# THE NEW ENGINEERING CONTRACT: RELATIONAL CONTRACTING, GOOD FAITH AND CO-OPERATION—PART 1

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> "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on the circumstances."
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> LORD BLACKBURN, *Mackay* v. *Dick* (1881) 6 App Cas 251.

## General

The New Engineering Contract ("NEC") is truly a "new" form of contract and yet it also borrows from traditional forms as well. A key question that this combination of new and old thus raises is how it should be approached in theoretical terms. The NEC does not fit easily within traditional contractual models. In fact, it would seem that much of traditional contract law operates at cross-purposes to the philosophy of the NEC as articulated by its drafters. If one accepts this proposition the question becomes whether another theoretical contractual framework can be put forward that better supports the NEC. It is suggested here, in answer to this, that a new contractual model, the *relational contract model*, provides the most sound theoretical framework for and explanation of the NEC. The centrepiece of the theoretical framework or paradigm developed here is the notion of *co-operation*. Co-operation, as will be described and expanded upon below, drawing upon the notions of *good faith* and *fairness,* in the context of relational contract theory, provides the best basis for reconceptualising not only the NEC but the construction contract as well. This two-part article sets forward and applies that model demonstrating how the theory works "on the ground", tracing the *locus* of the NEC in empirical research on contract behaviour, long term contracting, partnering, fiduciary relationships, and dispute management.

## The model

Before turning to the theoretical model in detail some reasons as to why theory is important may be outlined. The first reason is that many of the

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issues that are dealt with in the provisions of the NEC are given different treatment depending upon the level of contractual analysis. Thus a more theoretical approach with a higher level of abstraction may serve to better illustrate tensions in the issues. The second reason is to demonstrate trends underlying provisions in the NEC as well as where or why the NEC either correctly anticipates or lags behind them. Hence, a theoretical approach can be a better measure of whether a particular approach is in keeping with the most current practice and views on that issue. Thirdly, a balanced view of the NEC must not only be descriptive in content but also normative. Contract theory has an inherently normative quality to it even when that point is most loudly disclaimed. Thus the theoretical model developed here admits of both descriptive and normative views. The intention here is to join debate on contractual as well as management paradigms and thereby show ways in which the NEC contributes to it. Lastly, one conclusion in this paper is that the NEC is deserving of the name and description "new" (form of) contract system. It follows that a new theoretical framework for the contract system is needed.

This article postulates a relational contract model to best describe the NEC and explain its obligations moreover than pursuant to traditional contractual models. The model highlights elements of good faith and co-operation, emerging in modern contract law, which are strongly manifested in the NEC.

## Relational contract theory

Traditional contract law,[1] according to Ian R MacNeil,[2] includes both the classical contract model and the neo-classical or realist contract model. These models[3] have dominated theoretical work during the twentieth century and were developed through the work of leading American contract scholars including Karl Llewellyn,[4] Edwin Patterson,[5] Lon Fuller,[6] and Grant Gilmore.[7] Karl Llewellyn has been particularly influential because of his work on the *Uniform Commercial Code*. Their work in particular has influenced later scholars and has also usefully served as the basis of a broader regrouping of

[1] E M Holmes and D Thurmann, "A New and Old Theory for Adjudicating Standardized Contracts" (1987) 17 *Georgia Journal of International & Comparative Law* 323, 326.

[2] MacNeil refers to both classical and neo-classical contract law as "traditional contract law": I R MacNeil, "Restatement (Second) of Contracts and Presentiation" (1974) 60 Virginia L Rev 589.

[3] Holmes and Thurmann, *supra,* note 1 at 323, 327.

[4] Llewellyn is closely associated with constructionalism and American Legal Realism: see Karl Llewellyn: "A Realistic Jurisprudence, The Next Step" (1930) 30 Columbia L Rev 431; "Some Realism About Realism — Responding to Dean Pound" (1931) 44 Harvard L Rev 1222; "The Normative, the Legal and the Law-jobs: The Problem of Juristic Method" (1940) 49 Yale LJ 1355.

[5] Edwin Patterson is also credited with the first use of the term "contract of adhesion": Holmes and Thurmann, *supra,* note 1 at 323, 327 fn 11 citing Patterson, "The Delivery of a Life-Insurance Policy" (1919) 33 Harvard L Rev 198 and thus also the adhesion model of contract law.

[6] L Fuller and W R Perdue, Jr, "The Reliance Interest in Contract Damages" (1936) 46 Yale LJ 52.

[7] Gilmore's works include *The Ages of American Law* (New Haven: Yale University Press, 1977); and *The Death of Contract* (2nd ed., Columbus: Ohio State University Press, 1995). Gilmore is also associated with the "contort" model: Holmes and Thurmann, *supra,* note 1 at 323, fn 13.

certain of the other contractual models.[8] Relational contract theory is only one of many new theories of contract law that have arisen during the last several decades.[9]

The meaning to be given to a relational contract seems to vary. Central to the theory are the concepts of *society*, *exchange*, *choice*, and *futurity*.[10] In essence, *society* is the context in which contracts operate and thus establishes the boundaries for contractual relationships. *Exchange* is the broadest means of promoting the distribution of goods and services. Unlike traditional contract theory, exchange here is not market-orientated but socially orientated and the parties' obligations toward each other are determined less by their respective promises than by their relationship. *Choice*, which could be compared perhaps to will or consent in traditional terms, is a central concept but only one of several bases for explaining and understanding the binding force of contract. Lastly, *futurity* is how the projection of exchange into the future is encapsulated here. For MacNeil and the relational contract model it is the future that is important in theoretical terms.[11] Once again this contrasts with presentiation or the present in the classical contract model. The success of the contractual relationship depends less upon what has been agreed than upon how the parties will agree to handle events in the future. This short distillation of MacNeil's work brings out some of the more central concepts that emerge in his writing at different times and to varying degrees.[12]

MacNeil emphasises different aspects of contracting depending upon the time involved and describes relational contracting both in contrast to discrete[13] contracts as well as through various relational norms.[14] He also describes exchange as varying according to whether the contract is discrete

[8] As described by Holmes and Thurmann, *supra,* note 1 at 323.

[9] It is unlikely that any attempt to characterise the competing theories could be complete; however, one fairly complete attempt by Holmes and Thurmann, *supra,* note 1 at 323, 326–327 listed some 19 models of contract law.

[10] I R MacNeil, *The New Social Contract* (New Haven: Yale University Press, 1980).

[11] One study has suggested that subcontractors were prepared to settle disputes with contractors over set-offs to avoid jeopardising future work, P Kennedy *et al.*, "Resolution of Disputes arising from Set-off Clauses between Main Contractors and Sub-Contractors" (1997): 15 *Construction Management and Economics* 527–537.

[12] MacNeil's work evolved over time as he emphasised different aspect of the relational contract model, see by I R MacNeil: "Reflections on Relational Contracts" (1985) 141 *Journal of Institutional and Theoretical Economics* 541, 542; "Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos" (1987) *Journal of Institutional and Theoretical Economics* 271, 278. Cf. "Values in Contract: Internal and External" (1983) 78 Northwestern University L Rev 340.

[13] I R MacNeil "Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a 'Rich Classificatory Apparatus' " 75 (1981) 75 Northwestern University L Rev 1018, 1019–1020. In another article MacNeil focuses instead on the "discrete norm" in contrast to "relational norms": "Values in Contract: Internal and External" (1983) 78 Northwestern University L Rev 340, 351–366. See also Victor Goldberg, "Relational Exchange: Economics and Complex Contracts" (1980) 23 *American Behavioural Scientist* 337.

[14] Robert E Scott, "Risk Distribution and Adjustment in Long-Term Contracts", in Fritz Nicklisch (Ed), *The Complex Long-Term Contract Structures and International Arbitration* (Heidelberg: C F Muller Juristischer Verlag, 1987), p. 51 at 80; Peter Vass, "Informal 'Contracts' in Regulated Industries" in *New Challenges in Construction Law*, a paper presented at the Ninth Annual Construction Conference, on 20 September 1996, of the Society of Construction Law, the Centre of Construction Law and Management and Eversheds Construction Group (London: King's College, 1996).

or relational. Discrete contracts have certain characteristics: typically short duration, limited personal interaction, precise party measurement of easily measured objects of exchange, and minimal future co-operation.[15] Relational contracts according to the theory would exhibit opposite characteristics. Norms are also central to relational contract theory. For instance, MacNeil sets out five norms of enhanced importance in *ongoing contractual relations*: namely role integrity, preservation of the relation, harmonisation of relational conflict, propriety of means and supracontract norms.[16] The variation that seems to come out of MacNeil's descriptions has been compared to a checklist and even been criticised as inappropriate for a legal perspective.[17]

By way of contrast to MacNeil, Eisenberg puts forward a simple definition of a relational contract. Thus, according to Eisenberg, a relational contract is a contract that involves merely an exchange and a relationship between the contracting parties.[18] This definition is useful for the purpose of illustration but does not work on other levels. Thus, for present purposes in the construction context, there are still very important relationships on the site, which are not contractual. These relationships would fall outside of Eisenberg's definition. For present purposes an agreed definition is not wholly necessary as the focus on the relational contract theory here will only be upon those key elements which coincide with both the suggested philosophy behind and what should be the suggested approach to interpretation and operation of the NEC.

Further, no strict definition is necessary if one accepts the relational contract model as more a *framework* for analysis and argument than hard and fast principles that lead to fixed and reproducible results. This approach is generally consistent with that of Jay Feinman.[19] Feinman argues that what is important in relational contract theory, and indeed what distinguishes it from neo-classical contract theory, are the values it embodies. Feinman writes:

> "The difference in values of neoclassical and relational contract lies in the baseline approach to obligation. Neoclassical contract emphasizes the autonomy of individuals from each other, and the limited liability that the autonomy necessitates. Relational contract, in contrast, emphasizes the interdependence of individuals in social and economic relationships. Because its paradigmatic unit of inquiry is the extensive relation

[15] I R MacNeil, "Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos" (1987) *Journal of Institutional and Theoretical Economics* 271, 275.

[16] I R MacNeil, "Values in Contract: Internal and External" (1983) 78 Northwestern University L Rev 340, 361.

[17] M A Eisenberg, "Relational Contracts", in Jack Beatson and Daniel Friedmann (Eds), *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995), 291, 293.

[18] *Ibid.* at 296. In an earlier article Eisenberg also put forward a simpler analysis premised upon only two values, namely, fairness and efficiency, in looking at contract and explaining its enforcement: see M A Eisenberg, "The Bargain Principle and its Limit[s]" (1982) 95 Harvard L Rev 741.

[19] See J Feinman, "The Last Promissory Estoppel Article" (1992) 61 Fordham L Rev 303.

> rather than the discrete transaction, relational contract focuses on the necessity and desirability of trust, mutual responsibility, and connection among people."[20]

This law and society approach, though present at least in Macneil's work for 30 years, has been somewhat marginalised. Recently, however, the theory has garnered attention.[21] This new scholarship suggests that relational work on the content of contractual behaviour has largely been accepted. One telling remark at the symposium, that "we are all relationists now", suggests that this shift to a theory revealing the embeddedness[22] of contracts will have significant impact on the canon of contract law.

With this understanding of relational contract theory the next step is to bring out of the relational contract literature primarily, but also other literature where relevant, analysis that is consistent with a theoretical model for the NEC. Then, as this paper develops, references will be made in discussion of the NEC that return to those features and thus reinforce the model. Prior to examining those elements more should be said of empirical support for the model.

## Empirical foundation

The NEC may be analysed using a relational contract theoretical framework, emphasising the importance of good faith, fairness and co-operation as elements of the new paradigm. Relational contract theory and the principles underlying the NEC are supported by empirical research. Beginning with Stewart Macaulay's seminal work[23] there has been a tremendous growth in empirical research in many disciplines that touches upon law.[24] This was put perfunctorily by Marc Galanter and Mark Alan Edwards at a Symposium on

[20] *Ibid.* at 303. Also, D Campbell (Ed), *The Relational Theory of Contract: Selected Works of Ian MacNeil* (London: Sweet & Maxwell, 2001).

[21] A symposium on MacNeil's ideas was held in 1999; see (2000) 94 Northwestern University L Rev, No 3 for the publication of the symposium's papers. See also Campbell, *ibid.*

[22] For an interesting description of how the idea of embeddedness has been used by traditional contract analysts to add nuance to the legal job of interpreting contracts, see H Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999) at pp. 25–28.

[23] Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 *American Sociological Review* 55. Macaulay developed this somewhat in Stewart Macaulay, "An Empirical View of Contract" [1985] Wisconsin L Rev 465. See also I R MacNeil, "The Many Futures of Contracts" (1974) 47 Southern California L Rev 691; O E Williamson, "Contract Analysis: The Transaction Cost Approach" in P Burrows and C G Veljanovski (Eds), *Economic Approach to Law* (London: Butterworths, 1981). It is interesting to note that only three years after Macaulay's work a report by the Tavistock Institute of Human Relations, *Interdependence and Uncertainty: A Study of the Building Industry* (London: Tavistock Publications, 1966) called for further empirical work in construction and with regard to evaluating the forms of contract.

[24] Some of the research has already been referred to. In a recent article Luke Nottage points out how critical legal theorists, feminist legal theorists, and the law and economics movement all quickly assimilated relational contract theory approaches: "Planning and Renegotiating Long-Term Contracts in New Zealand and Japan" [1997] New Zealand L Rev 482, 483–486 and then writes: "[m]ost recently, his [MacNeil's] insights are being vigorously reabsorbed into contract theory based again on consent and contemporary versions of liberal thought. Thus empirical research into contract has been a major contributor to recent developments in both contract law theory and jurisprudence generally in the US" (p. 485, footnotes omitted).

Law and Society and Law and Economics[25]: "[t]he appearance of the *law ands* is part of the story of the displacement and disintegration of the prevailing legalist creed and its replacement with an arena of competing programs."[26]

More importantly the interest in empiricism[27] can be seen in project management literature[28] and increasingly in the legal literature both of which have significant implications for the NEC and contractual paradigms in general. Dr Martin Barnes has said: "The management of projects has become a science with its own set of rules, techniques and words which are not even mentioned in the existing standard forms. If the conditions of contract were redraughted from first principles, having regard to modern management methods, a much more purposeful document could be produced."[29]

The essence of the work done by Macaulay was to show that contract law plays a marginal role in long-term continuing business relationships. The same conclusion was reached in the leading British article by Hugh Beale and Tony Dugdale, "Contracts between Businessmen".[30] It would appear from Beale and Dugdale's research, as well as some that has followed it,[31] that

[25] *Symposium on Law and Society and Law and Economics: Common Ground, Irreconcilable Differences and New Directions.* The papers presented at the Symposium were published in [1997] Wisconsin L Rev 375–637.

[26] M Galanter and M A Edwards, "Introduction: The Path of the Law *Ands*" [1997] Wisconsin L Rev 375, 376.

[27] For a recent, lengthy and well-articulated call for more attention to be paid to empirical work in the law see R Posner, *Overcoming Law* (Cambridge: Harvard University Press, 1995).

[28] This is the subject of references throughout this paper.

[29] M Barnes, M W Abrahamson, and H A Palmer, introducers, and reported by J N Barber, "Towards Simpler Contracts" 80 *Proceedings of the Institution of Civil Engineers*, part 1 (June 1986), 812–818, 818.

[30] H Beale and T Dugdale, "Contracts between Businessmen" (1975) 2 *British Journal of Law and Society* 45.

[31] See notably S Macaulay, "Elegant Models, Empirical Pictures, and the Complexities of Contract" (1977) 11 *Law and Society Review* 11 507; G Gottlieb, "Relationism: Legal Theory for a Relational Society" (1983) 50 University of Chicago L Rev 50 567; and D Charny, "Non-legal Sanctions in Commercial Relationships" (1990) 104 Harvard L Rev 373. While these articles are of general application some early empirical work was also done in construction concerning tendering: see F M Schultz, "The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry" (1952) 19 University of Chicago L Rev 237; Note "Another Look at Construction Building and Contracts at Formation" (1967) 53 Virginia L Rev 1720; and R Lewis, "Contracts Between Businessmen: Reform of the Law of Firm Offers an Empirical Study of Tendering Practices in the Building Industry" (1982) 9 *Journal of Law and Society* 153. More recent empirical work has lately been published by R Weintraub, "A Survey of Contract Practice and Policy" [1992] Wisconsin L Rev 1. Scholars have also attempted to draw conclusions based on the number or overall percentage of total cases, the types of case and in some instances the residence of the litigants. Thus, P Vincent-Jones was able to point to the high percentage of foreign litigants in United Kingdom Commercial Court litigation: "Contract Litigation in England and Wales 1975–1991: A Transformation in Business Disputing?" [1993] *Civil Justice Quarterly* 337, 355–356; M P Ellinghaus, "An Australian Contract Law?" [1989] *Journal of Contract Law* 1 13, 19–20: the low percentage of construction cases in the Australian High Court, 6.8%, and United Kingdom House of Lords, 5.2%; and L Friedman, *Contract Law in America: A Social and Economic Cost Study* (Madison: University of Wisconsin Press, 1965): contract cases varied dramatically during different periods in the history of the Wisconsin Supreme Court (pp. 11–12, 186–190). From an historical point of view considerable work has been done on attitudes toward law in the English legal system by Ferguson much of which would again contradict the classical contract theory view: see R B Ferguson "Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes" (1977) 4 *British Journal of Law and Society* 18; R B Ferguson, "The Adjudication of Commercial Disputes and the Legal System in Modern England" (1980) 7 *British Journal Law and Society* 141. However, in general, there has been much less empirical work in England into contract than elsewhere: Nottage,

people neither plan as carefully nor pay as much attention to their contractual obligations as had previously been thought. Rather it is the *relations*, the cultures[32] at play, which determine the extent of much of the risk that is borne on either side of a contract. Further it was shown in these articles that people would perform disadvantageous contracts in the hope of maintaining relations or storing credits in effect for the future. That future may be understood in terms of a subsequent contract with the same party or subsequent conduct within the same contract. People were also shown to be willing to renegotiate in circumstances that had turned out badly for either or both sides of the agreement. In practice, wider ranges of circumstances were recognised as excusable than most contracts had provided for. This accords with the view that many disputes are not dealt with or recorded in any way and that only a small proportion result in any formal mode of dispute resolution.[33] Research has also shown the critical role played by trust in collaborative contracts.[34]

To anyone who has ever used or heard the adage that "contracts are left in the drawer" or words to that effect, these conclusions may not be that surprising. However, for those engaged in drafting contracts and seeking to provide for party behaviour, the conclusions are worrying because of their discontinuity with assumptions underlying much classical doctrine. In so far as drafters are concerned they can broadly construe these conclusions in either one of two ways: (a) continue to ignore them and keep drafting agreements despite this discontinuity; or (b) seek to redraft contracts to better take account of the parties' behaviour and expectations. It is argued here that the NEC has adopted the latter course. That is, the NEC drafters have sought to reflect these conclusions in their provisions. First of all the

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*supra*, note 3 at 485 makes this point at the same time he ironically notes (at p. 485) again that Devlin J had, intuitively perhaps, surmised as much back in 1951. Thus Devlin J had written in "The Relation between Commercial Law and Commercial Practice" (1951) 14 MLR 14 249 at 252: "In the ordinary sphere of litigation a defendant is usually delighted to take advantage of every technicality that will enable him to frustrate the plaintiff. But business men are not always separated by a quarrel or a grievance; usually they have a friendly dispute which they want solved. If the courts will not solve it for them satisfactorily, they will find somebody else who will." Finally, see H Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999) at pp. 196–201 for how these insights may impact on legal reasoning in long-term contracts.

[32] Culture in relation to the NEC is examined by J Rooke and D Seymour, "The NEC and the Culture of the Industry: Some Early Findings Regarding Possible Sources of Resistance to Change" (1995) 2 *Engineering, Construction and Architectural Management*, No 4, 287.

[33] J T Conlin *et al.*, *Sources, Causes and Effects of Construction Disputes: A Research Project*, CIOB Publication No 196 (London: CIOB, 1995), 69–75. See also J T Conlin, D A Langford and P Kennedy, "The Relationship between Construction Procurement Strategies and Construction Contract Disputes" in D A Langford and A Retik (Eds), *The Organization and Management of Construction: Shaping Theory and Practice* (London: E & FN Spon, 1996), Vol 2, 360–371.

[34] See G Wood, P McDermott, "Building on Trust: a Co-operative Approach to Construction Procurement, 7 *Journal of Construction Procurement,* No 24; J J Myers, "Alliance Contracting: A Potpourri of Proven Techniques for Successful Contracting" [2000] ICLR 56.

contract is not to be left in the drawer but used and used regularly. The programme, meeting, notice provisions etc. ensure recourse is made to the contract. Secondly, the contract proceeds on much of the best project management advice that is available. This is shown in many of the procedures that operate in the form. Third, the contract takes advantage of the parties' willingness to renegotiate in the face of changed circumstances; hence the detailed quotation procedure in the form and the assumptions about equality that it makes in important respects.

The Macaulay, Beale and Dugdale research has shown that people perform contracts because of the *relational* sanctions that operate. In part, it is submitted, these relational sanctions are reflected in the number of internal remedies for breach available in construction contracts but they are also reflected in various informal and relational dispute resolution mechanisms. Formerly, this function was largely fulfilled by the independent architect or engineer; however, today under the NEC, it is accomplished through the adjudicator. Previously the parties' continuing relationships meant that compromises based upon their understood interdependence were often arrived at with an implicit understanding of their interdependence. However, this understanding could not always be counted upon and the role of the architect and engineer came under closer scrutiny. While the NEC has built upon this process of understanding it more accurately reflects the true relational norms that exist in construction contracting.

**Key model elements**

The key elements of the model may be summarised in this fashion:

1. Construction contracts are ideal for relational analysis. They are inherently multidisciplinary and involve a wide range of actors. The context is rich with relational subtext.
2. Relational contract theory is compatible with promise-centred contract scholarship. Much of this scholarship complements relational contract theory on the question of why construction contracts are binding.
3. Relational contract theory would tend to support analysis of the NEC as a long-term contract that is suitable for partnering. Long term contracts, such as these, lend themselves both to relational contract theory and the jurisprudence flowing from norms inherent in the theory: good faith, fairness and co-operation.
4. Relational contracts and the NEC are both flexible. The former allows for, and the latter manifests, open terms, grants of discretion and various adjustment mechanisms.

These elements all stem from three underlying principles which will be

discussed herein: good faith, fairness and, in a follow-on article, co-operation in construction contracting. These principles have attracted significant jurisprudence and theories around the world, and are important to understand in order to get at the meaning of the NEC. The latter, through incorporating an express duty to co-operate, opens the gates to implying duties of good faith and fair dealing as well. These meanings will be explored in the remainder of this article.

## Good faith and fairness in classical contract theory

Good faith and fairness are relational contract concepts that suit the NEC. "Classical" contract law[35] and theory has been one of the dominant paradigms in contract literature.[36] It is premised upon abstract legal principles that are said to be universally applicable to contract in whatever form and context.[37] Although heavily criticised[38] the influence of the paradigm has been substantial and still influences newer approaches, particularly in the law and economics school of theorists.[39] Classical contract theory is dominated by the notion of freedom of contract.[40] In large part it is this legacy of freedom of contract that has limited the role of judicial supervision over the content of agreements.[41] The techniques that the courts

[35] "Contract law" is described singularly here. See generally J Beatson and D Friedmann, "Introduction: From 'Classical' to Modern Contract Law" in Beatson and Friedmann, *supra*, note 17 at 3.

[36] See generally for an exposition of this paradigm P S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979), Chap 21. Contract scholars who developed the theory include C C Langdell, *A Summary of the Law of Contracts* (2nd ed., Boston: Little, Brown, 1880); O W Holmes, *The Common Law* (Boston: Little, Brown, 1881). Holmes's contribution has again lately been revisited in a special edition of the *Harvard Law Review*: (1997) 110 Harvard L Rev, No 5, on the centenary of his seminal article "The Path of the Law" (1896–97) 10 Harvard L Rev 457.

[37] See P S Atiyah, *ibid.*, at pp. 402–404. In part, this universality derived from the influences of natural law upon scholars in the late nineteenth and early twentieth centuries. A recent delivery of these arguments comes in R Bigwood, "Conscience and the Liberal Contract: Observing Basic Distinctions, Part I" (2000) 16 *Journal of Contract Law* 1 and R Bigwood, "Conscience and the Liberal Contract: Observing Basic Distinctions, Part II" (2000) 16 *Journal of Contract Law* 191.

[38] See e.g. J Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991), pp. 214 *et seq.* and questioned in particular by critical legal studies scholars see eg D Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harvard L Rev 1685; and R M Unger, *The Critical Legal Studies Movement* (Boston: Harvard University Press, 1986).

[39] See Richard A Posner and Francesco Parisi (Eds), *Law and Economics* (Cheltenham: Edward Elgar Publications, 1997). Alternative theories or models of contract law are developed below.

[40] See on the development of the notion of freedom of contract: Atiyah, *supra*, note 24; and see generally R Pound, "Liberty of Contract" (1908–09) 18 Yale LJ 454; S Williston, "Freedom of Contract" (1921) 6 *Cornell Law Quarterly* 365; Sir D H Parry, *The Sanctity of Contracts in English Law* (London: Stevens, 1959); and L Friedman, *Contract Law in America*: *A Social and Economic Cost Study* (Madison: University of Wisconsin Press, 1965). It can be noted that today the notion continues to influence contemporary thinking strongly. Thus, lately in *Fair Construction Contracts*, a consultation paper issued by the Construction Sponsorship Directorate (London: HMSO, Department of the Environment, May 1995) when considering intervention, it was written at p. 13: "[t]he case for interventions proposed in this case would have to be very clearly made. In particular it would be necessary to demonstrate that these provisions would materially add to the benefits sought from the protection proposed for standard form contracts, that they could be given effect to in ways which did not substantially affect the freedom of the parties to enter into business agreements on their own terms, and were preferable to a non-regulatory option."

[41] See Atiyah, *supra*, note 24 at 402–404.

have employed to supervise the parties' agreements are necessarily narrow. The doctrine of consideration,[42] the necessity for privity of contract,[43] the overriding importance of consent,[44] and restrictions on independent third party rights[45] have been used to varying degrees by the courts to limit certain aspects of freedom of contract. There are also of course equitable principles that are important in this supervisory role. However, equitable principles, in particular the duty of good faith, have been subordinated to and seemingly marginalised in the face of the overriding common law contractual paradigm of freedom of contract.[46] Some may thus be surprised to learn that English law has no express general requirement of good faith,[47] despite the fact that good faith, as a basis for relationships, is as old as the Bible.[48]

Reziya Harrison has speculated on the reasons why this has occurred in a new major work entitled *Good Faith and Sales*.[49] Harrison writes of administrative problems in the Chancery courts, reaction against good faith in general, shifts following the passage of the Judicature Act 1873, and the "deadening" effect of legislation.[50] These developments have all served to

[42] Consideration has typically been used as a limiting mechanism under classical contract theory involving complex notions of both bargain and enforceability: see e.g. classic definitions of consideration in *Currie* v. *Misa* (1875) LR 10 Exch 153, 162, and *Thomas* v. *Thomas* (1842) 2 QB 851. In more recent work scholars such as Eisenberg have moved away from the formalism of the classical approach and highly articulated rules in different contexts toward articulating the meaning of consideration in terms of "principles that are sufficiently open textured to account for human reality, and to permit growth of doctrine as principles unfold and social facts change over time": M A Eisenberg, "The Principles of Consideration" (1982) 67 Cornell L Rev 640. Recently, see Roy Kreitner "The Gift Beyond the Grave: Revisiting the Question of Consideration" (2001) 101 Columbia L Rev 1876

[43] *Tweedle* v. *Atkinson* (1861) 1 B & S 393, 30 LJQB 265; *Dunlop Pneumatic Tyre Co Ltd* v. *Selfridge & Co Ltd* [1915] AC 847 (HL); *Scruttons Ltd* v. *Midland Silicones Ltd* [1962] AC 466 (HL); and *Beswick* v. *Beswick* [1968] AC 58 (HL). Privity, of late, no longer poses the obstacle that it did for so long with the passage of the Contracts (Rights of Third Parties) Act 1999.

[44] For instance through jurisprudence involving cases on duress, undue pressure, undue influence, and even "unconscionability", consent though is a relative concept see L Brilmayer, "Consent, Contract and Territory" (1989) 74 Minnesota L Rev 1.

[45] Third party rights are better protected in other jurisdictions: in the civil law through stipulation for the benefit of a third party; in the United States legislatively: see *Restatement (Second) of the Law of Contracts* (American Law Institute 1981), §302; and in Australia under the jurisprudence, see *Trident General Insurance Co Ltd* v. *McNiece Bros Pty Ltd* (1988) 165 CLR 107.

[46] This is still the case in England, though elsewhere in the Commonwealth equitable principles are making significant inroads into common law doctrines, especially in modern contract law. Australia and Canada, in particular, have made appreciable progress in areas of unconscionability, estoppel and fiduciary duties. The foremost author on this subject is former Australian Chief Justice Sir Anthony Mason. See, for example, A Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 LQR 66; P J Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214.

[47] *Interfoto Picture Library* v. *Stiletto Visual Programmes Ltd* [1989] QB 433 at 439 (CA); *Banque Keyser Ullmann SA* v. *Skandia* (*UK*) *Insurance Co Ltd* [1990] 1 QB 665 (CA), affirmed [1991] 2 AC 249 (HL); affirmed [2001] 2 Lloyd's Rep 483. See generally Lord Denning, "The Need for a New Equity", 5 *Current Legal Problems* (1952), 1; Arthur L Goodhart, *English Law and the Moral Law* (London: Stevens, 1953); J F O'Connor, *Good Faith in English Law* (Aldershot: Dartmouth, 1990); R Harrison, *Good Faith in Sales* (London: Sweet & Maxwell, 1997); and H K Lucke "Good Faith and Contractual Performance" in P D Finn (Ed), *Essays on Contract* (Sydney: Law Book Co, 1987). See also R Brownsword, N J Hird, G Howells (Eds), *Good Faith in Contract: Concept and Context* (Aldershot: Dartmouth, 1999) and A D M Forte (Ed), *Good Faith in Contract & Property Law* (Oxford: Hart, 1999).

[48] "Keep thy word, and deal faithfully . . .": Ecclesiasticus 29:3.

[49] Harrison, *supra,* note 35.

[50] Harrison, *supra,* note 35, 6–10.

minimise the force of equitable doctrines especially good faith and fair dealing.

While good faith as a broad duty does not enjoy the prevalence that it once did under the common law, considerable support for its use in discrete areas of the law, as well as new developments, can be referred to. Indeed, the absence of an express and general obligation of good faith in or across English law has not by any means resulted in its disappearance. Leading scholars have made important contributions to the topic[51] and more recently the collection of papers in *Good Faith and Fault in Contract Law*[52] and the work by Harrison[53] have breathed new life into the subject.[54]

## Good faith

To return to Harrison's work, the author has inquired into the nature of the duty of good faith. But what kind of duty is it? How is it to be classified? These questions have arisen mainly in the context of the duty of good faith in insurance contracts. The courts have over the years expressed a number of somewhat tentative views. Essentially the contest has been between:

(1) an implied term of the contract;
(2) a condition precedent to liability under the contract; or
(3) simply a body of rules, arising outside the contract, imposed originally by the courts of equity, to prevent imposition.[55]

Harrison concludes that the "weight of authority" leans towards the duty being, when required, an implied term of the contract of *some kind*.[56] Both well-placed academics and jurists have made the same point. Thus, Professor E Allan Farnsworth wrote of implied terms serving this function in 1963[57]; and Humphrey LLoyd has written since then:

> "Considerable use is made of the doctrine of the implied term as a means of avoiding what is thought to be the unpalatable or unreasonable consequences of what has been

[51] R Powell, "Good Faith in Contracts", 9 *Current Legal Problems* (1956), 16; E A Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" [1963] University of Chicago L Rev 666; F Kessler and E Fine, "*Culpa in Contrahendo*, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study" (1964) 77 Harvard L Rev 401; R A Newman, "The Renaissance of Good Faith in Contracting in Anglo-American Law" (1969) 54 Cornell L Rev 553; O'Connor, *supra*, note 35; and J F O'Connor, *Good Faith in International Law* (Aldershot: Dartmouth, 1991).

[52] Beatson and Friedmann, *supra*, note 17. Most of the papers in the text were originally presented at a colloquium held at Merton College, Oxford, in September 1993. Individual papers are referred to here throughout.

[53] Harrison, *supra*, note 35.

[54] J W Carter and M P Furmston, "Good Faith and Fairness in the Negotiation of Contracts Part I" (1994) 8 *Journal of Contract Law* 1; S Litvinoff, "Good Faith" (1997) 71 Tulane L Rev 1645, 1657–1658.

[55] Harrison, *supra,* note 35 at 20. Adopting an historical perspective Harrison goes about crafting an argument for how good faith and fair dealing can be shown in a myriad of real property cases. Working from this caselaw and drawing out the incidents when terms are implied Harrison is able to demonstrate convincingly a substantial body of law devoted to this topic. Much of it, it is submitted, is capable of application beyond property confines to other areas of the law, including construction.

[56] Harrison, *supra*, note 35 at 23 (original emphasis).

[57] Farnsworth, *supra*, note 39 at 666.

> contractually agreed. English law does not have an obligation of 'good faith' as it is understood in other legal systems. However in many instances the result which might be obtained by use of that obligation can in practice be arrived at either by a careful reading of the contract or by the use of an implied term."[58]

Lord Justice Steyn has remarked that without a general doctrine of good faith "English law has had to resort to the implication of terms".[59] Lord Steyn has been particularly influential in recent judgments. Specifically his lordship has made the link between the leading English common law good faith jurist, Lord Mansfield, and in particular his judgment in *Carter* v. *Boehm*,[60] with good faith in the common law today. Thus Steyn LJ, as he then was, said, at first instance in *Banque Keyser Ullmann SA* v. *Skandia (UK) Insurance Co Ltd:*

> "The rationale of the rule imposing a duty of utmost good faith on the insured is that matters material to the risk are generally speaking peculiarly within his knowledge. In so far as matters are peculiarly within the insurer's knowledge, as in Lord Mansfield's example of the arrived ship, principle and fairness requires the imposition of a similar duty on the insurer. Indeed, it is difficult to imagine a more retrograde step, subversive of the standard of our insurance law and our insurance markets, than a ruling today that the great judge erred in *Carter* v. *Boehm*, 3 Burr 1905 in stating that the principle of good faith rests on both parties."[61]

In addition, in the English context, recent enactment of the Arbitration Act 1996, with its inclusion of a section on amiable composition also introduces a significant good faith notion into English law.[62] By comparison, Priestley J has said of Australian law that "terms may readily be implied into contracts having substantially the same effect as the good faith formulation in the United States".[63]

The importance of implied terms in theoretical formulations for contract

[58] H LLoyd QC, "Approaches to Long-Term Contracts", in Nichlisch, *supra*, note 14 at 399–400 and citing *London Borough of Merton* v. *Stanley Hugh Leach Ltd* (1985) 32 BLR 51 at 80, fn 20.

[59] Steyn J (as he then was), "The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?" *Denning L J* (1991), 131, 133; and lately: "[i]n systems of law where there is a general duty of good faith in the performance of contracts the need to supplement the written contract by implied terms is less than in the English system. In our system, however, the implication of terms fulfils an important function in promoting the reasonable expectations of parties": "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433, 438–439.

[60] In *Carter* v. *Boehm* (1766) 3 Burr 1905, 97 ER 1162 Lord Mansfield said good faith is "the governing principle . . . applicable to all contracts and dealings": (1766) 3 Burr 1905 at 1910, 97 ER 1162 at 1164. Cf. Lord Kenyon in *Mellins* v. *Motteux* (1792) 170 ER 113 at 114, who said that "in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith".

[61] *Banque Keyser Ullmann SA v. Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665 at 701, [1987] 2 All ER 923 at 943. For a detailed analysis of the operation of utmost good faith (as a precontractual duty implied in law because of the nature of the contract) see T J Schoenbaum, "The Duty of Utmost Good Faith in Marine Insurance Law" (1998) 29 *Journal of Maritime Law and Commerce* 1.

[62] This view is developed by J A McInnis in "The Arbitration Bill and Equity Arbitrations in England", in A M Odams and J Higgins (Eds), *Commercial Dispute Resolution* (London: Construction Law Press, 1996), p. 109.

[63] Priestly J, "A Guide to a Comparison of Australian and United States Contract Law" (1989) 12 University of New South Wales LJ 4, 23. In wording reminiscent of the *Restatement (Second) of the Law of Contracts,* Priestly J has also said in one of the leading Australian cases on the subject, *Renard Constructions (ME) Pty* v. *Minister for Public Works* (1992) 26 NSWLR 234 at 268, that "people . . . have grown used to the courts applying standards of fairness to contracts which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance"; although in *Service Station Association Ltd* v. *Berg Bennett & Associates Ltd* (1993) 117 ALR 393 (Fed CA) Gummow J said at

can be seen in the commentators' work as well. Thus, Roger Brownsword,[64] for example, after referring to an observation of Lord Wilberforce in *National Carriers Ltd* v. *Panalpina* (*Northern*) *Ltd*[65] for support, writes of a "modern" model of contract in this way:

> "Accordingly, certain types of implied terms are no longer excludable by agreement; if the parties choose to make a certain type of contract then it is simply subject to particular stock items. Equally, certain types of contractual terms are disallowed as unfair or unconscionable … Contract in the modern model becomes a site for good faith and conscionable dealing, a mixture of procedural and substantive regulation confining the parties' freedom to take unfair advantage of one another."[66]

## Leading jurisdictions

The number of either express or implied incarnations of good faith in other jurisdictions cannot be considered in detail here although some examples are illustrative of its breadth and acceptance. Thus in the United States the doctrine of good faith is firmly established in the Uniform Commercial Code,[67] and §1–203[68] provides: "[e]very contract or duty within this Act

p 407: "… no authority which binds this court supports the implication by law of a term [of good faith] of such a width as that in §205 [of the *Restatement (Second) of the Law of Contracts*] …". Renwyck Niemann, in a recent review of developments in the area believes that an affirmation of such a general duty of good faith is on the horizon in Australia, subject to ongoing work to come to terms with the meaning of the concept. See R Niemann, "Recent Aspects of Good Faith" (2002) 18 *Building and Construction Law* 103. This reflects a trend in Canada as well: A J Heal, "Construction Partnering: Good Faith in Theory and Practice" (1999) 15 (3) Const LJ 167 at 182. Good faith terms have been implied in American caselaw in numerous areas and beginning with causes of action in tort California insurance cases, e.g. *Comunale* v. *Traders & General Insurance Co*, 328 P 2d 198 (1958); *Gruenberg* v. *Aetna Insurance Co,* 510 P 2d 1032 (1973); and then extending to other areas and eventually commercial contracts in general, e.g. *Commercial Cotton Co Inc* v. *United California Bank*, 209 Cal Rptr 551 (1985); and *Wallis* v. *Superior Court* (*Kroehler Manufacturing Co*), 207 Cal Rptr 123 (1984); however the breach of the terms only gives rise to a cause of action in tort when a special relationship exists between the parties. The American position resembles but still goes further than English case law in this regard and as lately set out in *Banque Keyser Ullmann SA* v. *Skandia* (*UK*) *Insurance Co Ltd* [1991] 2 AC 249 (HL), where no general duty of good faith would be imposed in the insurance contract there under consideration but which rather gave rise to liability on the basis of the parties' special relationship. English law has also resisted the expansion of liability in tort for breach of contract and narrowly confined the exceptions, e.g. negligent statements from *Hedley Byrne & Co Ltd* v. *Heller & Partners Ltd* [1964] AC 465 (HL).

[64] R Brownsword, "Towards a Rational Law of Contract" in T Wilhelmsson (Ed), *Perspectives of Critical Contract Law* (Aldershot: Dartmouth, 1993), p. 241. See also Brownsword, Hird and Howells (Eds), *supra,* note 35 and *Contract Law:Themes for the 21st century* (London: Butterworths, 2000), p. 97.

[65] *National Carriers Ltd* v. *Panalpina* (*Northern*) *Ltd* [1981] AC 675, 696 (HL). "I think that the movement of the law is away from a rigid theory of autonomy towards the discovery—or I do not hesitate to say imposition —by the courts of just solutions, which can be ascribed to reasonable men in the position of the parties", in R Brownsword, *ibid.,* at 262.

[66] *Ibid.,* at 241, 262.

[67] The drafting of the UCC reflects the influence of civil law in particular Germany. See J Whitman, "Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code" (1987) 87 Yale LJ 156; E A Farnsworth, "Good Faith in Contract Performance", in Beatson and Friedmann, *supra,* note 17 at 155 noting specifically that Karl Llewellyn, Chief Reporter for the UCC, was inspired by the *treu und glauben* provision of the German Civil Code.

[68] In addition approximately 50 other sections also refer to the concept. Some of these sections contain definitions of good faith, thus §1–201(19) provides in part that good faith is "honesty in fact in the conduct or transaction concerned" and §2–103(1)(b) provides in the sales context that good faith means in addition "the observance of reasonable standards of fair dealing in the trade".

imposes an obligation of good faith in performance or enforcement." The *Restatement (2d) of Contracts* similarly provides in §205: "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." The American Bar Association's *Model Procurement Code Project for State and Local Governments* sets out the requirement of good faith and §1–103 provides: "[t]his Code requires all parties involved in the negotiation, performance, or administration of [State] contracts to act in good faith."[69] The importance of these provisions, the Uniform Commercial Code with its legislative effect and the *Restatement* and the *Model Code* with their persuasive effect serves to firmly embed the concept of good faith in American law.[70]

International law also contributes to the expansion of the concept of good faith. Thus, the United Nations Convention on Contracts for the International Sale of Goods imposes a good faith requirement in Article 7(1): "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

Although the Convention article does not directly impose a duty to observe good faith as such, inclusion of the reference to good faith and the importance of the stated regard to have for it in interpreting the Convention, nevertheless have an impact in jurisdictions without express good faith obligations.[71] In contrast, the recently enacted UNIDROIT Principles for International Commercial Contracts did not impose an express good faith obligation.[72]

In another respect, it has been suggested that the *lex mercatoria* is a source of good faith duties. Thus, upon a thorough review of the topic, Lord Mustill concluded that the rules of the *lex mercatoria* include: (1) a duty to perform a contract in good faith; and (2) a duty to renegotiate the contract in good faith

[69] *Model Procurement Code Project for State and Local Governments* (New York: American Bar Association, 1979). Recommended Regulations under the Code were approved on 2 August 1980 and are included in the fifth Reprinting of the Model Code, February 1993, Washington. The Model Code provides statutory principles and policy guidance for managing the procurement of services, supplies and construction for public purposes; and administrative and judicial remedies for the resolution of controversies relating to public contracts; and a set of ethical standards for both public and private participants, Introduction to the Model Code, p. vi.

[70] The history of judicial recognition of an implied covenant of good faith and fair dealing is traced by R S Summers, "The General Duty of Good Faith—Its Recognition and Conceptualization" (1982) 67 Cornell L Rev 810. Good faith is also an express obligation under article 1759 of the Louisiana Civil Code.

[71] See P Winship, "Private International Law and the UN Sales Convention" (1988) 21 Cornell International LJ 487.

[72] Article 2.15 of the UNIDROIT *Principles* is framed negatively in terms of bad faith. Good faith has often been defined or explained negatively, thus good faith is not bad faith, or good faith is the opposite of bad faith. This is referred to as the "excluder" analysis: UNIDROIT, *Principles of Commercial Contracts* (Italy: UNIDROIT, 1994). Under the NEC PSC Second Edition the adjudicator's liability is affected by bad faith under clause 90.12.

if unforeseen difficulties intervene during performance even without a revision clause in the contract.[73]

In Australia attention to good faith has been said to embrace both: (1) a duty to act honestly; and (2) a duty to have regard to the legitimate interests of the other party.[74] Attention has also focused on unconscionability as a good faith "equivalent".[75] In France good faith and fair dealing are important in the formation of the contract and impose strong pre-contractual duties of disclosure.[76] In Germany the doctrine *treu und glauben* regulates debtors' and creditors' rights of performance.[77] Once again, in England, the duty of good faith or fair dealing applies in the formation of the contract of sale normally

[73] Mustill LJ (as he then was), "The New *Lex Mercatoria*: The First Twenty-five Years" (1988) 4 *Arbitration International* 86, 95–96 (footnotes omitted). Close attention is also paid to s. 52 of the federal Trade Practices Act 1974 in Australia and similar fair trading legislation that is broader in many Australian states and how it may impact on good faith although J W Carter and M P Furmston state that even with "... voluminous and diverse [caselaw] ... [t]here is no single theme and it would be an error to rationalize the law on the basis of a principle of good faith": in "Good Faith and Fairness in the Negotiation of Contracts Part II" (1995) 8 *Journal of Contract Law* 93, 99. The issue s. 52 raises is important in the United Kingdom because of the suggestion by the Office of Fair Trading to introduce a general duty to trade fairly which would in effect be similar to s. 52. See the views of S R Clegg, "Contracts Cause Conflict", in P Fenn and R Gameson (Eds), *Construction Conflict Management and Resolution* (London: E & FN Spon, 1992), pp. 128–144 who writes that contracts are a source of conflict as the parties seek to renegotiate terms to their advantage as the project progresses; and lately *Halifax Financial Services Ltd* v. *Intuitive Systems Ltd* (1999) CILL 1467.

[74] E.g. Carter and Furmston, *supra*, note 42 at 7. See for a very good general discussion of good faith *Gibson* v. *Parkes District Hospital* (1991) 26 NSWLR 9; noted by J G Fleming, "Insurer's Breach of Good Faith —A New Tort" (1992) 108 LQR 357. Legitimacy is also a consideration in the model Nagla Nassar postulates in elaborating upon when a duty to co-operate arises in long-term contractual relationships. Legitimacy, for Nassar, refers to the fact that the right of a party to secure a benefit from or an entitlement to continue in a contractual relationship assumes it is justifiable. Justifiability may be determined either with reference to the accepted norms in the relationship or even the commercial marketplace: N Nassar, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Transactions* (Dordrecht: Martinus Nijhoff Publishers, 1994), pp. 164–167.

[75] See "Dealings with the Vulnerable Buyer or Seller", in Harrison, *supra,* note 35 at 296–333 and fn 1 at p. 296 referring to Sir A Mason, "Unfairness in Contracting: the Role of Equity and Good Conscience in Commercial Transactions" , a paper given at Gray's Inn Hall on 5 July 1995; *Commercial Bank of Australia Ltd* v. *Amadio* (1983) 151 CLR 447. Unconscionability is also a significant doctrine in the United States and which may be considered separately from good faith duties. American law also distinguishes between "procedural unconscionability" and "substantive unconscionability": see generally R Craswell, "Property Rules and Liability Rules in Unconscionability and Related Doctrines" (1993) 60 University of Chicago L Rev 60 1; A A Leff, "Unconscionability and the Code—The Emperor's New Clause" (1967) 115 University of Pennsylvania L Rev 485; R A Epstein, "Unconscionability: A Critical Reappraisal" (1975) 18 *Journal of Law and Economics* 293.

[76] M Fabre-Magnan, "Duties of Disclosure and French Contract Law", in Beatson and Friedmann, *supra*, note 17 at 99; see also J Ghestin, "The Pre-contractual Obligation to Disclose Information—French Report" in D Harris and D Tallon, eds, *Contract Law Today— Anglo-French Comparisons* (Oxford: Clarendon Press, 1989), pp. 151–166; Kessler and Fine, *supra*, note 39 at 401; A Duggan, M Bryan, and F Hanks, *Contractual Non-Disclosure* (Melbourne: Longman, 1994); R Zimmermann and S Whittaker (Eds), *Good Faith in European Contract Law* (New York: Cambridge University Press, 2000).

[77] Werner F Ebke and Bettina M Steinhauer, "The Doctrine of Good Faith in German Contract Law" in Beatson and Friedmann, *supra*, note 17 at 171, referring in particular to §157 and §242 of the German Civil Code. The authors write at p. 171 that in "German contract law, the doctrine of good faith fulfills three basic functions: it serves as the basis of interstitial law-making by the judiciary, it forms the basis of legal defenses in private law suits, and it provides a statutory basis for reallocating risks in private contracts". The German Law of Standard Contract Terms, 9 December 1976, in Art 9.1, the general clause, also refers to

as a duty of candour and accuracy.[78] If one were to turn to other civilian jurisdictions,[79] such examples may be multiplied. Thus, in Asia, for example,[80] references to the Japanese,[81] Indonesian,[82] Thai[83] and Taiwanese[84] Civil Codes, and most recently the new PRC Contract Law,[85] all stipulate *forms* of good faith duties.

The above indications of the doctrine of good faith in its different forms are not limitative of the guises in which the doctrine is said by others to also operate. Thus, Nili Cohen has referred to some of the "piecemeal solutions"[86] of English law that have been adopted to impose limits on freedom of contract or action in the bargaining process. These include promissory estoppel, restitution, collateral contract, and even the tort of negligence.[87] It may be separately noted that promissory estoppel has also been held out as a further means of assessing fairness[88] and although the concept does not

"undue advantage to such an extent as to be incompatible with good faith". It should be noted that the Roman law term *bona fides* (good faith) was replaced in Germany with the more "Germanic" *treu und glauben* according to Saul Litvinoff because of more nationalistic feelings at the time of the introduction of the German Civil Code: Litvinoff, *supra*, note 42 at 1654.

[78] Harrison, *supra*, note 35 at 29. Harrison notes the duty is a presumption of law that operates both as an obligation in interpreting existing provisions and as an implied term when there are no relevant express terms that can be interpreted.

[79] See generally H Beale, "European Principles of Contract Law and Construction Contracts" and C Thomas, QC, "Influence of Civil Law on the Development of Construction Contracts", both in *Construction Law: Looking to the Future: at Proceedings of the Eleventh Annual Conference of the Centre of Construction Law and Management and Keating Chambers* (London: King's College, Keating Chambers, 1998).

[80] These examples are given by R Landsberg and P Megens, "Applications of Good Faith in Contracting" [1996] ICLR 180, 182–183. "Risk Sharing and Contract Forms: Devising Appropriate Contract Terms", in *Future Directions in Construction Law: at Proceedings of the Fifth Annual Conference of the Centre of Construction Law and Management* (London: King's College, 1992), pp. 99–111.

[81] See Art 1(2).

[82] See Art 1338(3)

[83] See Arts 5 and 368 of the Thailand Civil and Commercial Code.

[84] See Art 148(2).

[85] Art 6 of the Contract Law 1999 provides for good faith to be followed by the parties in exercising their rights and performing their duties. In Art 4 of the General Provisions of Civil Law 1986 good faith is included as one of four principles to be followed in civil actions along with voluntariness, fairness and exchange of equivalent values: see L Bing, "The Autonomy of Principle of Honesty and Faithfulness (Good Faith) in Chinese Contract Law" in *International Conference on Comparative Private Law 1999 in Hong Kong, 3 June 1999*, by the Faculty of Law, Hong Kong University (Hong Kong: Faculty of Law, Hong Kong University, 1999).

[86] N Cohen, "Pre-contractual Duties: Two Freedoms and the Contract to Negotiate", in Beatson and Friedmann, *supra*, note 17 at 25, 28–29, takes his use of this term from the judgment of Bingham LJ in *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd* [1989] QB 433 at 439 (CA).

[87] *Ibid.* at 29. Recently, a major study listed the following doctrines employed in common law jurisdictions to achieve fairness results: "the law of implied terms; the doctrine of estoppel (including proprietary estoppel); part performance of a contract in equity; the *de minimus* rule; qualifications of legal rights by reference to the notion of reasonableness; relief against forfeiture in equity; the maxim according to which 'no man can take advantage of his own wrong'; the notion of breach of confidence; the doctrine of fundamental mistake; the law relating to repudiation; and (occasionally) even a rule that contractual power may only be exercised in good faith." The list relating to civilian jurisdictions is longer still. See Zimmerman and Whittaker, *supra*, note 64 at 676.

[88] M Chen-Wishart, "Consideration, Practical Benefit and the Emperor's New Clothes", in Beatson and Friedmann, *supra*, note 17 at 123, 148.

create a cause of action under English law[89] it has been used to this effect in American[90] and Australian[91] and New Zealand law.[92] Daniel Friedmann[93] too points out the special role remedies have played in this regard. Arguing in favour of the imposition of a duty of good faith in the bargaining process Cohen has stated good faith could overcome the "adversarial" approach which is characteristic of English law,[94] and for our purposes what is said to be the adversarial approach that is also characteristic of the construction industry.

In relational contract theory MacNeil writes that good faith is both "anti-presentiating, and very much anti-discrete;"[95] while Whincop writes: "[g]ood faith's heterogeneity is inherently relational, because it is flexible enough to examine behaviour contextually.[96] The emphasis upon and importance of the context for good faith and its *flexibility* thus comes up repeatedly.[97]

In summary there are many possible individual applications for the good faith doctrine and although not all of them will be relevant to the construction industry,[98] certain cases may still usefully be referred to. These cases involve notions of good faith and also fit well with the language of the

[89] See generally D Friedmann, "Good Faith and Remedies for Breach of Contract", in Beatson and Friedmann, *supra*, note 17 at 399; S M Waddams, "The Choice of Remedy for Breach of Contract", in Beatson and Friedmann, *supra*, note 17 at 471.

[90] §90(1), *Restatement (Second) of the Law of Contracts* (1981).

[91] *Waltons Stores* (*Interstate*) *Ltd* v. *Maher* (1988) 164 CLR 387; *Commonwealth* v. *Verwayen* (1990) 95 ALR 321; followed in *Mobil Oil Australia Ltd* v. *Lyndel Nominees Pty Ltd* (1998)153 ALR 198.

[92] *Burbery Mortgage, Finance & Savings Ltd* v. *Hindsbank Holdings Ltd* [1989] 1 NZLR 356; *Gold Star Insurance Co Ltd* v. *Graunt* (1991) 3 NZLBC 102.

[93] Friedmann, *supra*, note 77 at 399–425. Friedman argues in favour of adoption of the concept for two reasons: "Good faith may provide a unifying concept for a number of distinct rules dealt under different headings, and contribute greater consistency in the law by exerting pressure upon rules which are incompatible with the idea of good faith", at pp. 399–400.

[94] Cohen, *supra*, note 74 at 25, 28.

[95] See I R MacNeil, "Contracts: Adjustments of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law" (1978) 72 Northwestern University L Rev 854, 885.

[96] M J Whincop, "A Relational and Doctrinal Critique of Shareholders' Special Contracts" [1997] Sydney L Rev 314, 331.

[97] See e.g. Litvinoff, *supra*, note 42 at 1656: "A comment to that section [§205, *Restatement (Second) of the Law of Contracts* (1981)] explains that the expression good faith is used in a variety of contexts and that its meaning varies with the context . . ."; Carter and Furmston, *supra*, note 42 at 3: "Good faith is itself a flexible notion, which will take its meaning, in part, from its context"; and S M Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995): 9 *Journal of Contract Law* 55, 58: "[g]ood faith, unconscionability and reasonable expectations are concepts that sound somewhat similar, and the terms are sometimes used together to signify (usually with approbation) what might be summarised as a flexible approach to contract law, avoiding rigid rules, and emphasising justice in the individual case, even at the cost of stability and predictability."

[98] Professor Malcolm Clarke's construction metaphor and the general theme from his article is apt: ". . . the foundations of a general rule of good faith can be discerned in the common law dust: that particular rules already in place may be used as the piles for the building of a principle of good faith": "The Common Law of Contract in 1993: Is There a General Doctrine of Good Faith" (1993) 23 Hong Kong LJ 318, 319 (footnotes omitted). B Colledge gives examples of the requirements of good faith in three categories: discretion, basic decency and implied terms of co-operation and prevention. She concludes that the law is moving towards increasingly strict good faith requirements: "Good Faith in Construction Contracts —The Hidden Agenda" (1999) 15(3) Const LJ 288.

NEC; in particular, in terms of tendering,[99] the duty to disclose information[100]; dealing with unforeseen circumstances[101] and as a corollary of the duty of co-operation.

**Fairness**

Following on the discussion of good faith above it is also fitting that fairness be considered. Reference has been made to the absence of a general duty of good faith in English law, the guises it may operate under instead[102] and the "piecemeal solutions" of English law on the topic. It is this precise vein that the topic of fairness may too be discussed for, as Collins has written: "the English law governing fairness comprises a patchwork of common law doctrines and statutory provisions. At no point does the law expressly empower courts to invalidate or rewrite any contracts which they regard as unfair . . . yet the cumulative effect of common law doctrines and statutory interventions brings the English law ever closer to such a position.[103]

**Recent examples**

We may turn briefly to two recent examples of statutory provisions, the Housing Grants, Construction and Regeneration Act 1996; and the CDM Regulations. The issue of fairness in English law was expressly raised in the Latham Report and the legislation that has followed it. Recommendation 25 in the Latham Report was headed "Unfair Conditions".[104] Although not all of the details of Recommendation 25 were adopted in the Housing Grants, Construction and Regeneration Act 1996, the Latham Report took a very broad view of legislation that should be passed to address the issue of unfairness in construction contracts. The Latham Report recommended that unamended standard forms should be used in industry conforming to certain assumptions of a modern form of contract. Further, in those circumstances where the substance of his other recommendations was not adopted, and whether for standard or bespoke forms, the prescribed legislation was to be able to declare certain actions "unfair or invalid". This

[99] See P Bick, *Some Aspects of Good Faith and Fairness in the Formation of Construction and Engineering Contracts* (London: Society of Construction Law, 1996); and M Clarke, *ibid.* at 325, both relying upon *Blackpool & Fylde Aero Club Ltd* v. *Blackpool Borough Council* [1990] 3 All ER 25 (CA).

[100] See Nassar, *supra*, note 62 at 146–156; and H Collins, "Implied Duty to Give Information During Performance of Contracts" (1992) 55 MLR 556.

[101] These are two of five possible applications discussed for good faith by S Litvinoff, *supra*, note 42 at 1659–1663. The same point is made by J Beatson, "Commentary on 'Good Faith and Fairness in Negotiated Contracts' " (1995) 8 *Journal of Contract Law* 138, 141: ". . . one way in which good faith and fairness may be taken into account of by English contract law concerns the renegotiation of bargains to meet changed circumstances. Both the promissory estoppel doctrine and the new notion of 'practical benefit' introduced by *Williams* v. *Roffey Bros and Nicholls* (*Contractors*) *Ltd* [[1991] 1 QB 1] facilitate this."

[102] Fairness can be considered both substantively and procedurally. R Barnett, "A Consent Theory of Contract" (1986) 86 Columbia L Rev 269, 283, develops this idea but notes that one of the obvious problems in trying to develop any substantive fairness theory is the lack of agreement on and identification of an appropriate standard.

[103] H Collins, *The Law of Contract* (2nd ed., London: Butterworths, 1993), p. 252.

[104] Latham Report, 84–85.

position is not far from many scholars who take broad views on the meaning of fairness and distributive justice of contractual relations.[105]

### The Latham Report and fairness

Returning to the actions that would be proscribed, the Latham Report recommendations pertained to:

(1) attempting to amend or delete the sections relating to times and conditions of payment, including the right to interest on late payment;
(2) seeking to deny or frustrate the right of immediate adjudication to any party to the contract or subcontract, where it has been requested by that party;
(3) refusing to implement the decision of the adjudicator;
(4) seeking to exercise any right of set-off or contra charge without:
    (a) giving notification in advance;
    (b) specifying the exact reasons for deducting the set-off; and
    (c) being prepared to submit immediately to adjudication and accepting the result, subject to refusing to implement the decision of the adjudicator; and
(5) seeking to set-off in respect of any contract other than the one in progress.[106]

### Fairness in other contexts

The Department of the Environment, too, carried out a consultation exercise in mid-1995 to gauge reaction to proposals of the Department to incorporate the Latham Report recommendations in new legislation.[107] Thus, in the consultation paper, *Fair Construction Contracts*,[108] the Department concluded

[105] See e.g. A T Kronman, "Contract Law and Distributive Justice" (1980) 89 Yale LJ 472; and D Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law" (1982) 41 Maryland L Rev 563. Atiyah is even prepared to consider the substantive fairness of a contract as a factor in its enforcement: P S Atiyah, "Contract and Fair Exchange", in *Essays on Contract* (Oxford: Clarendon Press, 1986), 329 *et seq.* See also J Gordley, "Equality in Exchange" (1981) 69 California L Rev 1587.

[106] Latham Report, 84.

[107] Aspects of Latham touching on fairness have been criticised on this basis: see M James, "The Latham Report" (1995) 11 *Professional Negligence* 59, noting the potential for conflict between unfairness as contemplated by Latham and other statutory provisions in the consumer area; and R Gaitskell, QC, "Is Latham Correct? A Survey of Construction Industry Opinion" [1995] Construction L Yrbk 31, who questions Latham's assumptions and states that a term such as fairness is "self-evident, universally acceptable, and yet impossible to apply because of [its] … generality", at pp. 31–32. This contradiction surrounding fairness is also looked at but not so dismissively by D Wright in "A 'Fair' Set of Model Conditions —Tautology or Impossibility" [1994] ICLR 549.

[108] *Fair Construction Contracts*, *supra*, note 28; and see *Responses to Department of the Environment Consultation Paper on Fair Construction Contracts*, Construction Sponsorship Directorate (London: HMSO, Department of the Environment, August 1995). See J Lewis, "Fairer Contracts Win Industry Vote", *Building Design*, 19 May 1995, 40; and T Bingham, "Legislating for Fairness", *Building*, 2 June 1995, 30–31.

that the "presence, fairness and adequacy" of certain terms[109] was relevant to assessing whether statutory recognition would be given to certain industry forms of contract. Although the Department moved away from statutory approval of certain standard forms of contract on the basis that it might encourage the use of bespoke forms, a statutory mechanism was eventually developed to ensure that eligible contracts ultimately satisfied intended fairness requirements.[110] This is being achieved through the *Scheme for Construction Contracts*.[111] Without focusing on the detail in either the legislation or the *Scheme* here both clearly serve to emphasise a greater interest in the issue of fairness.[112]

Fairness has also been discussed in the recent past in other contexts as well. Take, for example[113] Leonard Fletcher, then president of the Society of Construction Law, who reported in 1989 on an *ad hoc* survey[114] into unfair terms in international construction contracts. At that time Fletcher's

[109] Notably terms addressing dispute resolution; rights of set-off; prompt payment; and protection against insolvency: *Fair Construction Contracts*, *ibid.* Payment, especially, has often been singled out for special attention. In NEDO's report *Faster Building for Industry* (London: HMSO, 1983), 2.16, the authors state: "Contracts successfully completed in a short time are those where good relationships and common objectives are established between the customer and the building team, mutual trust is established, particularly on the question of fair payment, and there is a clearly designated and responsible project leader throughout the preocess [*sic*]. Details of the contract tend to be of small importance when these conditions are met. However, current standard forms of contract, although binding on the parties, tend to be concerned with distributing and limiting responsibility rather than focussing it": at 9.

[110] Express references to the fairness aspect of the legislation were made in consideration of the Housing Grants, Construction and Regeneration Bill, see e.g. Lord Lucas, on behalf of Government, Hansard, HL, Vol 574, col. 1350.

[111] The original draft Scheme for Construction Contracts originally published by a Select Committee in the House of Lords was withdrawn following extensive criticism and replaced by the second Scheme for Construction Contracts that became law.

[112] While statutory protection controls over unfair terms has thus been increased with the Scheme it should not be forgotten that the common law too retains its vigour and remains effective to strike down unfair provisions as seen lately in *AEG (UK) Ltd* v. *Logic Resource Ltd* [1995] CCH Commercial Law Reports 265; commented on by Robert Bradgate, "Unreasonable Standard Terms" (1997) 60 MLR 582.

[113] See e.g. also M Lenihan, "To 'B' or 'D & B'? Design and Build in the 90s", a joint paper given to the Society of Construction Law in London on 8 March 1994, part 1, legal adviser to John Laing, plc in whose assessment much risk is unfairly transferred to contractors particularly through amendments to standard forms; and a paper and commentaries delivered at the Third *Journal of Contract Law* Conference including J Swan, "Party Autonomy and Judicial Intervention: the Impact of Fairness in Commercial Contracts"; S M Waddams, "Commentary on the Impact of Fairness in Commercial Contracts", at 28; and J W Carter, "Commentary on the Impact of Fairness in Commercial Contracts", at 30.

[114] Other surveys seem to reach similar conclusions: e.g. a survey carried out by the FCEC on how unfair terms influence willingness to bid: "Unfair Terms", *Contract Journal*, 10 August 1995, 3; and a survey undertaken on amendments to standard forms by D J Greenwood, *Contractual Arrangements and Conditions of Contract for the Engagement of Specialist Engineering Contractors for Construction Projects* (Newcastle: the University of Northumbria at Newcastle, CASEC, January 1993) a study undertaken on amendments to standard forms and citing as examples: "Abuses of Standard Forms of Contract and Sub-contract", A Report prepared by a Working Party of the National Joint Consultative Committee, Building, 13 February 1991, unpublished; and "Domestic Sub-contracting: Fair Play Benefits the Client" (CASEC, 1986) and a review of unfair terms in building forms by the Office of Fair Trading that found their use widespread: see (1996) 19 *Construction Law Today* 1.

dominant reaction to the multitude of *ad hoc* forms was one of surprise.[115] His list of examples of "unfair" clauses that were revealed by the survey pertained to and included the following[116]:

(1) reservation of the right by the employer to require amendment of the contractor's programme without conceding any claim for compensation or for extension of time for completion;
(2) unconditional on demand performance bonds; and
(3) provision for payment of the contractor within a fixed number of days of the engineer's certificate but no stipulation of the number of days within which the engineer had to issue any subsequent certificate after receipt of the application.

Fletcher's illustrations, and more importantly the provisions adopted in the Housing Grants, Construction and Regeneration Act 1996, are evidence of standards against which the NEC too may be judged in terms of the fairness in its operation. The legislation moves industry past the argument that no unfairness can arise when the parties have come to a voluntary agreement—which coincides with the traditional contract paradigm.[117] For Fletcher: "unfairness stems from the imposition of a contractual obligation, the outcome of which construction contractors as a class are not properly qualified or equipped to appraise; the point being that, in relation to such a term, there is no reliable basis available to tenderers for estimating its financial implications."[118]

The implications of this were and are twofold: significantly inflated tender prices to allow for the risk, and a greater risk of one-sided financial outcomes depending upon whether the risk materialised. It also gives rise to this paradox; that is: "[u]nfair contract terms have a propensity for inflicting their negative consequences on everyone involved; not only the successful tenderer, but all the others in the competition; and not only the contractor but also the employer".[119] The focus upon the overall cost-implications of such unfair terms is also one of the foundations of the new legislation which was in large part intended to reduce total construction costs by 30%.

[115] L Fletcher, "Unfair Terms in International Construction Contracts", a paper given to the Society of Construction Law in London on 4 July 1989. The survey canvassed the practices of 25 international contractors over 10 years and it was reported that about 80% used *ad hoc* forms though mostly resembling the FIDIC conditions, with 10% using significantly amended forms and 10% using FIDIC unamended. Fletcher's surprise was also in the wide range of onerous obligations which were transferred to contractors and the unreasonableness of the burden imposed on them to acquire specialist knowledge in tendering, 3–4.

[116] *Ibid.* 4–5.

[117] It is interesting to note that Cheshire, Fifoot and Furmston's *Law of Contract* (12th ed., London: Butterworths, 1991) describes undue influence in terms of unfairness and improper conduct, 309 *et seq.*

[118] Fletcher, *supra*, note 103 at 5–6.

[119] *Ibid.* at 6.

The emphasis upon notions of fairness begs the question of what interpretations should be placed upon the notion by the courts. Some guidance may be sought from a variety of sources including domestic counterparts in other legislation,[120] approaches in other jurisdictions in Europe,[121] the United States,[122] and Australia,[123] as well as judicial doctrines[124] and caselaw.[125] Domestically in the United Kingdom considerable attention has been given to unfair terms in consumer contracts,[126] both before and after the passage of recent legislation implementing a European Union Council Directive[127] on unfair terms. The United Kingdom law, based on the Directive, provides in part: " 'unfair terms' means any term that contrary to the requirement of good faith causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer . . .".[128] One effect of the Directive is to give the United Kingdom a

[120] See e.g. s. 61(3) Sale of Goods Act 1979. An especially interesting example can be found in Article 133 of the Act on Obligations in the former Yugoslavia and analysed by N Misita, "On the "Feasibility of Social-Oriented Concepts in Contract Law" in T Wilhelmsson, *supra*, note 52 at 369–371, 391–393.

[121] V Powell-Smith writes of contrasting roles of standard form contracts in civilian and common law jurisdictions in this way: "Standard form contracts are not a peculiar feature of the common law, but in civil law countries they tend to supplement certain mandatory provisions of the Civil Code which govern building contracts and endeavour to strike a *fair* balance between the legitimate interests of the contracting parties": "An Asean Region Standard Form of Construction Contract: The Way Ahead" [1991] *Journal of Malaysian and Comparative Law* 23–24 (emphasis added).

[122] J Sweet, "Judging Contracts: Some Reflections on the Third International Construction Law Conference" [1994] ICLR 413, 419, writes that the fairness of the contract in the American context will either depend upon the free market and competition, or if they did not exist, then upon law. See also on the American position D Tiplady, "Judicial Control of Contractual Unfairness" (1983) 46 MLR 601.

[123] In New South Wales a residual supervisory jurisdiction is vested in the courts under the Contracts Review Act 1980, NSW. See generally J R Peden, *The Law of Unjust Contracts Including the Contracts Review Act 1980 (NSW) With Detailed Annotations Procedure and Pleadings* (Sydney: Butterworths, 1982).

[124] Collins observes how one theory of fairness, based upon a particular distributive outcome achieved by the market and the ability of individuals to pursue their own interests and make rational choices, comes out of classical contract law: *supra*, note 91 at 253–264. See generally, A T Kronman, "Contract Law and Distributive Justice" (1980) 89 Yale LJ 472.

[125] Fairness as a concept is material in other areas of the law. Thus, in negligence for example, fairness is a consideration in assessing proximity relative to imposing a duty of care on a defendant in a given set of circumstances. See generally J Stapleton, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence" (1995) 111 LQR 301. Similarly a considerable jurisprudence exists in administrative law, see de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed., Lord Woolf, Jeffrey Jowell, and A P Le Sueur (Eds), London: Sweet & Maxwell, 1995), pp. 375–548 addressing procedural fairness. Or see *Principles of Judicial Review* by the same authors (London: Sweet & Maxwell, 1999), pp. 311–359. It has already been proposed that fairness in this regard be adopted as the standard for the adjudicator under the NEC. P Capper, "The Adjudicator under the NEC 2nd Edition: A New Approach to Disputes" (1995) 2 *Engineering, Construction and Architectural Management*, No 4, 317–326 at 323.

[126] See generally H Beale, "Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts" , in Beatson and Friedmann, *supra*, note 17 at 231.

[127] EU Council Directive 93/13/EEC, 5 April 1993, Unfair Terms in Consumer Contracts (OJ L 95/29), which came into force on 1 July 1995. See generally M Dean, "Unfair Contract Terms: The European Approach" (1993) 56 MLR 581; E Hondius, "EC Directive on Unfair Terms in Consumer Contracts: Towards a European Contract Law" (1994) 7 *Journal of Contract Law* 34; R Brownsword and G Howells, "The Implementation of the EC Directive on Unfair Terms in Consumer Contracts—Some Unresolved Questions" [1995] JBL 243; A B Overby, "An Institutional Analysis of Consumer Law" (2001) 34 *Vanderbilt Journal of Transnational Law* 219.

[128] Unfair Terms in Consumer Contracts Regulations 1994, SI 1994 No 3159, reg. 4(1).

dual system of protection.[129] The issue of whether legislation predating the Directive applies to standard form construction contracts is subject to competing views and while not directly relevant to the discussion of fairness may nevertheless presage debate that will follow on the applicability of the Directive and enacting regulations to construction contracts.[130]

The debate about the implementation of the Directive (and the converging European law of good faith generally) is currently going strong in England, particularly with a collection of essays from Brownsword[131] and a study from Zimmerman and Whittaker.[132] Most writers start from the commonly held position that there is a stark divide between England and the Continent in this area as the former does not admit of a general principle of good faith in contract law. These works and others serve to bridge the divide and show that because of other elements in the common law, the divide is not so great as it may appear. This comes out strongly in the Zimmerman and Whittaker study, where 30 "hard cases" on good faith were analysed by reporters from the 15 European Union states. Of 30 cases, 20 had either total unanimity of result, or had only one or two dissenters. Rarely was England out on a limb by itself.[133] There was certainly a wide range of doctrines used to analyse the facts, but in the end, there was remarkable convergence of result.

There remains resistance in England to a general principle of good faith, which Brownsword characterises into five strands, or fears: (1) the "repugnancy thesis" (good faith requiring selfless behaviour as repugnant to adversarial negotiations), (2) lack of calculability, (3) a too-difficult subjective element regarding contractors' states of mind, (4) encroachment on party autonomy, (5) inappropriateness to all contexts.[134] The debate is narrowing down to whether a general duty will do anything different than the good faith content already in the law through the rigorous use of a variety of doctrines. There are calls for rationalising the area under the banner of a good faith requirement.[135] Some calls for change are rooted in a desire for clarity,[136] while others are just trying to cope with the reality that it will be nearly impossible to "ring-fence" the good faith requirement of the

[129] E.g. under the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1994. See generally Brownsword and Howells, *supra*, note 115; J Beatson, "European Law and Unfair Terms in Consumer Contracts" (1995) 54 CLJ 235–238, and Clive Halperin, "Fair Enough?" (1995) 139 *Solicitors' Journal* 632–634; S Whittaker, "Unfair Contract Terms, Public Services and the Construction of a European Conception of Contract" (2000) 116 LQR 95.

[130] The competing views are set out in J A McInnis, *Hong Kong Construction Law* (Singapore: Butterworths, 1995), Div XII, paras. 678–726.

[131] Brownsword, Hird and Howells, *supra*, note 35.

[132] Zimmerman and Whittaker, *supra*, note 64. See also K Groves, "The Doctrine of Good Faith in Four Legal Systems" (1999) 15(4) Const LJ 265 and R Harrison and C Jansen, "Good Faith in Construction Law: the Inaugural King's College Construction Law Conference" (1999) 15(5) Const LJ 346. The latter goes back to first principles to draw comparisons between English and Dutch/Continental law and proposes an interesting "Good Faith Code for Construction" at p. 371 which builds on these principles.

[133] Zimmerman and Whittaker, *supra*, note 64 at 655.

[134] See especially R Brownsword, "Positive, Negative, Neutral: the Reception of Good Faith in English Contract Law", in R Brownsword, N J Hird and G Howells, *supra*, note 35 at 21.

[135] See especially A Mason, *supra*, note 34.

[136] E McKendrick, "Good Faith: A Matter of Principle?", in Forte, *supra*, note 35 at 59.

European Directive within consumer contracts. Either way, there is significant movement in this area at the moment.

A review of the literature on the issue of fairness reveals that it is often discussed at the same time as the issue of good faith.[137] At times, these exact or related concepts are used either in place or explanation of each other. Thus, in the *Principles of European Contract Law*[138] good faith and fair dealing are dealt with *together* as one principle in a single article.[139] Article 1.106 sets out a basic principle that is not confined to specific rules, and even though individual applications of the principle can be seen in some of the other principles.[140] The commentary on Article 1.106 distinguishes between good faith and fair dealing in this way:

> "'Good faith' means honesty and fairness in mind, which are subjective concepts. A person should, for instance, not be entitled to exercise a remedy if doing so is of no benefit to him and his only purpose is to harm the other party. 'Fair dealing' means observance of fairness in fact which is an objective test . . . In the French language both these concepts are covered by the expression '*bonne foi*' and in German by '*treu und glauben*'.".[141]

In German contract law, the doctrine of good faith fulfils three basic functions: "it serves as the legal basis of interstitial law-making by the judiciary; it forms the basis of legal defenses in private law suits; and it provides a statutory basis for reallocating risks in private contracts".[142]

The relevance of this principle, and both good faith and fairness, to construction contracts has already been suggested. Martin Odams de Zylva[143] juxtaposes the concepts with terms in the American Institute of Architects (or

[137] In fact, as fairness has had increasing attention given to it of late, so, too, has the issue of good faith, see e.g. Carter and Furmston, *supra*, note 42; Carter and Furmston, *supra*, note 61; Bick, *supra*, note 87: ". . . fairness may be treated either as a separate requirement of the law of pre-contractual relations or as one aspect of a general obligation of good faith", at p. 12.

[138] O Lando and H Beale (Eds), *Principles of European Contract Law*, prepared by the Commission on European Contract Law, O Lando, Chairman (Dordrecht: Martinus Nijhoff, Commission on European Contract Law, 1995).

[139] *Ibid.* at 53: "Article 1.106: Good Faith and Fair Dealing (1) In exercising his rights and performing his duties each party must act in accordance with good faith and fair dealing. (2) The parties may not exclude or limit this duty"; *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at 439 (CA).

[140] E.g. Articles 3.104 the right to cure defective performance before the time of completion, and 4.102(2)(b) on the right to refuse specific performance of a contractual obligation if it involves unreasonable effort or expense. Very close parallels to these articles could also be drawn to clauses under the NEC and in particular, cl. 43 correcting defects, and cl. 44 accepting defects, respectively.

[141] Lando and Beale, *supra*, note 126 at 55. Roger Brownsword has expressed the view that good faith alone has both an objective and subjective component: see R Brownsword, "Two Concepts of Good Faith" (1994) 7 *Journal of Contract Law* 197.

[142] W F Ebke and B M Steinhauer, "The Doctrine of Good Faith in German Contract Law", in Beatson and Friedmann, *supra*, note 17 at 171.

[143] M O de Zylva, "Towards a Common Law: The Difficulty of Harmonising International Construction" (1997) 13 Const LJ 107. See also by the same author "The Influence of Commerce and the Changing Face of Dispute Resolution", in Odams and Higgins, *supra*, note 50 at 161 which addressed the same subject of harmonisation as well an earlier series of published papers within A M Odams (Ed), *Comparative Studies in Construction Law: The Sweet Lectures* (London: Construction Law Press, 1995), pp. 103–212.

"AIA") standard form contract while Paul Bick[144] sees a growing role for good faith and fairness in contract formation and particularly tendering. Odams de Zylva writes that: "the effect of this reasoning is to make good faith a subjective concept and fair dealing objective. The subjective/objective challenge is met by the AIA."[145] A further example of the combination of these two concepts in another standard is in the report *Building Britain 2001*.[146] The report cites article 1 of the Japanese General Conditions of Construction Contract[147] as follows: "[t]he Owner and the Contractor shall perform this Contract sincerely through cooperation and in good faith". Landsberg and Megens give another example, apart from the language of standard forms. These commentators suggest there are at least three sets of circumstances in which good faith obligations could be relevant in international infrastructure[148] construction:

(1) pre-contract;
(2) as an express or implied obligation in the contract or in relationships established as an adjunct to major contracts but which may not themselves be contractually binding (such as partnering charters)[149]; and
(3) dispute resolution.[150]

Justin Sweet also offers numerous examples of where an implied term of good faith and fair dealing would be likely to arise in a construction contract:

(1) where a contractor intends to complete construction earlier than expected then he should co-operate and so notify the employer;
(2) where an employer has to grant a time extension, even without a time extension clause then he should co-operate and do so; and
(3) where the owner has to schedule work and co-ordinate activities of participants in the project then he should co-operate and do so.[151]

[144] Bick, *supra*, note 87. A Ghosh sees an important role for good faith and fair dealing in the exchange of information in construction and engineering contracts: *The Role of Good Faith and Fair Dealing* (London: Centre of Construction Law and Management, King's College, 29 September 1995).

[145] Odams de Zylva, *supra*, note 131 at 115 referring to cll. 3.2.1 and 3.7.3 in the AIA form and the respective headings of "good faith" and "fair dealing" in these clauses of the form.

[146] *Building Britain 2001* (Reading: Centre for Strategic Studies in Construction, 1988), p. 25.

[147] Japanese General Conditions of Construction Contract 1966; today these same conditions are used in a 1981 edition approved jointly by the Architectural Institute of Japan, the Architectural Association of Japan, the Japan Architects Association and the Associated General Contractors of Japan Inc. The clause shows how far these Japanese general conditions have come from the original 1910 Contract Agreement and Conditions of Contract that was probably partly based on the 1903 RIBA form: Toshihiko Omoto, "A Comparative Study of British and Japanese Construction Contracts" [1996] ICLR 451, 459.

[148] See generally J Jenkins, "Contract Structure and Risk Allocation in Major Infrastructure Projects" [1993] ICLR 495; F Nicklisch, "Contract Structures and Risk Allocation in the Construction of Tunnels" [1992] ICLR 111; and P H McGowan *et al.*, *Allocation and Evaluation of Risk in Construction Contracts*, Occasional Paper No 52 (Ascot: CIOB, 1992).

[149] The effect of non-binding declarations of intention in law is that they confer no right of action for loss suffered as a result of the failure to carry out the intention, *Harris* v. *Nickerson* (1873) LR 8 QB 286.

[150] R Landsberg and P Megens, "Applications of Good Faith in Contracting" [1996] ICLR 180, 187.

[151] J Sweet, "Planning for Delays in American Complex Long-Term Construction Contracts: Correcting Bad Law, Removing Ambiguities or Exercising Bargaining Power?", in Nichlisch, *supra*, note 14 at 329.

Therefore, Sweet, Landsberg and Megens, in these ways, underscore the importance and utility of good faith both in international and domestic construction contexts.

In conclusion, the notions of good faith and fairness are undergoing a renaissance. They play a significant role in law in many jurisdictions today. Their influence and importance can only be expected to increase. The import of this jurisprudence will only increase in the context of the NEC, as the form is explicitly grounded in these principles. (Their use is thus a matter of agreement between the parties, not reliant on the doctrine of implied terms.) It will be argued in part 2 of this article that the express obligation to co-operate in the NEC may allow for both the adjustment[152] and qualification of the parties' relationship.[153]

[152] An argument is made for the judicial adjustment of contracts by English courts by J A McInnis in "*Force Majeure* in Building Contracts", in E McKendrick (Ed), *Force Majeure and Frustration of Contract* (2nd ed., London: Lloyd's of London Press, 1995), 195 at 213. Three reasons in support of the argument developed by McInnis pertain to: (1) judicial adjustment under the Law Reform (Frustrated Contracts) Act 1943; (2) the influence of European Community law; and (3) that adjustment often better accords with the wishes of contractors than termination of the contract. While there is considerable support for the view that long term and complex contracts are unique and thus may support a stronger case for intervention based on fairness it has also been remarked by Max Abrahamson that "[c]omplex and simple contracts might equally be fair or unfair. The only difference was that simple contracts cut out those involved in claims": M Barnes, M W Abrahamson, and H A Palmer, introducers, reported by J N Barber, "Towards Simpler Contracts", 80 *Proceedings of the Institution of Civil Engineers*, part 1 (June 1986) 819.

[153] See D Goodard, "Long-Term Contracts: A Law and Economics Perspective" [1997] New Zealand L Rev 441. R Flanagan *et al.* pointed out shortcomings in existing relationships in this way: "Relationships between contractors, customers and suppliers can currently be described as *ad hoc* collaborations, which is clearly not conducive to establishing effective teams or to the application of the principles of a lean process": R Flanagan, I Ingram, and L Marsh, *A Bridge to the Future. Profitable Construction for Tomorrow's Industry and Its Customers* (London: Thomas Telford; Reading: Reading Construction Forum, 1998), p. 34.