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SEP Patents: Respect for the Principle of Objective Good Faith in Negotiations, the Duty of Procedural Loyalty, and the Burden of Proof Regarding FRAND Elements[+].

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Abstract:

The increasing judicialization of disputes involving Standard Essential Patents (SEPs) has shifted the focus of legal debate beyond the mere assessment of patent infringement, placing greater emphasis on the parties' conduct during negotiations for licenses on Fair, Reasonable, and Non-Discriminatory (FRAND) terms.

Against this backdrop, this article examines whether objective good faith constitutes the underlying principle capable of simultaneously defining the parties' negotiation duties and the allocation of the burden of proof in FRAND disputes. It argues that objective good faith operates as a unifying framework connecting FRAND negotiations, procedural conduct, and the dynamic allocation of evidentiary burdens.

Building upon the interaction between good faith in negotiations and duties of procedural loyalty, the article seeks to demonstrate that the effectiveness of the FRAND framework depends upon the existence of minimum standards of conduct applicable both during licensing negotiations and throughout subsequent judicial proceedings. It further contends that the allocation of the burden of proof should reflect each party's role in the formation and documentation of the negotiating relationship. By examining the impact of these duties on evidentiary production, the assessment of party conduct, and the granting of judicial remedies, the article proposes an integrated approach to the substantive and procedural elements that structure the FRAND regime.

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I. Introduction

The importance of protection for standard-essential patents has acquired new legal, economic, and social contours in recent decades. Disputes and issues once confined to the telecommunications niche are beginning to take on new dimensions with current technological advances, marked by ultra-high speed, interconnectivity, and dependence on global standards.

The possibility of innovating in isolation throughout much of the twenty-first century has given way to complex ecosystems in which thousands of companies must ensure that their products are interoperable in the face of the continuing advancement of technologies such as artificial intelligence, 5G/6G, autonomous vehicles, and advanced robotics.

It is in this context, within a clearly defined geopolitical field of dispute among the United States, China, and the European Union, that the race for technological knowledge has become increasingly intense and, consequently, global economic growth may be observed. We are experiencing what ROMER taught in 1990: "*Growth is driven by technological change resulting from deliberate investment decisions made by profit-maximizing agents.*"

Thus, we see new markets emerging from technological convergence and the dissemination of artificial intelligence, whose effects are not limited to any specific sector but extend across virtually the entire economy. We live in an era in which technical dependence is unavoidable, insofar as infrastructure built on global technical standards is increasingly necessary.

Technical standards reduce transaction costs, expand economies of scale, and accelerate technological dissemination. Precisely to make technological dissemination and renewal possible, it is essential to have an effective system for protecting the industrial property developed by innovative companies whose technologies are incorporated into technological standards.

The act of declaring a patent as potentially essential to a standard carries with it an undertaking by the patent holders before standard-setting organizations (SSOs): to offer, on fair, reasonable, and non-discriminatory (FRAND) terms, licenses to patents that may cover the standards to all parties interested in implementing the technology at issue.

In most cases, patent holders and implementers successfully navigate the negotiation process, reaching agreements without the need for judicial intervention. However, notwithstanding the existence of guiding parameters for negotiation practices, the parties' divergence over multiple aspects of such negotiations has fostered new disputes before courts around the world and, more recently, before competition authorities, such as CADE—the Brazilian Administrative Council for Economic Defense.

Beyond the important issues concerning the limits of these institutions' authority in disputes involving standard-essential patents, as well as the multiple topics discussed in this field—for example, the nature of the terms offered to the implementer, whether they were in fact fair, reasonable, and non-discriminatory, i.e., FRAND, which entails not only an analysis of the royalty amount offered but also an examination of the parties' actual conduct during the pre-negotiation, negotiation, and/or post-negotiation phases—the conduct of the companies involved in these conflicts has assumed an increasingly relevant role.

In this context, a central question arises: is objective good faith the structuring principle capable of simultaneously defining the parties' negotiation duties and the allocation of the burden of proof in FRAND disputes?

Building on the interaction between good faith in negotiations and the duty of procedural loyalty, this article seeks to demonstrate that the effectiveness of the FRAND system depends on the existence of minimum standards of conduct both in the negotiation sphere and in the procedural sphere. It further argues that the allocation of the burden of proof should reflect each party's position in the formation and documentation of the negotiation relationship. By examining the impact of these duties on evidentiary production, the assessment of the parties' conduct, and the granting of judicial relief, the article proposes an integrated reading of the substantive and procedural elements that structure the FRAND regime.

II. Objective Good Faith in Negotiations

Agreements involving the licensing of standard-essential patents give rise to intercompany relationships in which one party's economic dependence on the other may be observed. As Paula Forgioni explains, such superiority entails the possibility or ability of one party to impose contractual terms on another, which must accept them (FORGIONI, 2021).

Although such dependence may create temporary positions of advantage, limits must be observed so that such advantage does not amount to an abuse of rights. The limit on the strategic exercise of contractual power is good faith (LARENZ, 1958).

Objective good faith refers to the manner in which an individual is expected to behave. It is a standard of conduct imposed on the parties to a legal relationship, requiring loyal and honest behavior consistent with the legitimate trust that has been created (FARIAS and ROSENVALD, 2023).

As in German law, which was a precursor in the development of objective good faith, Brazilian law adopted a general clause of objective good faith, as may be seen in Articles 113 and 422 of the Civil Code—Law No. 10,406/2002. Article 422 is reproduced below in analytical comparison with its equivalents in the other legal systems mentioned:

Country	**Statute**	**Free Translation**
Germany, 1896	German Civil Code *Bürgerliches Gesetzbuch – BGB*	§ 242 - The debtor is required to perform in the manner required by good faith, taking customary practice into account.
Switzerland, 1907	Swiss Civil Code Zivilgesetzbuch – ZGB	Art. 2 ZGB - Acting in accordance with good faith 1. Every person must act in accordance with 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 afforded legal protection.
Italy, 1942	Italian Civil Code *Codice Civile 2023* *R.D. 16 marzo 1942, n. 262*	Art. 1,337. In conducting negotiations and forming the contract, the parties must act in accordance with good faith.
Portugal, 1966	Portuguese Civil Code of 1966	Article 762 (General Principle) 1. The debtor performs the obligation when he or she renders the performance to which he or she is bound. 2. In performing the obligation, as well as in exercising the corresponding right, the parties must proceed in good faith.
Brazil, 2002	Brazilian Civil Code (Law No. 10,406/2002)	Art. 422. The contracting parties are required to observe, both in the conclusion of the contract and in its performance, the principles of probity and good faith.

It follows, therefore, that good faith is the basic rule governing the performance of contractual obligations.

As a general clause that structures contemporary law of obligations, objective good faith performs multiple functions uniformly recognized by Brazilian civil-law scholarship. It is a rule that serves interpretive and integrative functions—creating ancillary duties of conduct—as well as a limiting function on the exercise of legal positions (MARTINS-COSTA, 2018). As systematized on the basis of Articles 113, 187, and 422 of the Civil Code, objective good faith transcends the express terms of the contract, imposing duties of loyalty, cooperation, and protection, and prohibiting contradictory or abusive conduct (TARTUCE).

Although the wording of Article 422 of the Brazilian Civil Code makes express reference to the contracting parties' duty to observe good faith in the conclusion of the contract, legal scholarship and case law are unanimous in holding that conduct in accordance with good faith is required throughout the entire negotiation phase.

FORGIONI explains that objective good faith concerns trust in the contract, and that the law governing commercial contracts should prioritize trust and protect legitimate expectations. In her view, transaction costs tend to decrease in markets in which economic agents trust one another's conduct.

With respect to the conduct of the specific agents involved in negotiations concerning standard-essential patents, under the case law developed in Europe, a party that does not participate in negotiations in good faith—by adopting, for example, delaying tactics to avoid execution of the license agreement—is deemed an "*unwilling licensee*." Conversely, a party that acts in good faith, that is, with a genuine willingness to negotiate, is considered a "*willing licensee*."

In examining the propriety of the conduct of an implementer accused of infringing standard-essential patents in Germany in 2020, the German court considered the following factors in concluding that the party was not a willing licensee: delays in responding; absence of substantive counteroffers; and strategic conduct aimed at delaying agreement.

Within this dynamic between the technology holder and the implementer, two risks must be balanced in the FRAND system: *hold-up*, when the patent holder charges excessive royalties in order to take advantage of a particular implementer or adopts measures to hinder that implementer's access to licensing; and *hold-out*, when the implementer uses the technology without paying and adopts delaying tactics to avoid adequately compensating the patent holder. Both types of conduct are objectionable and do not reflect good faith in negotiations and should therefore be avoided.

In 2014, the European Commission examined conduct amounting to abuse of a dominant position by SAMSUNG, a Korean company, in an antitrust proceeding, based on its deliberate choice to prevent APPLE, a U.S. company, from using the ETSI 3G UMTS telecommunications standard without first taking adequate steps to make an effective attempt at negotiation within a reasonable period of time. Between 2011 and 2012, SAMSUNG brought a series of claims for injunctive relief in France, Germany, Italy, the Netherlands, and the United Kingdom against APPLE, whose conduct was not deemed to be in bad faith as an *unwilling licensee*. In those circumstances, SAMSUNG's pursuit of preliminary and permanent injunctions to prevent APPLE from implementing the standard could constitute anticompetitive conduct.

Finally, regarding the dynamics of negotiations between the parties, it should be noted that, even where essential technology is involved, in light of the principle of freedom of economic initiative and freedom of contract, the implementer may withdraw from the negotiations, particularly if abusive terms are imposed on it. This does not, however, constitute a safe harbor for infringement. On the contrary, in such a case, the implementer should set aside an amount for royalties payable to the patent holder and properly document the negotiation exchanges.

II.1. Duty to Negotiate on FRAND Terms as a Manifestation of Objective Good Faith

The practice of licensing standard-essential patents is marked by distinctive features, beginning with the fact that the holder of patents covering technology declared essential to a standard, such as 6G, before a standard-setting organization (SSO), undertakes to grant non-exclusive licenses to those interested in implementing that technology.

Moreover, the patent holder must grant such licenses on fair, reasonable, and non-discriminatory terms ("FRAND" terms).

This particular dynamic gives rise to the understanding that the FRAND commitment creates a contractual, or even pre-contractual, duty between the parties involved. The patent holder would first enter into an agreement with the standard-setting organization (SSO), with the agreement between the patent holder and the implementer constituting a subsequent contract (SIDAK, 2018).

The concept of what constitutes FRAND is relatively simple. Its application, however, is complex, particularly because the FRAND model is not treated merely as a factual matter, but rather as a normative judgment. An offer is FRAND not only because it corresponds to other market licenses, but also because it satisfies a legal standard of fairness and reasonableness. Accordingly, the analysis of what is fair, reasonable, and non-discriminatory also depends on an examination of the parties' conduct and the specific features of the negotiation at issue.

One of the most emblematic cases supporting this understanding is *Huawei v. ZTE* (Case No. C-170/13), in which the Court of Justice of the European Union established a true roadmap of conduct for SEP holders and implementers. As early as 2015, the European Court examined which forms of party conduct during negotiations would permit a legitimate claim for injunctive relief.

The SEP holder has an obligation to give prior notice to the alleged infringer, identifying the patent and the alleged infringement. After the alleged infringer expresses an interest in taking a license, the SEP holder must make a formal FRAND license offer, including the royalty amount and the calculation criteria. As to the expected conduct of the alleged infringer, it must respond diligently and in good faith, without delaying tactics; if it rejects the offer, it must submit a FRAND counteroffer; and, if it continues to exploit the patent, it must provide security, such as a deposit or bank guarantee, and account for the use.

On May 5, 2020, the German Federal Court of Justice (Bundesgerichtshof—BGH), in *Sisvel v. Haier* (KZR 36/17), held that the implementer must clearly, seriously, and unequivocally express its willingness to enter into a FRAND license. The BGH concluded that Haier had not demonstrated such willingness to engage in licensing and therefore could not invoke the FRAND defense. In a second decision, issued on November 24, 2020, in case KZR 35/17, also involving Sisvel and Haier, the BGH reiterated that the central requirement is proof of a genuine willingness to enter into a FRAND license and rejected the Düsseldorf appellate court's view that Sisvel's offer was discriminatory.

With specific regard to offers, determining what is reasonable and/or non-discriminatory is undoubtedly one of the most sensitive aspects of the issue.

In *Unwired v. Huawei*, which drew worldwide attention for addressing the authority of a local court to set global royalties, the Supreme Court of the United Kingdom rejected the "*most-favoured license*" theory, understood as absolute identical treatment, and instead adopted the view that the non-discrimination commitment should not be treated in isolation, but as part of a single, unitary obligation. "*The terms of the license must be made available on a fair, reasonable and non-discriminatory basis, and that expression must be interpreted as an integrated whole. There are not two separate obligations, one requiring the license terms to be fair and reasonable and another, separately, requiring them to be non-discriminatory. Still less are there three autonomous obligations—one requiring the terms to be fair, another that they be reasonable, and a third that they be non-discriminatory.*"

In Brazilian courts, the definition of FRAND terms and the discussion of values have not yet reached the level of robustness already achieved in Europe, but they are gaining ground. By way of example, reference may be made to a decision by the Rio de Janeiro State Court judge, the Honorable Judge Victor Agustin Jaccoud Diz Torres, in which the court anticipated what would be considered fair, reasonable, and non-discriminatory (FRAND) terms:

> "*FRAND terms are those that can be rationally justified within the licensor's rational and commercial logic and that are not intended to benefit or harm any market participant. Put by reference to their opposite: anything that is not arbitrary or capricious will be fair and reasonable, while anything that is not intentionally discriminatory will be considered equitable. (...)*
> *[F]airness and reasonableness will be achieved if the price is not set randomly, arbitrarily, or capriciously, that is, if it is proposed on the basis of some commercial or operational rationale of the licensor and if that underlying rationale is not itself intended to harm or benefit one competitor over another.*"
> (Excerpts from the decision rendered on December 11, 2025, in Case No. 3016299-22.2025.8.19.0001)

Royalty calculation is the most technical and most contentious field in disputes involving standard-essential patents. There is no—nor should there be expected to be—uniformity among decisions rendered by different courts. The United Kingdom has placed significant weight on comparable agreements and global licenses; Brazil is still far from having a consolidated methodology.

In this field, the case of *InterDigital v. Lenovo* ([2023] EWHC 539) is relevant. In that case, the English court determined the terms of a global FRAND license after concluding that the parties had been unable to reach agreement through negotiation. Here, good faith ceases to be an abstract principle and becomes a legal fact subject to proof, as the court examined: the detailed chronology of the negotiations; the content of offers and counteroffers; the comparable licenses relied upon by the parties; the justifications for rejecting proposals; collaborative or strategic behavior during the litigation; and the compatibility of the parties' procedural positions with their prior negotiating conduct.

The outcome of that case, with global royalties being set as a lump sum plus default interest, is also relevant insofar as it discourages *hold-out*. This is because the court decided to maintain interest on past-due amounts.

II.2. Duties Arising from Good Faith in the Licensing of Standard-Essential Patents

There being no doubt as to the need to observe duties of cooperation, information, and prohibition of contradictory conduct (*venire contra factum proprium*) between the parties in negotiations for the licensing of standard-essential patents, the duty of transparency arising from objective good faith deserves particular emphasis. Compliance with that duty is more than recommended during negotiations between holders and implementers.

Lack of transparency in negotiations for licenses to patents declared essential is the central factor giving rise to concern.

At this point, it bears recalling that the Institute of Electrical and Electronics Engineers (IEEE), the world's largest technical organization, began in 2015 to require greater transparency in licensing terms, including disclosure of royalty amounts.

Accordingly, the patent holder is expected to be willing to disclose comparable licenses and the royalty-calculation methodology, to explain any discounts granted to third parties, and to justify regional differences. Conversely, the implementer receiving the offer is expected, rather than engaging in *hold-out*, to act responsively and diligently, identifying with the patent holder any inconsistency in the offer made, requesting information, and negotiating deadlines.

III. THE DUTY OF PROCEDURAL LOYALTY

If, on the one hand, good faith is a standard of conduct that imposes ethical behavior on all individuals involved in a legal relationship, once the dispute is brought before the courts there can be no doubt that it continues to apply. This is expressly enshrined in Article 5 of the Brazilian Code of Civil Procedure, Law No. 13,105 of 2015: "*Any person who in any way participates in the proceedings must act in accordance with good faith.*"

Parties are not expected to act in bad faith or disloyal before the Judiciary; rather, they are expected to adopt conduct that is honest, in good faith, ethical, and consistent with the very essence of the judicial process. In this regard, Justice Nancy Andrighi explained, in a decision rendered in Special Appeal No. 1,989,076/MT:

> *"The Brazilian legal system, in several provisions, rejects practices that are incompatible with the ethical-legal principle of procedural loyalty. The judicial process, in its instrumental expression, constitutes a means designed to ensure access to a just legal order and, for that very reason, is imbued with basic values that underscore the eminent purposes to which it is bound.*
>
> *Accordingly, the parties may not be permitted to use the judicial process abusively, in direct contravention of the duty of probity imposed on all those who seek judicial relief. The conduct of a bad-faith litigant must be summarily rejected by the courts, which cannot tolerate procedural abuse as a practice that undermines the ethical essence of the judicial process."*

Thus, once a dispute involving infringement of standard-essential patents has been judicialized, it seems evident that the duty of procedural loyalty prevents the parties from concealing or denying documents and/or information used during the negotiations, concealing comparable licenses, or changing in court the position they had maintained out of court.

IV. BURDEN OF PROOF REGARDING FRAND ELEMENTS

In light of the particular dynamics of disputes involving standard-essential patents, as well as the duties and responsibilities of each of the actors involved, this article now turns to the evidentiary obligations arising in any judicial dispute.

First, as to the elements supporting the patent holder's claim, there is no controversy. Under the general rule set forth in Article 373, I, of the Brazilian Code of Civil Procedure, the patent holder bears the burden of proving: ownership of the patent, its term of validity, essentiality—if and when challenged—and infringement.

In addition, particularly in connection with requests for preliminary injunctive relief, the patent holder must make a *prima facie* showing that it duly notified the implementer, identified the allegedly infringed SEP, and made a FRAND offer (*Huawei v. ZTE*—C-170/13, 2015).

The implementer, in turn, pursuant to Article 373, II, of the Brazilian Code of Civil Procedure, bears the burden of proving impeditive facts relating to its own conduct. In other words, once notice and a FRAND offer have been shown, the implementer bears the burden of demonstrating that it acted as a "*willing licensee*" (*Sisvel v. Haier* I and II).

This leads to one of the central questions addressed in this article: "Who must prove that the offer is or is not FRAND?" At least three possible models may be identified:

1. **Burden on the Patent Holder**

   The party asserting that its offer is FRAND must prove that assertion. Accordingly, the patent holder must demonstrate the methodology used, market practices, comparable royalties, and the absence of excessive royalty stacking. This is the position most protective of the implementer.

2. **Shared Burden**

   The patent holder proves that its offer is reasonable, for example, by demonstrating the rationale underlying the methodology—whereas the implementer proves why the offer is not FRAND. This model has gained traction in several jurisdictions.

3. **Dynamic Burden**

   This model has been adopted by the English courts. Each party proves what it is best placed to prove, for example, its comparables, economic models, and supporting justifications. The implementer may be required to demonstrate that it made a FRAND counteroffer, while the patent holder may be required, for example, to prove the absence of discrimination.

It is on the basis of this body of evidence that the court calculates reasonable royalty amounts.

Specifically with respect to the burden of proving discrimination, the ND element—because it constitutes a fact modifying or impeding the patent holder's claim, mere allegations are insufficient; the implementer must identify concrete comparables, such as licenses granted to third parties, equivalent circumstances, and differential treatment.

It is important to note that a significant portion of economic literature and U.S. case law assigns substantial probative value to comparable licenses in determining FRAND royalties, going so far as to treat them as the principal starting point for assessing the reasonableness of an offer. From this perspective, the presentation of sufficiently representative comparables could justify the creation of a rebuttable presumption of FRAND compliance, subject to the implementer's showing of circumstances that undermine their comparability.

The greatest challenge concerning the evidentiary dynamics of disputes involving standard-essential patents lies in the informational asymmetry between the parties, since it is typically the patent holder that possesses the licensing portfolio, prior agreements, including those containing confidentiality clauses—the negotiation history, and the negotiated rates.

For that reason, scholars in this field have advocated mandatory disclosure obligations and targeted shifts in the burden of proof.

In our view, the existence of such asymmetry reinforces the need for the patent holder to comply with the duties of good faith, transparency, and procedural loyalty.

A legitimate discussion regarding the burden of proof arises when one examines a change in negotiating behavior or unexpected conduct. Would such conduct influence the allocation of the burden of proof? If so, in what situations? For example, if the patent holder refuses to produce comparables, conceals information, or changes its negotiation methodology, should it face evidentiary consequences? Conversely, if the implementer fails to respond, fails to submit a counteroffer, or refuses to negotiate, should it lose certain defenses?

Although this issue has not yet been settled, there appears to be a tendency, across different legal systems, for the parties' conduct during FRAND negotiations to influence the court's assessment of the dispute. Based on the duties of good faith, cooperation, and procedural loyalty, the judge may adopt corrective measures designed to neutralize undue advantages obtained through opportunistic conduct and to encourage compliance with expected standards of negotiating behavior. In this context, an unjustified refusal to produce comparable licenses, an arbitrary change in the royalty-calculation methodology, the concealment of relevant information, or unfounded resistance to negotiation may be assessed by the judge as evidence unfavorable to the party engaging in such conduct.

Similarly, the implementer's inaction in response to proper notices, failure to submit a substantiated counteroffer, adoption of delaying tactics, or systematic refusal to negotiate may justify significant procedural consequences, including the limitation of certain defenses or the formation of adverse presumptions as to its willingness to enter into a license on FRAND terms. From this perspective, the parties' conduct does not strictly alter the abstract rules governing allocation of the burden of proof, but it does influence the assessment of the evidence produced and the determination of the procedural consequences arising from evidentiary insufficiency in each concrete case.

Companies holding standard-essential patents are expected, as a matter of practice, to license their patents on equal and transparent terms. In this regard, publication of the amounts charged for licensing standard-essential patents is a best practice, as it allows the implementer to assess whether the proposal received falls within the terms already practiced contractually with other players in the same segment.

An unfounded refusal or unexplained silence may signal a lack of engagement and/or an attempted *hold-out*, thereby shifting to the implementer the burden of proving that the relevant proposal was not FRAND.

It would be impossible to enumerate all possible forms of disloyal conduct by parties to judicial proceedings, as the creativity of disloyal business actors is limitless. Maintaining decorum in litigation is no trivial matter, since litigation arises precisely when the parties have failed to enter into a license agreement. Nevertheless, the legal requirement produces concrete effects, including the possibility that the court may impose procedural sanctions on the defaulting party, especially sanctions of a financial nature.

Whenever the implementer is in fact exploiting the patented invention, the patent holder should achieve some measure of success in a patent infringement action combined with a request for cessation of use. Judicial determination of royalties will be inevitable, because unauthorized free use of an invention without the patent holder's authorization is not permitted; however, the royalty amount may fall short of what the patent holder seeks if it fails to persuade the court of the reasonableness of the amount claimed.

Moreover, failure to observe the duties of good faith in negotiations and procedural loyalty in litigation may also have a material influence—favorable to the implementer—on claims for compensation for past and unauthorized exploitation of the patent, including denial of claims for penalties or default interest.

The parties' conduct should also influence the court's decision when assessing any request for cessation of use by way of preliminary relief, since such an exceptional measure should not be imposed on implementers acting in good faith, particularly if they are already paying provisional royalties. Conversely, it should not be denied where patent holders offering FRAND terms are faced with repeat infringers who rely on stratagems to avoid paying royalties. Between these two extremes lies a myriad of particular situations that make this decision—whether or not to grant preliminary relief ordering cessation of use—one of the most difficult tasks faced by the Judiciary in proceedings involving SEPs.

On the other hand, a counterclaim by the implementer seeking the grant of a license with royalties to be set by the Judiciary, provided that payment to the patent holder is secured by an effective guarantee, should not be denied merely because the implementer, before being served with process to respond to the action, failed to observe good faith in negotiations: the essential nature of the patent precludes exclusion of a potential licensee as a form of punishment.

Indeed, the commitment assumed by the patent holder when declaring its patent essential to a technological standard prevails over any animus—even if justified—that it may have toward the licensee. In this respect, the essential element to be examined by the Judiciary will be the implementer's unequivocal demonstration that it will not again use the same or new subterfuges to avoid paying the royalties due to the rightful party.

V. CONCLUSION

In light of the foregoing, it appears clear that objective good faith is the structuring principle capable of simultaneously defining the parties' negotiation duties and the allocation of the burden of proof in FRAND disputes.

In this respect, good faith ceases to represent merely a general principle of contract law and assumes a decisive role in defining the parties' rights and obligations. The assessment of the legitimacy of the SEP holder's claims and of the defenses asserted by the implementer often depends on reconstructing the negotiation history, analyzing the proposals exchanged, evaluating the parties' willingness to move toward an agreement, and examining the consistency between their out-of-court statements and their procedural positions. From this perspective, good faith ceases to be merely a substantive standard of conduct and assumes the character of a legal fact subject to proof.

The relevance of good faith is further heightened when negotiations fail and the dispute is submitted to the Judiciary. At that stage, the duties of cooperation, transparency, and procedural loyalty perform a function complementary to good faith in negotiations, imposing on the parties the duty to present, fully and consistently, the elements necessary for the proper adjudication of the dispute. The selective concealment of information, the assertion of allegations inconsistent with prior conduct, or the strategic use of litigation to create artificial negotiating advantages may compromise not only the resolution of the particular case, but also the very purpose of the FRAND commitment.

The practical consequences of breaches of these duties by the parties will depend on the circumstances of each case: the imposition of procedural sanctions on either party, the setting of penalty amounts and default interest owed by the implementer, the amount of royalties to which the patent holder is entitled, and the possible prohibition on the implementer's exploitation of the invention—whether ordered by way of preliminary relief or in a final judgment—may all constitute serious consequences imposed on those who breach the duties of contractual good faith and procedural loyalty.

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