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THE APPLICATION OF THE PRINCIPLE OF GOOD FAITH ON ADMINISTRATIVE CONTRACTS FROM THE TURKISH LAW PERSPECTIVE

I. Introduction

The principle of good faith has been recognized as a general principle in contract law in most of the modern legal systems including German, French and American's. Black's Law Dictionary defines good faith as "*a state of mind consisting in* (*1*) *honesty in belief or purpose*, (*2*) *faithfulness to one's duty or obligation*. (*3*) *observance of reasonable commercial standards of fair dealing in a given trade or business*, *or* (*4*) *absence of intent to defraud or to seek unconscionable advantage*.".[1] Good faith is usually defined by these notions; as unconscionability, fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, decent behaviour, a common ethical sense, a spirit of solidarity, community standards of fairness, honesty in fact.[2]

Pacta sund servanda is regarded as the main principle that governing contracts since the Roman times. *Pacta sunt servanda* requires that the parties to a contract must keep their words and perform the contract as agreed before. However, sometimes, changing in the circumstances, which are not attributable to one of the parties, may make performance of the contracts as promised very difficult for one party. In these circumstances, it is not honest to expect this party to perform the contract as agreed. Due to the *clausula rebus sic stantibus*, changing of the circumstances amends the provisions of contract. Another principle governing the contracts in Roman law is freedom of contract. Freedom of contract requires parties to enter into contract and lay down the conditions of contract freely. Parties to a contract can determine the conditions of the contract freely as long as they acted in good faith.

The principle of good faith requires parties to act in good faith, which means, in fair and decent manner by taking into account the other party's expectations. Good faith restrains the abovementioned principles because under some circumstances, the contract may be changed, modified, or even terminated if the changing circumstances obviously disturb the balance between the parties. Furthermore, where a party is acting contrary to good

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[1] Garner, Brayn A. (Editor in Chief): *Black's Law Dictionary.* 8th ed. Thomson West. St. Paul. 2004. 713.

[2] Keily, Troy: Good Faith and the Vienna Convention on Contracts for the International Sale of Goods [CISG]. *Vindobona Journal of Commercial Law and Arbitration Issue*. 3 (1999) 1, 15–40.

faith, this party may have to pay the losses of the aggrieved party, which caused his behaviour.[3]

Public entities establish legal relationships with private law persons and other public law persons to conduct public services and for the public interest. For this, while fulfilling their duties and using their powers, they take unilateral decisions and make transactions.[4] Sometimes, the public entities conclude contracts with private law persons to acquire necessary goods or services in order to run public administration and public services. At first sight, these contracts are all called as administrative contracts. However, regarding some legal systems, including the Turkish one, one should distinguish the concept of *administrative contracts* from the concept of *administration's contracts*. In these legal systems, all the contracts, whose one of the parties is a public entity, cannot be regarded as *administrative contracts* automatically. There are some criteria to qualify a contract as *an administrative contract*. In *administrative contracts*, the public entity holds a favourable position than the other party and hence, it is usually deemed that these contracts are subject to different rules, namely administration law, rather than the private contract law rules. On the other hand, some contracts of public entities are concluded as a result of their capacity to make legal transactions. These contracts, which are not qualified as *administrative contracts*, are named as *administration's contracts*. These contracts are purely governed by private law and the public entity is also subject to private law rules and principles. Moreover, these contracts to subject to civil judiciary whereas *administrative contracts* are subject to judicial review of administrative courts.[5]

This paper, primarily, deals with the question whether a private law concept, the principle of good faith, applies to government contracts as a general principle from a comparative law perspective. In this paper, after presenting the private law principle of good faith and general information about administrative contracts in comparative law, a discussion will be made whether good faith can be regarded as a general principle on administrative contracts with respect to Turkish law. Finally, two public law legal institutions will be mentioned demonstrating the role of the principle of good faith in administrative contracts.

II. Good faith in general

II.1. Meaning of good faith

Good faith is originally one of basic principles of private law. Good faith and fair dealing represents the modern expression of the old Latin term *bonus pater familias* or even *bona fides*.[6]

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[3] It is possible to come across two kinds of good faith principles in law. First, subjective good faith, which has to do with knowledge and provides a person to acquire ownership even if the property has been transferred by a non-owner. Second, objective good faith constituting a standard of conduct which the behaviour of a party has to conform to, and by which it may be judged. Apaydin, Eylem: *The Principle of Good Faith in Contracts*. Leges, İstanbul, 2014. 1. The focus of this paper is objective good faith.

[4] Günday, Metin: *İdare Hukuku*. İmaj, Ankara, 2015. 183.

[5] Günday, 2015. 183–184.

[6] The Association of European Administrative Judges (AEAJ): Principles of Good Faith and Fair Dealing and Legitimate Expectations in tax proceedings. https://www.aeaj.org/page/Principles-of-Good-Faith-and-Fair-Dealing-and-Legitimate-Expectations-in-tax-proceedings. (10.09.2018.)

The sources of good faith go back to Roman law.[7] The latin maxims, *venire contra factum proprium*, *fides servanda est*, *bonae fidei negotium*, *ex iniuria ius non oritur*, *fraus et ius nunquam cohabitant*, *clausula rebus sic stantibus*, *ex aequo et bono*, *bona fidem in contractibus considerari aequum est*, *nemo auditur propriam turpitudinem allegans*, explains the general notion of good faith.

Good faith, deemed as a necessity in contractual relations, is a basic element, which is widely accepted and incorporated with many international agreements, besides the national legislations. The widest concept of good faith requires parties to act in good faith in negotiations, performance of contract, exercising of rights and breach of contract, moreover, in the interpretation of contracts.[8] In addition to this concept, good faith has been used as a basis of many doctrines on transformation of contract as '*doctrine of imprevision*' in French law, '*doctrine of foundation of transaction*' in German law and '*clausula rebus sic stantibus*' in other civil law countries. '*Clausula rebus sic stantibus*' is a doctrine which has been internationally recognized as an objective rule of law of nations.[9] Where there has been a fundamental change of circumstances which has occurred and which was not foreseen by the parties at the time of concluding their agreement, it is regarded to force the parties to obey the clauses of the contract as contrary to good faith.[10] The principle of good faith is also the source for pre-contractual liability. For instance, *Jhering*'s theory of '*culpa in contrahendo*' provides that contracting parties are under a duty to negotiate in good faith.[11]

II.2. Good faith in modern legal systems

There is no general requirement of good faith in English contract law as understood in civil law systems. *Goode* states that "*London is thought that is the world's leading financial centre*, *the predictability of the legal outcome of a case is more important than absolute justice. It is necessary in a commercial setting that businessmen at least should know where they stand*."[12] *Bridge* states, "good faith and fair dealing is an imperfect translation of an ethical standard into legal ideology and legal rules" and, "good faith is an invitation to judges to abandon the duty of legally reasoned decisions and to produce an unanalytical incantation of personal values."[13]

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[7] See for details Schermaier, Martin Josef: Bona Fides in Roman Contract Law. In: Reinhard Zimmermann – Simon Whittaker (eds): *Good Faith in European Contract Law*. Cambridge University Press, Cambridge, 2000.

[8] For good faith in contract performance and enforcement see Speidel, Richard: The Duty of Good Faith in Contract Performance and Enforcement. *Journal of Legal Education* 46 (1996) 4, 537.

[9] Maniruzzaman, A. F. M.: State Contracts with Aliens the Question of Unilateral Change by the State in Contemporary International Law. *Journal of International Arbitration*. 9 (1992) 4, 141–171. 158.

[10] Apaydin, 2014. 8.

[11] Public international law recognises it and United Nations Charter specifically refers to it. Similarly, it is regulated in UNIDROIT Art. 1.7, 2.15/2,3; CISG Art. 7(1); PECL Art. 2:301. Apaydin, 2014. 4.

[12] Goode, Roy: The Concept of "Good Faith" in English Law. Centro di studi e ricerche di diritto comparato e straniero diretto da M.J. Bonell Saggi, conferenze e seminari 2. w3.uniroma1.it/idc/centro/publications/02goode.htm-20k (10.09.2004.)

[13] Bridge, Michael: Does Anglo-Canadian Law Need a Doctrine of Good Faith. *Canadian Journal of Business*, 9 (1984) 385–425; 412.

A debate is going on whether English law should adopt a general good faith requirement in contract law. This debate has been heated recently. After the EC Directives in consumer law, inevitably, the English law faced the general requirement of the good faith in contracts.[14] This made some unhappy. Say, *Teubner* expresses his thoughts saying that "good faith is irritating British law".[15]

In *Director-General of Fair Trading* (*DGFT*) *v. First National Bank plc*[16] the Court of Appeal held that the assessment of unfairness was to be done purely by reference to the legislative scheme. This decision confirms that English law at present seems to be developing a good faith requirement.[17] In *Yam Seng Pte Ltd v International Trade Corporation Ltd*[18] Justice *Leggatt* expresses that: "*the traditional English hostility towards a doctrine of good faith in the performance of contracts*, *to the extent that it still persists*, *is misplaced*".[19] In *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd*[20] the court made clear that the obligation to act in good faith under a particular provision in a contract did not extend to all conduct under the contract and "if the parties want to impose a duty they must do so expressly."[21] In *MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt* [22] Lord Justice *Moore-Bic*k stated that: "recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences". The judgment makes it clear that there is still no general organising principle of good faith in English law.[23]

Contrary to English law, American law has adopted the principle of good faith as a general principle governing the contracts. The Uniform Commercial Code Section 1–203 of the Code provides that "every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Uniform Commercial Code has two definitions of good faith that apply to contracts for the sale of goods: One general definition; in Section 1–201(19), "'*Good Faith*' *means honesty in fact in the conduct or transaction concerned*." Another one; the special definition, in Section 2–103, "'*Good Faith*' *... means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade*." Section 205 of the Restatement (Second) of Contracts provides that every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

[14] Brownsword, Roger: Good Faith in Contracts Revisited. *Current Legal Problems*, 49 (1996) 2 111–157. 112

[15] Teubner, Gunther: Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences. *The Modern Law* Review, 61 (1998) 11. 11.

[16] Director-General of Fair Trading (DGFT) v. First National Bank plc. *The Weekly Law Reports.W.L.R*. 2. 2000. 1353.

[17] Twigg-Flesner, Christian: A Good Faith Requirement for English Contract Law? *Nottingham Law Journal* 9 (2000) 1, 80. 84. http://www.nls.ntu.ac.uk/clr/PDF/nlj9_1/080.pdf (10.09.2018.)

[18] Yam Seng Pte Ltd v International Trade Corporation Ltd. *High Court of England and Wales Decisions* (*Queen's Bench Division*) *EWHC*. (*QB*). 2013. 111.

[19] Mahmud, Sana: Is There a General Principle of Good Faith under English Law? 2016–2017. https://www.fenwickelliott.com/research-insight/annual-review/2016/principle-good-faith-english-law. (10.09.2018.)

[20] Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd. *Court of Appeal of England and Wales Decisions* (*Civil Division*) *EWCA Civ*. 2013. 200.

[21] Mahmud, 2016–2017.

[22] MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt. *Court of Appeal of England and Wales Decisions* (*Civil Division*) *EWCA Civ*. 2016. 789.

[23] Mahmud, 2016–2017.

The principle of good faith is a general principle in German Law. It is regulated in the sections 157 and 242 of the German Civil Code, the *Burgerliches Gesetzbuch* (BGB), which provide that: "*Contracts shall be interpreted according to the requirements of good faith*, *ordinary usage being taken into consideration*." (s.157) "The debtor is bound to perform according to the requirements of good faith, ordinary usage being taken into consideration." (s.242). This provision has been called a "king" in the Civil Code. It has been used to provide a moralisation of the entire German law.[24] Good faith serves three basic purposes in German law; to particularize an incomplete contractual obligation by imposition of secondary duties, to serve as a general internal limitation of legal rights in case of their illegitimate exercise, and to be used as a tool to interfere in contractual relations in order to avoid grave injustice.[25]

The modern version of the '*clausula rebus sic stantibus*', *Oertmann*'s theory of '*the foundation of the transactions*' based on BGB 242 owes its origin to this corrective function of good faith.[26] According to this theory, the transaction can be modified or cancelled if its foundation has changed or disappeared, if the conditions that form the basis of the parties contractual relationship cease to exist or the party which would be detrimentally affected by the change in circumstances.[27]

The German concept of good faith includes the negotiation stage of the transaction. Under German law, a party may be liable under the doctrine of *culpa in contrahendo*.[28]

Article 1134 of the French Civil Code provides that a contract should be performed in good faith. Groves states that concept of good faith or '*bonne foi*' in French law has three main functions.[29] Firstly, good faith is the legal basis for the rules relating to the French doctrine of abuse of rights. Secondly, the courts are developing different types of duties or obligations based on the general obligation of good faith, that are specific to certain categories of contracts. Thirdly, good faith has been applied to contracts governed by public law.[30]

Italian law contains a general clause on good faith in article 1175 Codice Civile, and specific clauses on good faith in negotiations (art. 1337) and in performance (art. 1375). This results in duties of disclosure, of cooperation, of protection of the other party's rights and things. These duties are stem from the general principle of good faith.[31]

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[24] Lando, Ole: Some Features of the Law of Contract in the Third Millennium http://www.scandinavianlaw.se/pdf/40-13.pdf (10.09.2018.) 395.

[25] Ebke, Werner F – Steinhauer, Bettina M: The Doctrine of Good Faith in German Contract Law. In: Jack Beatson – Daniel Friedmann (eds): *Good Faith and Fault in Contract Law*. Clarendon Press, Oxford, 1995. 171.

[26] Whittaker, Simon – Zimmermann, Reinhard: Good Faith in European Contract Law: Surveying The Legal Landscape. In: Jack Beatson – Daniel Friedmann (eds): *Good Faith and Fault in Contract Law*. Clarendon Press, Oxford, 1995. 25.

[27] Ebke–Steinhauer, 1995. 180.

[28] Apaydin, 2014. 21.

[29] Groves, Kelda: The Doctrine of Good Faith in Four Legal Systems. *Construction Law Journal*, 15 (1999) 4, 265–287.

[30] Groves, 1999. 265–287.

[31] Cordero, Giuditta: Moss Lectures on Comparative Law of Contracts. https://folk.uio.no/giudittm/PCL_Vol15_3%5B1%5D.pdf (10.09.2018.)

III. Administrative contracts

III.1. Meaning of administrative contracts

There is no doubt that contract is originally a private law concept. On the other hand, it is obvious that public administration must resort to contractual arrangements in order to acquire necessary goods or services. Thus, contract constitutes a form of administrative action, from which the parties' obligations and rights arise.[32] At this point, *Langrod* states that

> "*all obligations originate in the area of private law and are* "*transposed*" *or* "*loaned*" *to the administrative sphere*, *either unchanged or with specific modifications required by the particular needs of public administration.*"[33]

It is well expected that the concept of contract is adopted with necessary changes and modifications by administrative law. In a rough definition, administrative contracts are the contracts where at least one of the parties is a public entity. As a result of the material distinction between *administrative contracts* and *administration's contracts*, the doctrine developed some criteria to differentiate *administrative contracts* from *administration's contracts*.

> "*In order for a contract to be considered as an* "*administrative*" *one*, *it must fulfil the following conditions*: *1. One of the parties thereto must be a public authority. 2. The administrative judicial authorities must have jurisdiction to look into such contracts. 3. It must be related to a public service or be classified by the law as an administrative contract. 4. It must include an* "*onerous*" *clause or condition from the public law*."[34]

These are the generally accepted criteria for a contract to be regarded as administrative contracts.

We, first, witness the concept of administrative contracts in French law.

> "*The French administration can enter into both administrative contracts* (*contrats administratifs*) *and private law contracts* (*contrats de droit privé*). *The two basic criteria for the former are that the contract relates to a public service and that the contract reserves exceptional powers to the administration* (*it contains clauses exorbitantes du droit commun*). *Either criterion may suffice to make a contract* '*administrative*' *in character*."[35]

In France, administrative contracts are created either directly by legislation or by the administrative court (*Conseil d'Etat*) taking into consideration the subject matter or the object in each case.[36] In French law, the administration can conclude administrative and private law contracts.

> "*The French juridical literature argues that*, *unlike public law contracts*, *private law contracts of the administration have two distinctive features*: *on the one*

[32] Langrod, Georges: Administrative Contracts: A Comparative Study. *The American Journal of Comparative Law*, 4 (1955) 3, 325–364. 326.

[33] Langrod, 1955. 327.

[34] Seif, Marie Grace: The Administrative Contract. https://www.tamimi.com/law-update-articles/the-administrative-contract/ (10.09.2018.)

[35] Bell, John – Boyron, Sophie – Whittaker,, Simon: *Principles of French Law*. Oxford University Press, Oxford, 2008. 195–196.

[36] Langrod, 1955. 330.

> *hand, they are not related to a public service and thus don't tackle public interest, and, on the other hand, they do not include exorbitant terms, and the administration acts like an owner.*"[37]

Hence in French law, public procurement contracts on the construction works such as roads, bridges, dams and buildings are categorically deemed as administrative contracts and are subject to administrative law.

French administrative law has inspired many foreign systems. Emerging from French system, we observe a kind of dual legal system in European continent.[38] It is evident that administrative law has developed a parallel system to private law in European legal systems. As a result of this approach, we observe a separate courts system, which have been dealing with either administrative disputes or other legal disputes. In many European countries, administrative courts establish a separate judiciary for instance, France, Germany, Turkey, and Hungary etc.

The French administration law has a great influence on the Turkish administration law too.

> "*At the time of late Ottoman Empire and early Turkish Republic era, Turkish administrative law was formed by the penetration of continental French administrative law institutions, concepts, codes and doctrine. Turkish state structure and administrative judicial system was highly affected by the French system. Even today, Turkish administrative law keeps its tie with French law. The French layer of Turkish administrative law includes the Conseil d'Etat, the Cour des Comptes, the Tribunal des Conflits, some financial organisations, the system of autonomous provincial and local administration and administrative tutelage*."[39]

In Turkey, there is a duality between judicial (law and criminal) courts and administrative courts like it is in France. Differently from ordinary courts, Turkish administrative courts deal only with the problem of legality of public administrations' acts and actions.

In the Turkish administration law, some contracts are directly qualified as administrative contract by an Act or a regulation. Where there is no such clarity,[40] there are three main criteria to qualify a contract as an administrative contract. Firstly, at least one of the parties to the contract must be a public entity. Indeed, if the other requirements are fulfilled, there is no reason to classify the contracts between two public entities as administrative contracts.[41] Secondly, subject of the contract must be about the conduct of a public service. Finally, the contract may give powers to the public entity which includes exorbitant terms and exceeds the boundaries of a private law contract. [42]

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[37] Pascariu, Liana: The Distinction of the Administrative Contract from other Types of Contracts. *The Annals of the* "*Ştefan cel Mare*" *University of Suceava. Fascicle of The Faculty of Economics and Public Administration*, 10, (2010) 408413; 408. On the page 409 of the paper, the author lists twelve criteria which identifies the nature of administrative contracts characteristics.

[38] Langrod, 1955. 344.

[39] Örücü, Esin: Conseil d'Etat: The French Layer of Turkish Administrative Law. *The International and Comparative Law Quarterly*, 49 (2000) 3, 679–700; 679.

[40] Örücü claims that the both the administrative courts and the Constitutional Court have always been eager to expand the definition of the term "administrative contracts." Örücü, 2000. 692.

[41] Gözübüyük, Şeref – Tan, Turgut: *İdare Hukuku Cilt I Genel Esaslar*. Turhan, Ankara, 2016. 484.

[42] Günday, 2015. 185–187. Gözler, Kemal – Kaplan, Gürsel: *İdare Hukuku Dersleri.* Ekin, Bursa, 2017. 456.

Administrative contracts grant some extraordinary rights to the public entity, which cannot be usually seen in a private law contract. For instance, the public entity has a right to control and direct the contractor. Moreover, the public entity has a right to impose a sanction on the contractor. Furthermore, the public entity has a right to make changes or modifications on the contract by its own unilateral decisions. Finally, the public entity may have a right to terminate the contract for the sake of public interest.[43]

Before explaining the types of administrative contracts, one must remember the discussion on the administrative contracts and administration's contracts distinction. On the latter, the public entities are on the equal terms with the other party contrary to the former.

Differing from the French Law, in Turkish law, public procurement contracts on the construction works such as roads, bridges, dams and buildings are categorically deemed as administration's contracts and hence, naturally private law contracts.[44] They are not regarded as administrative contracts. As a result of this understanding, such contracts are governed by private law, specifically Turkish Civil Code and Turkish Code of Obligations. Gözler and Kaplan lists of these contracts as: public procurement contracts, subscription contracts such for gas, electricity or water, build-operate-transfer contracts and public-private co-operation contracts for health institutions.[45] These contracts are listed among the Turkish government and public entities' private law contracts.

Administration's contracts have three different features than the administrative contracts. Firstly, they are not governed by the administrative law but by the private law. Second, where there is a dispute arising from these contracts, it is tried before the civil courts and not before the administrative courts. Finally, in administration's contracts, public entity and private law persons are on equal terms, whereas, in administrative contracts, public entities are given powers by the contracts containing exorbitant terms rather than the rules of private law.[46]

III.2. Types of administrative contracts

III.2.1. Public service concession agreements

Public service concession agreement is a contract concluded between a public legal entity and a private law person, which requires and entitles a private law person to establish and run for a determined period of a public service in return for the payment of the service users to their own profit and loss.[47] The *concessionaire* makes investment to run the public service given to himself, runs at his own risk, collects the fees from the users of this service and hands over the facilities to the government at the end of the contract term. Usually, the contract term lasts about fifty years. The public service is run on the terms defined by the contract and the charter drafted by the government's unilateral

[43] Gözler–Kaplan, 2017. 502–507. Gözübüyük–Tan, 2016. 536–539.
[44] Gözler–Kaplan, 2017. 456.
[45] Gözler–Kaplan, 2017. 456–457.
[46] Gözübüyük–Tan, 2016. 482–495.
[47] Gözler–Kaplan, 2017. 460.

will. The *concessionaire* either accepts the terms and conclude contract or refuses the concession.[48]

French doctrine defined the concession contract as having as main objective the assignment of the public service to the concessionaire. The object of the contract, however, can be the performing of operations required for that service, these being considered public works, "as they are performed on property meant to ensure the functioning of the public service".[49]

III.2.2. Public borrowing contracts

Public borrowing contracts means a contract concluded for taking loans from private law persons and issuing government securities in order to cover budget deficit, liquidity deficit and public debt refinancing and investment project financing; as well as issuing guaranties and counter-guaranties. This can be done by issuing bonds and stocks. These contracts are considered as administrative contracts as they give some rights and powers to the public entity, which can be deemed as exorbitant terms rather than the rules of private law. For instance, these bonds are non-sizable. Under some certain circumstances, these bonds and stock may function as money.[50]

III.2.3. Administrative Employment Contracts

Usually, the public legal entities conduct their duties with civil servants and there would not be a contract between the civil servants and the public entity. It is not a contractual relationship but a statutory one.

On the other hand, the public entity may need employing workers in order to run a public service. Hence, employment contracts are concluded between a public legal entity and a person in order to enable the public authority to employ a person as a contracted worker. If the regulation which empowers the public entity to make such contracts qualifies these contracts as administrative contracts, they are called as administrative employment contracts and subject to administrative law.

IV. Good faith in administrative contracts

IV.1. General overview

An administrative contract has at least two parties; a public entity and a private law person or persons. It is well established that the private law person has a duty to act in good faith

[48] Gözler–Kaplan, 2017. 460.

[49] In French doctrine, the classification of administrative contracts distinguishes between public works and public services concession contracts, indicating that the remuneration of the exploiting entrepreneur is ensured from the taxes received by the users of the work. Matei, Cătălina G.: Differences between the Concession Contract of Public Services and other Contracts. *Bulletin of the Transilvania University of Braşov Series VII*: *Social Sciences Law*, 6 (2013) 55, 158. http://webbut.unitbv.ro/BU2013/Series%20VII/BULETIN%20VII%20PDF/26%20Matei.pdf (10.09.2018.)

[50] Gözler–Kaplan, 2017. 462.

while using the rights or performing the undertakings as mentioned above. The discussion on the matter is focussed whether the public entity is under such duty when using the rights or performing the undertakings arising from a contract.

A strong assertion is witnessed in Shalev's article, which reads that the public authorities are also under the duty to act in good faith. She states that

> "*The duty of a public authority to act in good faith towards the citizen is unquestioned. The State, its authorities and its employees are trustees of the public*, *and as such they are obligated to treat the citizen fairly and in good faith*, *and to refrain from behaving arbitrarily towards him. The duty to act in good faith applies to the public authorities at all times*, *in all places*, *in every capacity in which it acts whether as sovereign or fiscus and in every sphere of its activity*, *whether private or public.*"[51]

"The public authority at all times acts under the uniform substantive law that governs its activity, and this law undoubtedly includes the authority's duty to act in good faith towards the citizen."[52]

The governments are also under the implied duties originated from the principle of good faith. The implied duties of the government include the implied duties not to hinder performance and to cooperate, the implied duty to provide adequate specifications, the implied duty to disclose superior knowledge, and the implied duty to terminate with reasonable discretion.[53] Some authors specifically states that every government contract contains implied duties, such as the duty to cooperate and the duty of good faith and fair dealing.[54]

IV.2. In comparative law

It is also observed that it is well accepted that the public authorities have to act in good faith in the EU law. Having explained that "t*he European Courts have developed a number of general principles of EU law which have their origin in private law*. *They have been developed in a public law context*." Hartkamp mentions the principle of good faith as a part of primary EU law.[55] In the EU law, the Council Directive 2014/24 on public procurement article 72 (Modification of contracts during their term) is an indication of good faith in this document. Similarly, Article 42 (Modification of contracts during their term) of the Directive 2014/23 on the award of concession contracts is an example of the good faith applications in the EU law. In this context, *Pascariu* suggests that the principles of freedom

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[51] Shalev, Gabriela: Good Faith in Public Law. *Israel Law Review*, 18 (1983) 127–134; 127.

[52] Shalev, 1983.131.

[53] Toomey, Daniel E. – Fisher, William B. – Curry, Laurie F.: Good Faith and Fair Dealing: The Well-Nigh Irrefragable Need for a New Standard in Public Contract Law. *Public Contract Law Journal*, 20 (1990) 1, 87–125. 109.

[54] Neeley, Steven A.: Can The Government Contract around the Duty of Good Faith and Fair Dealing? https://www.contractorsperspective.com/contract-administration/contracting-around-good-faith-and-fair-dealing/ (10.09.2018.)

[55] Hartkamp, Arthur S.: The General Principles of EU Law and Private Law: Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel. *Journal of Comparative and International Private Law*, 75 (2011) 2, 241–259; 255–256.

of contract and good faith should be adaptive in the administrative contract as general principles, composed of negotiated clauses and regulatory clauses, as long as the public interest prevails.[56]

A research group called as ReNEUAL issued 'Model Rules on EU Administrative Procedure' which includes a general duty of good faith for the public authorities in administrative contracts. Its fourth Book headed as Contracts states that "Section 2: EU contracts governed by EU law Subsection 1: Execution and performance IV–26 Good faith and fair dealing (1) The contracting parties have a duty to act in accordance with good faith and fair dealing when performing an obligation, exercising a right to performance, pursuing or disputing a remedy for non-performance, or when exercising a right to terminate an obligation or the contractual relationship. (2) The duty under paragraph (1) may not be excluded or limited by contract."[57]

While Groves lists the functions of good faith in French law, she states

> "*differing from other systems' concept of good faith, good faith has been applied to contract governed by public law, which applies to contracts between a private entity and a public body…. This is based on the ideal of the continuity of public service which justifies the variation of a contract to enable its continued performance, albeit under altered circumstances.*"[58]

Here, she mentions the *theory of imprevision*. It is clear that good faith applies to administrative contracts in French law.

In Hungary, the public authorities are clearly under the duty to act in good faith. Hungary Act CXLIII of 2015 on Public Procurement, Article 2. 1.[59] states that "…*3. In the course of procurement procedures, contracting authorities and economic operators shall act in compliance with the principle of good faith and fair dealing. The abuse of rights is prohibited*…."

In Greece, Kaltsa and Kourtesi, while discussing if the private law principles apply to the administrative contracts, they state

> "*Despite the existence of specific statutory provisions, courts often have recourse to private law principles when the need arises to intervene in public contracts. This is achieved by using Articles 197, 200, 288 and 388 of the Civil Code, which define the general principles of private law transactions. The general principles are that good faith and transactions usage* (*i.e. established commercial practice*) *should be shown in the negotiation phase* (*Article 197*), *during execution of the contract* (*Article 288*) *and also in interpreting the contract* (*Article 200*). *Article 388 provides for a specific application of the above-mentioned provisions in*

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[56] Pascariu, Liana: The Opportunity of a European Administrative Contract Law. *European Journal of Law and Public Administration*, 3 (2016) 1, 105–113; 110.

[57] Auby, Jean-Bernard – Mirschberger, Michael – Schröder, Hanna – Stelkens, Ulrich – Ziller, Jacques: *ReNEUAL Model Rules on EU Administrative Procedure Book IV – Contracts*. 2014.168 http://www.reneual.eu/images/Home/ReNEUAL-Model_Rules-Compilation_BooksI_VI_2014-09-03.pdf (10.09.2018.)

[58] Groves, 1999. 265–287.

[59] In Hungary, in accordance with the Act I of 2017 on the Code of Administrative Litigation Section 4. par. 7. 2. "*administrative contract means a contract, or an agreement concluded by and between Hungarian administrative organs to perform a public function, as well as contracts defined as such by an Act or government decree*." The public procurement contracts concluded under the Act CXLIII of 2015 on Public Procurement are not classified as administrative contracts. In our classification, they are deemed to be as administration's contracts.

> *case of an unexpected change of circumstances, following the conclusion of the contract, which would endanger the proper functioning of the contract…. Following this line of argument, courts have transposed and applied these private law provisions in administrative contracts, primarily in disputes concerning the revision and re-evaluation of contractual consideration. The way in which the above – mentioned principles are implemented in administrative contracts is none the less on a different and constantly evolving basis.*"[60]

Later Act 1414/1984 was introduced in Greece, which specifically excludes the revision of contracts by recourse to Articles 288 and 388. However, this did not prevent the Greek judges from applying the good faith on the administrative courts.

> "*Despite this new law, the courts continued to apply the private law rules, on the ground that it would be contrary to the constitutional principle of equality not to do so. Thus the courts intervened to revise contracts, even where the terms of the contract specifically excluded this, where good faith and transactions usage required a revision in the event of an unforeseeable change of circumstances.*"[61]

In common law,

> "*taken together the Commonwealth cases show that in circumstances typical of construction procurement, the process is regulated by contract law. The implied terms include a term that the owner must treat all tenders equally and fairly, that the tender process will be conducted honestly and not unconscionably, which collectively may be described as an obligation of good faith or fair dealing.*"[62]

For instance, the government must exercise termination for convenience clauses in good faith.[63]

In American law, the federal common law recognizes the implied duty of good faith and fair dealing in government contracting. It is said that "the norm of good faith and fair dealing is valid and binding on government actors or corporate office holders in the same way that a constitutional norm or a rule of corporate law does."[64] As in one of the Supreme Court's decision stated "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[65] The principle of good faith and fair dealing prohibits unreasonable exercises of contractual discretion by the government.[66] Moreover, the implied duty of good faith and fair dealing requires the parties to cooperate in performance and not

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[60] Kaltsa, Anastasi – Kourtesi Thomi: The Implementation of Private Law Principles in Administrative Contracts. *European Public Law*, 6 (2000) 3, 322–325; 323.

[61] Kaltsa–Kourtesi, 2000. 324.

[62] Craig, R.W.: Good Faith or Fair Dealing in Construction Procurement https://www.irbnet.de/daten/iconda/CIB3526.pdf (10.09.2018.)

[63] Claybrook, Frederick W. Jr.: Good Faith in the Termination and Formation of Federal Contracts. 1997. https://www.crowell.com/documents/DOCASSOCFKTYPE_ARTICLES_481.pdf (10.09.2018.)

[64] Macmahon, Paul: Good Faith and Fair Dealing as an Underenforced Legal Norm LSE Law, *Society and Economy Working Papers* 22/2014. 5. http://eprints.lse.ac.uk/60567/1/WPS2014-22_MacMahon.pdf. (10.09.2018.)

[65] Claybrook, 1997.

[66] Macmahon, 2014. administrative contract means a contract or an agreement concluded by and between Hungarian administrative organs to perform a public function, as well as contracts defined as such by an Act or government decree;

act in a way that destroys the other party's reasonable expectations of the benefits provided by the bargain.[67]

In Canadian Law, the requirement of good faith is a general principle in public law[68] and the public authorities have to act in good faith regarding the public procurement contracts. *Brindle* states that "*a bid contract will invariably contain an implied term that the owner must act fairly and in good faith in the tendering process*. *The duty is one of procedural good faith*." [69] In Canadian Law, the duty to act in good faith and in a manner that maintains and promotes the integrity of the public tendering system is mentioned as an interest considered by courts.[70] In *Boulis v. MMI* decision, the duty to act in good faith is mentioned as one of the restrictions on the use or non-use of discretionary powers in administrative law.[71] In *Olympic Construction Ltd. v. Eastern Regional Integrated Health Authority*,[72] the Newfoundland and Labrador Supreme Court reviewed two separate tender projects and noted that the duty to act in good faith, which in a manner maintains and promotes the integrity of the public tendering system, is among the competing interests and then found that Eastern Health breached its good faith performance of contractual obligations.[73]

In Australia, if the contract does not include an express provision, the case law that has developed that the duty of good faith will be implied since the landmark decision of *Renard Constructions* (*ME*) *Pty Ltd v Minister for Public Works*.[74] In this case, the court considered that there was a strong case for accepting a good faith obligation similar to that in Europe and the United States. It is concluded that the requirement to act reasonably and honestly was implied because the rules laid down for implication of terms had been satisfied.[75] In some contracts, the government includes an express provision to its contracts to a requirement for both parties to act in good faith.[76] It is apparent that objective standards of fairness and reasonableness now exist in Australian administrative law unlike in the United Kingdom.[77] In Australia, with a simple explanation, good faith requires that administrative

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[67] Tucker, James: A. O Ye of Little Faith: Breaching the Duty of Good Faith and Fair Dealing While Complying with the Express Terms of a Government Contract. https://www.lexology.com/library/detail.aspx?g=21a8f20f-bd94-425c-b353-1172081e9b43 (10.09.2018.)

[68] Grey, J. H.: Discretion in Administrative Law. *Osgoode Hall Law Journal*. 17 (1979) 1, 107–132; 128.

[69] Brindle, Derek A.: Procurement and the Duty of Good Faith. http://www.jml.ca/wp-content/uploads/publications/Procurement_DutyGoodFaith.pdf 3–4. (10.09.2018.)

[70] Public Sector Procurement Law Newsletter May 2013. https://www.keelcottrelle.com/assets/files/pdf/archive/public-sector-procurement/Procurement%20Law%20Newsletter.pdf. (10.09.2018.)

[71] *Boulis v. MMI The Supreme Court Reports* (1974) 875.

[72] Olympic Construction Ltd. v. Eastern Regional Integrated Health Authority. *Supreme Court of Newfoundland and Labrador*, 2013. 4.

[73] Public Sector Procurement Law Newsletter May 2013. 34. https://www.keelcottrelle.com/assets/files/pdf/archive/public-sector-procurement/Procurement%20Law%20Newsletter.pdf (10.09.2018.)

[74] Renard Constructions (ME) Pty Ltd v Minister for Public Works. *New South Wales Law Reports. NSWLR*. 1992. 26. 234.

[75] Nolen, Sue: Managing Good Faith Requirements in Government Contracts. (2004) https://www.vgso.vic.gov.au/sites/default/files/publications/Managing%20Good%20Faith%20Requirements%20in%20Government%20Contracts.pdf. 1. (10.09.2018.)

[76] Nolen, 2004. 1.

[77] Buchan, Jenny – Gunasekara, Gehan: Administrative Law Parallels with Private Law Concepts: Unconscionable Conduct, Good Faith And Fairness In Franchise Relationships *Adelaide Law Review*. 36 (2015) 541–575;

decisions are made honestly and conscientiously in the administrative law,[78] as the result of the policies including the requirement that government act with fairness, integrity and impartiality in its commercial dealings.[79]

IV.3. Turkish law perspective

Initially, it is essential to remember that public entities in Turkish law may conclude contracts subject to the private law called as administration's contracts including public procurement contracts. These contracts are subject to the rules and principles of private law. It is well established by court decisions that the Turkish Code of Obligations should apply to these contracts.[80] Hence, both parties, the public entity and the contractor, are doubtlessly under the duty to act in good faith as required by the article 2 of the Turkish Civil Code. It reads as follows

"*B. Scope and limits of legal relationships*
I. Acting in good faith
1 Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations.
2 The manifest abuse of a right is not protected by law."

As for the administrative contracts, whether the principle of good faith applies on the administrative contracts subject to administrative law is to some extent ambiguous in Turkish law. Whether a public authority is under a duty to act in good faith under these contracts has almost never been thoroughly discussed so far. It is a fact that there is not an explicit rule in Turkish law requiring the public authority to act in good faith and fair dealing. Indeed, in Turkish administrative law, there is an assumption that every single administrative act, process or conduct is legal as long as it is challenged at the administrative court and decided the otherwise by the administrative court.

In administrative contracts, the public legal entity has a right to alter the other party's obligations under the contract by its unilateral decisions. It is a well-established principle in administrative law.[81] On the contrary, this is completely unacceptable in private law. Consequently, where the public legal entity is in default, the private law person does not have a right to refuse to submit its performance. In other words, it cannot make a plea for the non-performance.[82] The private law person can only claim for the loss. Moreover, the public legal entity has a right to impose a sanction on the private law person including a pecuniary penalty, force for the performance and termination of the contract. These rights and powers are inexplicable with the duty to act in good faith.

Gözler and *Kaplan*, when listing the administration's obligations arising from the administrative contracts, state that the administration should protect the other party of

547. https://www.adelaide.edu.au/press/journals/law-review/issues/36-2/alr-36-2-ch09-buchan-gunasekara.pdf (10.09.2018.)

78 Buchan–Gunasekara, 2015. 559.

79 Nolen, 2004. 3.

80 Gözler–Kaplan, 2017. 456.

81 Giritli, İsmet – Berk, Kahraman – Bilgen, Pertev – Akgüner, Tayfun: *İdare Hukuku*. Der, İstanbul, 2015. 1343.

82 Giritli–Berk–Bilgen–Akgüner, 2015. 1343.

the contract and comply with the financial balance of the contract.[83] *Kaplan* writes that in case of a breach of an administrative contract, only the party who has acted in good faith may claim the termination of the contract.[84] On the other hand, *Alamur* states that in administrative contracts only the other party is under the duty of performance in good faith, not the public authority.[85] When she lists the private law principles applying the administrative contracts such as *theory of imprevision* and *force majore*, she does not mention the principle of acting in good faith particularly.

Public legal entity's privileges come with a price indeed as a result of the *principle of the Fait du Prince*. Every single amendment in the administrative contracts called as *Fait du Prince*. However, if the public legal entity aggravates the contract for the other party and impairs the financial balance of the contract, it should pay for the difference caused by its actions, orders and decisions. However, if the financial balance of the contract is impaired by the unforeseen causes, the *theory of imprevision* applies in French and Turkey, doctrine of foundation of transaction applies in German legal families as a result of *clausula rebus sic stantibus*.

In conclusion, in the light of the above explanations, it may be inferred that although the good faith may have some specific applications in Turkish administrative law, the public entity is not a general duty to act in good faith with respect to administrative contracts in Turkish law.

IV.4. Functions of good faith in administrative contracts

IV.4.1. The presumption of good faith

It is widely accepted principle that where questioned, the government is presumed to act in good faith in the performance of its contractual duties unless the otherwise is proved by a court decision.[86] *Toomey*, *Fisher and Curry* assume that the presumption of a governmental higher standard of conduct is viewed, perhaps, as a necessary barrier against an avalanche of indiscriminate claims.[87]

IV.4.2. The theory of imprevision

The maxim of *omnis conventio intellegitur rebus sic stantibus*, according to which all conventions are considered valid if the circumstances under which they were concluded

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[83] Gözler–Kaplan, 2017. 502. The authors mentions a French Conseil d'Etat's decision stating that when examining the illegality of the contract, the judge should take the parties' duty to act in good faith into account. 525.

[84] Kaplan, Gürsel: Fransız İdare Hukukunda İdari Sözleşmelerden Kaynaklanan Uyuşmazlıkların Çözümü İle İlgili Yeni Hukuki Gelişmeler. *Dicle Üniversitesi Hukuk Fakültesi Dergisi*. 21 (2016) 1–35; 16.

[85] Alamur, Seher: *Türk Hukuku'nda İdari Sözleşmeler.* İstanbul, 2013. Unpublished LLM Thesis. https://tez.yok.gov.tr/UlusalTezMerkezi/tezSorguSonucYeni.jsp (10.09.2018.). The same approach Çakrak, Recep – İldeş, Samet: Kamu Hukuku ve Özel Hukuk Açısından Dürüstlük Kuralı ve Uygulama Alanı. https://www.jurix.com.tr/article/4373# 24/27 (10.09.2018.)

[86] Macmahon, 2014.

[87] Toomey–Fisher–Curry, 1990. 91.Toomey–Fisher–Curry lists the court decisions expressing this principle in US case law on the same page footnote 13.

remain unchanged is the origin of the *theory of impresivision*.[88] This theory originated form the French law has affected many legal systems all over the world. Here, we will make our explanations regarding the Turkish law, the writer of this paper's home country.

The *theory of impresivision* has been generally recognised in administrative law since the well-known '*Gaz de Bordeaux*' decision. In Turkey, the administrative courts have consistently recognised a revision of the contract on the basis of unpredictability.[89] On the other hand, Turkish Code of Obligations art. 138 regulates excessive onerosity, the legal institution for the adaption of contract upon the unforeseen changed circumstances. TCO art. 138 says

> "*the parties during conclusion of the contract arises due to a reason not caused by the obligor and if the present conditions during conclusion of the contract are changed to the detriment of the obligor to such an amount as to violate principal honesty and if the obligor has not discharged his debt yet or has discharged his debt by reserving his rights arising from excessive difficulty of performance, the obligor shall be entitled to demand from the judge the adaptation of contract to new provisions*, *and to withdraw from the contract when such adaptation is impossible. In contracts including continuous performance*, *the obligor shall*, *as a rule*, *use his right to termination instead of right to withdraw. This provision shall also apply to the debts in foreign currencies*."

This article does not apply to administrative contracts.

In Turkish administration law, there is no such explicit regulatory rule in the Codes about the *theory of imprevision*. It is formed and applied by the decisions of the Council of State. In accordance with the principles set by this court, there are three conditions for the application of the *theory of imprevision*. Firstly, during the formation of the contract, the parties to a contract should not foresee or expect the incident that changes the financial situation of the contract. In general, these circumstances can be listed as natural disasters, such as drought, flood, earthquake; administrative measures such as the prohibition or restriction of imports or exports; and other restrictions of trade, changes in the system of prices, tariff changes and administered prices, changes in standards, and economic changes such as an extremely large and sudden fall or jump in prices.[90] Secondly, these incidents must be beyond the will of the parties and is of temporary nature. Otherwise, parties to a contract might claim the termination of the contract due to the application of force majeure administrative. Finally, these unforeseen incidents should change the circumstances regarding performance of the contract severely.[91] Unless, the performance of the obligation would be "excessively onerous for one party or if under such

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[88] Ciongaru, Emilian: Theory of Imprevision, a Legal Mechanism for Restoring of the Contractual Justice. https://ac.els-cdn.com/S1877042814048599/1-s2.0-S1877042814048599-main.pdf?_tid=fda7de14-42a8-4746-bb6a-e22aa44679f3&acdnat=1543494415_1278ebe64f538021106965ac36cdbf22. (10.09.2018.)

[89] Serozan, Rona: General Report on the Effects of Financial Crises on the Binding Force of Contracts: Renegotiation, Rescission or Revision. In: Başoğlu, Başak (ed.): *The Effects of Financial Crises on the Binding Force of Contracts*: *Renegotiation*, *Rescission or Revision*. Springer, 2016. 13.

[90] Puvača, Maja Bukovac – Mihelčić, Gabrijela – Grgić Iva Tuhtan: Can Financial Crisis Lead to the Application of the Institute of Changed Circumstances Under Croatian Law? In: Başak Başoğlu (ed.): *The Effects of Financial Crises on the Binding Force of Contracts*: *Renegotiation*, *Rescission or Revision.* Springer, 2016. 90.

[91] Giritli–Berk–Bilgen–Akgüner, 2015. 1347.

circumstances a party would suffer an excessive loss",[92] amendment of the contract cannot be claimed.

With the fulfilment of these requirements, the contract is no longer applicable as agreed. Where the parties cannot reach an agreement between themselves, the court determines the rules which would apply on the contract during these unforeseen incidents. However, differing from the private law, that does not mean that the administrative contract has been terminated. The essence of the contract is still in force and is functional. The private law person has to continue to submit its performance of contract and the public authority should preserve the balance of the financial structure of the contract and compensate the loss. This is the consequences of the principle of *Fait du Prince*.[93]

In Turkish private law, in case of such incidents, the obligor shall be entitled to demand from the judge the adaptation of contract, and to withdraw from the contract when such adaptation is impossible.

V. Conclusion

Since Roman times, the principle of good faith is regarded as a requirement in contractual relations. It is widely accepted and incorporated with the legal systems all over the world.

As shown above, the recent approach in administrative law clearly states that the public entities should act in good faith in every act, conduct and contract. However, whether the principle of good faith applies to administrative contracts stirs controversy.

Firstly, it is apparent that in some legal systems including Turkish law some certain public administration's contracts are subject to private law. It is unquestioned that both parties whether public entity or private law person have to act in good faith in these types of contracts.

Secondly, regarding the administrative contracts subject to administrative law and administrative judiciary, the answer is still not straightforward. The comparative law reveals that the recent approach in the administrative contract validates that the principle of good faith applies on the both parties to an administrative contract. Mostly, this is done by court decisions. However, some latest legislation evidently includes provisions setting the good faith as a principle in administrative contracts. On the other hand, the classic approach requires only the private law persons to act in good faith. That is also true regarding the current Turkish law. Regardless of the approaches, the principle of good faith has two mostly accepted applications in administrative contracts: the presumption of good faith and *theory of imprevision*.

It should not be forgotten that instituting a uniform government standard of good faith and fair dealing in parity with the private law standard has the advantage of bringing the contractual duties of the government into balance with those of private parties.[94]

However, if the classical view is accepted, which is well explained by *Mewett* as

> "*The administration is the guardian of the interests of the public and every contract entered into by it*, *which is administrative in nature*, *has*, *for its objects*,

[92] Puvača–Mihelčić–Grgić, 2016. 93.

[93] Giritli–Berk–Bilgen–Akgüner, 2015. 1348., Gözler–Kaplan, 2017. 513.

[94] Toomey–Fisher–Curry,1990. 125.

> *the performance of some service in the interests of the public. But no contract can ever deprive the administration of the power and the duty to take any steps which are necessary for the protection of the public interest. Although, therefore, an administrative contract contains all the terms of the contract, and all the rights and duties which are contractual in nature, the terms of the contract alone are not sufficient to determine all the rights and duties which are imposed upon the parties.* (...) *From the regulatory Powers of the administration arises its right to act in the interests of the public and, where necessary, terminate the contract, direct the mode of performance, or modify the contractual specifications in some way*."[95]

it would be difficult to defend that principle of good faith applies to the public entities party to an administrative contract unquestionably. The classical dominance of public authorities may seem to overrule the principle of good faith in order to serve the public interest best.

To sum up, the discussion on this paper requires the acceptance of the fact that "t*he theory of administrative contracts remains vague, irresolute, even at times erroneous*."[96] In this context, it is anticipated that the principle of good faith keeps extending its application area over the administrative contracts.

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[95] Mewett, Alan W.: The Theory of Government Contracts. *Mcgill Law Journal*, 5 (1958) 4, 222–246; 225.
[96] Langrod, 1955. 330.

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