also Cooter Robert, “The Cost of Coase,” 11 J. Legal Stud. 1,1982. [↑](#footnote-ref-133)
134. Berg Joyce, John Dickhaut and Kevin McCabe, ‘Trust, reciprocity and Social History,’ 10 Games and Economic behaviour 122, 1995, pp. 130-132; Vanberg Christoph, ‘Why People Keep their Promises: An Experimental Test of Two Explanations,’ 76 Econometrica 1467, 2008; and Wilkinson-Ryan Tess, ‘Legal Promise and Psychological Contract,’ 47 Wake Forest Law Review 843, 2012, p. 845. [↑](#footnote-ref-134)
135. Hoffman David and Tess Wilkinson-Ryan, ‘The Psychology of Contract Precautions,’ 80 University of Chicago Law Review 395, 2013, p. 429-430. [↑](#footnote-ref-135)
136. Hesselink Martin, The Comcept of Good Faith,’ in Towards a European Civil Code, 2010, p. 619. [↑](#footnote-ref-136)
137. See e.g. Zamir Eyal and Doron Teichman, ‘Behavioural Law and Economics,’ Oxford University Press, 2018, p.262. [↑](#footnote-ref-137)
138. Ibid. [↑](#footnote-ref-138)
139. Ibid. [↑](#footnote-ref-139)
140. Hoffman and Wilkison, (n 74). However, there are some authors that have a critical stand towards the imposition of the good-faith standard in contract law, arguing that contract law should be formalistic, leaving the advancement of trust and cooperation to other social systems – advocating a division of contract law and non-legal norm systems (economic, social and moral). See e.g. Bernstein Lisa, ‘Merchant Law in a Merchant Court: rethinking the Code’s Search for Immanent Business Norms,’ 144 University Pa. Law Review 1765, 1996; and Scott Robert, ‘The Death of Contract Law,’ 54 Toronto Law Journal 369, 2004. [↑](#footnote-ref-140)
141. See Benabet A, “La Bonne Foi Dans L’execution du Contrat, in » Rapport Francais in La Bonne Foi, Travaux de l’Association Henri Capitant, t. XLIII, 1994, p. 291 ; and Carbonier J., « Droit Civil, 4 Les Obligationis, 18th ed., 1995. [↑](#footnote-ref-141)
142. Rowan Solene, The new French Law of Contract,” 46 International and Comparative Law Quarterly 4, 201. See also Smits M. Jan and Caroline Calomme, “The Reform of the French Law of Obligations: Les Jeux Sont Faits,” 23 Maastricht Journal of European and Comparative Law 6, 2016, pp. 1040-1050. [↑](#footnote-ref-142)
143. Steiner Eva, “French Law: A Comparative Approach,” 2nd ed., Oxford: Oxford University Press, 2018, p. 229. See also Beale, Hugh, Hartkamp, Arthur, Kotz, Hein and Denis Tallon, “Cases, Materials and Text on Contract Law,” Hart publishing, 2002, at p. 239. [↑](#footnote-ref-143)
144. And as a consequence, liability may now (from art. 1112 Civil Code) also arise from breaking off negotiations; ibid. [↑](#footnote-ref-144)
145. Civ. (1) 16 Feb. 1999, Bull. Civ. 1 no. 52. [↑](#footnote-ref-145)
146. There C had in 1977 sold her life interest in a property to a niece S, who agreed in return to pay an annual, index-linked sum, on default of which C had the power to terminate the contract on notice. In 1990, C served notice on S to pay arrears for the previous 12 years and on C’s death, C’s daughter sued for the full amount and purported to terminate the contract under the express term; ibid. [↑](#footnote-ref-146)
147. Flour, Aubert and Savaux, Acte juridique, 314-315. [↑](#footnote-ref-147)
148. Bell John, Sophie Boyron and Simon Whittaker, “Principles of French Law,” Oxford: oxford University Press, 2008, p. 333. See also Civ. (1) 23 Jan. 1996, Bull. civ. 1 no. 36; and Com. 3 Nov. 1992, Bull. Civ. IV no. 338. [↑](#footnote-ref-148)
149. Giliker, Paula,”Pre-contractual Liability in English and French Law, Kluver, 2002, at p. 45. [↑](#footnote-ref-149)
150. Here a delictual liability for pre-contractual bad faith was imposed where a party intentionally kept another in a state of protracted uncertainty and then breached advanced negotiations without legitimate reason, knowing that the other has incurred considerable expense; RTD 753, 1992. Moreover, in the “Monoprix”-case, the French Cour de Cassation, decided that liability for pre-contractual bad faith does not require negotiations to have been broken off with an intention to cause harm to the other party; French Cour de Cassation, Chambre civile 3, 3 octobre 1972, n° de pourvoi 71-12.993. [↑](#footnote-ref-150)
151. Bell et al., supra note 139, p. 310. [↑](#footnote-ref-151)
152. Yet, it should be stated that The Code Civil itself before the modernisation already furnished an illustration of the culpa in contrahendo principle in Art. 1599 which provided that while the sale of a thing belonging to another is void, if the purchaser is unaware of the seller’s defective title he may recover damages from him; Beal et al., supra note 138, p.407. [↑](#footnote-ref-152)
153. The new Article 1112 starts by emphasizing the freedom of contracting where commencement and breaking-off of negotiations may be exercised freely. However, the same article also provides that negotiations must satisfy the requirement of good faith and it places an explicit limit for fault, since it is not possible to recover loss of profits which were expected from the negotiated but never concluded contract; Pannebakker Ekaterina, “Pre-contractual phase: reflections on the attractiveness of the new French rules for the parties to international commercial transactions,” in Stijns S. and S Jansen (eds.), “The French Contract Law reform: a source of Inspiration?,” Intersentia, 2016, pp.29-46. [↑](#footnote-ref-153)
154. Steiner, supra note 134, p. 229. [↑](#footnote-ref-154)
155. Articles 1112 and 1112-1 of the French Code Civil, Ordonance no 2016-131 du 10 février 2016 portant réforme du droit des contracts, du régime général et de la preuve des obligations, JORF no 0035 of 11 February 2016. On disclosure duty see Grimaldi C., “Quand une obligation d’information en cache une autre: inquiétudes à l’horizon,” Recueil Dalloz 2016, at pp. 1009. [↑](#footnote-ref-155)
156. Supra note 144. The ordonnance was officially translated by Cartwright John, Bénedicte Fauvarque-Cosson and Simon Whittaker (accessible at www.textes.justice.gouv.fr/art\_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf. [↑](#footnote-ref-156)
157. Rowan, supra note 133, at p.8. [↑](#footnote-ref-157)
158. Malaurie, Philippe, Aynes, Laurent and Philippe Stoffel-Munck, “Les Obligations,” Defrenois, 2003. See generally, Starck, Boris, “Obligations,” in Roland, H., Boyer, L. (eds.), “Contrat,” 3rd ed., Vol. II, LITEC, 1989; Larroumet, Christian, “Les Obligations – Le Contrat,” 2nd ed., Economica, 1990; Mazeaud, Henri, Mazeaud, Leon, Chabas, François, “Obligations: Droits Reels Principaux, Excercises Pratiques,” 10th ed., LGDJ, 2000; and Weill, Alex, Terré, François, “Droit Civil - Les Obligations,” 4th ed., Dalloz, 1986. [↑](#footnote-ref-158)
159. Such expectation is also in the heart of the contract particularly where we deal with long-term contracts; ibid. [↑](#footnote-ref-159)
160. Steiner, supra note 134, p. 229. Court have for example refused to enforce “clause resolutoire”, whereby a contract with tenant can be automatically terminated by landlords under certain circumstances, to the advantage of landlords acting in bad faith. In Cass. Civ. 3, 6 June 1984, Bull. Civ. 111 such a clause was invoked by a landlord in the absence of his tenant who was on holiday and court decided that landlord, in taking advantage of the absence of his tenant in this case was acting in bad faith. [↑](#footnote-ref-160)
161. “Since the defect had not been news to Sergius (for he had sold the property earlier), there had been no need to declare it; Sergius had not been misled, because he could remember the legal rights on the property which he had bought; Cicero, De Officiis, Book 3, 67. [↑](#footnote-ref-161)
162. I. Claeys, T. Tanghe, Nieuw algemeen contractenrecht, handboek, 2023, P. 141 (van de 966) [↑](#footnote-ref-162)
163. L. Cornelis, « Le responsabilité précontractuelle, conséquence éventuelle du processus précontractuel », TBBR 1990, p. 410, nr. 19  
     Bron L. CORNELIS VINDEN en eventueel als nog tijd ook de Bronnen van Cornelis : (102) Par exemple: causer un dommage en lui faisant perdre d'autres occasions, se moquer de la partie adverse, l'écarter d'autres candidats ... ; voy. MARCHANDISE, Ph., o.c., 13, n° 22; HERBOTS, J., o.c., 69-70, n° 33; VANWIJCK-ALEXANDRE, M., o.c., Ann. Fac. Dr. Liège, 1980, 22-23. [↑](#footnote-ref-163)
164. Bronnnen !!! zegt Cornelis dit ook al?

     I. Claeys, T. Tanghe, Nieuw algemeen contractenrecht, handboek, 2023, P. 141 (van de 966)

     A. DE BOECK, bijzondere overeenkomsten obo afl. 132, p. 237 van 239 tot 268

     Claeys verwijst naar, dus nog op te zoeken, A. DE BOECK, “De precontractuele aansprakelijkheid anno 2010” in Themis nr. 56, Brugge, die Keure, 2010, 3-4. Vgl. ook met art. 2.1.15 (3) Unidroit Principles 2016. Wss deze bron niet nodig want recenter werk van De Boeck? [↑](#footnote-ref-164)
165. Raskolnikov, Alex, “Irredeemably Inefficient Acts: A Threat to markets, Firms and Fics,” 102 Geo, L. J. 1133, 2014 [↑](#footnote-ref-165)
166. I. Hijmans, Romeinsch zakenrecht, Zwolle, Tjeenk Willink, 1926 , 328 p totaal, dit op p 179. Zie conclusie boek romeins recht, maar rechtstreekse bron opgevraagd Hijmans , p. 179. Te controleren [↑](#footnote-ref-166)
167. Belgian Ondernemingsrechtbank Gent, 13 november 2006, ECLI nr. ECLI:BE:ORGNT:2006:JUG.20061113.4 [↑](#footnote-ref-167)
168. A. DE BOECK, bijzondere overeenkomsten obo afl. 132, p. 259 tot 262 [↑](#footnote-ref-168)
169. Rb. Hasselt (5e k.) 13 januari 2003, *RW* 2005-06, afl. 17, 672 [↑](#footnote-ref-169)
170. Such as United States, in particular in the Uniform Commercial Code, para. 1-203 which provides: “Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.” Moreover, Restatement of Contracts Second in its section 205 provides as follows: “Dity of Good Faith and Fair Dealing. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” For an excellent conceptualization of good faith principle in US contract law see Summers S. Robert, “The Conceptualization of Good Faith in American Contract Law: A General Account,” in Zimmerman Reinhardt and Simon Whittaker (eds.), “Good Faith in European Contract Law,” Cambridge: Cambridge University Press, 2008, pp. 118-145. [↑](#footnote-ref-170)
171. See e.g. Yam Seng Pte Ltd v International Trade Corp Ltd (2013) EWHC 111, QB. [↑](#footnote-ref-171)
172. However, as Steiner suggest it would be wrong from »to assert from the absence of such a requirement of good faith that fairness is absent from the English contractual legal sphere, since doctrines such as undue influence and unconscionability, albeit used with restraint and in piecemeal fashion, have nevertheless been recognized in favour of vulnerable parties as grounds for relief against enforcement; Steiner, supra note 134, p. 230. See also Stapleton J., “Good Faith in Private Law,” 52 Current Legal Problems 1, 1999, pp. 1-36; and Teubner G., “Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergence,” 61 Modern Law Review 1, 1988, 11; Bridge, Michael. 2017. Good faith, the common law and the CISG. Uniform Law Review 22: 98–115; McKendrick, Ewan 1999. Good faith: A matter of principle? In Good faith in contract and property law, ed. A.D.M. Forte, 39–62. Oxford: Hart Publishing; and McKendrick, Ewan. 2015. Good faith in the performance of a contract in English law. In Comparative contract law: British and American perspectives, ed. Larry di Matteo and Martin Hogg, 196–209, Oxford: Oxford University Press. [↑](#footnote-ref-172)
173. Lord Ackner, “as unworkable in practice as it is inherently inconsistent with the position of a negotiating party;” Walford v Miles [1992] 2 A.C. 128, 138. [↑](#footnote-ref-173)
174. Ranieri, supra note 87. [↑](#footnote-ref-174)
175. Good, Royston Miles. *The concept of "good faith" in English law*. Centre for Comparative and Foreign Law Studies (Rome), 1992. [↑](#footnote-ref-175)
176. Ibid. [↑](#footnote-ref-176)
177. Ranieri, supra note 87. [↑](#footnote-ref-177)
178. Good, supra note 113. [↑](#footnote-ref-178)
179. Ranieri, supra note 87. [↑](#footnote-ref-179)
180. Quoting see e.g. Yam Seng Pte Limited v International Trade Corporation Limited [2013] EWHC 111 (QB) and, most recently, Essex CC v UBB Waste (Essex) Ltd (No. 2) [2020] EWHC 1581 (TCC) in England and Wales; Bhasin v Hrynew 2014 SCC 71 and Callow v Zollinger 2020 SCC 45 in Canada; Giliker Paula, Contract Negotiations and the Common Law: A Move to Good Faith in Commercial Contracting?, Liverpool Law Review 2022. [↑](#footnote-ref-180)
181. Gilliker, supra note 180, at p. [↑](#footnote-ref-181)
182. Gilliker, supra note 180. See also Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea) [2001] UKHL 1; [2003] 1 A.C. 469; Compass Group UK and Ireland Ltd (t/a Medirest) v Mid Essex Hospital Services NHS Trust [2013] EWCA Civ 200; [2013] B.L.R. 265. In in Berkeley Community Villages Ltd v Pullen,23 a property development contract with the express term that “the parties will act with the utmost good faith towards one another” was construed as imposing a contractual obligation to observe reasonable commercial standards of fair dealing in accordance with the agreement, faithful to the agreed common purpose of the parties; [↑](#footnote-ref-182)
183. Ibid. [↑](#footnote-ref-183)
184. Burrows, supra note 8 at p. 76 at seq. See also Atiyah, P., “Consideration in Contracts: A Fundamental Restatement,” Australian National University Press, 1971; Treitel Gunther, “Consideration: A Critical Analysis of professor Atiyah’s Fundamental Restatement,” 50 Australian Law Journal 439, 1976; Slawson W. David, “The Role of Reliance in Contract Damages,” 76 Cornell Law Review 197, 1990; Gardner Simon, “The Remedial Discretion in Proprietary Estoppel,” 115 Law Quarterly Review 353, 1999; Halson, Roger, “The Offensive Limits of Promissory Estoppel,” 17 Lloyd's Maritime and Commercial Law Quarterly 2, 1999 and Chen-Wishart Mindy, “In Defense of Consideration,” 13 Oxford Commonwealth Legal Journal 1, 2013. [↑](#footnote-ref-184)
185. Cooke, E., “The Modern Law of Estoppel,” Oxford University Press, 2000. [↑](#footnote-ref-185)
186. For an excellent synthesis on promissory estoppel see e.g. Cooke, E., “The Modern Law of Estoppel,” Oxford University Press, 2000; and McKendrick, E., “Contract Law: Text, Cases, and Materials,” 7th ed., Oxford University Press, 2016, pp. 236 et seq. [↑](#footnote-ref-186)
187. Concept, ideas and underlying principles may be found in the law of contracts, although under different names and employing different language of description; Cooke, E., “The Modern Law of Estoppel,” Oxford University Press, 2000. [↑](#footnote-ref-187)
188. See for example Lord Ackner’s statement in Walford v. Miles (1992, 2 AC 128 at 138): “the concept of 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 in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms.” [↑](#footnote-ref-188)
189. McKendrick, Ewan, “Contract Law: Text, Cases, and Materials,” 7th ed., Oxford University Press, 2016, pp. 239 et seq. [↑](#footnote-ref-189)
190. Treitel, G.H., “The Law of Contract,” 13th ed., Sweet & Maxwell, 2011 p. 439. [↑](#footnote-ref-190)
191. Facts of the case are as following: landlord leased certain property in London to tenants before the WWII. Before the war some of the tenants left the property and to help to keep it the landlord reduced the rent for the remaining tenants. After the war the landlord wished to restore the rent to its previous level, and also claim arrears of rent (the amount lost by reduction); 1 KB 130 1947. [↑](#footnote-ref-191)
192. Whincup, H. Michael, “Contract law and Practice: The English system and Continental Comparisons,” 4th ed., Kluwer, 2001. [↑](#footnote-ref-192)
193. The defendant company was the lessee of property owned by the plaintiff. On 22.10.1874 the plaintiff, acting pursuant to its entitlement under the lease, served notice upon defendants to repair the property within 6 months. The lease was forfeitable by the plaintiff if the defendants failed to comply with the notice. The defendants replied that the repairs would be carried out but also suggested that the plaintiff might wish to buy the defendants’ interest in the property and they therefore proposed to defer carrying out the repairs until they heard from the plaintiff in relation to their offer to dispose of their interest in property. In November 1874 the plaintiff entered into negotiations with the defendants for the surrender of the lease but made no response to the defendants’ statement that they intended to defer carrying out the repairs. The negotiations between the parties broke down on 31.12.1874. There were no further communications between the parties until 19.4.1875 when the defendants wrote to the plaintiff and stated that, in the light of the breakdown in negotiations, “the company would take in hand the repairs.” The notice issued by the plaintiff expired on 22.4.1875 and on 28 April the plaintiff served a writ of ejectment on the defendants. The defendants completed the repairs in June 1875. The House of Lords held that the defendants were entitled to be relieved against the forfeiture of the lease. The plaintiff’s notice to repair the property was in suspension for the duration of the negotiations between the parties and did not revive until 31.12.1874.The repairs were carried out by the defendants within six months of that date and they were entitled to relief against forfeiture; *Hughes v Metropolitan Railway Company* (1877), 2 App Cas 439, House of Lords. [↑](#footnote-ref-193)
194. McKendrick, supra note 136, at 238. [↑](#footnote-ref-194)
195. “The landlord did not say: “I will reduce the rent if in return you will promise to stay here for the duration of the war.” The tenants then did not give or do and, were not required to give or do, anything in return. They were actually free to stay or go as they pleased, though naturally those who stayed relied on the landlord’s assurance; ibid, at p. 83. [↑](#footnote-ref-195)
196. Whether Lord Denning intended such a bold attack on the doctrine of consideration at the time is open to question. However, for an indication of his contemplation that the doctrine of consideration was in need of significant reform see Denning, Alfred, “The Discipline of Law,” Butterworths, 1979, pp. 200-205 [↑](#footnote-ref-196)
197. Moreover, Lord Denning’s description of the doctrine is informative and brief: “Estoppel is a principle of justice and of equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.” Ibid. [↑](#footnote-ref-197)
198. Facts of the case are as following: a husband promised to pay his wife maintenance when they separated, but then broke his promise and, of course, some years later she sued for the arrears; 1951. [↑](#footnote-ref-198)
199. Because she had given no consideration for her husband’s promise and hence no contract has ever been established. It had not been given in return for any action of forbearance on her part. She argued in front of the court that since she has relied upon the promise by not seeking a court order against her husbands, as he must have intended, he was therefore estopped under the previous High Trees principle from denying his promise; ibid. [↑](#footnote-ref-199)
200. Ibid. [↑](#footnote-ref-200)
201. Ibid. [↑](#footnote-ref-201)
202. In *Avon County Council v. Howlett*, 1983, a bank mistakenly overstated the sum in a customer’s account. Afterwards the bank could not recover the amount overstated once the customer has reasonably supposed that the statement was correct and had spent the money; ibid. See also *Lombard v. Stobart,* 1990. [↑](#footnote-ref-202)
203. 1975. [↑](#footnote-ref-203)
204. For example in *Durant v. Heritage*, 1994, a niece who for many years was tenant of her uncle’s run-down property spent large sums of money renovating the property in the belief (reliance), even encouraged by her uncle, that he would bequeath it to her. He left it instead to someone else. The niece successfully claimed ownership of the property on the basis of proprietary estoppel; Whincup, supra note 95. See also Gillett v. Holt, 2000; Yaxley v. Gotts, 1999 and Zelmer v. Victor, 1997. [↑](#footnote-ref-204)
205. Box v. Midland Bank (1981) 2 Lloyd’s Rep 391, [↑](#footnote-ref-205)
206. Markesinis et al, supra note 2. [↑](#footnote-ref-206)
207. See for example BGH MDR 1954, 346, 347; BGH WM 1984, 205. [↑](#footnote-ref-207)
208. McFarlane, Ben, “Promissory estoppel and debt,” in Burrows, Andrew and Edwin Peel (eds.), “Contract Formation and Parties – The Oxford-Norton Rose Law Colloquium,” Oxford University Press, 2010, p. 115 et seq. [↑](#footnote-ref-208)
209. EWCA Civ 1329 (2007), 1 WLR 643 (2008). [↑](#footnote-ref-209)
210. McFarlane, for example argues, that things have not improved since 1972, when Lord Hailsham observed that “the whole sequence of cases based upon promissory estoppel since the war…rise problems of coherent exposition which have never been systematically explored; in Woodhouse AC Israel Cocoa Ltd. SA v. Nigerian Produce Marketing Co. Ltd. (1972) AC 741, at p. 757, reported in McFarlane, Ben, “Promissory estoppel and debt,” in Burrows, Andrew and Edwin Peel (eds.), “Contract Formation and Parties – The Oxford-Norton Rose Law Colloquium,” Oxford University Press, 2010, p. 115 et seq. [↑](#footnote-ref-210)
211. Beatson, Jack, Burrows Andrew and John Cartwright, “Anson’s Law of Contract,” 29th ed., Oxford University Press 2010, p. 119 et seq. See also Stone Richard, James Devenney and Ralph Cunnington, “Text, Cases and Materials on Contract Law,” 2nd ed., Routledge, 2011, pp. 111; Youngs, Raymond, “English, French and German Comparative Law,” 3rd ed., Routledge, 2014; and McKedrick, Ewan, “Contract Law: Text, Cases and Materials,” 7th ed., Oxford University Press, 2016.. [↑](#footnote-ref-211)
212. Burrows Andrew, “A Casebook on Contract,” 5th ed., Hart Publishing, 2016, at pp.119. [↑](#footnote-ref-212)
213. D & C Builders v Rees [1966] 2 WLR 28 Court of Appeal. [↑](#footnote-ref-213)
214. Beatson, supra note 163 at p. 120 et seq. [↑](#footnote-ref-214)
215. E.g. Hughes v. Metropolitan Railway Co.; WJ Alan & Co. Ltd v. El Nasr Export and Import Co. 2 QB 189, 213, 1972 [↑](#footnote-ref-215)
216. E.g. Tool Metal Manufacturing Co. Ltd v. Tungsten Electric Co. Ltd. 1 WLR 761, 1955 [↑](#footnote-ref-216)
217. This was made clear by the judgements of the Court of Appeal in Combre v Combre, 2 KB 215, 1951, 1 All ER 767, 1951; The Proodos C, 3 All ER 189, 1981. See also Furmston Michael, “Cheshire, Fifoot & Furmston’s Law of Contract,” 6th ed., Oxford University Press, pp.132; and Stone et al., supra note 162 at pp. 116. [↑](#footnote-ref-217)
218. Derry v. Peek, 14 App Cas 337, 1889. [↑](#footnote-ref-218)
219. Esso Petroleum Co. Ltd. V. Mardon, QB 801, 1976. [↑](#footnote-ref-219)
220. In William Lacey Ltd. V. Davis (2 All ER 712, 1957) Justice Barry J held that a builder could recover for work done after he had been told that his tender was the lowest and that he could expect to receive the contract (yet, the claim was not in contract but implied or quasi-contract). [↑](#footnote-ref-220)
221. Waltons Stores Ltd. V Maher, 164 CLR 387, 1988 and Giumelli v. Giumelli, 196 CLR 101, 1999. In relation to Giumelli case Edelman argues that the “Australian estoppel” rests on a “rule-based discretion” whereby the promisee’s expectation interest is protected; Edelman J., “Remedial Certainty or Remedial Discretion in Estoppel after Giumelli?” 15 Journal of Contract Law 179, 1999. [↑](#footnote-ref-221)
222. McKendrick, supra note 118, at 271. [↑](#footnote-ref-222)
223. Ibid. [↑](#footnote-ref-223)
224. Therefore a liability for culpa in contrahendo on the basis of a general principle of good faith is not recognized in English law (Lord Ackner in Walford v Miles [1992] 1 All ER 453; 2 AC 128, 138 (HL): ‘A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating parties’). This confirms the reservations expressed by those who suspect that ‘when a European contract law including a good faith clause comes into force, British judges will simply dig out their established case law rules and apply them just as before, as long as they are compatible with the letter of the good faith clause, which—as has always been obvious—they clearly are’ Cartwright, John, “Protecting Legitimate Expectations and Estoppel in English Law,” 10 Electronic Journal of Comparative Law 3, 2006. [↑](#footnote-ref-224)
225. Gilliker, supra note 180. [↑](#footnote-ref-225)
226. Chen-Wishart, Mindy, and Victoria Dixon, 'Good Faith in English Contract Law: A Humble “3 by 4” Approach', in Paul B Miller, and John Oberdiek (eds), Oxford Studies in Private Law Theory: Volume I (Oxford, 2020; online edn, Oxford Academic, 18 Feb. 2021). [↑](#footnote-ref-226)
227. Ibid. [↑](#footnote-ref-227)
228. Open recognition of this humble version of good faith will: make explicit the implicit ethical content of English contract law, enhance our understanding and organization of many apparently disparate rules, legitimize these rules and facilitate legal development in a manner consistent with common law incrementalism; Ibid. [↑](#footnote-ref-228)