



**Fifth Annual Conference**  
**The Future of the Commercial Contract in Scholarship and Law**  
**Reform**  
**Friday, 16th October 2020**

The Use of "Good Faith" under UAE Law - diversions from the CISG  
standard?

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Good faith is considered the bedrock of sale contracts in civil law countries.

Good faith can be characterized by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question

Duty to act in good faith is implied into all contracts that are subject to UAE law

Article 246 of the UAE Civil Code provides that: “a contract **must be performed** in accordance with its contents, and in a manner consistent **with the requirements of good faith**”.

## **Meaning of Good Faith**

The concept of good faith could mean the obligation to act honestly, reasonably, moderately and in a cooperative manner.

Good faith could mean also not to use the terms of the contract to seek unfair advantage, cause unjustified damage or exploit the other, and if possible, avoid conflicts

UAE Courts: an act of bad faith by one contracting party may provide a cause of action for the other. The duty of good faith is overarching.



## **The Right to Exclude "Good Faith" by Mutual Agreement of the Parties**

In UAE law, rules are divided into two categories; mandatory (obligatory) rules and complementary rules.

While the parties to a contract can agree to the contrary of a complementary rule, they cannot do so when it comes to a mandatory (obligatory) rule.

The requirement of good faith as provided in article 246 of the UAE Civil Code falls under the obligatory rules.

Under UAE law, however, the parties cannot contract out of the duty of good faith imposed by Article 246

- **Other Articles Relevant to Good Faith**  
Article 106 of the UAE Civil Code provides that a party is prohibited from exercising its rights if:
  - it is intended to infringe the rights of another party
  - the outcome is contrary to the rules of Sharia, the law, public order, or morals
  - the desired gain is disproportionate to the harm that will be suffered by the other party
  - it exceeds the bounds of custom or usage

### **Liability of the Parties Due to Non-compliance with Good Faith Relational theory of contract**

the determination as to whether parties have fulfilled their contractual obligations in a manner consistent with good faith is a matter of fact that falls within the discretion of trial courts

it is easier to determine whether a party has acted in bad faith rather than whether it has acted consistently with the requirements of good faith

UAE Federal Supreme Court: “contracts must be performed according to the contents thereof, and in a manner consistent with the dictates of good faith.... If a contracting party ceases to perform his obligation by reason of circumstances that have arisen after the making of the contract, whether by his own default or whether by an extraneous cause giving the other contracting party the right to withhold performance of what he is obliged to do as aforesaid, then it will follow from that that the other contracting party will not have the right to have recourse for an indemnity against the other contracting party so long as it is not proved that he has abused his right.

- Dubai Court of Cassation: A bad faith action of the other contracting party may provide a cause of action in itself for the other party.

### **Good faith applicable to pre-contract negotiations**

Good faith in the UAE civil code relates to the performance of the contract, and it is questionable whether it would extend to dealings during the pre-contractual period

If a party to a contract makes a statement found to be fraudulent, UAE courts will likely render the contract void for lack of mutual consent. The wronged party can, in these circumstances, apply to the court for the contract to be canceled and could also seek damages

It is important in pre contractual negotiations to highlight that the contract will not be binding until all details have been finalized and it has been executed.

The UAE Civil Code inspired by the Egyptian and Jordanian civil codes, which enshrine a principle recognized within the Islamic jurisprudential tradition: that a right should not be exercised unlawfully, or contrary to a principle of good faith.

## Good faith and termination for convenience

Problem- There may be grounds to terminate for breach of contract but, in other cases, it can be preferable to terminate for convenience

Contracts include a right to terminate for convenience, usually without restriction (although an early termination fee may be applicable). This allows a party to end a contract *at any time* without having to prove that a breach of contract has occurred or that express contractual obligations have not been met

- Is good faith relevant to the exercise of a right to terminate a contract?
- In accordance with UAE Civil Code (art.246 & 106), the party's right to terminate for convenience ought to be exercised in good faith



## Changing Contract Terms Using Good Faith

The principle of good faith cannot be used as a tool to adjust or erode the effect of clear contract terms

If good faith could override contractual terms that could leave parties uncertain as to whether or not an agreed (but onerous) term must be adhered to. Parties are bound by the terms they have agreed to and the duty of good faith does not alter their contractual rights or obligations

- **Interpretation of UAE court for contract governed by a foreign law**
- UAE Civil Code (art. 19): the form and substance of contractual obligations are governed by the law of the state in which both contracting parties reside
- UAE Courts apply UAE law and disregard foreign governing law provisions in contracts if the UAE Court considers it has competent jurisdiction to adjudicate a dispute



# Conclusion

- It is prudent for contracting party to be aware of the good faith jurisprudence in UAE.
- Article 246 of the UAE Civil Code forms the basis for good faith, read together with art. 106.
- Good faith is most likely to be applied to evidence for, or to support, an allegation of breach

# Commercial Contracts:

## From Contractual Freedom towards Fairness and Compassion

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16 October 2020

# Setting the scene

*"Héritage du siècle des Lumières, la devise 'Liberté, Egalité, Fraternité' est invoquée pour la première fois lors de la Révolution française" (L'Elysée)*

## ❖ Party autonomy

- The right to self-govern his own legal position within the limits of the law
  - ✓ Freedom to enter into agreements (or not)
  - ✓ Freedom to choose the contracting parties
  - ✓ Freedom to determine the content of the agreement

## ❖ Basic Idea of the civil code (1804) and commercial codes

- *Quid pro quo* – "*Qui dit contractuel, dit juste*" (A. Fouillée)
  - ✓ No (re)-introduction of the *iustum pretium*-doctrine

# Socialization of Contract Law

*"In any case, as Alexis de Tocqueville shrewdly observed when comparing the United States and France in the 1830's and 1840's, the French preferred equality to liberty.*

*This preference resulted in a strong central state and weak civil society" (N. Ferguson)*

## ❖ Definition

➤ *"Make (someone) behave in a way that is acceptable to society"*

## ❖ Basic restrictions to party autonomy

- Rules of *Ordre Public* & rules governing the validity of a contract
- Fundamental rights of others (e.g. Property rights, etc)
- Principle of non-discrimination

## ❖ What happened next?

- Market distortions, unequal bargaining power, etc.

# Socialization of Contract Law (II)

## ❖ What happened next?

- Market distortions, unequal bargaining power, etc.
  
- Rules were enacted to protect certain (categories of) persons
  - Employees (labour law)
  - Tenants (specific contract law)
  - Consumers (consumer law)
  - ...
  - Small and Medium-Sized companies, starting companies, etc.
    - ✓ Unequal bargaining power
    - ✓ Not their core business
    - ✓ Less legal background
    - ✓ Financial vulnerable

# Socialization of Contract Law (III)

## ❖ What kind of rules?

- Socialization of the freedom of contract *sensu stricto*
  - ✓ Mandatory information (*information paradigm*)
  - ✓ Refusal to enter into an agreement = *abuse of rights doctrine*
    - e.g. Cass. 7 October 2011 (B)  
*"le refus de contracter peut constituer un abus de droit lorsque l'usage de la liberté de refus de contracter est exercé d'une manière qui excède manifestement les limites de l'exercice normal de cette liberté par une personne prudente et diligente"*
  - ✓ Prohibition to enter into an agreement
    - e.g. Insolvent borrowers (consumer credit)
  - ✓ Obligation to enter into an agreement
    - e.g. liability insurance for motorvehicles
    - e.g. access to payment accounts (Directive 2014/92/EU)
    - e.g. Access to B2B payment accounts  
(Proposition de loi du 24/9/2020)

# Socialization of Contract Law (IV)

## ❖ What kind of rules?

### ➤ Socialization of the freedom of contract *sensu stricto (II)*

#### ✓ Unfair Trading

- B2C: Directive 2005/29/EC, as amended by Directive 2019/2161/EU
- B2B:
  - Directive 2006/114/EC concerning misleading and comparative advertising
  - Directive 2019/633/EU on unfair trading practices in business-to-business relationships in the agricultural and food supply chain
- P2B:
  - Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services

# Socialization of Contract Law (V)

## ❖ What kind of rules?

- Socialization of the freedom of contract *sensu lato*
  - ✓ Pacta sunt servanda
    - e.g. *force majeure* ('practical' impossibility) vs. *hardship*
  - ✓ Remedies
    - e.g. right to repair
  - ✓ Unfair contract terms
    - e.g. Directive 93/13/EC
    - e.g. Loi du 4 avril 2019 modifiant le Code de droit économique en ce qui concerne les abus de dépendance économique, les clauses abusives et les pratiques du marché déloyales entre entreprises (B)



# Socialization of Contract Law (VI)

## ❖ What kind of rules?

### ➤ Socialization of the freedom of contract *sensu lato*

- Sont abusives, les clauses qui ont pour objet de :
  - 1° prévoir un engagement irrévocable de l'autre partie, alors que l'exécution des prestations de l'entreprise est soumise à une condition dont la réalisation dépend de sa seule volonté;
  - 2° conférer à l'entreprise le droit unilatéral d'interpréter une quelconque clause du contrat;
  - 3° en cas de conflit, faire renoncer l'autre partie à tout moyen de recours contre l'entreprise;
  - 4° constater de manière irréfragable la connaissance ou l'adhésion de l'autre partie à des clauses dont elle n'a pas eu, effectivement, l'occasion de prendre connaissance avant la conclusion du contrat.

# Socialization of Contract Law (VII)

## ❖ What kind of rules?

### ➤ Socialization of the freedom of contract *sensu lato*

- Sont présumées abusives sauf preuve contraire, les clauses qui ont pour objet de :
  - 1° autoriser l'entreprise à modifier unilatéralement sans raison valable le prix, les caractéristiques ou les conditions du contrat;
  - 2° proroger ou renouveler tacitement un contrat à durée déterminée sans spécification d'un délai raisonnable de résiliation;
  - 3° placer, sans contrepartie, le risque économique sur une partie alors que celui-ci incombe normalement à l'autre entreprise ou à une autre partie au contrat;
  - 4° exclure ou limiter de façon inappropriée les droits légaux d'une partie, en cas de non-exécution totale ou partielle ou d'exécution défectueuse par l'autre entreprise d'une de ses obligations contractuelles;
  - 5° sans préjudice de l'article 1184 du Code civil, engager les parties sans spécification d'un délai raisonnable de résiliation;
  - 6° libérer l'entreprise de sa responsabilité du fait de son dol, de sa faute grave ou de celle de ses préposés ou, sauf en cas de force majeure, du fait de toute inexécution des engagements essentiels qui font l'objet du contrat;
  - 7° limiter les moyens de preuve que l'autre partie peut utiliser;
  - 8° fixer des montants de dommages et intérêts réclamés en cas d'inexécution ou de retard dans l'exécution des obligations de l'autre partie qui dépassent manifestement l'étendue du préjudice susceptible d'être subi par l'entreprise.

# Conclusion

- ❖ **Movement towards the expansion of the level of protection to SME's... even to all businesses**
- ❖ **Movement towards the erosion of the notion of party autonomy in the name of 'fairness'**
  - **(Content of) Commercial contracts are being socialized by stricter legal rules**

# Many thanks for your attention!

**Do you have questions, remarks, suggestions...?**

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*Erasmus*

# Culpa in Contrahendo & Good Faith

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*The Future of the Commercial Contract in Scholarship and Law Reform, LCF, 16 October 2020.*

# Culpa in Contrahendo & Good Faith

- ❖ CiC:
  - ❖ „*fault in conclusion of a contract*“
  - ❖ duty to behave in good faith during the bargaining process
- ❖ Germany, Austria, France, Italy, Switzerland, Greece or Belgium vs England
- ❖ *Bona Fides* in Roman law

# German Law

- ❖ Notion of “fidelity and faith” (literally) (Treu und Glauben)
  - ❖ § 242 BGB (German Civil Code):
    - ❖ *"The debtor is obliged to perform according to the requirements of good faith, ordinary usage being taken into consideration"* (Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern).
  - ❖ § 157 BGB (German Civil Code):
    - ❖ *"Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into account"* (Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern).

# § 242 BGB (German Civil Code)

- i. (i) Specification of the way in which contractual performance has to be rendered and giving supplementary duties;
- ii. (ii) Limitation of the exercise of contractual rights: and
- iii. (iii) Interfering in contractual relations in order to avoid grave injustice.



# Austrian Law

- ❖ *Codex Theresianus*
- ❖ § 914 ABGB (Austrian General Civil Code):
  - ❖ *"When interpreting contracts, it is not necessary to adhere to the literal meaning of the expression, but to explore the intention of the parties and understand the contract in a way that corresponds to the practice of fair dealing."* (Bei Auslegung von Verträgen ist nicht an dem buchstäblichen Sinne des Ausdrucks zu haften, sondern die Absicht der Parteien zu erforschen und der Vertrag so zu verstehen, wie es der Übung des redlichen Verkehrs entspricht).

# English Law

- ❖ No general duty of *good faith* owed by any contracting party to the other whilst the contract is being negotiate
- ❖ *Walford v Miles*:
  - ❖ " (...) that a duty to negotiate in good faith was unworkable in practice and inherently inconsistent with the position of a negotiating party, since while the parties were in negotiation either of them was entitled to break off the negotiations at any time and for any reason (...) "
- ❖ *Lloyds Bank Ltd v Bundy*
- ❖ *Knatchbull-Hugessen v SISU Capital Ltd*
- ❖ With *Yam Seng Pte Ltd v International Trade Corp* arising of turning point

# Culpa in Contrahendo & Good Faith

- ❖ Not all jurisdictions and contract law regimes recognise concept of *good faith*
- ❖ In practice: essentiality of *good faith* can be seen in particular in cross-border M&A transactions



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# US Franchise Regulation as a Paradigm for the EU

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# Overview

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- ❖ Part 1 – Call for Reform
- ❖ Part 2 – Protective Laws
- ❖ Part 3 – Value of Mandatory Disclosure Regime
- ❖ Part 4 - What next?

*Lorem Ipsum Dolor*

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## Part 1 – Call for Reform

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# Call for Reform

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- ❖ Over the years, the European Parliament has called for reform of EU franchise regulation (2016, 2017)
  - ❖ To address underperformance of EU franchise sector relative to US and Australia
  - ❖ The comparative turnover of the franchise sector is:
    - ❖ 11% of GDP in Australia
    - ❖ 6% in the US
    - ❖ Only 1.89% in EU

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# Call for Reform

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- ❖ Two pivotal concerns underpin this Call:
  - ❖ **Legislative divergence** in protection
  - ❖ **Lack of uniformity** in national measures targeting unfair practices in franchising sector
- ❖ Together, these concerns are seen to impede:
  - ❖ **Creation of a single market** in the EU
  - ❖ **Cross-border contracting** in the franchise sector
- ❖ Also, likely to impede inward investment



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# Call for Reform

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- ❖ Varying levels of protection are afforded to franchisees across the EU
  - ❖ Only a handful of MSs have dedicated pre-contractual regimes (Sales Law)
    - ❖ Available in France, Italy and Spain for example
    - ❖ Oblige franchisors to provide would-be franchisees with:
      - ❖ Mandatory pre-contractual disclosure
      - ❖ Cooling-off period
  - ❖ Many MSs, in contrast, offer no dedicated regimes

*Lorem Ipsum Dolor*

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## Part 2 – Protective Laws

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# Protective Laws

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- ❖ Protective Laws offer protection to franchisees from ‘cradle to grave’
- ❖ By imposing non-derogable rules on the parties
- ❖ Guaranteeing inalienable rights to franchisees
- ❖ During the pre-contractual phase (sales and registration laws) and throughout the contract life cycle (relationship laws)
  - ❖ Sales Laws (address mandatory disclosure)
  - ❖ Registration Laws (govern centralised registration)

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# Protective Laws

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- ❖ Sales Laws (e.g. In US - Federal Trade Commission or FTC Rule; CFIL - California Franchise Investment Law - in California; *Loi Doubin* - in France)
  - ❖ Impose **mandatory disclosure obligations** on franchisors and provide for a **mandatory review period**
- ❖ Such regimes are occasionally reinforced by:
  - ❖ **Sanctions regime** (civil and criminal e.g. *Loi Doubin*)
  - ❖ A system of **enforcement**; and / or
  - ❖ **Private remedies** accessible to aggrieved franchisees (e.g. *Loi Doubin*; *CFIL*)

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# Sales Law in the federal law

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- ❖ Introduced in 1971, the FTC Rule (US) addresses the:
  - ❖ Pre-contractual disclosure obligation of the franchisor (23 fields of information + franchise agreement)
  - ❖ Procedural aspects of the disclosure process
    - ❖ Who must provide disclosure?
    - ❖ When must such disclosure take place?
      - ❖ At least 14 days prior to execution of the agreement/ payment of consideration

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# Sales Law in the federal law

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- ❖ These 23 fields of information fall into three categories (information on franchisor, franchisee and franchise)
- ❖ Franchisor (detailed proprietary and strategic information - legal and business in nature - including credentials, difficulties e.g. insolvency, litigation)
- ❖ Franchisee (**benefits** e.g. training, support, IP offered and **commitments** e.g. advance, royalties, marketing contribution)
- ❖ Franchise infrastructure (scope, duration, exclusivity etc)

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# Sales Law in France

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- ❖ *Loi Doubin*, proposed by Minister Doubin in 1989:
  - ❖ Requires **frank disclosure** at least **20 days** before the date assigned for signing the contract - Such disclosure must be made in a **Disclosure Document** accompanied by the **draft agreement**
  - ❖ Mandates for a level of informational disclosure sufficient to enable the potential franchisee to determine if she wishes to proceed with the transaction (*'qui lui permettre de s'engager en connaissance de cause'* - L330-3, Commercial Code)
  - ❖ Provides for **criminal and civil sanctions** where there is a failure to provide this mandated information / tender such information **promptly**
  - ❖ Provides for private remedies: Franchisee has a right to sue for civil **damages** for any harm caused by a failure to furnish documents / accurate information

*Lorem Ipsum Dolor*

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# Part 3 - Value of Mandatory Disclosure Regime

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# Arguments in favour of mandatory disclosure

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- ❖ Beyond the saving on transactional costs and the mitigation of risks, mandatory disclosure is advantageous
- ❖ Addressing the:
  - ❖ Vulnerability of would-be franchisees, resulting from:
    - ❖ Informational assymetry
    - ❖ Power imbalance
    - ❖ Lack of business experience

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# Arguments in favour of mandatory disclosure

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- ❖ Research looking into the antecedents of franchisees shows that the vast majority of would-be franchisees (65%-70%):
  - ❖ Have little to no experience running a business (whether their own or belonging to another)
- ❖ This research suggests that, as such, they are unaware of the need to:
  - ❖ Scrutinise information / documents disclosed
  - ❖ Seek professional advice (accountant, lawyer)
  - ❖ Carry out a market comparison
  - ❖ Seek recommendations from other franchisees in the network

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# Arguments against mandatory disclosure

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- ❖ Beyond the cost implications of mandatory disclosure (for the franchisor and the market), objections to mandatory disclosure are scant:
  - ❖ Advocates for franchisors object *primarily* to protective regimes offering relationship law, rather than sales law
  - ❖ The literature does not appear to include objections to minimum disclosure obligations
  - ❖ Though there is an overriding preference for soft law regimes

*Lorem Ipsum Dolor*

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Part 4 - What should the EU do  
next?

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# Options

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- ❖ Option 1: Maintain the current *status quo*
- ❖ Option 2: Introduce best practice guidelines
- ❖ Option 3: Introduce an EU regime

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# Option 1: Maintaining the current *status quo*

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- ❖ With each MS remaining responsible for their own regime & contracting parties having discretion to use soft law options
  - ❖ Formulated by professional associations, these elective rules are:
    - ❖ Rarely include an structured infrastructure for disclosure (cf general disclosure obligation)
    - ❖ Offer no public oversight, no system of public enforcement and no private remedies
- ❖ Accordingly, this option would fail to address the EP's concerns:
  - ❖ **Divergence** is still likely to subsist
  - ❖ No uniform body of law will exist **tackling abusive conduct** by franchisors

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## Option 2: Introduce guidelines promoting best practice

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- ❖ Mentioned by the EP, this Option calls for best practice guidelines:
  - ❖ Encouraging convergence on unfair trading practices between the MSs
  - ❖ Shaping normative environment of franchise agreements to ensure these comply with labour standards
- ❖ However, such a regime does *not* guarantee uniformity of protection and thus potentially adversely impacts on:
  - ❖ Would-be investors and the wider market
  - ❖ Dampening cross-border and inward investment
  - ❖ Undermining the goals of the EP's proposed Reform

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# Option 3: Introduce an EU regime

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- ❖ A regime based on mandatory disclosure & registration would go a long way to addressing the EP's concerns, ensuring:
  - ❖ **Legislative divergence** in protection
  - ❖ **Uniformity** of national measures
- ❖ Thus enhancing the:
  - ❖ Creation of a **single market** in the EU
  - ❖ **Cross-border contracting** in the franchise sector



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# Option 3: Introduce an EU regime

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- ❖ **Infrastructure for a mandatory regime?**
  - ❖ Inspired by the disclosure & registration regime used in federal and state law in the US
    - ❖ E.g. in California state which combines mandatory disclosure with registration
  - ❖ A mandatory disclosure & registration regime would guarantee:
    - ❖ Inalienable protections – procedural and substantive – relating to pre-contractual disclosure

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# Option 3: Introduce an EU regime

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- ❖ **Infrastructure for a mandatory regime?**
  - ❖ A system of mandatory disclosure could be reinforced by a system of centralised registration (akin to that used in California) offering a myriad of benefits:
    - ❖ Transparency
    - ❖ Enhanced accessibility
    - ❖ Public oversight of compliance and enforcement

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# Option 3: Introduce an EU regime

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- ❖ **Infrastructure for mandatory disclosure regime?**
  - ❖ **Procedural:**
    - ❖ Akin to the system used in the FTC law, such a system could offer:
      - ❖ A cooling-off period of adequate length
        - ❖ Providing sufficient consultation & reflection time
    - ❖ Defined procedural steps associated with disclosure along with set timeframes (e.g. filing, serving, revising)

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# Option 3: Introduce an EU regime

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- ❖ Infrastructure for mandatory disclosure regime?
  - ❖ Substantive:
    - ❖ Informed decision-making could also be achieved through a strategic design of the content of the disclosure document
    - ❖ Such a design would:
      - ❖ Ensure a disclosure of *key* information and documentation to the would-be franchisee, whilst providing sufficient time for consultation and reflection
      - ❖ Address general and specific economic (market-based) and non-economic (paternalism) concerns

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# Option 3: Introduce an EU regime

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- ❖ **Oversight and enforcement?**

- ❖ Centralised oversight & enforcement could be national or European

- ❖ The benefits of a European level regime are:

- ❖ One system for all

- ❖ Uniform implementation by means of centralised oversight and enforcement

- ❖ Ease of access to information (the information could be offered in all official languages)

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# Option 3: Introduce an EU regime

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- ❖ **Oversight and enforcement?**
  - ❖ One size fits all could be a problem in the EU, as such national oversight and enforcement could prove to be:
    - ❖ A good political compromise
    - ❖ Cheaper and faster to administer
    - ❖ Permitting use of regional and national language/s

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# Option 3: Introduce an EU regime

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- ❖ **Oversight and enforcement?**
- ❖ Alternatively, these responsibilities could be shared between the EU & MSs
  - ❖ Through delegation to a Designated Authority (national) with EU oversight and coordination
  - ❖ Coupled with dialogue amongst national Designated Authorities, and between Commission and Designated Authorities (think AML Directives)

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# Option 3: Introduce an EU regime

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- ❖ **Sanctions? Private remedies?**
  - ❖ Inspired by the system in France, a mix of private remedies and sanctions could be determined by EU
  - ❖ For administration and gold-plating by the MSs
    - ❖ EU could stipulate civil and / or criminal liability, leaving the rollout to each MS (e.g. AML Directives)



# HONG KONG INSURANCE INDUSTRY IN RESPONSE TO COVID-19

Mr. Chee Wai Terry WONG  
Dr. Tat Chee TSUI

# Agenda

- 1. Background, Response from the government and insurance industry
- 2. Temporary Facilitative Measures
- 3. If the COVID-19 is “Act of God”?

# Background

- Being hard-hit by the COVID-19, the world will never be the same again.
- Hong Kong has obviously not been able to be immuned . According to Statista , a forecasted global GDP loss due to COVID-19 in 2020 is 2.4% and Monetary GDP loss in best case COVID-19 scenario amounts to USD76.69 bn. All these are forecasted figures; it is likely that the actual figures may be bigger, not to mention the psychological and emotional effects on, almost, everyone on earth.

# Hong Kong Government's Response

- The Hong Kong Government introduces a stimulus package of a total HK\$287.5 billion<sup>1</sup> (approximately 9.5% of Hong Kong's gross domestic product) has been unveiled by the Hong Kong Government. Key measures include:
  - Tax related measures
  - Job retention
  - Job creation and job advancement
  - Sector-specific relief
  - Government rental concessions, fee waivers, provision of loans and loan repayment deferrals to reduce financial burdens
  - Relief through Government facilitation
  - Other measures

# Hong Kong Government's Response

- Hong Kong Insurance Authority (hereinafter “IA”) issued a new set of Guidelines (hereinafter, “GL”), notably:
  - GL25: Guideline on Offering of Gifts
  - GL27: Guideline on Long Term Insurance Policy Replacement
  - GL28: Guideline on Benefit Illustrations for Long Term Insurance Policies
  - GL29: Guideline on Cooling-off Period
  - GL30: Guideline on Financial Needs Analysis
  - GL31: Guideline on Medical Insurance Business

# Hong Kong Insurance Industry's Response

	TITLE	SUMMARY	DATE
1	Submission of statutory, actuarial and financial return	The IA sent a letter to authorized insurers reminding them of their obligations to submit on an annual basis various statutory, actuarial and financial returns to the IA. The letter also reminds any authorized insurer which anticipates difficulties in meeting the submission deadlines given the current COVID-19 situation to inform its case officer as soon as possible and obtain the extension required.	9 April 2020

# Hong Kong Insurance Industry's Response

2	Phase 2 of the temporary facilitative measures to tackle the outbreak of COVID-19	The IA published a circular introducing phase 2 of the temporary facilitative measures in response to the COVID-19 outbreak. Phase 2 extends the measures to cover term insurance policies, refundable insurance policies without a substantial savings component, and renewable insurance policies without cash value that provide insurance protection (eg hospital cash, medical, critical illness, personal accident, disability or long-term care cover).	27 March 2020
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# Hong Kong Insurance Industry's Response

3	<b>Submission of Audited Financial Statements and Auditor's Report under Section 73(1) of the Insurance Ordinance (Cap.41) ("IO")</b>	<b>The IA published a circular regarding the requirement for licensed insurance broker companies to submit audited financial statements and an auditor's report under section 73(1) of the Insurance Ordinance (Cap.41). The IA will allow broker companies to apply for an exemption to the deadline to submit these documents under section 79 of Cap.41, if such companies encounter difficulties in complying with the deadline due to the COVID-19 outbreak. The IA will consider the circumstances and impact of the outbreak on each individual broker in assessing the application.</b>	<b>24 February 2020</b>
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# Hong Kong Insurance Industry's Response

4	Temporary facilitative measures to tackle the recent outbreak of Novel Coronavirus	The IA published a circular introducing temporary facilitative measures in response to the COVID-19 outbreak. The measures largely involve the facilitation of the distribution of Qualifying Deferred Annuity Policy (QDAP) and Voluntary Health Insurance Scheme (VHIS) products via non-face-to-face methods, provided that authorized insurers adopt two compensating measures - upfront disclosure and an extended cooling-off period. The circular also sets out guidelines on the implementation of non-face-to-face distribution methods.	21 February 2020
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# Temporary Facilitative Measures

- In response to COVID-19, the Insurance Authority also introduced temporary facilitative measures (TFM) which allow insurers and intermediaries to sell certain types of long term insurance by non-face-to-face methods, departing from the face-to-face (F2F) distribution ordinarily required. The TFM have been introduced following collaboration between the Insurance Authority and industry.

# Temporary Facilitative Measures

- The current TFM apply to long term insurance only, as general insurance (such as property insurance, travel insurance, commercial products such as public liability or employees' compensation) does not have a F2F requirement as part of the selling process. The TFM so far have been implemented in two phases.

# Temporary Facilitative Measures

- Phase 1 (21 February 2020 until 31 March 2020). It applied to:
  - Qualifying Deferred Annuity Policy (QDAP) products
  - Voluntary Health Insurance Scheme (VHIS) products with long term insurance elements

# Temporary Facilitative Measures

- Phase 2 (27 March 2020 until 30 June 2020, now extended to 31 December 2020). Phase 2 applies to a wider range of products:
  - Phase I products (QDAP and VHIS)
  - term policies
  - refundable insurable policies without substantial savings component
  - renewable insurance policies without cash value.

# Temporary Facilitative Measures

- The TFM apply to distribution of the relevant products under Phase 1 and 2 by any non-F2F means (e.g. digital, tele-marketing, video-conference, postal, or any combination of these). Zoom meeting is potentially acceptable.
- Further, other TFM measures include:
  - dispensing with the otherwise-required Financial Needs Analysis (FNA)
  - extended cooling-off period of at least 30 days instead of the usual minimum of 21 days, within which time the policyholder can change his/her mind.

# Temporary Facilitative Measures

- Can TFMs become the future direction of the Hong Kong Insurance Industry?
- It is understandable that the COVID-19 shall be with us for quite some time and business activities must go on. TFMs offer a viable alternative to F2F negotiation and conclusion of policies generally. It is not entirely implausible that it may minimize the need for F2F activities.

# Temporary Facilitative Measures

- Moves by insurance underwriters to provide additional coverage
- Underwriters generally provide additional and wider coverage coupled with the ease in application, no or shorter waiting periods.



# Act of God? For Commercial Contract

- Commercial Contract
- Some urge the governments to declare that the COVID-19 Pandemic as “Act of God”, in order to avoid liabilities they suffer.
- Is COVID-19? Arguable.
- If governments accept this suggestion, as the legislation or executive orders generally prevail over commercial agreements, does this policy help?

# Act of God? For Commercial Contract

- When the Buddha saved the pigeon from the eagle, the eagle, “It is not mercy! You save the pigeon but let me starve”!
- - The Story of Shibi (The Buddha)



# Act of God? For Commercial Contract

- One must also note that this apparent “benefit” should not be considered in vacuo, but must be prepared to consider another side of the same coin, i.e. this practice is just transferring the risk of this Pandemic to the other side.
- As a whole, there is no net positive effect the whole society as my gain becomes your loss, tantamount to saving some by killing others.

# Act of God? For Commercial Contract

- Regardless of employment law, an employment contract is nothing more than a contract between employers and employees. As the employers may breach the employment contract for the pandemic, US government, for example, subsidize part of the salary if employers keep the positions.
- May the government pay for it?

# Act of God? For Insurance Contract

- Insurance companies may not be held liable to pay customers under general insurance plans.
- However, with positive image marketing and corporate responsibility in mind, it may not be a bad choice too if insurance companies pay those victims who had suffered such “Act of God” even if held to be so by the governments.

# Act of God? For Insurance Contract

	Company B pays	Company B does not pay
Company A pays	No difference	Company A is in advantage
Company A does not pay	Company B is in advantage	No difference

# Act of God? For Insurance Contract

- The payment to victims in the San Francisco Earthquake 1906 was one of the milestones for the Munich Reinsurance Company to create its reputation.

# Conclusion

- “.....Both the epidemic itself and the resulting economic crisis are global problems. They can be solved effectively only by global co-operation.....”
- “ .....First and foremost, in order to defeat the virus we need to share information globally. That’s the big advantage of humans over viruses. A coronavirus in China and a coronavirus in the US cannot swap tips about how to infect humans. ....”
- “.....When the UK government hesitates between several policies, it can get advice from the Koreans who have already faced a similar dilemma a month ago. But for this to happen, we need a spirit of global co-operation and trust.”
- - Professor Yuval Noah Harari

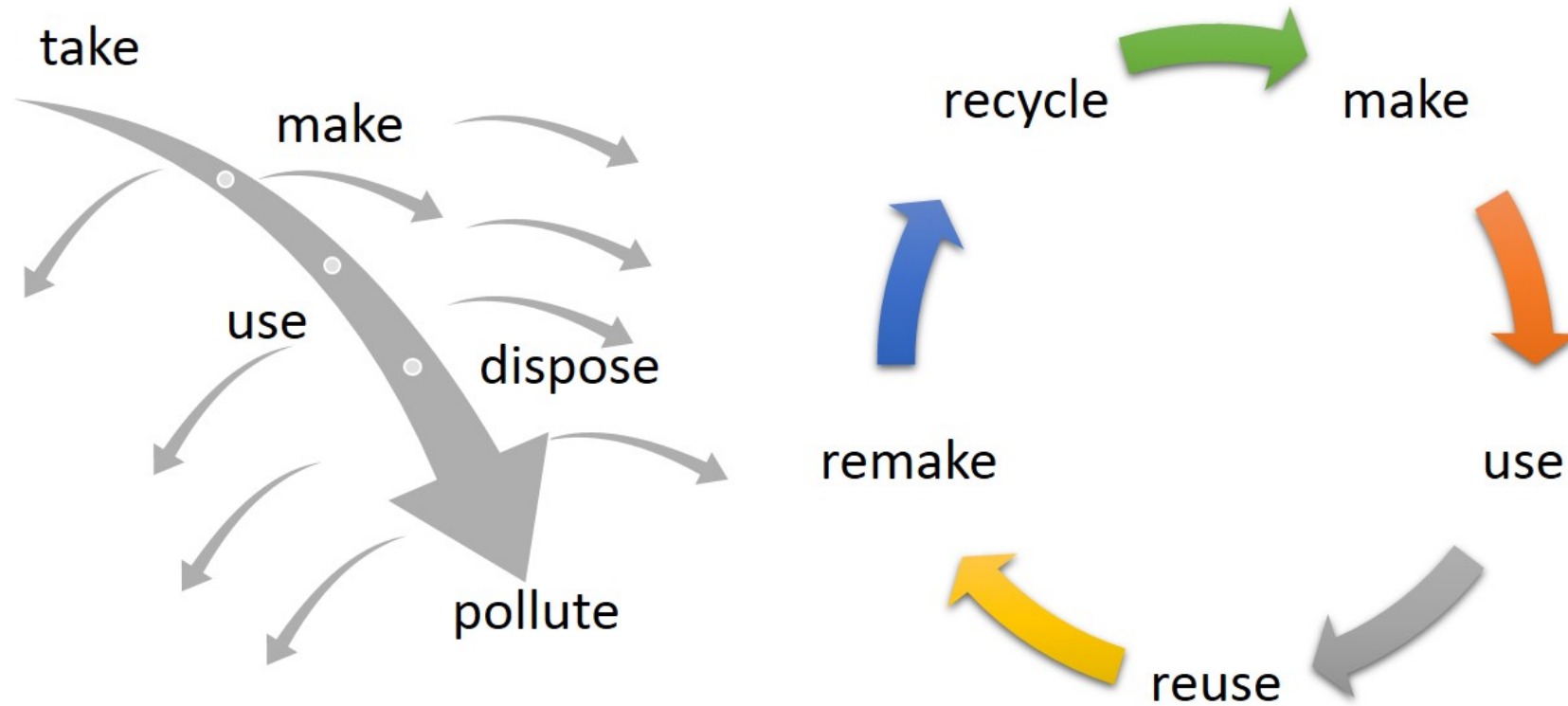




# Sales Contracts and the Circular Economy

Dr. K.M. Kryla-Cudna, MJur (Oxon)

# Circular economy



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# Durability

- Motivating producers to invest more in the longer lifespan of their products
- Preventing planned obsolescence



# The role of repair

- Repair as a primary remedy
- Price reduction



# Repair in commercial contracts – domestic solutions

- EU Directive on consumer sales – repair and replacement as the primary remedies
- The same regime for consumer and commercial sales in a number of EU Member States
- § 439 I BGB: ‘[a]s supplementary performance, the buyer may, **at his option**, demand the removal of the defect or supply a thing free from defects.’
- Art. 7:21: replacement can be claimed ‘unless the lack of conformity is **too minor** to justify it’



# Repair in commercial contracts – the CISG

- Repair – available unless unreasonable (Art. 46(3) CISG)
- Replacement – available only if the breach is **fundamental** (Art. 46(2) CISG)
- Avoidance (rescission) – available only if the breach is **fundamental** (Art. 49(1) CISG)
- Damages in lieu of the entire performance – available only if the breach is **fundamental**

Thus, **if the breach is not fundamental**, only: repair, price reduction, complementary damages = **the buyer must keep the goods**

# Commercial vs consumer sales

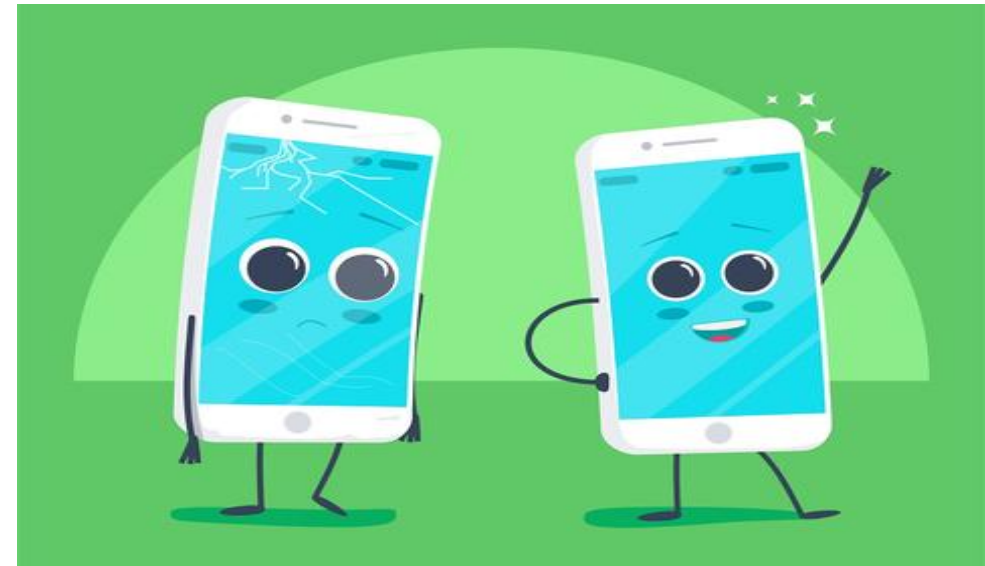
➤ **Commercial contracts** – the goods must serve the commercial purpose for which they were purchased, they **do not need to be flawless**

➤ **Consumer contracts** – goods purchased to obtain a subjective benefit, they normally **must be flawless**



# Refurbishment

- Replacement with a refurbished good
- Questioned in case law (consumer sales):
  - Denmark: the consumer is entitled to receive goods of the same value
  - The Netherlands: following the decision of the CJEU in *Quelle* the trader should bear all consequences of the breach






# Further research questions

- The role of the principle of good faith in the process of electing a remedy
- Sustainability values vs the theoretical foundations of contract law





From «Green bond principles» to  
«green bond covenants»: the role of  
transnational contract law for the  
sustainable finance agenda

Federica Agostini





JAGIELLONIAN UNIVERSITY  
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# **Eco-reasonableness. Possibility of incorporating green principles into general private law clauses**

Dr Katarzyna Południak-Gierz

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16th October 2020

The Future of the Commercial Contract in Scholarship and Law Reform

This article is a part of the research within the project Homo consumens, Homo ecologicus - ecological efficiency test of the new directive on certain aspects concerning contracts for the sale of goods financed by Narodowe Centrum Nauki, (NCN) [National Science Centre] in Kraków, Poland, with the number of 2019/34/A/HS5/00124.



## 1. Eco-principles and the general clauses

### Choice of the research subject

Why criterion of reasonableness and not good faith, contractual fairness, professional diligence, principle of social coexistence or good manners or the impossibility of performance?

### ...and the plan of the presentation

- interplay between criterion of (eco)reasonableness and legitimate expectations standard, areas of interest
- specific manners in which the eco-reasonableness criterion may influence the content of the contract, efficiency comparison
- general pros and cons of using a general private law clause as an instrument for implementation of green principles
- limitations of the model of incorporation of ecological concerns into general contract law clauses



## 2. Decoding the content of the contract under the legitimate expectation standard of the eco-reasonableness benchmark

**Incorporation**





### **3. Eco-reasonableness**

#### **New approach to objectification in dir. 2019/771**

The objectively assessed standard of reasonableness should incorporate:

- 1) subjective requirements for conformity
- 2) objective requirements for conformity (in addition)

And the new objective in Rec. 32:

achieving more sustainable consumption patterns and a circular economy?

Link: the legitimate expectations of the consumer should encompass certain durability of the good, understood as the ability of the good to maintain its required functions and performance through normal use

Point of reference:

- product-specific Union legislation (of the highest importance)
- circumstances of the case, including: pre-contractual information, public statements of entities constituting a link in the chain of transactions, need for reasonable maintenance of the good, price of the good, intensity and frequency of consumer's use, etc.



## The incorporation of green principles into the reasonable (legitimate) expectations framework:

- the principle of ecological effectiveness shapes the contract interpretation because of the change of axiology of EU (consumer) law
- beginnings of the principle of ecological effectiveness – supplementary mechanisms necessary
  - the appearances attributable to the seller
  - the empirical context
  - the normative framework



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**Ecologically Effective Mower**



## **Encouraged expectations based on objective and standardized or subjective and individual elements Appearances attributable to the seller**

Encouraged expectations based on objective and standardized elements:

3. pre-contractual information

4. public statement made by or on behalf of the seller, or other persons in previous links of the chain of transactions, including the producer (esp., advertising or/and labelling)

Lack of these characteristics => inconformity of the good

Encouraged expectations based on subjective and individual elements

3. suggestions, exploitation of biases, passive attitude of the consumer etc.

Lack of these characteristics => good in conformity with the contract





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## Empirical basis

Starting point: Dieselgate model

Point of reference for expectations: what is typical on the market

Outcome: against ecological efficiency

3. negative patterns petrified

4. lack of incentive for innovation

## Mixed basis

The good in order to be in accordance with the contract needs to have characteristics that are required by law, having in mind objective technological limitations.

Point of reference for expectations: what is possible on the market

Outcome: against ecological efficiency

3. lack of incentive for innovation



Polska strategia wschodnia – jak być powinno?

Robert Chwała, s. 12

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Jan Piński, s. 8

Krótką przygodą z Schengen

Jakub Wasiński, s. 15

Twoje dane są na sprzedaż

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A+++

A++

A+

A

B

C

D

A++

## Normative basis

Legal standards:

3.eco-standard is shaped by law which is directly binding for the private law actors

Scenario 1: not determined in the contract

Scenario 2: set aside by the wording of the contract (qualified consensus)

Outcome: Contract valid, eco-standard binding nevertheless

Extra-legal standards:

3.eco-standard is shaped by law which is directly binding for the private law actors

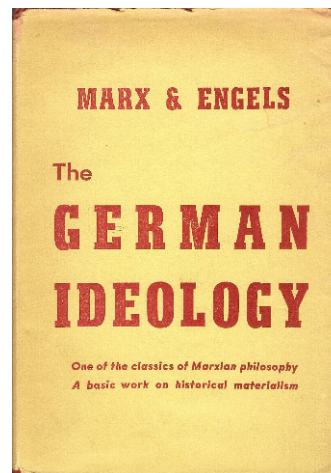
Scenario 1: the code of conduct within the environment in which the transaction is taking place

Scenario 2: the design of this transaction environment



## 4. General private law clauses as an instrument for implementation of green principles

- flexibility
  - general clauses can undergo changes without national legislator's intervention
  - once the clause is applied – it is possible to adjust the level of e.g. ecological protection to the peculiarities of the case at hand
- implementing ideology
  - Individuals' perspective: decrease of certainty of law, ill-suited in B2C-like contexts
  - Systematic issues: publicization of the private law, differentiation across member states





## 5. Conclusions

### Limitations of eco-reasonableness

Illusion of protection

Contract law as an instrument for protection of these values which contradict the interests of both parties to the contract.

Searching for solution:

- the eco-reasonableness criterion, though possibly may form part of the consumer legitimate expectations standard, shall be highly ineffective if its application brings about an effect that is not desired by the either of the party
- beneficial to the weaker party => weak protection
- beneficial for the business => possibly a viable option

# Overview

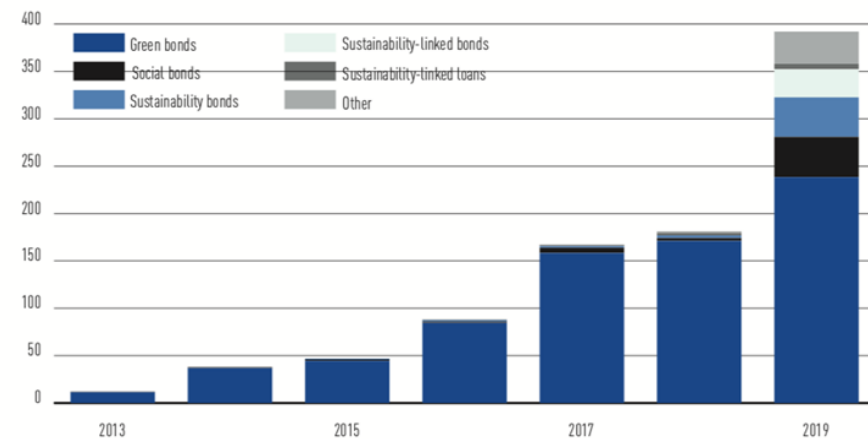


- Green bonds: definition
- Green bond Governance: regulatory initiatives and challenges
- Green Bond market practice: selected documentation
- The role of contract law
- The potential of standard «green clauses»

## What green bonds are

- Sustainable finance debate: policies and financial instruments in line with environmental, social and governance (ESG) objectives
- Debt securities delivering environmental («green») benefits
- Parallel labels: «social», «sustainable», «blue», «transition» bonds
- Meaning of «Green»?

**Sustainable debt surpassed \$350bn in 2019**  
Annual issuance by instrument type, \$bn



Source: Climate Bonds Initiative, S&P Global Ratings

## Regulatory initiatives on green bonds

- Definitions of «green»: activities and practices

Public regulation

Few examples:  
China, India

Activities: Eligible  
projects, practices (eg  
reporting  
requirements)

Market-driven non-binding  
standards

E.g. Green Bond Principles, ICMA  
(2018)

«use of proceeds»: projects,  
practices (reporting,  
certification, earmarking  
requirements)

Hybrid initiatives

EU Green Bond standard  
(expected in 2021)

voluntary but in line with a  
binding «taxonomy» of  
sustainable activities  
(Regulation (EU) 2020/852)

Green bonds:  
definition

Green Bonds  
Governance

Market  
Practice

The role of contract  
law

The potential of  
standard  
clauses

# Governance challenges

- Heavy reliance on **soft law**:

- Inconsistent market practices (green bonds in the oil sector? To build parking garages?)
- No public enforcement mechanisms against issuers

Additional **risks** for investors:

- «Greenwashing»
- Abuses on the use of proceeds





Green bonds:  
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# Main standard-setters on «greenness»

## ISSUERS (and INVESTORS)

Core BOND  
DOCUMENTATION (eg  
PROSPECTUSES)

Green bond  
«frameworks» (repe  
ated issuances)

- Vague/Flexible on use of proceeds
- Inconsistent disclosure/management practices
- No enforcement mechanisms for investors

(analysis of selected green bond documentation: eg *ENERGA Finance*, *Repsol*, *Koninklijke Philips*, *Orsted A/S*, *Toyota*)

## THIRD-PARTY SERVICE PROVIDERS

Opinions, verifications, certifications, ratings

Divergent methodologies to assess  
«greenness»

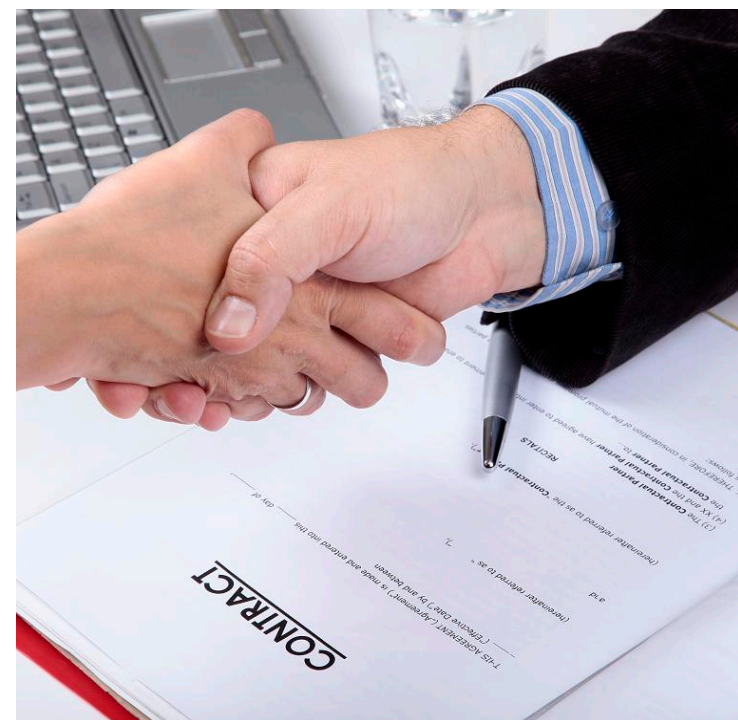
(eg Climate Bonds' Standard Certification Scheme, Sustainalytics, Vigeo Eiris)

## Overcoming the *impasse*: the role of contract law

- Bond documentation as the key vehicle to shape environmental standards of the issuance

### Added value:

- conflict of interest and risk-mitigation tool
- The quasi-regulatory function of bond clauses: binding, expanding investors' enforcement powers:
  - 1) omissions/misstatements on the use of proceeds
  - 2) inaccurate/defective reporting
- In line with bondholders' engagement strategies: «voice»



# The role of transnational contract law

- Shortcomings of ad-hoc negotiation of »green« covenants:  
coordination costs, investors' lack of bargaining power



The role of trade associations: **Standard clauses** (see ISDA's work on derivatives)

- «Greenness» as a **covenant**: use of proceeds, external review, regular reporting, earmarking.

Right to damages

- «Greenness» as an **Event of Default**: damages, acceleration

- Advantages:

- Harmonisation of market practices
- Transparency - Credibility: Market demand
- Legal risk/accountability - incentive for issuers' commitment



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of Glasgow

Thank you for your attention!

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**WORLD  
CHANGERS  
WELCOME**

