

# Good Faith and Treaty Interpretation

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The newly concluded Trade and Cooperation Agreement between the EU and UK has limited provisions concerning taxation, but interesting provisions relevant to interpretation of treaties including good faith. The Agreement does not seek to replicate many of the rights which UK citizens and businesses had under EU law. There is no general non-discrimination provision. Double tax treaties are expressly excluded from most favoured nation treatment (Article SERVIN.2.4: 3(a)). Nonetheless, some familiar elements of EU law in the Agreement will likely have an effect on tax such as free movement of capital (Title IV). Social security has a measure of co-ordination based on EU law principles (Heading Four: Title I). Part Two Title IX Chapter 5 enacts BEPS prohibitions on harmful tax competition. Administrative cooperation in combating VAT fraud and mutual assistance in recovering tax claims follows existing EU law instruments.

What immediately caught my eye however, are general provisions and principles of treaty interpretation in Part One that are so exceptional, I set them out in full:

## Article COMPROV.3: Good faith

1. The Parties shall, in full mutual respect and good faith, assist each other in carrying out tasks that flow from this Agreement and any supplementing agreement.
2. They shall take all appropriate measures, whether general or particular, to ensure the fulfilment of the obligations arising from this Agreement and from any supplementing agreement, and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement or any supplementing agreement.

## Article COMPROV.13: Public international law

1. The provisions of this Agreement and any supplementing agreement shall be interpreted in good faith in accordance with their ordinary meaning in their context and in light of the object and purpose of the agreement in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969.
2. For greater certainty, neither this Agreement nor any supplementing agreement establishes an obligation to interpret their provisions in accordance with the domestic law of either Party.
3. For greater certainty, an interpretation of this Agreement or any supplementing agreement given by the courts of either Party shall not be binding on the courts of the other Party.

Even a cursory review of these express stipulations to give effect and to interpret the Agreement in good faith reveals a restatement of the customary international law of treaties as codified in Articles 26 and 27 of the Vienna Convention on the Law of Treaties (Article COMPROV.3 ( Good faith)). Article COMPROV.13 (Public international law) virtually parrots Article 31(1) of the Vienna Convention on treaty interpretation. Article COMPROV.13 (2) asserts the principle of autonomous treaty meaning confirmed in the UK on many occasions by the highest courts. Lord Steyn said in *R v Secretary of State for the Home Department, ex p Adan* [2001] 2 WLR 143 at 154E it is the "very alphabet of customary international law" and must be determined "untrammelled by notions of its national legal culture".

Similarly, the absence of an international doctrine of binding precedent enshrined in article 59 of the Statute of the International Court of Justice is reproduced in Article COMPROV.13 (2). Judicial decisions are, of course, a source of international law (see Article 38(1)(d) of the ICJ Statute).

While the UK government expressed a desire for a "Canada style" agreement, neither the Comprehensive and Economic Trade Agreement between the EU and Canada nor the related Joint Interpretative Instrument contain such provisions.

## Good faith - an organizing principle

A recent reminder of the application of the good faith doctrine is to be found in the Supreme Court of Canada decision rendered on 18 December 2020 in *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45. The case concerned an alleged breach of contract in terminating an agreement which contained a termination provision, by knowingly misleading the other party that it would not be terminated. The court ruled that the termination was not an honest performance of the contract in breach of the good faith principle.

Justice Kasirer at [2], confirmed 'a general organizing principle of good faith, which means that "parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily". This organizing principle, he explained, "is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations". The organizing principle of good faith manifests itself through "existing doctrines" addressing "the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance'.

## Universal minimum standard

Justice Brown at [130], described the principle as "a universally applicable minimum standard, all contracts must be performed honestly."

The decision affirms the masterful analysis of good faith by the Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71, where the court traced the doctrine from its Roman Law roots and early acceptance in English contract law and civil law, as exemplified by the Quebec Civil Code.

In the *Callow* case, a majority of judges included in their analysis the civil law doctrine of abuse of rights. Justice Brown and two other justices considered that it was not helpful to include references to the civil law in a case concerning the common law (in Ontario). Whatever the merits of that view, in the international context, a convergence of of common and civil law principles supports the existence and content of customary international law or general principles of law recognised by civilised nations (ICJ Statute, Article 38(1)(c)) and in the Vienna Convention, since treaties are simply a form of contract between states.

## Explicit good faith obligations

Why then is there explicit reference to a long and well established principle of international law, in the final Agreement, when it is not in the EU Commission's negotiating position set out in their draft of 18 March 2020? Readers may speculate, in light of events relating to the earlier treaty between the parties:

- On 17 October 2019, the EU and UK concluded a withdrawal agreement pursuant to Article 50 of the TEU which entered into force on 1 February 2020.
- On 9 September 2020, the UK government tabled a Bill in Parliament (the Internal Market Bill) which, the government acknowledged would violate the protocol to the withdrawal agreement on Ireland and Northern Ireland and international law.
- On 1 October 2020 the European Commission formally initiated infringement proceedings against the UK under the Withdrawal Agreement dispute resolution provisions.

References to basic legal principle reinforce and are a reminder of, the international rules-based order that has framed modern international relations, particularly in a time when that order is under threat. A rigorous approach to compliance with international law norms can be expected in EU-UK relations.[1]

## Tax treaties

The Trade and Cooperation Agreement provides a framework for all future agreements between the UK and EU and between the UK and EU Member States which, by default, will be governed by these explicit provisions (Article COMPROV.2). This includes, in principle, all future UK tax treaties with Member States.

Good faith as formulated by the Supreme Court of Canada has important implications for tax treaties: Treaty override by domestic legislation clearly infringes the duty of honest performance. Domestic legislation that fails to give effect to a treaty is likewise an infringement. That duty also requires a high standard in the interpretation and application of treaties, and a reasonable and purposive interpretation over a excessively literal application. The duty to exercise discretionary powers in good faith imposes a high standard on the conduct of mutual agreement procedures and, following the *Callow* case, honesty in exercising termination provisions.

[1] The UK legislation to implement the Agreement in the (European Union (Future Relations) Act 2020 given Royal Assent on 29 December 2020) refers to Comprov 13 (public international law) in section 30 as follows:

"**Interpretation of agreements:** A court or tribunal must have regard to Article COMPROV.13 of the Trade and Cooperation Agreement when interpreting that agreement or any supplementing agreement."

COMPROV. 3 (Good Faith) is not mentioned. Lawyers may wish to compare the general implementing language in s. 29, with the general tax treaty implementing language in TIOPA 2010 s. 6, discussed in Schwarz on Tax Treaties, 5<sup>th</sup> Ed, Chapter 4, para 10-250. Also contrast s. 29 with the implementing language in s. 22(1) (Administrative co-operation on VAT and mutual assistance on tax debts).