

# AMICUS CURIÆ

Journal of the Society for  
ADVANCED LEGAL STUDIES

ISSUE 89  
Spring 2012

## IN THIS ISSUE

### CRIME

Towards a decentralised European  
Public Prosecutor's Office? ..... 2

EU defence rights: how the system  
can be improved ..... 9

### INTERNATIONAL ARBITRATION

The concept of good faith in  
investment disputes: the arbitrator's  
dilemma ..... 16

### MIGRATION

Human rights – challenges and  
possibilities ..... 19



## GENERAL EDITOR

**Professor Barry A K Rider**, *Professorial Fellow, Development Studies Programme, University of Cambridge, Fellow Commoner and sometime Fellow, Dean and Tutor of Jesus College, Cambridge, Honorary Senior Research Fellow, IALS*

## DEPUTY GENERAL EDITOR

**Julian Harris**, *Associate Research Fellow, Institute of Advanced Legal Studies*

## ADVISORY COUNCIL OF THE INSTITUTE OF ADVANCED LEGAL STUDIES

Chairman: **The Rt Hon The Lord Hope of Craighead**

**Professor Peter Alldridge**, *Queen Mary, University of London*

**Mr Mazhar Ilahi**, *Student Representative, IALS*

**Mr Daniel Bethlehem QC**, *Legal Advisor, Foreign & Commonwealth Office*

**Sir Geoffrey Bowman**, *Former First Parliamentary Counsel*

**Professor Fiona Cownie**, *Keele University*

**Professor Matthew Craven**, *School of Oriental and African Studies, University of London*

**Professor Mike Edwards**, *Institute of Classical Studies and Deputy Dean of the School of Advanced Study*

**Dame Professor Hazel Genn**, *University College, London*

**Professor Rosa Greaves**, *University of Glasgow*

**Mr Christopher Hale**, *Partner, Travers Smith*

**Professor Patrick Hanafin**, *Birkbeck, University of London*

**Professor Roger Kain**, *Dean of the School of Advanced Study*

**Professor Martin Loughlin**, *London School of Economics and Political Science, University of London*

**Professor Timothy Macklem**, *King's College, London*

**The Rt Hon Lord Justice Mummery**

**The Rt Hon Lord Justice Munby**, *Chairman, Law Commission*

**Professor Alan Paterson**, *University of Strathclyde*

**Professor David Sugarman**, *Lancaster University*

**Professor Avrom Sherr**, *Director, Institute of Advanced Legal Studies*

**Jules Winterton**, *Associate Director and Librarian, Institute of Advanced Legal Studies*

## ADVISORY COUNCIL OF THE SOCIETY FOR ADVANCED LEGAL STUDIES

Chairman: **Lord Scott of Foscote**

**Mr Colin Bamford**, *Barrister, 3–4 South Square*

**Dr Evan Bell**, *Senior Legal Assistant, Office of the Director of Public Prosecutions for Northern Ireland*

**Mr Michael Blair QC**, *3 Verulam Buildings*

**The Hon Mr Justice Cranston**

**Professor Rosa Greaves**, *University of Glasgow*

**Mr Peter Harris**, *former Official Solicitor, Senior Research Fellow, Institute of Advanced Legal Studies*

**The Rt Hon The Lord Hope of Craighead KT**, *Chairman, Advisory Council of the Institute of Advanced Legal Studies*

**Ms Sonja Leydecker**, *Partner, Herbert Smith*

**The Rt Hon The Lord Mackay of Clashfern KT**, *former Lord Chancellor*

**The Rt Hon Lord Justice Mummery**

**Mr George Staple QC**

**Dame Heather Steel**

**Dr Edward Swan Skadden**, *Visiting Professor, UCL*

**Dame Juliet Weldon CB, QC**

**Mr Jules Winterton**, *Associate Director and Librarian, Institute of Advanced Legal Studies*

*Amicus Curiae* is published quarterly by the Society for Advanced Legal Studies and issued free of charge to SALS members. The journal is also available on subscription (£75 per annum for four issues including p&p to UK and Europe, £85 pa for the rest of the world).

For further details please contact SALS, Institute of Advanced Legal Studies, 17 Russell Square, London WC1B 5DR (tel: 020 7862 5865; email: SALS@sas.ac.uk), or access the SALS website (<http://ials.sas.ac.uk/SALS/society.htm>).

Contributions to *Amicus Curiae* are welcomed. Articles should be accompanied by the name and address of the author. The journal can accommodate short pieces of approximately 700–1,200 words, and also longer articles of up to 4,000 words. Articles should be written in an informal style without footnotes. *Amicus Curiae* carries articles on a wide variety of topics including human rights, commercial law, white collar crime, law reform generally, and topical legal issues both inside and outside the UK.

Articles should be sent to Julian Harris at the Institute of Advanced Legal Studies, 17 Russell Square, London WC1B 5DR (tel: 020 7862 5868; email: Julian.Harris@sas.ac.uk). The Editorial Board reserves the right to refer articles to external referees for consideration.

The Society for Advanced Legal Studies does not accept responsibility for the accuracy of contributed articles or statements appearing in this publication. The views expressed by the authors of contributed articles should not be regarded as the official view of SALS except where stated.

Typeset and printed by Acorn Print Media, North Road, Loughborough, Leicestershire LE11 1LE.

ISSN 1461-2097

© 2012 Society for Advanced Legal Studies

# The concept of good faith in international investment disputes – the arbitrator’s dilemma

by A F M Maniruzzaman

The concept of good faith has been a subject of perennial controversy since it was derived from the Roman legal equivalent “*bonas fides*.” Juristic views on and the legal conceptualization of the idea of good faith may often vary across the cultural divides and legal traditions. At a higher level of abstraction there may be a semblance of understanding that it is a moral principle and is reflective of all good senses such as honesty, good conscience, fairness, equity, reasonableness, equitable dealing or fair dealing, etc, but its application may cause the divergence of opinions. This has caused some uncertainty about the nature of the concept itself and the consequent unpredictability of the outcome of its application.

When focused on the content of good faith, the courts in different countries as well as academic commentators seem to be often baffled. Nor in the sources of the *lex mercatoria* such as the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, and the United Nations Convention on Contracts for the International Sale of Goods (CISG or the Vienna Sales Convention) can one find a clear definition of the content of the notion of good faith. In order to rationalise good faith jurists have proffered various legal theories ranging from efficiency arguments to formal entitlements in the spirit of solidarity to its conceptualisation in a more specific sense as “a true behavioural standard.” This dilemma pervades in international law in general and in the emerging case law of international investment law in particular. Therefore, it proves the international arbitrator’s task in an investment dispute all the more difficult as in any other field when it comes to define the concept and to render any decision on the basis of it.

It thus merits a fresh look at the concept of good faith in order to understand its scope and function in a contractual relationship which is the focus of this article. In order to

apply the concept to a particular context, good faith could be considered a functional or objective one in the sense of a framework of relationship between the parties to a contract and cooperation being its underlying current. In this respect good faith is a framework concept based on cooperation as its philosophical foundation. In international business-contracting the consideration of mutual interests of the contracting parties in the spirit of cooperative dealing seems to get favour in some quarters as a manifestation of modern trend of collectivism as opposed to the nineteenth century legacy of individualism. Farnsworth, however, observes:

*“Good faith performance has always required the cooperation of one party where it was necessary in order that the other might secure the expected benefits of the contract. And the standard for determining what cooperation was required has always been an objective standard, based on the decency, fairness or reasonableness of the community and not on the individual’s own beliefs as to what might be decent, fair or reasonable. Both common sense and tradition dictate an objective standard for good faith performance” (E Allan Farnsworth, Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code, 30 U CHI L REV 666 (1963)).*

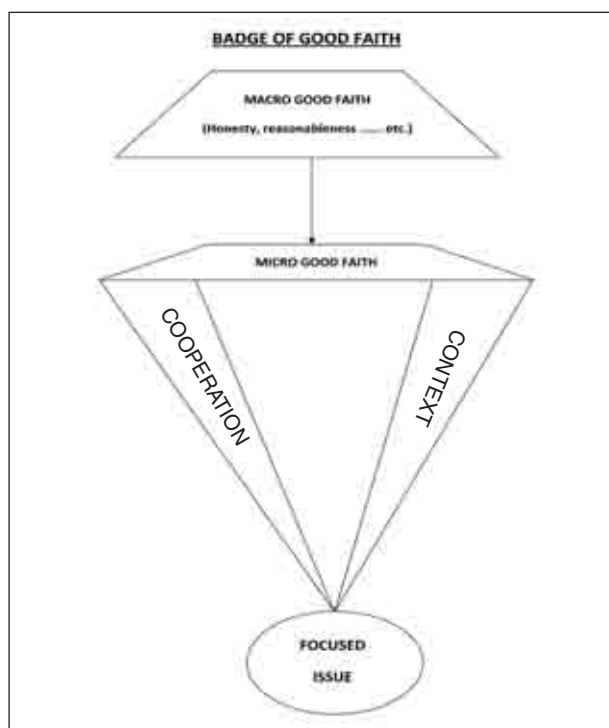
It needs to be stressed that cooperation should not be understood in the sense of familial relationship such as motherly love or brotherly affections, but must be confined to the contractual relationship, hence the notion of good faith as a framework concept, ie fidelity to the bargain, as mentioned earlier. As far as the content of good faith is concerned the focus has to be specific in a particular context concerned in the contractual framework to see if the parties have acted in the spirit of cooperation, ie good faith cooperation (see L Carvajal-Arenas, ‘Good Faith in the Lex Mercatoria: An Analysis of Arbitral Practice and Major Western Legal Systems (PhD Thesis, University of Portsmouth, 2011)). In numerous

domestic court decisions (eg *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177: <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2009/177.html> and see also relevant cases mentioned therein) and in international judicial (eg the *North Sea Continental Shelf cases* (ICJ): <http://www.icj-cij.org/docket/files/52/5561.pdf>), and arbitral decisions (eg *Wintershall v Qatar* (1990) 15 Yb Comm Arb'n 30, *Mechema Ltd (England) v SA Mines, Minerais et Métaux (MMM) (Belgium)* (1982) 7 Yb Comm Arb'n 77) there seems to be a tendency to give weight to the context in which the concept is to be meant. Article 31 (1) of the Vienna Convention on the Law of Treaties also points out the importance of the context of the terms of the treaty while interpreting it in good faith. Therefore, the content of the concept of good faith is more of a contextual nature than the concept itself understood in the abstract sense.

The International Court of Justice observed: “(t)he principle of good faith is ‘one of the basic principles governing the creation and performance of legal obligations’; it is not in itself a source of obligation where none would otherwise exist” (ICJ, *Border and Transborder Armed Actions Case (Nicaragua v Honduras)*, Jurisdiction and Admissibility, judgment December 20, 1988, ICJ Rep 69, at 105 (1988)).

One may thus wonder if good faith can be understood in two senses, viz, “macro good faith” and “micro good faith.” In respect of the former the abstract notion of good faith in the sense of honesty, fairness, reasonableness signifying its subjectivity may be meant, ie “macro good faith” – a horizontal approach, a layer of idea which is generic (ie an idea at a higher level of abstraction) and may not be understood the same in different factual patterns as it will depend on its application to them. Thus, from the notional point of view good faith in the macro sense is considered to act as a major interpretative principle. While, on the other hand, it should be appreciated that what appears to be good faith in one context may not appear the same in another context with a different pattern of facts, situations or surrounding circumstances. Thus, the notion of good faith focusing on the particular context concerned – ie the vertical approach – may be understood as “micro good faith” which brings with it the sense of objectivity rather than subjectivity understood in the horizontal sense, ie “macro good faith.”

It should be appreciated that the *pacta sunt servanda* principle, being the foundation of all contracts, is the manifestation of “macro good faith.” But “micro good faith” being applied in specific factual contexts may limit the application of the *pacta sunt servanda* principle in order to conform to it, even in changed circumstances that affect the contract (see A F M Maniruzzaman, “State Contracts with Aliens – The Question of Unilateral Change by the State in Contemporary International Law” (1992) 9 J Int'l Arb 141; Detlev Vagts, “Essays in Honor of Oscar Schachter, Rebus Revisited. Changed Circumstances in



Treaty Law,” 43 Columbia J Trans L (2005), 459). Therefore, the *pacta sunt servanda* principle in a contractual relationship may not be applied as an incantation or in the abstract sense, rather it should be assessed in terms of “micro good faith.”

The above conceptual paradigm may be termed as the “badge of good faith” and can be shown diagrammatically as follows. In the diagram (see above) “macro good faith” represents as a concept at a higher level of abstraction which sits horizontally and underneath it goes down “micro good faith” as a functional or objective concept which is particularly pointed with its two arms – “cooperation” as the underlying current and “context” as the target beam – to a focused issue in respect of which good faith is questioned. Thus, depending on whether good faith exists or not in respect of a particular issue, the “badge of good faith” can operate as a thinking process and can determine itself the worthy place where it belongs (ie to certify the existence of good faith).

In international investment law, substantive standards of treatment (investment treaty provisions) such as fair and equitable treatment, full protection and security, protection of legitimate expectation, transparency, non-discrimination, national treatment and most favoured national treatment, are considered fundamentally based on good faith, or manifestations or corollaries of good faith, but their content depends on the specific contexts in which they are applied. Here comes the crunch point when one asks: even if a state literally complies with the foregoing standards in respective cases, will it be always considered to have acted in good faith in its relationship to the other contracting party? Inversely, if a state acts in good faith to comply with its non-investment international treaty obligations relating to human rights, the environment or

climate change that may interfere with investors' rights, will it be implicated in bad faith *vis-à-vis* the foreign investors? It is difficult to give any straightforward answers to these questions. The answers, however, may be found specifically in the contexts in which the notion of good faith is to be examined. In investment arbitration jurisprudence such a contextual extrapolation seems to be increasingly endorsed rather than the simple meaning attributed to a standard of treatment: see for example the *S D Myers (S D Myers, Inc v Government of Canada)* (2000), partial award: <http://italaw.com/documents/SDMeyers-1stPartialAward.pdf>); *Mondev (Mondev Int'l Ltd v USA)*: <http://italaw.com/documents/Mondev-Final.pdf>); *ADF (ADF Group Inc and USA)* (2003): [http://italaw.com/documents/ADF-award\\_000.pdf](http://italaw.com/documents/ADF-award_000.pdf)); *Loewen (The Loewen Group, Inc and Raymond L Loewen v USA)* (2003): <http://italaw.com/documents/Loewen-Award-2.pdf>); and *Waste Management (Waste Management, Inc v United Mexican States)*: [http://italaw.com/documents/laudo\\_ingles.pdf](http://italaw.com/documents/laudo_ingles.pdf)).

Often, in order to reflect good-faith cooperation in an investment contract situation the aforementioned standards of treatment for foreign investors may have to be weighed against the state party's competing public interests, such as the protection of the environment, the promotion and protection of human rights and the securing of the economic development of the host country. There seems to be a growing support for such a stance amongst various stakeholders such as host countries, NGOs, international organisations (the World Bank and the IMF, etc.) and others, though this aspect of international investment law is still in the early stage of development.

The scope and content of the standards of treatment for foreign investors may differ from contexts to contexts

entailing the understanding of good faith in the micro sense. As the comments to section 205 of the UCC also states, in a different domain of law though, that "[t]he phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context." To get a result then it would be advisable to look at the notion of "micro good faith" – a context-based one with the objectivity that underscores the framework of relationship, cooperation being its philosophical foundation. Good faith in a particular situation should thus be understood not as an abstract concept but as a functional or objective one, i.e. in the micro sense, covering all stages of a contract. This micro approach to good faith may help us solve major problems or disputes, as the adage goes: "*good things come in small packages.*"

If the above conceptual clarification of good faith bears some value, its relevance will not only be in international investment law but also in international law (in general) and other branches of international law and, above all, in domestic laws.

- An earlier version of this article has been published in Kluwer Arbitration Blog. 

**Professor A F M Maniruzzaman, PhD (Cambridge), FRSA**

*The author is Chair in International Law and International Business Law & Director of Research and Postgraduate Research Degrees, School of Law, University of Portsmouth. He is also an Honorary Fellow (Professorial) at the Centre for Energy, Petroleum, and Mineral Law and Policy (CEPMLP), University of Dundee, Scotland.*

# CONSULTANT EDITORS

## Administrative Law

**Prof Christopher Forsyth** Faculty of Law, University of Cambridge

**Sir Derek Oulton** Life Fellow Magdalene College, Cambridge

**Prof Alan C Page** Professor of Public Law, University of Dundee

## Arbitration

**Julian Critchlow** Fenwick Elliott

**Samuel Haubold** Littleton Chambers

**Prof A F M Maniruzzaman** Professor of International and Business Law and Director of Postgraduate Studies and Research in Law, School of Law, University of Portsmouth

**Dr Colin Ong** Essex Court Chambers

## Banking Law and Practice

**Prof Andrew Campbell** Professor of International Banking and Finance Law, University of Leeds

**Prof Richard Hooley** Professor of Law, King's College London

**Peter Richards-Carpenter** Fried Frank LLP

## Civil Litigation and Procedure

**Saul M Froomkin QC**, Mello Jones & Martin, Bermuda

**Phillip Howell-Richardson** Independent Mediator

**Jon Lang** Independent Mediator

**Dick Pears** Tanfield Chambers

## Commercial Law

**Prof Michael Bridge** Cassel Professor of Commercial Law, LSE

**Prof Stephen Weatherill** Jacques Delors Professor of European Law, Oxford

## Company Law

**Prof Anthony Boyle** Emeritus Professor of Law, Queen Mary, University of London

**Tim Frazer** Arnold and Porter LLP

**Prof Joanna Gray** Professor of Financial Regulation, University of Newcastle

**Andrew Hicks** former Senior Lecturer in Law, University of Exeter

**Dr John McMullen** Short Richardson & Forth LLP, Visiting Professor of Law, Durham University

**Chris Riley** Reader, Director of the Institute for Commercial and Corporate Law, University of Durham

**Jerry Walter** Fried Frank LLP

**Prof Adrian Walters** Professor of Corporate and Insolvency Law, Nottingham Trent University

**Dr Frank Wooldridge**

## Competition Law

**Tim Frazer** Arnold and Porter LLP

**Professor Richard Whish** Professor of Law, King's College London

## Computers and the Law

**Prof Ross Anderson** Professor of Security Engineering, University of Cambridge

**Dr James Backhouse** Reader, Information Systems and Innovation Group, LSE

**Prof Michael Froomkin** School of Law, University of Miami

## Constitutional Law

**Prof Robert Blackburn** Professor of Constitutional Law, King's College London

**Prof Robert Hazell** Professor of British Politics and Government, Director of the Constitution Unit, UCL

**Professor Colin Munro** Emeritus Professor of Constitutional Law, University of Edinburgh

## Contract

**Dr Mahmood Bagheri** IALS

**Professor Andrew Tettenborn** University of Swansea

## Corporate Finance

**Simon Gleeson** Clifford Chance

**Christopher Hale** Travers Smith

**Prof Andrew Haynes** University of Wolverhampton  
**Ned Swan** Skadden, Visiting Professor, UCL

## Criminal Law

**Prof Estella Baker** Professor of European Criminal Law and Justice, University of Sheffield

**Sheilagh Davies QC** 9 Lincoln's Inn Fields

**Prof David McClean CBE, QC** Emeritus Professor, University of Sheffield

**The Hon Mr Justice Silber**

**Prof Anthony Smith** Professor of Criminal and Public Laws, University of Cambridge

## Employment Law

**Viv Du-Feu** Capital Law LLP

**Jennifer Eadey QC** Old Square Chambers

**Dr John McMullen** Short Richardson & Forth LLP, Visiting Professor of Law, Durham University

## Environmental Law

**Richard Burnett-Hall** Consultant, Bristows

**David Ong** Reader, University of Essex

## European Law

**Prof Estella Baker** Professor of European Criminal Law and Justice, University of Sheffield

**Prof Christopher Bovis** H K Bevan Chair, University of Hull

**Frédérique Dahan** Senior Counsel, European Bank for Reconstruction and Development

**Prof Jo Shaw** School of Law, University of Edinburgh

**Prof Stephen Weatherill** Jacques Delors Professor of European Law, Oxford

## Family

**Graham Ritchie** solicitor

## Financial Crime

**Rowan Bosworth-Davies** AML Analytics

**Prof Louis de Koker** of Law, Faculty of Business and Law, Deakin University, Australia

**Dr Chizu Nakajima** Director, Centre for Financial Regulation and Crime, Cass Business School, City University

**Richard Parlour** Financial Markets Law International

**Prof Barry A K Rider** Professorial Fellow, Development Studies Programme, University of Cambridge, Fellow Commoner and sometime Fellow, Dean and Tutor of Jesus College, Cambridge, former Director, IALS

## Financial Markets

**Prof Eva Lomnicka** King's College London

**Prof Barry A K Rider** Professorial Fellow, Development Studies Programme, University of Cambridge, Fellow Commoner and sometime Fellow, Dean and Tutor of Jesus College, Cambridge, former Director, IALS

## Financial Services

**Dr Richard Alexander** Lecturer in Financial Law, SOAS

**Prof Joanna Benjamin** Emeritus Professor of Law, LSE

**Martyn J Bridges** Bridges & Partners

**Prof Alastair Hudson** Professor of Equity and Law, Queen Mary, University of London

**Dr Oonagh McDonald CBE**

**Dr Chizu Nakajima** Director, Centre for Financial Regulation and Crime, Cass Business School, City University

**Prof Barry A K Rider** Professorial Fellow, Development Studies Programme, University of Cambridge, Fellow Commoner and sometime Fellow, Dean and Tutor of Jesus College, Cambridge, former Director, IALS

**Margarita Sweeney-Baird** Part-time Honorary Visiting Lecturer, Department of Accounting and Finance, University of Birmingham

## Human Rights

**Prof Mads Andenas** Professor of Law at the universities of Leicester and Oslo

**Sir Geoffrey Bindman QC** Bindmans LLP

**Sir Nicholas Blake QC**

**Prof Steven Greer** Professor of Human Rights, University of Bristol

**Khawar Qureshi QC** Serle Court, Visiting Professor in Commercial Law, SOAS

**Geoffrey Robertson QC** Doughty Street Chambers

## Insolvency

**Prof David Milman** Professor of Law, University of Lancaster

**Prof Dan Prentice** Erskine Chambers, Emeritus Professor of Corporate Law, University of Oxford

**Prof Adrian Walters** Professor of Corporate and Insolvency Law, Nottingham Trent University

## Intellectual Property

**Paul Garland Kemp** Little LLP

**Paul Harris** Speechly Bircham

## International Financial Law

**Prof Mads Andenas** Professor of Law at the universities of Leicester and Oslo

**Prof Ravi Tennekoon** King's College London

## International Trade Law

**Prof Kern Alexander** Professor of Banking and Financial Market Law, University of Zurich, Senior Research Fellow, IALS

**Prof Joseph McMahon** Professor of Commercial Law, University College Dublin

**Prof A F M Maniruzzaman** Professor of International and Business Law and Director of Postgraduate Studies and Research in Law, School of Law, University of Portsmouth

## Jurisprudence

**Prof William Twining** Emeritus Quain Professor of Jurisprudence, UCL

## Legal Education and Practice

**Prof Kim Economides** University of Otago, New Zealand

**Prof Richard Moorhead** Professor of Law, University of Cardiff

**Prof Avrom Sherr** Woolf Professor of Legal Education and Director of the Institute of Advanced Legal Studies

**Richard Susskind OBE** Visiting Professor in Internet Studies, Oxford Internet Institute, University of Oxford

## Maritime & Shipping Law

**Richard Siberry QC** Essex Court Chambers

## Planning Law

**Richard Harwood** 39 Essex Street Chambers

## Private International Law

**Khawar Qureshi QC** Serle Court, Visiting Professor in Commercial Law, SOAS

## Public International Law

**Prof Christine Chinkin** Professor of International Law, LSE

**Prof A F M Maniruzzaman** Professor of International and Business Law and Director of Postgraduate Studies and Research in Law, School of Law, University of Portsmouth

## Religion and Law

**Prof Dr John Warwick Montgomery** Professor Emeritus of Law and Humanities, University of Bedfordshire, Distinguished Research Professor, Patrick Henry College (USA)

## Restitution and Contract Law

**Prof Gerard McCormack** Professor of International Business Law, University of Leeds

**Professor Andrew Tettenborn** University of Swansea

## Trade Union Law

**Jennifer Eadey QC** Old Square Chambers

**John Henty QC** Old Square Chambers

## Trusts and Equity

**Hon Mr Justice David Hayton** Caribbean Court of Justice

**Professor Paul Matthews** King's College London

**Prof Sarah Worthington** Professor of Law, LSE

