# THE NEW ENGINEERING CONTRACT: RELATIONAL CONTRACTING, GOOD FAITH AND CO-OPERATION—PART 2

ARTHUR MCINNIS*

*Consultant, Clifford Chance*

## Co-operation

Co-operation is key in both relational contracting and under the NEC. The classical contractual paradigm supported by economic analysis predicated upon rational, utility minded individuals maximising self-interest in discrete transactions in competitive markets with the allocation of all relevant risks at the time of contracting[1] has come under serious challenge. Two scholars in particular who have made the point emphatically are Campbell and Harris:

> "It is the implicit psychological and sociological assumption in the dominant law and economics literature of rational economic behaviour as narrowly *individual* utility-maximization that has run out of explanatory productivity in the case of long-term contracts and must be regarded as false. Efficient long-term contractual behaviour must be understood as consciously co-operative. We see a long-term contract as an analogy to a partnership. The parties are not aiming at utility-maximisation directly through performance of specified obligations, rather, they are aiming at utility-maximisation indirectly through long-term co-operative behaviour manifested in trust and not in reliance on obligations specified in advance. The co-operative mechanism by which utility is achieved in a long-term relationship is radically different from that in the paradigmatic, short-term, specified contract. The precise conduct required by future long-term co-operation is necessarily unable to be specified in advance and the shares in the joint product of that co-operation are equally not specified in advance. The parties accept a general and productively vague norm of fairness in the conduct of their relationship."[2]

* BA, LL B, BCL, LL M, Ph D, FCI Arb, Solicitor, Hong Kong.

[1] C J Goetz and R E Scott, "The Mitigation Principle: Toward a General Theory of Contractual Obligation" (1983) 69 Virginia L Rev 967–969 develop some of these criteria in their description of bargain model theorists in the economics literature. In contrast to bargain model theorists, Goetz and Scott also develop the view of transaction cost theorists whose hypothesis does not depend upon the allocation of all risks at the time of contracting. Once again the classical term that is often used with reference to the allocation of all risks at the moment of contracting is "presentiation": see again I R MacNeil, "Restatement (Second) of Contracts and Presentiation" (1974) 60 Virginia L Rev 589.

[2] D Campbell and D Harris, "Flexibility in Long-term Contractual Relationships: The Role of Co-operation" (1993) 20 *Journal of Law and Society* 166, 167. R W Gordon makes a similar point: "In the 'relational view' of Macaulay and MacNeil . . . the object of contracting is not primarily to allocate risks, but to signify a commitment to cooperate": "Macaulay, MacNeil, and the Discovery of Solidarity and Power in Contract Law" [1985] Wisconsin L Rev 565, 569. See generally R Axelrod, *The Evolution of Cooperation* (London: Penguin Books, 1984).

According to Wilhelmsson, inherent in the classical contract paradigm, is an essential "antagonism" in how parties to a contract deal with each other.[3] With antagonism at the foundation of both classical contract and neo-classical contract and economic theory it should not be surprising to have it feature in much of the commentary on construction contracting and indeed the industry at large. However, in industry, the term has negative connotations and some steps have been taken to address antagonism through the Housing Grants, Construction and Regeneration Act 1996 legislation.

Co-operation is at the centre of Wilhelmsson's theoretical framework. He summarises this aspect of the framework as "anti-traditionalist . . . a form of flexible and changing co-operation between and with regard to different actors on the market, enforced as a tool of rational distribution in society".[4] John Uff, QC, who seems to first accept and then reject this aspect of the classical paradigm, still sees the dichotomous nature of the debate over the value of antagonism in work.[5] A contrary view and economic rationale for assuming future obligations to co-operate, rather than not, is put forward by Goetz and Scott. Their argument can be summarised in this way:

> "In outline, the argument is that in many cases it is simply not possible (or cost effective) for party A to specify in advance how the other party, B, should act in order to minimise certain risks, or even to identify all the relevant risks. Rather than assume the risk of an opportunistic refusal by B to act in a way that minimises the parties' joint costs, A will be

[3] The term "antagonism" is held out by T Wilhelmsson as one of five "traditional" contract law tendencies along with content-neutrality, static, atomistic, and abstractness. These four latter tendencies contrast with their five counterparts in "modern" contract law which are respectively content-orientation, dynamic, collectivist, and person-orientated. The contrasting tendency to antagonism was unsurprisingly "co-operation", T Wilhelmsson, "Questions for a Critical Contract Law", in T Wilhelmsson (Ed), *Perspectives of Critical Contract Law* (Aldershot: Dartmouth, 1993), 38–41.

[4] *Ibid.* at 41.

[5] J Uff, QC, "Control of Disputes within the Contractual Framework", in *Future Directions in Construction Law: Proceedings of the Fifth Annual Conference of the Centre of Construction Law and Management* (London: King's College, 1992), 197–219, writes on co-operation specifically as envisaged in the NEC that "[m]any have doubted whether this objective [replacing adversarial attitudes with a new spirit of co-operation] is achievable, unless by adopting a cost-reimbursable contract, where the contractor is indifferent to the amount of work which he has to carry out. Even here, it is difficult to think that the employer will ever be indifferent to the level of costs incurred. On any other basis, it is naïve to suppose that the commercial interests of the promoter of a construction project and of the contractor are not opposed. The contractor's economic interest is in maximising his recovery and minimising his outlay; the promoter's interest is in securing compliance with time and quality requirements without paying more than a proper price. These interests are not exactly opposed, nor are they opposed in all respects. But they tend in different directions, particularly when events lead to cost increases, pressure on the contractor's programme or issues about quality or conformance", at 197–198, but then Uff concedes "English law generally does not enforce compliance with a contract, but limits itself to ordering payment of money pursuant to a breach of the contract. It is a matter for the parties themselves to decide whether they will perform the contract in whatever circumstances arise. Their decision may be subject to many commercial and other influences. This may be a field of study for the social scientists. But it is to be doubted that parties will choose not to pursue a dispute which is open to them under the contract because the contract is drafted in a particular way", at 198 (footnotes omitted).

prepared to pay in advance for B to assume an obligation to act in an efficient non-opportunistic way."[6]

## Implied terms

Implied terms play a role as well in Scott's analysis in addition to serving as important legal signals that standardise risk assignments and serve to maintain a "co-operative equilibrium".[7] There are various cases where it will not be possible to always set out in detail and in advance all of the ways in which co-operation between the parties to a contract will maximise their joint interest.

Goodard[8] writes, in these cases the parties often:

(1) confer discretion on one party in relation to the other party's sphere of contractual activity;
(2) assume obligations to co-operate; and
(3) enter into broad obligations to act in accordance with a particular standard; e.g. a good faith, best efforts or fiduciary standard.[9]

## NEC features

The NEC may be referred to by comparison. In the form there are both broad grants of discretion as well as an express obligation to co-operate in clause 10.1. Goodard's model builds upon the extensive literature analysing supply contracts to generalise a set of special features of "long-term"[10] contracts. These features may be set out and compared to NEC provisions to support the NEC's classification as a "long-term" or relational contract. In particular,

[6] D Goodard, "Long-Term Contracts: A Law and Economics Perspective" [1997] New Zealand L Rev 423, 433 referring to C J Goetz and R E Scott, "Principles of Relational Contracts" (1981) 67 Virginia L Rev 1089. Scott brings out the dilemma that comes with increasing complexity and uncertainty and that there may be no ideal strategy for distributing risk at the time of contracting. In his view contracting parties will agree—either expressly or impliedly to adjust their initial risk allocation scheme in light of subsequent events. Regrettably though once the contract risks are distributed as agreed, each party will then have less incentive to accommodate the others' request for adjustment. Each party is thus faced with a difficult choice whether to adjust co-operatively, as they have originally agreed, or to respond to immediate self-interest and circumvent the responsibility. Uff and Ryan, in comparison have noted that "[c]urrent traditional forms of contract produce an environment that creates opportunistic behaviour where information is scarce": in "The Economic Realities of Construction", J Uff, QC, and M O de Zylva (Eds), *New Horizons in Construction Law* (London: Construction Law Press, 1998), 128.

[7] See R E Scott in "Risk Distribution and Adjustment in Long-Term Contracts", in F Nichlisch (Ed), *The Complex Long-Term Contract Structures and International Arbitration* (Heidelberg: C F Muller Juristischer Verlag, 1987), 51, 82–89: "Implied terms provide contracting parties a foundation of time tested and reliable instruments for distributing and adjusting risks", 85 (footnotes omitted). These ideas are fully developed in C J Goetz and R E Scott, "The Limits of Choice: An Analysis of the Interactions between Express and Implied Contract Terms" (1985) 73 California L Rev 261.

[8] Goodard, *supra*, note 6 at 423.

[9] *Ibid.* at 431–432. Goodard later notes another alternative that parties may pursue, namely, referring disputes to a third party, 436.

[10] Goodard, *ibid.* at 423, effectively equates "long-term" and "relational": "Economic analysis . . . sheds considerable light on the likely features of those long-term contracts that are referred to as 'relational contracts' . . .".

he lists the following features: term[11]; reciprocal base level commitments plus flexibility[12]; restrictions on trade with third parties[13]; quality of performance[14]; information exchange[15]; dispute resolution[16]; co-operative obligations[17]; bonding/hostage provisions[18]; and control of contractual discretion to prevent opportunism in their exercise.[19]

The above illustrations are specific. Detractors of an express obligation to co-operate would argue the concept is too vague, subjective or open-ended to apply in a contract. Patterson[20] though, more than 40 years ago, raised the same concerns: "Two questions arise about the part to be played in the law by the conception of co-operation: Does it presuppose an altruistic motivation, does it impose the ethical standards of saints and seers upon individual bargainers? Does it open up too broad a field of operation for sentiment and sympathy, and for the promise-breakers who seek to play upon these emotions?"[21] and then answered the first question as follows:

> "... exchange by means of contract does not necessarily involve a loss by one party and a gain by the other. Regarded as a means of co-operation for the satisfaction of their respective wants, contract effectuates ... a gain by each, and hence co-operation is operation in furtherance of enlightened self-interest. Co-operation on this level is 'the division of labor mediated by a common purpose'. Co-operation 'may or may not be benevolent in its ultimate intent' ... The law of contracts can move but slowly toward the ideal society. Yet it has long been recognised that contracts 'contrary to public policy' or against good morals are not enforceable. The negative requirement needs to be supplemented by an affirmative one, that contracts *are enforceable* in that way which will make them best serve their function in society."[22]

And then answered the last question in this way:

> "The second question can be answered by looking to the role of principles in the law. They do not prescribe categorical answers. In application they always collide with other principles, and particular evaluations are determined by the relative value of the one or the others as exemplified in the circumstance of the case. Thus contract, as a means of stabilising expectations, of creating certainty about the future out of relative uncertainty, calls for a maximum of foresight ... and a minimum of tampering with the written word. I see no indication that the courts are likely to displace this principle *as a principle*. The construction of requirements of co-operation—whether as conditions or as duties—has

[11] *Term* is simply the minimum duration required to recover the value of specialised investments made by the parties. In a construction contract it could be compared simply to the term of the contract without more.

[12] E.g. ECC contract strategies admitting of any sharing of risk in pricing would qualify in this regard.

[13] E.g. ECC provisions requiring consent over contracting or subcontracting in cl. 26, ECC.

[14] E.g. ECC provisions in core cl. 4.

[15] E.g. ECC provisions in relation to communications in cl. 13.

[16] E.g. ECC provisions in core cl. 9.

[17] E.g. ECC provisions in cl. 10.

[18] E.g. damages, low performance damages, deposit provisions, termination rights in EEC secondary option clauses G, H, J, P, R and S. Scott, *supra*, note 7 at 77 states that these devices are used to obtain "the promise of subsequent cooperation"; and see generally R E Scott, "A Theory of Relational of Secured Financing" (1986) 86 Columbia L Rev 901.

[19] E.g. ECC provisions in core clause 9.

[20] E W Patterson, "Constructive Conditions in Contracts" (1942) 42 Columbia L Rev 903.

[21] *Ibid.* at 942.

[22] *Ibid.* at 942.

> thus far affected chiefly the minor incidents of performance. It can be extended further, by judicial good sense, without impairing the essential stability of transactions."[23]

In these answers, Patterson has shown the law is not static, that it is influenced by, and of course part of, a complex system of controls. Each principle, whether that of co-operation or otherwise, is influenced as well as limited by other principles. These factors, more than anything else, and which are inherent in the common law, will be used to promote the interests of the contractors as well as those of the public. An express contractual requirement of co-operation promotes a more transparent reconciliation of all these interests. Patterson's insights could be part of a re-evaluation at the time of the then dominant legal positivist philosophies that looked down upon statements that were neither empirically nor logically verifiable and until scholars like H L A Hart[24] and John Rawls[25] called for change. Through their work in particular fairness came to have a substantive and verifiable basis far removed from the vague and subjective role it perhaps held in moral terms alone. Similar to the theoretical framework advocated here Rawls set out a "fairness principle" which holds:

> "that a person is required to do his part as defined by the rules of an institution when two conditions are met: first, the institution is just . . . and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests. The main idea is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission."[26]

Rawls' explanation is wholly consistent with the institution of contracting and the duty of co-operation at law. It is both an explanation of why contract is binding and a worthy justification for it. The view transcends once again subjective views of fairness, whether express or implied, and grounds fairness in the "mutually co-operative venture" founded under the parties' rules or contractual agreement. This is also consistent with the central role contract is given in the theoretical explanation of the NEC.

Classical contract theory assumes the parties perform their contracts as agreed. Parties are contractually bound to perform according to the terms of the contract. Each party may insist upon his rights subject only to the law. There is no additional obligation or duty to co-operate in the performance in classical contract theory. However, in practice, the courts have insinuated duties to co-operate into parties' agreements through a variety of devices including the general rules of interpretation of documents and implication

[23] *Ibid.* at 942.
[24] See H L A Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983).
[25] See J Rawls, *A Theory of Justice* (Oxford: Clarendon Press, 1971).
[26] *Ibid.* at 111–112.

of terms.[27] Leaving aside general rules of interpretation, courts will enforce not just the terms parties have expressly agreed to but also the terms that can logically be implied from those express terms.[28] Logic, however, is not a strict limiting factor and there are many other cases where the law admits of and invokes implied terms.[29]

**Co-operation as an implied term**

One conventional analysis of implied terms proceeds by classifying terms according to whether they are implied by (1) custom, (2) law; or (3) for some other reason.[30] Despite these categories, it has been argued that "a duty to cooperate will typically be justified on similar grounds regardless of whether it is treated as a rule of construction or as implied in law or in fact".[31] The High Court of Australia seemed to support this in *Hughes Aircraft Systems International* v. *Airservices Australia*,[32] where a duty to co-operate was implied in fact (as *ratio*) as well as in law (in *obiter*). Another writer suggests that for doctrinal coherence, the implied terms method must be abandoned in favour of the rule of construction approach, the latter having the breadth of a common principle (like implication in law) and the flexibility to adapt to

[27] "Implied terms" is the nomenclature used here although it "covers a number of dissimilar notions": *Halsbury's Laws of England* (4th ed., reissue), Vol. 9(1), para. 778. Other terms used have included "implied conditions", "constructive conditions", "conditions implied in law", and "conditions implied-in-fact": Patterson, *supra*, note 20 at 903–907. Patterson also deserves credit for a very early use of the term "gap filler" which has become synonymous with implied terms. "Constructive conditions of exchange are gap-fillers; they operate in the absence of language in the contracts which contradicts the construction", at 913. See also A L Corbin, "Recent Developments in the Law of Contracts" (1937) 50 Harvard L Rev 449, 465, noting courts " . . . supply the gap and allocate the risk of loss in accordance with reason". The terms "gap fillers" and default rules are used synonymously with implied terms here. Lately, Lord Steyn has written in this regard that: "[o]ften the expectations of the parties would be defeated if a term were not implied, e.g. sometimes a contract simply will not work unless a particular duty to co-operate is implied . . . Such terms operate as default rules": "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433, 441–442.

[28] See e.g. for cases on the distinction between implication of terms versus interpretation of express terms: *Aspdin* v. *Austin* (1844) 5 QB 671; *Re Cadogan & Hans Place Estate Ltd, ex parte Willis* (1895) 11 TLR 477 (CA); *Williams* v. *Burrell* (1845) 1 CB 402; 14 LJCP 98; 135 ER 596; and *A E Farr Ltd* v. *The Admiralty* [1953] 2 All ER 512, [1953] 1 WLR 965.

[29] G Williams, "Language and the Law—IV" (1945) 61 LQR 384, 398: "[j]udges are accustomed to read into documents and transactions many terms that are not logically implied in them." Williams gives examples from areas of the law including the sale of goods, landlord and tenant, and master and servant.

[30] *Halsbury's Laws of England* (4th ed., reissue), Vol. 9(1), para. 778 *et seq. Cf.* the classification by G Treitel, *The Law of Contract* (London: Sweet & Maxwell, 8th ed., 1995), 185 *et seq.* of: (1) fact, (2) law, and (3) custom; and even the classification by Hugh Collins, *The Law of Contract* (London: Butterworths, 2nd ed., 1993), 225–229: (1) unexpressed intention, (2) importation of general legal obligations, and (3) model contracts. The Halsbury's classification is also adopted in *Luxor (Eastbourne) Ltd* v. *Cooper* [1941] AC 108 at 137 (HL), and was endorsed lately in *Scally* v. *Southern Health and Social Services Board* [1992] 1 AC 294, [1991] 4 All ER 563 (HL). The threefold classification has been critiqued by A Phang, "Implied Terms in English Law—Some Recent Developments" [1993] JBL 242. *Cf.* the fourfold classification of Justice Byrne in "Implied Terms in Construction" (1995) 11 BCL 6.

[31] J M Paterson, "Terms Implied in Fact: the Basis for Implication" (1998) 13 *Journal of Contract Law* 103 at 119. Paterson argues the traditional view that terms should be implied based on the hypothetical intention of the parties.

[32] (1997) 146 ALR 1. For commentary, see A Phang, "Tenders, Implied Terms and Fairness in the Law of Contract" (1998) 13 *Journal of Contract Law* 126.

particular circumstances (like implication in fact).[33] Arguably, Peden is ahead of her time: the language used by the courts is still implication and the reasoning, as will be argued, is relational.

Whilst the three-pronged division is the "conventional" analysis it is remarkable upon closer examination how seriously this analysis is also questioned at the same time. Thus, in *Halsbury* it is stated:

> "[i]t would be misleading to think of the implication of terms simply on the basis of an inquiry into the intention of the parties in a particular case. Over the course of time, there has been a convenient tendency to group those terms which are likely to be imported by reason of the particular *relationship* between the parties . . . the real issue in any particular case may be into what classification the contract in question falls; the question may therefore become one of the *relationship* of the parties rather than their intention."[34]

The particular relationships are well known; for instance, in the sale of goods, employment, or construction.[35] The attention given to the nature of the relationship between the parties for deciding which terms will be implied is wholly consistent with the importance attributed to relationships in a theoretical sense here.[36] The point was made by Lord Denning some 20 years ago in *Shell UK Ltd* v. *Lostock Garage Ltd.*[37] Thus Lord Denning spoke of two categories of implied terms: a first category that "comprehends all those relationships which are of common occurrence"; and a second category made up simply of "those cases which are not within the first category".[38] The importance of Lord Denning's categories for present purposes is his inclusion of the "contractor for building works" in a relationship of common

[33] E Peden, "'Cooperation' in English Contract Law—to Construe or Imply?" (2000) 16 *Journal of Contract Law* 56. Elsewhere, Peden argues that co-operation is the notion underpinning all deliberations on policy considerations when implying terms in law, concluding that "an overt recognition that the implication of terms in law is frequently to be justified by the mutual obligation of co-operation would be of value". She cites *Malik* v. *Bank of Credit & Commerce International SA* [1998] AC 20 (HL). See E Peden, "Policy Concerns Behind the Implication of Terms in Law" (2001) 117 LQR 461.

[34] *Halsbury's Laws of England* (4th ed., reissue), Vol. 9(1), para. 779 (emphasis added and footnotes omitted); others agree: see e.g. B Coote, "Contract Formation and the Implication of Terms" (1993) 6 *Journal of Contract Law* 51.

[35] Hugh Collins would say that the traditional tests cannot justify the implication of terms here. Collins writes of "model contracts" which reflect such relationships; in his example, contracts of sale, employment and tenancy; and rather the "courts select these terms in the light of practical experience, views about the fair allocation of risks between the parties, and customary practices in the trade or business": *The Law of Contract* (London: Butterworths, 2nd ed., 1993), 227. Relationships in the context for example of project scheduling, budgeting, monitoring and other project activities are focused upon by Ralph L Kliem and Irwin S Ludin, *The People Side of Project Management* (Aldershot: Gower, 1995).

[36] Three decisions are referred to in support in *Halsbury's Laws of England* (4th ed., reissue), Vol. 9(1), para. 779, n. 4: *Lister* v. *Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 576, [1957] 1 All ER 125 at 132 (HL), *per* Viscount Simonds; *Morgan* v. *Ravey* (1861) 6 H & N 265; and *Re Chappell, ex parte Ford* (1885) 16 QBD 305 at 307 (CA), per Lord Esher MR. Similarly, J W Carter and M P Furmston, "Good Faith and Fairness in the Negotiation of Contracts—Part II" (1995) 8 *Journal of Contract Law* 93, 116 and nn. 148 and 150, make the same point with reference to Australian authority; namely, *Hospital Products Ltd* v. *United States Surgical Corp* (1984) 156 CLR 41 and *Shepherd* v. *Felt and Textiles of Australia Ltd* (1931) 45 CLR 359: "[i]t is strongly arguable that these are terms implied in law from the nature of the relation rather than terms implied in fact to make the particular agreements work." See also *Robb* v. *Green* [1895] 2 QB 1 and *House of Spring Gardens Ltd and Ors* v. *Point Blank Ltd* [1984] IR 611.

[37] *Shell UK Ltd* v. *Lostock Garage Ltd* [1976] 1 WLR 1187, [1977] 1 All ER 481 (CA).

[38] *Ibid.* [1976] 1 WLR 1187 at 1196–1197, [1977] 1 All ER 481 at 487–488, *per* Lord Denning MR.

occurrence.[39] In relationships in Lord Denning's first category the implied terms "are not founded on the intention of the parties, actual or presumed, but on more general considerations".[40] Conversely, in relationships in the second category the terms are implied on the basis of imputed intention. Returning to *Halsbury*'s classification of implied terms, after consideration of both terms implied by custom and terms implied by law, this conclusion is made:

> "The conclusion would appear to be that terms implied by law are not happily described as 'implied terms': they are rather duties which (frequently subject to a contrary intention) are imposed by the law on the parties to particular types of contract. In deciding whether to create such duties, the courts tend to look, not to the intention of the parties, but to considerations of public policy."[41]

Thus, it has been stated that the move from implying terms on the basis of intention to implying terms on the basis of the *relationship* or common practice results in implication as a matter or rule of law.[42] Many commentators have long since made the point that intent is but a fiction.[43] In the construction context the use of implied terms to found agreement has been approved and disapproved by commentators. Thus Mr Justice Byrne strongly critiques the intrusion of the courts in this practice.[44] Perhaps of more interest is Byrne J's fear that it is so widespread that the practice is now giving way to acceptance that the law itself has a role to play in both the formation and content of commercial contracts.[45] If one accepts this position, and indeed there is support for the routine implication of a wide variety of terms in construction contracts, then it would seem that it is less the traditional tests that govern than broader questions of policy.

[39] It is interesting that Lord Denning did not describe a second party in this respect as he did in setting out his other relationship examples, e.g. seller and buyer, owner and hirer. While it would seem logical to thus "imply" the employer as the other party in the relationship there is no reason that it could not also be said to extend to the contractor and subcontractor relationship as well.

[40] *Ibid.* [1976] 1 WLR 1187 at 1196, [1977] 1 All ER 481 at 487, per Lord Denning MR, citations omitted.

[41] *Halsbury's Laws of England* (4th ed., reissue), Vol. 9(1), para. 781 (footnotes omitted).

[42] *Ibid.* Vol. 9(1), para. 781, text to nn. 36–38. Glanville Williams has written in this regard: " . . . it is a matter of taste whether [certain] implied terms . . . be styled implied terms or rules of law. They are in fact merely rules of law that apply in the absence of an expression of contrary intent: whether we choose to call them implied terms or not is simply a matter of terminology": Williams, *supra*, note 29 at 404 (footnotes omitted). See Lord Tucker in *Lister* v. *Romford Ice and Cold Storage Co Ltd* [1957] AC 555 (HL) at 594: that terms are implied at law because "they have become attached in the course of time to certain classes of contractual relationships . . . ".

[43] The history of the use of the fiction of intent as a guise for judicial construction is set out by E A Farnsworth, "Disputes over Omissions in Contracts" (1968) 68 Columbia L Rev 860, 862 *et seq.*, with examples and references to other leading commentators including: Williams, *supra*, note 29 at 401; A L Corbin, "Conditions in the Law of Contract" (1919) 28 Yale L J 28 739, 743–744; and L Fuller, "Legal Fictions" (1930) 25 Illinois L Rev 363, 369.

[44] The Hon Mr Justice Byrne, "Implied Terms in Construction" (1995) 11 *Building and Construction Law* 6.

[45] *Ibid.* at 6, 7.

John Redmond, on the other hand, takes the position that the practice shows "the creativity of the courts in introducing implied terms into contracts, whilst pretending that they are merely discovering terms that were there all the time".[46] Commenting on the implied duty to warn in two cases[47] Redmond states: "it is difficult to accept that the duty to warn was in reality necessary[48] for the contract to work. After all in both cases the buildings were built, albeit defectively. The implied term was really not necessary to achieve a building but sensibly distribute the risk and liability to those who the judge felt truly responsible".[49] Thus, for Redmond, the implied term serves as another risk allocation tool that the courts can use, albeit still maintaining the underlying reasonableness that is so closely associated with the practice.[50]

There are other reasons and bases upon which terms are implied. It is a process of development and reflects both values and the historical context. Just over 100 years ago Justice Holmes set forth a rationale in his view which still has the ring of truth to it today: "You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or in short, because of some attitude of yours as a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusion."[51]

Implication may also be understood from an historical perspective. John Uff, QC, has stated:

> "The conclusion is inescapable from the traditional wording of these contracts [referring to present-day United Kingdom standard forms] that the lawyers commissioned to draft the early contracts were probably Chancery pleaders, with the experience of leases but without any knowledge of the practical or commercial problems and situations on a building site with which, of course, the building contracts should have been concerned to deal. The result is that certain critically important problem areas concerned with price have been traditionally ignored by the draftsmen and so left for implication by law."[52]

Turning from this background and these general considerations with regard to the first two bases upon which terms are implied, namely, custom and law, it falls to consider the third basis for implication as it is in this category that discussion of the subject of co-operation itself is often found.

[46] J Redmond, "Creative Implication: Implied Terms in Construction Contracts," a paper given to the Society of Construction Law in London on 4 July 1995.

[47] *Equitable Debenture Assets Corpn Ltd* v. *William Moss Group Ltd* (1984) 2 Con LR 1; *Victoria University of Manchester* v. *Hugh Wilson & Lewis Womersley (a firm)* (1984) 2 Con LR 43.

[48] Recalling the necessity argument for implying terms from *The Moorcock* (1889) 14 PD 64 (CA).

[49] Redmond, *supra*, note 46 at 6.

[50] *Ibid.* at 6. Redmond draws upon other commentators with a similar view and cites S Wilson and L Rutherford, from "Design Defects in Building Contracts: A Contractor's Duty to Warn" (1994) 10 Const LJ 90.

[51] O W Holmes, "The Path of the Law" (1897) 10 Harvard L Rev 466.

[52] Uff, *supra*, note 5.

**Traditional twofold analysis**

The subject of co-operation and what duties may arise in this regard through the implication of terms is normally discussed under two headings: (1) co-operation; and (2) not to prevent completion (or performance).[53] These two headings are sometimes discussed in relation to what is called a *positive* duty and a *negative* duty in English case law.[54] Similar references can also be found in American case law.[55] One of the clearest articulations of the different foundations for these two duties is given in *Mona Oil Equipment & Supply Co Ltd* v. *Rhodesia Railways Ltd.*[56] In the *Mona Oil* case Devlin J referred specifically to two principles: co-operation and prevention.[57] According to

[53] Patterson, *supra*, note 20 at 929, n. 122. The author gives himself credit for this distinction, referring to his earlier works: E W Patterson, Cases on Contracts II (1935), 266 *et seq.*, "Constructive Conditions of Cooperation or Non-Prevention": E W Patterson, "Judicial Freedom of Implying Conditions in Contracts", in *Recueil d'Études sur les Sources du Droit en l'Honneur de François Geny* (Paris: Librairie du Recueil Sirey, 1935), Vol. 2, 393; *cf.* S J Stoljar, "Prevention and Co-operation in the Law of Contract" (1953) 31 *Canadian Bar Review* 231, n. 3. Others, too, have adopted the distinction, e.g. S Furst, QC, and V Ramsey, QC, *Keating on Building Contracts* (London: Sweet & Maxwell, 7th ed., 2001), 64–65.

[54] Stoljar, *op. cit.*, writes that the "basic requirement of co-operation must be stated in two parts. (1) Reduced to its lowest terms, the general duty to co-operate becomes but a duty not to prevent or hinder the occurrence of an express condition precedent upon which the performance of the promisor depends . . . (2) On the other hand, the requirement of co-operation may turn into a distinctly positive duty, that is a duty to take all such necessary or additional steps in the performance of the contract that will either materially assist the other party or will generally contribute to the full realization of the bargain." I N D Wallace (Ed), *Hudson's Building and Engineering Contracts* (London: Sweet & Maxwell, 11th ed., 1994), Vol. 1 at 96, refers to two duties as well, one of which is referred to as the "prevention principle"; and later at 568–569 *Hudson* refers to both the "prevention principle" and "co-operation" as implied terms. Furst and Ramsey, *op. cit.*, discuss these implied terms under two headings: "co-operation" and "not to prevent completion", 64–65.

[55] *Williston on Contracts*, §887, provides in part: "Where the necessary event is peculiarly within the power of the promisee, the obligation of the promisor is conditional on the promisee's bringing the event to pass; and if the contract is bilateral there is an implied obligation on the part of the promisee that he will bring the event to pass. Thus, wherever the cooperation of the promisee is necessary for the performance of the promise, there is a condition implied in fact that the cooperation will be given, and if the contract is bilateral there is an obligation to give it": W H E Jaeger, *Williston on Contracts: A Treatise on the Law of Contracts* (Mount Kisio: Baker, Voorhisy, 3rd ed., 1957–1978).

[56] *Mona Oil Equipment & Supply Co Ltd* v. *Rhodesia Railways Ltd* [1949] 1 All ER 1014 (KB), followed in *South West Trains Ltd* v. *Wightman & Others, The Times* 14 January 1998.

[57] "*Mackay* v. *Dick* . . . contains two separate and independent propositions, one enunciated by Lord Blackburn, and the other by Lord Watson, and there is a danger of misunderstanding them if, as in the headnote to the case, they are combined into one . . . Lord Blackburn says nothing about prevention. The principle he enunciates may be put succinctly, as Viscount Simon LC put it in *Luxor (Eastbourne)* v. *Cooper* . . . saying that where co-operation is necessary, it is implied that it is forthcoming . . . The second proposition, based on the opinion of Lord Watson, advances a stage further and gives the plaintiff in appropriate cases an additional form of relief. If the breach of the implied term prevents the plaintiff from performing a condition binding on him, he is to be taken as having fulfilled that condition, and, if the condition is one on which his right to payment depends, he may sue for damages. That these propositions are distinct is shown by the fact that Lord Blackburn's reasoning does not involve the second at all. His construction of the contract does not require it . . . Lord Watson . . . proceeded on a different construction of the contract and so invoked the principle I have stated. He rested it on well-established doctrine . . . and not on any implication in the contract. The formulation of the implied term in cases of this class depends, in my judgment, on the necessity for co-operation. Without co-operation the contract would lack business efficacy, and this class of case is, therefore, simply an exemplification of the general principle . . . I can think of no term that can properly be implied other than one based on the necessity for co-operation. It is, no doubt, true that every business contract depends for its smooth working on co-operation, but in the ordinary business contract, and apart, of course, from express terms, the law can enforce co-operation

Devlin J the "co-operative" principle would be implied when necessary; but not the "preventive" principle which instead could be supported by reference to the judgment given and authorities cited by McCardie J in *Colley* v. *Overseas Exporters*.[58] Hence prevention was a matter of law in Devlin J's view.

J F Burrows varies the above twofold classification and prefers to examine co-operation under two broad headings: (1) interference with enjoyment of subject-matter; and (2) interference with performance of promises.[59] Relying upon this classification building contract cases would be more likely to arise under the second heading. Patterson has also looked closely at the subject from an historical point of view. His analysis is relevant in relational contract theory because it underscores, well prior to the postulation in MacNeil's work, the importance of exchange and the division of labour to relational contract theory.[60]

**Prevention: negative co-operation**

Lord Asquith, in *William Cory & Son Ltd* v. *London Corporation,* is often credited with one of the leading statements of what has occasionally been shortened and referred to as the "prevention principle":

> "The claimants argue that it is an implied term of every, or almost every, contract between A and B . . . that A shall not prevent or disable B from performing the contract and *vice versa* . . . In general, no doubt, it is true that a term is necessarily implied in any contract whose other terms do not repel the implication, that neither party shall prevent the other from performing it, and that a party so preventing the other is guilty of a breach."[61]

---

only in a limited degree to the extent that it is necessary to make the contract workable. For any higher degree of co-operation the parties must rely on the desire that both of them usually have that the business should get done": *Mona Oil Equipment & Supply Co Ltd* v. *Rhodesia Railways Ltd* [1949] 1 All ER 1014, 1017–1018 (KB).

[58] *Colley* v. *Overseas Exporters* [1921] 3 KB 302 (KB) distinguished *Mackay* v. *Dick* (1881) 6 App Cas 251 (HL), on the basis that it was decided under Scots law and before passage of the Sale of Goods Act 1893. McCardie J: "Although, as I have said, *Mackay* v. *Dick* . . . turned on Scotch law yet I think that that principle is equally well settled in English law. It is frequently asserted in well-known text books based on English law [after referring to several texts continued] . . . the principle moreover has been frequently applied by the Courts and is illustrated by *Braithwaite* v. *Foreign Hardwood Co* . . . *Sprague* v. *Booth* . . . [and] *Kleinert* v. *Abosso Gold Mining Co* . . ." (at 308–309). See generally A G Guest, *Benjamin's Sale of Goods* (London: Sweet & Maxwell, 5th ed., 1997).

[59] A future refinement of these two heads is developed by J F Burrows, "Contractual Co-operation and the Implied Term" (1968) 31 MLR 390, who first of all divides the topic of co-operation into two broad areas, namely: interference with enjoyment of subject-matter, and interference with performance of promises. With regard to this second head Burrows adopts a further subdivision as follows: "[t]he cases will be classified according to whether party B is blamed for having done a positive act obstructing party A, or whether he is being blamed for sitting back and not actively helping. The distinction, then, is between a duty not positively to obstruct and a duty to co-operate actively", at 396. Burrows' duty not to obstruct is examined both under the heading of "total prevention" as well as "mere hindrance", at 396–402.

[60] Patterson, *supra*, note 20 at 929.

[61] *William Cory & Son Ltd* v. *London Corporation* [1951] 2 KB 476 at 484, [1951] 2 All ER 85 at 88 (CA), per Lord Asquith. The issue of whether the prevention amounts to a breach of contract is also assumed for example in *Stirling* v. *Maitland and Boyd* (1864) 5 B & S 840, 852. The *Stirling* case involves a somewhat different obligation to maintain conditions within one's control; thus Cockburn CJ said: "If a party enters

Both Patterson and Stoljar examine the early cases[62] upon which the implied duty of prevention rests. Stoljar is the more critical of the two commentators with regard to the foundation for the duty. In contrast to some of these early decisions though, a much stronger basis for the principle can be seen in a series of early building cases.[63] Among these cases or examples that Stoljar lists there are the failures of a building owner to give immediate possession of the building site[64]; to supply requisite plans[65] or materials[66] in time; or his unjustifiable interference in the course of construction.[67]

A similar rule has been discerned by Nagla Nassar in cases involving international arbitrations.[68] Nassar, who has undertaken a major study into long-term international commercial transactions focusing in particular on arbitration awards,[69] has concluded that in one

> "category of cases . . . where implementation of the contract has already commenced . . . the party refusing to cooperate in the implementation of the contract at issue has been held to be in breach of that contract. One is expected to use his best efforts to carry out the

into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative." See also V Williams LJ in *Barque Quilpué Ltd* v. *Brown* [1904] 2 KB 264 at 271–272 (CA): " . . . in this contract, as in every other, there is an implied contract by each party that he will not do anything to prevent the other party from performing the contract or to delay him in performing it." Lord Watson in *Sailing Ship Blairmore Co Ltd* v. *Macredie* [1898] AC 593 at 670–608 (HL): "The rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfill, or escape those obligations by offering to the other party an indemnity which is not that which the other party contracted to accept." *Marshall and anor.* v. *Colonial Bank of Australia* (1903–1904) 1 CLR 632 at 647, *per* Griffiths CJ: ". . . all contractual relations impose upon the parties a mutual obligation that neither shall do anything which is calculated to hamper the other in performance of the contract on his part."

[62] Patterson, *supra*, note 20 at 931; and Stoljar, *supra*, note 53 at 234, n. 11: "It will be shown that these views [in the early decisions] are not altogether true and are perhaps based on too narrow an interpretation of the earlier decisions." It may be noted that many of the early decisions involve penal bonds.

[63] The "modern theory of prevention stems from another line of sixteenth and seventeenth century decisions dealing with the lessor-lessee relation in what were the earliest examples of building leases . . . which were later to be neatly summarized by Comyns and which thus became the starting-point for subsequent development": Stoljar, *supra*, note 53 at 236–237 (footnotes omitted). The "building cases" were one of five categories of cases or relationships that Stoljar looked at and that also included commission cases, employment cases, notice cases, and sale of goods cases.

[64] *Ibid.* at 237 n. 27, citing *Holme* v. *Guppy* (1838) 3 M & W 387. See also *Lodder* v. *Slowey* [1904] AC 442 (HL); and *Amalgamated Building Contractors* v. *Waltham Cross UDC* [1952] 2 All ER 452 (CA).

[65] *Ibid.* at 238 n. 27 citing *Roberts* v. *Bury Improvement Commissioners* (1870) LR 5 CP 310.

[66] *Ibid.* at 238 n. 28 citing *MacIntosh* v. *The Midland Counties Rly Co* (1845) 14 M & W 387 and *Holme* v. *Guppy* (1838) 3 M & W 387.

[67] *Ibid.* at 238 citing *Russel* v. *Da Bandeira* (1862) 13 CBNS 149. For recent commentary on the inappropriate use of this doctrine after *Peak Construction (Liverpool) Pty Ltd* v. *McKinney Foundations Ltd* (1970) 69 LGR 1, see I N D Wallace, "Prevention and Liquidated Damages: A Theory too Far?" (2002) 18 *Building and Construction Law* 82.

[68] In a searching and original work, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Transactions* (Dordrecht: Martinus Nijhoff Publishers, 1994), Nagla Nassar focuses on developing a theoretical foundation for long-term contracting. Relying primarily upon arbitral decisions, but also some International Court of Justice and sundry national court decisions, Nassar endorses MacNeil's terminology and the framework of relational contracting and then illustrates its operation with reference to the jurisprudence she describes.

[69] ICC award in case No 4761 of 1987 (1987) 114 JD Int's (Clunet) 1012, 1016–1017; and also appearing in an English translation at [1989] ICLR 330, 334.

> contractual project, and not to interfere with the contractual environment in a way that may hinder performance."[70]

Cases involving prevention may also be referred to thus Nassar once again writes:

> "Disputes involving obstruction of performance shed even more light on the extent to which cooperation is required. Contracting parties are required to refrain from any conduct that would obstruct the contract's implementation under two factual scenarios. Included under the first category are cases where the non-cooperative conduct impedes the commencement of the contractual project[71] ... The second category of cases comprises instances where the implementation of the contract has already commenced ... In these and other cases,[72] the party refusing to cooperate in the implementation of the contract at issue has been held to be in breach of that contract. One is expected to use his best efforts to carry out the contractual project, and not to interfere with the contractual environment in a way that may hinder performance."[73]

Thus, both doctrine and jurisprudence on prevention provide considerable guidance on construing one aspect of the duty of co-operation. The second aspect of co-operation in a positive sense may now be turned to.

### Positive co-operation

The classic statement of the requirement for co-operation in contracting comes from Lord Blackburn in *Mackay* v. *Dick*:

> "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."[74]

Several observations must be made. The case involved the sale of goods as many later cases do that raise the principle. It is noteworthy that it was

[70] Nassar, *supra*, note 68 at 162 nn. 62, 63 and 64, citing *General Dynamics Telephone Systems Center, Inc* v. *Iran* (1985 II) 9 Iran-USCTR 153, 157; *QuesTech, Inc* v. *Iran* (1985 II) 9 Iran-USCTR 107, 112; *Harnischfeger Corporation* v. *Ministry of Roads and Transportation* (1984 III) 7 Iran-USCTR 90, 103; *Dic of Delaware, Inc* v. *Tehran Redevelopment Corporation* (1985 I) 8 Iran-USCTR 144, 160–162, 164, 168–171.

[71] *Ibid.* at n. 59 citing ICC award in case No 6230, *Sub-contractor (UK)* v. *Main Contractor (Austria)* (1992) 17 YBCA 164, 169.

[72] *Ibid.* at n. 64, citing *Harnischfeger Corporation* v. *Ministry of Roads and Transportation* (1984 III) 7 Iran-USCTR 90, 103; *Dic of Delaware, Inc* v. *Tehran Redevelopment Corporation* (1985 I) 8 Iran-USCTR 144, 160–162, 164, 168–171.

[73] *Ibid.* at 162.

[74] *Mackay* v. *Dick* (1881) 6 App Cas 251 at 263 (HL). See also *Hamlyn & Co* v. *Wood & Co* [1891] 2 QB 488; [1891–1894] All ER Rep 168 (CA), which held that the question of whether in any case an implication ought to be made must depend on the particular facts of the case; and that the construction of one contract in this respect affords little or no guidance for the construction of another. It has also been stated *obiter*, that there "is, of course, no general rule that terms cannot be implied into a standard form contract. The same principles apply to standard form contracts as they do to negotiated contracts": Kaplan J in *Jardine Engineering Corp Ltd & Ors* v. *Shimizu Corp* [1992] 2 HKC 89 (HC). On this authority an argument can be made that similar considerations apply when construing the NEC.

decided on appeal under Scots law and thus was heavily influenced by civil law traditions. The case was also heard before codification of sales law in the United Kingdom. Lord Blackburn relied upon a very early case decided in 1469 for the principle he formulated and then described as one of "obvious good sense and justice".[75] His Lordship's principle presupposes a requirement of co-operation and the duty itself is not expressly mentioned. The duty was derived from an interpretation of the contract and as an implied promise. It has since been considered[76] and applied[77] in a wide variety of cases.

Another English case that is often cited as authority for a duty of co-operation is *Luxor (Eastbourne) Ltd* v. *Cooper*.[78] However, this case, involving a principal agent, in fact distinguished *Mackay* v. *Dick*.[79] It was held in *Luxor* on the facts of the case that no implied term of co-operation arose. Viscount Simon LC was unable to view the implication of the term sought as "necessary",[80] although his *obiter* remark on the issue is followed nevertheless and routinely cited in support of the duty.[81] The importance of the *dictum* has not gone unnoticed to Alan Shilston who writes, referring to Viscount Simon's *dictum*: " . . . the importance of this dictum, to a construction industry practitioner, continually reasserts itself the underlying ethos of what contracting is all about is revealed. Yet it has frequently struck me as surprising that this essential piece of background fabric to the recognised standard forms of contract has never been set down in expressed language."[82]

Shilston's statement, perhaps no less significant today, should still be qualified given the express references to co-operation now made not only in the NEC but also the JCT Management Contract.[83]

[75] *Mackay* v. *Dick* (1881) 6 App Cas 251 at 264 (HL).

[76] E.g. *City of Dublin Steam Packet Co* v. *R* (1908) 24 TLR 657; *Sprague* v. *Booth* [1909] AC 576 (PC); *Harrison* v. *Walker* [1919] 2 KB 453; *Colley* v. *Overseas Exporters* [1921] 3 KB 302; *United States Shipping Board* v. *Durrell* [1923] 2 KB 739; and *Mona Oil Equipment & Supply Co* v. *Rhodesia Rlys Ltd* [1949] 2 All ER 1014.

[77] E.g. *Kleinert* v. *Abosso Gold Mining Co* (1913) 58 SJ 45; and *Saunders* v. *Ernest A Neale Ltd* [1974] 3 All ER 327.

[78] *Luxor (Eastbourne) Ltd* v. *Cooper* [1941] AC 108 (HL); discussed recently in *Nala Engineering Ltd* v. *Roselec Ltd*, QBD, Technology & Construction Court, 23 March 1999.

[79] *Mackay* v. *Dick* (1881) 6 App Cas 251 (HL).

[80] Viscount Simon LC: "I am unable to regard the suggested implied term as 'necessary'. The well known line of authorities, of which *Mackay* v. *Dick* (1881) 6 App Cas 251 is a leading example, do not, in my opinion, lead to the conclusion drawn from them by the majority of the Court of Appeal in *Trollope & Sons* v. *Martyn Brothers* [1934] 2 KB 436": *Luxor (Eastbourne) Ltd* v. *Cooper* [1941] AC 108 at 118 (HL).

[81] Viscount Simon LC: ". . . generally speaking, where B is employed by A to do a piece of work which requires A's co-operation . . . it is implied that the necessary co-operation will be forthcoming": *Luxor (Eastbourne) Ltd* v. *Cooper* [1941] AC 108 at 118 (HL).

[82] A W Shilston, "The Obligation to Co-operate: What Does This Involve?" a paper given at a joint meeting of the Society of Construction Law and the Society of Construction Arbitrators in London on 2 June 1992 (London: Society of Construction Law, 1992), 2.

[83] J Gilbert, in fact, would equate the management contract itself with one essential criterion, namely "co-operation". See e.g. Gilbert in the information section, "A Personal View from the Touchline—The

The *Luxor* case illustrates one of the two principal means by which implied terms are either justified or not in any given case; namely, by reason and necessity. These two control measures in effect permit almost any result to be logically supported. Hence, from *Bull* v. *Robison*[84] "any warranty implied by the law must be a reasonable warranty, and cannot be one which is physically impossible to comply with". The link to impossibility in this regard is also important for it shows the way in which the term is used to attenuate the harshness of absolute obligations.[85] Reasonableness, as well, serves as the foundation or otherwise of numerous implied terms that, in construction contract cases, often centre upon notice, care and skill, duration and money.[86] With regard to the second criterion of necessity, although referred to in *Mackay* v. *Dick*,[87] the requirement is most closely associated with *The Moorcock*.[88] Clear statements of the principle have also been expressed in *Trollope & Colls Ltd* v. *North West Metropolitan Regional Hospital Board*,[89] and *BP Refinery (Westernport) Pty Ltd* v. *President, Councillors and Ratepayers of the Shire of*

JCT Management Contract" (1988) 4 Const LJ 326. Cl. 1.4 of the JCT Management Contract provides: "The Management Contractor shall upon and subject to the Conditions co-operate with the Professional Team as stated in Appendix 1". T Blackler *et al.*, *Rowe & Maw, JCT Management Contract. A Comprehensive Analysis of the Contract Package* (London: Sweet & Maxwell, 1989), 38 comment: "The legal duty of co-operation on the part of the Management Contractor constitutes the fundamental legal difference between management and traditional contracting." Unlike under traditional contracting arrangements Blackler *et al.* construe cl. 1.4 as imposing a very clear and positive obligation upon the management contractor to co-operate and even initiate activity.

[84] *Bull* v. *Robison* (1854) 10 Exch 342; 156 ER 476 at 477, per Baron Alderson.

[85] Patterson, referring to cases such as *Holme* v. *Guppy* (1838) 3 M & W 387, and *Russel* v. *Da Bandeira* (1862) 13 CBNS 149, although not *Bull* v. *Robison* (1854) 10 Exch 342; 156 ER 476, concludes that such "cases recognize a much milder variety of prevention by the obligee as excusing performance of the obligation to pay a penalty for delay indicates the ascendance of the principle of co-operation over the principle that obligations are to be literally fulfilled": Patterson, *supra*, note 20 at 932 and n. 137. This follows from Patterson's observation that implied conditions are often discussed in one of three contexts: "exchange, co-operation, and frustration", 905. Furst and Ramsey, *supra*, note 53 at 57, similarly, use "three different senses" for implied terms: one of which "a vital change of conditions" he equates with frustration.

[86] See *Halsbury's Laws of England* (4th ed., reissue), Vol. 9(1), para. 787, for specific examples. Assistance on the meaning of *reasonableness* is also given in many cases including: *Wells* v. *Army & Navy Co-operative Society Ltd* (1902) 2 Hudson's BC 4th ed. 346; 86 LT 764; and *Neodex* v. *Swinton and Pendlebury BC* (1958) 5 BLR 38. See generally Justice T R H Cole, "The Concept of Reasonableness in Construction Contracts" (1994) 10 *Building and Construction Law* 7.

[87] *Mackay* v. *Dick* (1881) 6 App Cas 251 (HL).

[88] *The Moorcock* (1889) 14 PD 64, [1886–1890] All ER Rep 530 (CA), per Bowen LJ. The case has been considered and applied in dozens of other cases in Commonwealth jurisdictions, some of which include: *Hamlyn* v. *Wood* [1891] 2 QB 488; *City of Dublin Steam Packet Co* v. *R* (1908) 24 TLR 657; *Hart* v. *Macdonald* (1910) 10 CLR 417; *Metropolitan Water Board* v. *Dick, Kerr & Co* [1917] 2 KB 1 (CA); *Kelantan Government* v. *Duff Development Co* [1923] AC 395 (HL); *Birmingham Construction Ltd* v. *Moir Construction Co Ltd and Board of Water Commissioners of City of Welland* (1959) 18 DLR (2d) 505; *Western Electric Ltd* v. *Welsh Development Agency* [1983] QB 796, [1983] 2 All ER 629; and *Associated Japanese Bank (International) Ltd* v. *Crédit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255.

[89] *Trollope & Colls Ltd* v. *North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260 at 267–268, [1973] 1 WLR 601 at 609 (HL), per Lord Pearson.

*Hastings*.[90] These tests are employed predominantly in the common law.[91] It is noteworthy once again that implication of the term must be both necessary and reasonable.[92] Either reasonableness[93] alone or even convenience alone is insufficient.[94] However, the courts vacillate as to how much emphasis they wish to place upon either of these requirements although lately necessity has held sway.[95] Burrows sees necessity in particular imposing a significant limitation upon the duty. " . . . the law is not prepared to go much further. While it goes a little beyond absolute 'necessity'—as to be sensible it must—it stops short of demanding co-operation merely because it would be reasonable. The English law does not require a degree of conduct equivalent to the Roman 'good faith'."[96]

While this view can be acknowledged the theoretical framework outlined here for the NEC is postulated in terms of both co-operation—the express statement thereof in clause 10.1—and good faith and fairness impliedly influencing the interpretation and application of the form. Other views can also be put forward. Thus, some writers very carefully *equate* co-operation and

[90] *BP Refinery (Westernport) Pty Ltd* v. *President, Councillors and Ratepayers of the Shire of Hastings* (1977–78) 16 ALR 363, 52 ALJR 20 (PC). The emphasis here is upon necessity although the tests in these cases are also put forward in terms of "business efficacy"; and in the case of *Shirlaw* v. *Southern Foundries (1926) Ltd* [1939] 2 KB 206, [1939] 2 All ER 113 (CA), MacKinnon LJ at 227 and 124 respectively formulated a test in terms of an "officious bystander" as well. The *BP Refinery* case could also arguably be put forward as an example of a combination of all of these tests; see in particular Lord Simon's formulation of the test to be applied (52 ALJR 20 at 26). The Simon formulation from *BP Refinery* has been relied upon by Judge Bowsher, QC, in *J & J Fee Ltd* v. *Express Lift Co Ltd* (1993) 34 Con LR 147.

[91] H Cohen, "French Construction Law: A Comparative Approach" (1997) 13 Const LJ 75 at 88 states that the use of the technique of implied terms as understood by the common law does not exist in French law, although article 1135 of the Civil Code obliges the parties to the extent that obligations arise from equity, custom and statute.

[92] The common law test for implication of terms focusing as it does upon necessity and reasonableness is similar in these ways to the considerations that have been found to be relevant in international arbitral jurisprudence. Nagla Nassar puts forward a test, in short, based upon this jurisprudence that a duty of co-operation will be found to exist when certain considerations are met. In short her test posits that parties in a contractual relationship exercise their rights in a legitimate way, one that takes into account the parties' interests as well. Interests protected though must be substantial and they may be weighed against the norms in the relationship including commercial norms. Decisions not to co-operate must be prudent, neither unreasonable nor unnecessary and a defaulting party must be able to justify the action taken not solely on the basis of a contractual entitlement: see Nassar, *supra*, note 68 at 164–167.

[93] *Lazarus* v. *Cairn Line of Steamships Ltd* (1912) 106 LT 378; 28 TLR 244; *Reigate* v. *Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592, [1918–1919] All ER Rep 143 (CA); *Re Comptoir Commercial Anversois* v. *Power, Son & Co* [1920] 1 KB 868, [1918–1919] All ER Rep 661 (CA); *Liverpool City Council* v. *Irwin* [1977] AC 239, [1976] 2 All ER 39 (HL); *George Hawkins* v. *Chrysler* (1986) 38 BLR 36 (CA).

[94] *Re Nott & Cardiff Corpn* [1918] 2 KB 146, 118 LT 487; on appeal *sub nom. Brodie* v. *Cardiff Corpn* [1919] AC 337 (HL).

[95] Thus in *Spring* v. *Guardian Assurance plc* [1994] 3 All ER 129 (HL), Lord Woolf, after setting out the circumstances supporting the implication of a term in an employment relationship said at 179: ". . . it is necessary to imply a term into the contract that the employer would, during the continuance of the engagement or within a reasonable time thereafter, provide a reference at the request of a prospective employer which was based on facts revealed after making those reasonably careful inquiries, a reasonable employer would make."

[96] Burrows, *supra*, note 59 at 404. Burrows' "best illustration" of this tendency comes from *Mona Oil Equipment Co* v. *Rhodesia Railways Ltd* [1949] 2 All ER 1014 at 1018, per Devlin J.

good faith. Clarke,[97] for example, takes a statement of the rule of good faith in American law[98] (that looks similar to the "prevention principle" and is framed in negative terms) along with a well-known quotation from a leading English case,[99] and recombines them to arrive at the formulation of the duty to co-operate given by Lord Blackburn in *Mackay* v. *Dick*.[100] He then adds, with reference to *Halsbury*, that "the proposition has also been restated as a duty of co-operation".[101] Similarly, Carter and Furmston expressly equate the modern doctrine of good faith in Australian law[102] to an earlier narrower version of co-operation. "The traditional perspective on the principle, [good faith] and the slightly narrower versions formulated in *Stirling* v. *Maitland* . . . and *Mackay* v. *Dick* . . . is co-operation in performance."[103] Lastly, Collins writes in "the United States lawyers describe the duty of co-operation during performance as the obligation to perform in good faith".[104] Hence, even apart from an argument that good faith, or good faith and fairness or fair dealing, could be implied in the NEC in many situations, the express reference to co-operation alone might suffice to import the notion.

A strong argument can also be made that the express obligation to co-operate in clause 10.1 takes future cases involving the NEC out from under narrower interpretations which have implied the term effectively as one necessary only to ensure the fulfilment of preconditions to performance.[105] In this regard, on one view, the duty to co-operate has been said to be *negative* rather than *positive*.[106] The duty to co-operate on another interpretation could be said to operate either as an adjunct to or a substitute for the finding of any fiduciary relationship. The importance of clause 10.1 in both its ability

[97] M Clarke, "The Common Law of Contract in 1993: Is There a General Doctrine of Good Faith?" (1993) 23 Hong Kong LJ 318.

[98] That "neither party to an agreement may do anything to impede performance of the agreement or to injure the right of the other party to receive the supposed benefit": *ibid.* at 331, n. 87, citing *US Surgical Corp* v. *Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, 800, which was referring to the law of New York and Connecticut.

[99] That "there is a 'positive rule of the law of contract that conduct of either [party] which can be said to amount to . . . bringing about the impossibility of performance is itself a breach'" and citing *Southern Foundries (1926) Ltd* v. *Shirlaw* [1940] AC 701 at 717 (HL): *ibid.* at 331, n. 88. It is submitted that there is merit in this analysis even if Clarke may have drifted into a third category of implied terms; namely, "frustration" according to some other authors: see e.g. Furst and Ramsey, *supra*, note 53 at 57.

[100] *Mackay* v. *Dick* (1881) 6 App Cas 251 at 263 (HL).

[101] Clarke, *supra*, note 97 at 331, n. 89: "They appear to be equated by the citations employed in support in, for example, *Halsbury's Laws of England*, 4th ed., vol. 9, para. 359." Later, in the article, Clarke concludes: "during performance, parties must not sabotage the contract by refusing a basic level of co-operation", at 341.

[102] Carter and Furmston, *supra*, note 36 at 116 citing, among other decisions, *Secured Income Real Estate (Australia) Ltd* v. *St Martin's Investments Pty Ltd* (1979) 144 CLR 596, 607 and *Renard Constructions (ME) Pty Ltd* v. *Minister of Public Works* (1992) 26 NSWLR 234.

[103] Carter and Furmston, *supra*, note 36 at 116, n. 154.

[104] Hugh Collins, The Law of Contract (London: Butterworths, 2nd ed., 1993), 304.

[105] E.g. *Mackay* v. *Dick* (1881) 6 App Cas 251(HL); *Luxor (Eastbourne) Ltd* v. *Cooper* [1941] AC 108 (HL); *Barque Quilpué Ltd* v. *Brown* [1904] 2 KB 264; *London Borough of Merton* v. *Stanley Hugh Leach Ltd* (1985) 32 BLR 51; and *Allridge (Builders) Ltd* v. *Grand Actual Ltd* (1997) 55 Con LR 91.

[106] E.g. Burrows, *supra*, note 59 at 396, once again: "The distinction, then, is between a duty not positively to obstruct and a duty to co-operate actively".

to make use of co-operative jurisprudence but at the same time to circumvent any limitations inherent in an implied term approach cannot be overstated. It is also consistent with the views of commentators who argue convincingly for the court ordered enforcement of express obligations to co-operate but not their implication.[107] The suggestion being made here to seek to leave open both the express and implied bases upon which a duty to co-operate can be founded has had a recent judicial endorsement. Thus, in *Maidenhead Electrical Services Ltd* v. *Johnson Control Systems Ltd* a duty to co-operate was implied in the parties' relationship notwithstanding an express contractual provision requiring co-operation as well.[108]

There are other bases that can be put forward for a far-reaching role for co-operation based upon express reference in the NEC. Thus, once again, from the *Mona Oil*[109] case, Devlin J clearly distinguished this case; so too has Nassar, whose work is especially important because of her close examination of international arbitral jurisprudence.[110]

> "To what extent does international commercial practice acknowledge the right to demand joint contractual operation—or, to what extent does it permit a party to put his own interests ahead of those of his partner and the contractual relationship? … Cases seldom expressly propose a general unrestricted duty to cooperate. One of the few exceptions is the ICC award in case No 2291[111] … Tribunals have been more ready to enact a duty to cooperate where there is a contractual provision to that effect.[112] … Similar positions have been adopted by other arbitral tribunals with respect to a variety of contracts.[113] The Iran-US Claims Tribunal, in particular, supported this position on several occasions, where it was held that a contracting party cannot unreasonably refrain from approving the legitimate requests or expectations of the other party.[114] This proposition is especially valid in cases where there are prior approval, or coordination clauses."[115]

[107] Goodard, *supra*, note 6 at 450; and R E Scott, "A Relational Theory of Default Rules for Commercial Contracts" (1990) 19 *Journal of Legal Studies* 597, 606–615.

[108] *Maidenhead Electrical Services Ltd* v. *Johnson Control Systems Ltd* (1997) 15 CLD 10–01, Official Referee, *per* Recorder Knight, QC.

[109] Devlin J: " … apart, of course, from express terms, the law can enforce co-operation only in a limited degree to the extent that it is necessary to make the contract workable": *Mona Oil Equipment & Supply Co Ltd* v. *Rhodesia Railways Ltd* [1949] 1 All ER 1014 at 1018 (KB).

[110] Nassar, *supra*, note 68. On this subject Nassar also draws upon the work of Burrows, *supra*, note 59; and R E Scott, "Conflict and Cooperation in Long Term Contracts" (1987) 75 California L Rev 2005, 156, n. 37, in Nassar among others.

[111] Two exceptions Nassar refers to are ICC award in case No 2291 of 1975 (1976) 103 JD Int'l (Clunet) 989, 991 and ICC award in case No 1434 of 1975 (1976) 103 JD Int'l (Clunet) 978, 982: Nassar, *ibid.* at 156–157, n. 40.

[112] *Ibid.* at 157, n. 41, refers here to the ICC award in case No 4761 of 1987 (1987) 114 JD Int'l (Clunet) 1012, 1016–1017; and also appearing in an English translation at [1989] ICLR 330, 334, involving an engineering subcontractor's request for a price increase.

[113] *Ibid.* at 157, n. 42, is here referring to ICC award in case No 2291 of 1975 (1976) 103 JD Int'l (Clunet) 989, 991; ICC award in case No 1434 of 1975 (1976) 103 JD Int'l (Clunet) 978, 982; ICC award in case No 4761 of 1987 (1987) 114 JD Int'l (Clunet) 1012, 1016–1017; *Cosmos Engineering Inc* v. *Ministry of Roads and Transportation* (1986 IV) 13 Iran-USCTR 179, 187; *Harris International Telecommunications Inc* v. *Iran* (1987 IV) 17 Iran-USCTR 31, 65–68; and (1988 II) 18 Iran-USCTR 292.

[114] *Ibid.* at 157, n. 43, referring again to *Cosmos Engineering Inc* v. *Ministry of Roads and Transportation* (1986 IV) 13 Iran-USCTR 179, 187; *Harris International Telecommunications Inc* v. *Iran* (1987 IV) 17 Iran-USCTR 31, 65–68.

[115] *Ibid.* at 156–157.

In at least two of the cases Nassar refers to, the duty to co-operate was discussed in terms of good faith.[116] Once again, this willingness on the part of the tribunals to equate the two notions is significant in the way in which it opens up consideration of the good faith jurisprudence construing the duty of co-operation. This is an important link between the concepts.

Nassar recognises at least one limitation under traditional contract doctrine and jurisprudence though and that is when express co-operation clauses are construed as agreements to agree and as such are potentially unenforceable.[117] However, rather than pursue that line of inquiry, Nassar, consistent with the theoretical framework developed here, declares this need not be the case if one accepts the following rationale and a relational perspective:

> "The same [viz. unenforceability] is not true under a relational approach, where a contract is not necessarily an all-encompassing set of by-laws, but is often merely a framework for the parties' relationship. The relational conceptualisation is not undermined when some of the contractual aspects are left for future consultation and collaboration between the parties, so long as the agreement is sufficiently defined and not totally vague international arbitral practice supports the relational approach. . . . "[118]

Turning away from these issues of characterisation, the subject of co-operation can also be considered in another important respect; that is, explication of the rules on the allocation of risk.

### Co-operation and risk allocation

Patterson has considered the issue taking as his starting point that the requirement of co-operation, when implied,[119] can impose duties additional to those in the contract. There were then, at the time he was writing and as there are today, many examples of implied obligations in building and construction cases. It was these instances that Patterson construed as arising through implied co-operation. The duty varied and could be satisfied, in some cases, by the exercise of due diligence, while not in others. Of these latter cases he wrote: "the requirement of co-operation is an allocation to the co-operator of the risk of the occurrence or non-occurrence of a certain event, in which case the requirement is not satisfied by his exercise of diligence. Similarly, the refusal to construct a requirement of co-operation may be regarded as an allocation of risk to the obligee . . .".[120]

[116] *Ibid.* at 156–157 referring to ICC award in case No 2291 of 1975 (1976) 103 JD Int'l (Clunet) 989, 991; and ICC award in case No 4761 of 1987 (1987) 114 JD Int'l (Clunet) 1012, 1016–1017; and also appearing in an English translation at [1989] ICLR 330, 334.

[117] *Ibid.* at 158. See also Jeannie Marie Paterson, "The Contract to Negotiate in Good Faith: Recognition and Enforcement" (1996) 10 *Journal of Contract Law* 120, who sets out and critiques four reasons why courts have refused to recognise a contract to negotiate in good faith, including "contracts to contract".

[118] Nassar, *ibid.* at 159.

[119] Implication here could be either by constructive condition or implied promise using his terminology: Patterson, *supra*, note 20.

[120] *Ibid.* at 935–936. Patterson relies upon a dicta of Justice Learned Hand in support: " 'It is of course true that, with certain exceptions not here important, an obligor takes the risk of whatever will prevent his performance, but that does not include prevention by the obligee himself' ", from *Overbury* v. *Platten*, 108 F (2d) 155, 157 (CCCA 2d 1939), at 935 n. 155.

Patterson develops certain boundaries for risks, which are determined by the requirement of co-operation. Thus, in the first instance, events for which the "co-operator" assumes the risk, which may include their non-occurrence, are those which assist the other party to the contract to perform his obligations. In the second instance, the co-operator takes the risk for events over which he has a substantial measure of control.[121] By focusing on early American case law Patterson has been able to demonstrate the application of these risk allocation principles through two examples involving the adequacy of plans and specifications (design) and soil conditions.[122] In the same way today, clause 10.1 should operate to impose additional duties upon the parties depending upon the proper allocation of the risk. Indeed, the striking similarity of language between Patterson's articulation of these risk allocation rules and those underpinning risk allocation in the NEC dramatically call for it.

In conclusion, the NEC itself with its detailed framework for the allocation of risk has already provided a means for determining the parties' obligations. Clause 10.1, in the context of and in conjunction with this framework, can be used to define how and in what respects the parties must also co-operate. However, it is to be expected that situations will arise in construing the NEC where it will be unclear upon whom a particular risk is imposed or even the extent to which it should be borne if it is to be shared. In such a case further consideration would have to be given to the issue of how the parties should fulfil their duty to co-operate. The theoretical basis for the NEC posited here presupposes a relational view of the parties and, consistent with that view, norms will be important in determining their respective obligations. The most important norms in this regard as has been seen remain those premised upon good faith, fairness and co-operation.

The foundation for all parties' actions in the NEC save the adjudicator is *co-operation*. The significance of beginning the contract with an affirmation of co-operation and imposing such an obligation upon the parties in clause 10 cannot be overstated. In the first place it has been shown how co-operative attitudes improve project success.[123] While some may argue that such a clause is devoid of content it has been argued here to the contrary that it has the fullest possible meaning because it underscores the necessity for action with

[121] *Ibid.* at 935–936.

[122] *Ibid.* at 936. *Cf.* English cases with regard to "design": *Independent Broadcasting Authority* v. *EMI Electronics and BICC Construction* (1980) 14 BLR 1; *Viking Grain Storage* v. *T H White Installations Ltd* (1985) 33 BLR 103; and *Basildon District Council* v. *J E Lesser (Properties) Ltd* [1985] QB 839, [1985] 1 All ER 20; and with regard to "soil conditions": *Roberts* v. *Bury Improvement Commissioners* (1870) LR 4 CP 755, LR 5 CP 310; and *Freeman & Son* v. *Hensler* (1900) 64 JP 260, 2 Hudson's BC 4th ed., 292.

[123] See *Success and Failure in Major Projects* (Oxford: Major Projects Association, 1986), Technical Paper 3. P W G Morris and G H Hough, *Preconditions*.

regard to every single obligation otherwise imposed upon those named in the contract.

## Long-term contracting

Relational contract theory is closely associated with long-term contracting[124] and incomplete agreements.[125] These two features appear in MacNeil's work and have been reiterated by others.[126] However, one issue that neither the legal literature nor the law and economics literature has reached broad agreement upon is whether long-term or relational contracts should be treated differently from simpler[127] contracts as a result of incompleteness.[128] The issue does not admit of an easy answer because simple contracts may be incomplete[129] in some material respects as well. However, while there is not total agreement on the answer it is proposed to accept the view that no special law is required for either relational or long-term contracts *per se*. This view is consistent with the position taken, at least initially, by the NEC drafters that a minor works version of the NEC was not necessary. In short, for the NEC drafters neither duration nor value was determinative of the appropriateness of the use of the NEC. Both long-term and short-term contracts, large or small values, or even no formal contractual framework at all, are consistent

[124] C J Goetz and R E Scott, "Principles of Relational Contracts" (1981) 67 Virginia L Rev 1089, 1091, note the relationship between long-term and relational contracts although they also note that duration alone is not the *sine qua non* of a relational contract. *Cf.* G Sebestyén, *Construction: Craft to Industry* (London and New York: E & FN Spon, 1998), 260: "Relational contracting (also known as 'long-term partnering' or 'collaborative contracting') is another of the procurement methods that differ from the traditional. In the context of the construction industry, it entails a long-term affiliation between the contractor and the client"; for role of long-term relations in defining contracts, see L A Dimatteo, "Equity's modification of Contract: An analysis of the Twentieth Century's Reformation of Contract Law" (1999) 33 New England L Rev 265.

[125] See A Schwartz, "Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judical Strategies" (1992) 21 *Journal of Legal Studies* 271. D Goodard, "Long-Term Contracts: A Law and Economics Perspective" [1997] New Zealand L Rev 423, 432–433, notes that economists speak of contracts that are "obligationally incomplete" (they fail to specify a relevant obligation) or "insufficiently state complete" (when the contract is insufficiently sensitive to future contingencies).

[126] N Nassar, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Transactions* (Dordrecht: Martinus Nijhoff, 1995); E McKendrick, "The Regulation of Long-term Contracts in English Law", in J Beatson and D Friedmann (Eds), *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995). Some research has already been done on whether relational contracting has begun to appear in the United Kingdom construction industry. That research suggests that there is a high level of long-term relationships that are routinely operating between clients and contractors, and contractors and subcontractors ranging from between six to eight years in the circumstances: S A Algasoff and P McDermott, "Relational Contracting: A Prognosis for the UK Construction Industry?" in *East meets West: at Proceedings of CIBW 92 Procurement Systems in Hong Kong, 4–7 December, 1994*, by the Department of Surveying, Hong Kong University (Hong Kong: Department of Surveying, Hong Kong University, 1994), 11.

[127] "Simpler" is used here in distinction to "discrete" upon which there is more evidence of consensus in the literature that relational contracts should be treated differently than discrete contracts.

[128] See e.g. Goodard, *supra*, note 6 at 458, who concludes "there is no need for a special law of long-term contracts"; and McKendrick, *supra*, note 126 at 332, "English law would not be justified in taking the step of recognizing the existence of a formal category of relational contracts".

[129] For a description of the levels of incompleteness, see H Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999) at 160.

with the theoretical framework developed here and yet also specifically appropriate for the NEC.

Professor Justin Sweet[130] holds out the international engineering transaction as the paradigm of the long-term complex transaction. In this regard he juxtaposes four sets of variables[131]:

(1) simple (discrete) or long-term complex (LTC);
(2) negotiated or in the main standardised;
(3) adhesive (those preferred by a dominant party for many similar transaction) or associated[132]; and
(4) domestic or international.[133]

There is a strong resemblance in these variables to MacNeil's work. Sweet states that the fairness of the contract will depend upon both the free market and competition, or if they did not exist then according to the law. The meaning of law contemplated here could be public, regulatory, or judicial. Judicial control, according to Sweet, is exercised through the doctrines of good faith, fair dealing, and unconscionability.[134] Sweet's analysis in this way not only integrates these doctrines but also makes passing reference to the NEC and the "relational" aspect of the early warning provisions. Thus, significantly, he writes:

> "... administrative provisions will be needed to deal with another attribute of an LTC [long-term complex contract], the likelihood of claims and disputes. These may be minimised if the law applies the concept of good faith and fair dealing to the parties ... The NEC set up an "early warning" system which affects compensation claims, an example of good faith and fair dealing. These adjustment doctrines, if accepted and used properly, can avoid the breakdown of a relationship and the economic dislocation cost associated with it."[135]

It is interesting that Sweet holds out the appropriateness of these adjustment doctrines in the case of the NEC. Implicitly the rationale is to avoid or reduce the chance of breakdown and avoid the associated economic costs.[136]

Further, while the importance of risk is clear in the management of construction, it has been suggested[137] that it need not be assigned overriding

[130] J Sweet, "Judging Contracts: Some Reflections on the Third International Construction Law Conference" [1994] ICLR 413, 417. In an earlier article Professor Sweet refers to "CLC Contracts" or "Complex Long-Term Construction Contracts": "I shall use CLC Contracts as a generic term for what are sometimes called building, engineering, civil or industrial contracts", in "Planning for Delays in American Complex Long-Term Construction Contracts: Correcting Bad Law, Removing Ambiguities or Exercising Bargaining Power?" in F Nicklisch (Ed), *The Complex Long-Term Contract Structures and International Arbitration* (Heidelberg: C F Muller Juristischer Verlag, 1987), 319 at 320.

[131] Sweet, "Judging Contracts", *supra*, note 130 at 413.

[132] Sweet saw the NEC, AIA and JCT forms as all *associated*: *supra*, note 130 at 417.

[133] *Ibid.* at 417.

[134] *Ibid.* at 419.

[135] *Ibid.* at 428.

[136] Beale and Dugdale, *supra*, Part 1, note 30.

[137] See J Uff, QC, and E Ryan, "The Economic Realities of Construction" in J Uff and M O de Zylva (Eds), *New Horizons in Construction Law* (London: Construction Law Press, 1998), 129–130.

significance in the drafting of the contract and that economic principles too must be taken into account. Thus, the NEC has been criticised on the same basis as the Latham Report in that they fail to address self-interest and opportunistic behaviour:

> "[T]he New Engineering Contract ... like all other current forms, fails to address the question of self-interest and opportunistic behaviour ... [i]n economic terms [the] [c]urrent standard forms, including the NEC, make no attempt to control transaction costs and, through the mechanism of claims, virtually ensure a high level of such costs in any situation involving uncertainty and overall recovery."[138]

The analysis here suffers from the same shortcomings from an efficiency viewpoint which characterise not only the like analysis of other forms of contract but the industry as a whole; in short, exchange relations conducted over time in the face of imperfect market information. The result will almost certainly be to produce transaction costs which are higher than the ideal. However, this is not to say there is no place for this form of analysis but rather to ask whether any particular form, such as the NEC, serves to improve the overall situation. To the extent that the NEC encourages greater transparency in pricing and the exchange of information in formulating prices than under traditional forms it is an improvement.

**Fiduciary aspects of long-term contracting**

A radical approach to the interpretation of the NEC would be to find that the obligations which parties or participants in a construction project assume toward each other are akin or tantamount[139] to a fiduciary relationship. Is there any basis for so radical a suggestion? In commercial transactions as a general rule fiduciary relationships or duties are not said to arise.[140] However, commentators point out that this rule is in essence too broad and may change depending upon the stage of the transaction, e.g. negotiation or completed agreement, or during the course of its fulfilment.[141] The subject of fiduciary relationships in the commercial transaction and the precise confines of the role that either equity currently plays or should play are a matter of debate.[142]

[138] *Ibid.* at 131–132. Cox and Thompson may well agree. The authors criticise the Latham Report for emphasising fairness and trust without addressing other relational variables such as opportunism: *Contracting for Business Success* (London: Thomas Telford, 1998), 49.

[139] The good faith duty discussed above can be regarded as a half-way house for fiduciary duties: see P Finn, "Contract and the Fiduciary Principle" (1989) 12 University of New South Wales LJ 76, 82–83; and S Litvinoff "Good Faith" (1997) 71 Tulane L Rev 1645, 1668, referring to *Market Street Associates Ltd Partnership* v. *Frey*, 941 F 2d 588, 594 (7th Cir 1991), *per* Posner J and *Tahoe Corp* v. *P & G Gathering Sy Inc*, 506 So 2d 1336 (La Ct App 2d Cir 1987).

[140] See e.g. *Hospital Products Ltd* v. *United States Surgical Corporation* (1984) 156 CLR 41 (HC Aust); *Jirna Ltd* v. *Mister Donut of Canada Ltd* (1972) 22 DLR (3d) 639; *Lac Minerals Ltd* v. *International Corona Resources Ltd* (1989) 61 DLR (4th) 14 (SCC).

[141] See generally J Gautreau, "Demystifying the Fiduciary Mystique" (1989) 68 *Canadian Bar Review* 68 1; and R P Austin, "Commerce and Equity—Fiduciary Duty and Constructive Trust" (1986) 6 *Oxford Journal of Legal Studies* 444.

[142] See J Kennedy, "Equity in a Commercial Context", in P D Finn (Ed), *Equity and Commercial Relationships* (Sydney: Law Book Co, 1987), 104; J R F Lehane "Fiduciaries in a Commercial Context", in P D Finn (Ed), *Essays in Equity* (Sydney, Law Book Co, 1985), 95; and W Goodhart and G Jones, "The

It appears clear that mere trust in the other contracting party without more is insufficient to establish a fiduciary relationship. Parties to agreements will be expected to act in their own best interest and exercise some degree of due diligence in their contracting. However, the requirement of trust in each other should not be ignored. Hence one is not arguing that a fiduciary duty should not arise because the parties have had the opportunity to prescribe their mutual duties or because the contractual remedies in the NEC are sufficient to redress injustices in themselves.[143] In fact the converse would appear to be so in the case of the NEC where fewer details are concluded in the contract than under traditional forms and the language is more open and textual. It should be recognised that not every situation will be covered. To this when one adds the express requirement that parties act in their own mutual interest and in a spirit of co-operation the finding of certain minimum fiduciary duties should not be ruled out. In summary it is not argued here that the NEC imports wholesale either equitable doctrines or fiduciary duties but rather to make the point that the contract system lends itself more to analysis in these terms than traditional contracts do.[144]

Turning to another aspect of fiduciary duties there is also support for the view that they may be relevant in the context of joint ventures, particularly in Australia. Thus, in *Hospital Products Ltd* v. *United States Surgical Corporation* Mason J said:

> "[t]hat contractual and fiduciary relationships may co-exist has never been doubted . . . The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true interpretation."[145]

However, joint ventures, particularly in the resources field, may be a special

---

Infiltration of Equitable Doctrine into English Commercial Law" (1980) 43 MLR 489; L S Sealy, "Commentary on 'Good Faith and Fairness in Negotiated Contracts' " (1995) 8 *Journal of Contract Law* 142, 143. See generally, P Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 Western Australian L Rev 1.

[143] See Sopinka J in *Lac Minerals Ltd* v. *International Corona Resources Ltd* (1989) 61 DLR (4th) 14 (SCC) where he quotes J Kennedy, "Equity in a Commercial Context", in P D Finn (Ed), *Equity and Commercial Relationships* (Sydney: Law Book Co, 1987).

[144] The limitations in relying upon the courts to imply duties can be seen lately in *Bedfordshire County Council* v. *Fitzpatrick Contractors Ltd* (1999) 62 Con LR 64 when the court refused to imply a term that the parties owed each other a duty of trust and confidence.

[145] *Hospital Products Ltd* v. *United States Surgical Corporation* (1984) 156 CLR 46 at 97. Jack Beatson also supports a view that "equity" will manifest itself through changes to cases involving, among others, joint ventures: J Beatson, "Public Law Influences in Contract Law", in Beatson and Friedmann, *supra*, note 126 at 263, 266. L S Sealy, "Commentary on Good Faith and Fairness in Negotiated Contracts" (1995) 8 *Journal of Contract Law* 142, 144, writes notwithstanding the *Hospital Products* case: " . . . it is not the business of the courts to imply fiduciary obligations into a contract where there are not other indicators of such a relationship present, any more than it is to imply a duty to co-operate . . . " (footnotes omitted). However, once again, in the case of the NEC the express obligation in cl 10.1 ECC to act in a spirit of mutual trust and co-operation may make all the difference in this regard.

case. It has been stated that "fiduciary relationships, *inter se*, seem to be essential for the efficacy of the [joint venture] device".[146]

One commentator who has tried to develop this theme is Gerald M D Bean. In *Fiduciary Obligations and Joint Ventures, The Collaborative Relationship*,[147] Bean concedes that adversarial relationships or what he terms "antagonistic models" in contract are the antithesis of the fiduciary relationship.[148] And yet within an antagonistic model, assuming for the moment that this characterisation is appropriate to the traditional standard form context, there may nevertheless be aspects of that relationship which are still fiduciary in nature. To reach this view Bean draws upon the reasoning of Deane J in *Moorgate Tobacco Co Ltd* v. *Philip Morris Ltd*[149] quoting Justice Deane in this way:

> "The continuing relationship between the parties under the agreement—involving shared objectives, accounting obligations and the provision of information—provided a context in which it would be easier to imply an undertaking by one party to act on behalf of the other in relation to a particular matter or venture than would be the case if that relationship had not existed."[150]

This is effectively the construction long-term relational contract or "LTRC". Bean's analysis focuses on precisely when antagonistic values are shed and a collaborative approach toward each other with respect to the subject-matter of the relationship occurs. If that point in time occurs then the subject-matter becomes fiduciary in character and a fiduciary duty may arise. Once again when is that point? It would be when one party acts in the other's interest regarding the particular matter or venture. From a factual point of view a court would look to see if the requisite trust and confidence essential to founding a fiduciary relationship also existed. Numerous examples could be given under the NEC to suggest the former point in time when one acts in the other's interest; for instance the adoption of the secondary option trust clause.

While it is rare to establish fiduciary duties in the case of the antagonistic model it is less rare in the case of a collaborative transaction. This stems from the fact that in a collaborative relationship the parties will be assumed at some point to pursue joint interests over self-interest. This is often evident in joint ventures and very often the collaborative and co-operative nature of the

[146] *Brian Pty Ltd* v. *United Dominions Corporation Ltd* [1983] 1 NSWLR 490 at 496, *per* Hutley JA; followed in *McKensey* v. *Hewitt*, 1585 of 1995, Supreme Court of NSW Equity Division, 1997 NSW LEXIS 1259, *per* Einstein J.

[147] G M D Bean, *Fiduciary Obligations and Joint Ventures, The Collaborative Relationship* (Oxford: Clarendon Press, 1995). See generally for further support M Reszka and P J Edwards, "Joint Ventures: A Construction Project Case Study" (1997) 2 *Journal of Financial Management of Property and Construction*, No 2, 5.

[148] *Ibid.* at 50.

[149] *Moorgate Tobacco Co Ltd* v. *Philip Morris Ltd* (1984–85) 156 CLR 414 (HC Aust).

[150] Bean, *supra*, note 147 at 52, quoting Deane J in *Moorgate Tobacco Co Ltd* v. *Philip Morris Ltd* (1984–85) 156 CLR 414 at 436 (HC Aust).

relationship is expressed in the joint venture agreement.[151] The attraction of the fiduciary model is supported for one other reason. Jack Beatson writes, in the absence of a general doctrine of abuse of rights in English law, the fiduciary relationship provides an important means of control over the exercise of private contractual rights.[152]

Relational contract theory pays particular attention to contractual interests and standards versus contractual rights. The focus is not upon strict legal rules determined in advance but flexible standards that vary with the context. The distinction between rules and standards is a live one.[153] "By preserving the governance of rules, English law has thus reinforced the values of certainty and security and undermined those of co-operation and solidarity, regarded as the underlying values of modern contract law."[154] The point has also been made by Atiyah and Summers who note the English predilection for rules in contrast to a more flexible American approach.[155] The relational approach with an emphasis upon standards may be illustrated by the case of *Litwin Construction (1973) Ltd* v. *Kiss*.[156] The *Litwin* case involved an action by a contractor against some investors in a housing project and it was remarked:

> "over and above the universal duty of honesty . . . there are graduated standards of extra honesty, only the highest of which is represented by the fiduciary standard. The higher standard of honesty may be a duty to act conscionably, or a duty to deal fairly, or a duty to act in good faith or in utmost good faith; all of which may fall short of the fiduciary standard of selflessness and loyalty."[157]

Thus the Court of Appeal was willing to discuss a wide variety of

[151] See H Sarie-Eldin, "Consortia Agreements in the International Construction Industry with Special Reference to Egypt", in *International Economic Law*, Vol 3, J J Norton (Ed) (London: Kluwer Law International, 1996) discussing the express co-operation committee clause in international joint ventures and its effect at 103–104, 107–108 and 117–125.

[152] Beatson, *supra*, note 126 at 274, n. 54, citing P D Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977); and R Flannigan, "The Fiduciary Obligation" (1989) 9 *Oxford Journal of Legal Studies* 285.

[153] The distinction between rules and standards is developed in K M Sullivan, "The Justices of Rules and Standards" (1992) 106 Harvard L Rev 22; and L Kaplow, "Rules Versus Standards: An Economic Analysis" (1992) 42 Duke LJ 42 557.

[154] N Cohen, "Pre-contractual Duties: Two Freedoms and the Contract to Negotiate", in Beatson and Friedmann, *supra*, note 126 at 29 (footnotes omitted).

[155] "Although we know of no way to do a systematic count, we believe that the proportion of flexible rules to hard and fast rules is much higher in the American system than in the English. This means that substantive reasons at the point of application are more often determinative in America. It also means that substantive reasoning plays a larger role in the interpretation of rules in America. Conversely, the English system, with its higher proportion of hard and fast rules, is more formal in its law and in its reasoning": P S Atiyah and Robert S Summers, *Form and Substance in Anglo-American Law. A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford: Clarendon Press, 1987), 71. See also A Tunc, "The Not So Common Law of England and the United States, or, Precedent in England and the United States, a Field Study by an Outsider" (1984) 47 MLR 150, suggesting the United States is more flexible in construction than England.

[156] *Litwin Construction (1973) Ltd* v. *Kiss* (1988) 29 BCLR (2d) 88 at 105 (BCCA).

[157] *Ibid.* The investors claimed the agreements were invalid for breach of fiduciary duty including the duty to act openly, honestly and fairly.

standards[158] that may be applicable both below and up to that of a fiduciary standard even though no duty at all arose on the facts. This conceptualisation of the role of these standards is consistent with relational contract theory. The standards referred to are inherently more flexible than rules or principles and notions of rights. Put simply parties are encouraged to further their relationship rather than end it.

In summary contractual interpretation will have a measurable effect on the success of the NEC. An equitable leaning in the court's (or the parties') interpretation is one way to facilitate the drafting objective, and the needs of the construction industry, for less adversariality. There are a variety of approaches[159] that may be pursued if one seeks to achieve this objective and relying upon fiduciary duties as an aid to interpretation of the NEC is but one of them. It would seem that a new form of contract could also call for new approaches to its interpretation and it is suggested here that the availability of familiar and flexible equitable notions is worth considering for inspiration. [160]

## Partnering

> "For all the incursions of equity in Australia, the common law contract in that country, as much as in Britain, is still marked by a refusal to view ordinary commercial transactions as joint ventures. Unconscionable conduct is increasingly attracting liability, but the point has not been reached where contractors are expected to take positive steps to conserve the welfare of their 'partners'."[161]

Carter and Stewart, in this quotation, take some liberties with their terminology for they invoke, at once, commerce, contract, joint ventures and partnering. One could state that these terms are well understood but, when used together in this way, a way that suggests some degree of compatibility

[158] Goodard, *supra*, note 6 at 458, speaks in terms of a "dictionary of performance standards to be invoked by contracting parties". Thus, in the case of future NEC options, it is possible to conceive of a wider selection than merely co-operation in cl 10.1 but options setting out these other standards, for example, as well.

[159] Other approaches toward the same end but not discussed above also include R Flannigan, who used the term "default scheme of regulation" for fiduciary obligations: "Fiduciary Obligations in the Supreme Court of Canada" [1990] Saskatchewan L Rev 45, and who would rely upon such default rules to explain ambiguous terms or add to express terms although not replace the contractual terms which have been agreed. Bean, *supra*, note 147 at 75, was also willing to find fiduciary duties on the basis of implied terms: "Where the nature or purpose of the contract demands a fiduciary duty be recognized, and perhaps the parties have not made it an express term, then such a duty can be considered to be in the nature of a term implied by law."

[160] The reverse of this argument comes from B Colledge, who counsels caution in the face of these new partnering situations. It is as yet unclear the extent of the obligations that will be read into collaborative contracts by the courts (fiduciary duties being perhaps one example). Her advice is to pay careful attention to the contract in order to avoid unfair surprises. See B Colledge, "Obligations of Good Faith in Partnering of UK Construction Contracts" [2000] ICLR 175.

[161] A Stewart and J W Carter, "Frustrated Contracts and Statutory Adjustment: The Case for a Reappraisal" (1992) 67 CLJ 109 (footnotes omitted). The term "partnering" can also be given an *extended* meaning to include "partnership" and a case can be made for treating relational contracts like partnerships: see D Campbell and D Harris, "Flexibility in Long-Term Contractual Relationships: The Role of Co-operation" (1993) 20 *Journal of Law and Society* 166, 167.

among them, it might be viewed as confusing. The view here though is that this overlapping of characterisations will become both more common and increasingly more important as law evolves with greater recognition of and protection for collaborative working relationships.[162] Some of the features of this more recent development may be referred to in the context of this theoretical framework and how it accords with it.[163]

*Partnering* has been defined as "a long-term commitment between two or more organisations for the purpose of achieving specific business objectives by maximising the effectiveness of each participant's resources".[164] Several elements in this definition, *long-term*, *two or more, objectives*, and *resources*, may be commented upon. To begin with, the definition is consistent with the definition of a construction contract as a long-term contract. In construction, as observed, there will be many organisations. One term used here has been "temporary multiorganisation" while another which also throws light on the subject is "network contract".[165] However described, the points of contact or

[162] Two commentators, Cox and Thompson, have focused upon the importance of collaboration and, while endorsing the NEC, have also written that before the NEC can be used successfully, a pre-contractual collaborative relationship should exist and govern the behaviour of the parties. However, in their view, and given the existence of such a collaborative relationship, the need for the NEC may well then be negligible as neither party would choose to rely upon the contract and risk breaking the relationship. In reply, it is submitted that this view gives inadequate attention to the fact that there are a host of other internal remedies available to the parties which they may have recourse to so as to maintain the relationship as well as condition it: Cox and Thompson, *supra*, note 138 at 171–172. The authors go on to note that most standard forms of contract encourage non-collaborative behaviour and thus operate to drive a wedge between the parties. However, in a survey of leading forms the authors concluded that the NEC still offered the *greatest* number of features providing support for collaboration. See Cox and Thompson, at 316–322, n. 4, referring to their earlier published survey results: I Thompson, A Cox and L Anderson, "Contracting Strategies in the Project Environment," *European Journal of Purchasing & Supply Management* 4 (March 1998), special issue.

[163] See P E Himes, "Partnering in the Construction Process: The Method for the 1990's and Beyond" (1995) 13 *Facilities*, No 613–15. The subject of collaborative or co-operative joint ventures is vast and one researcher, E Anderson, has identified over 3,000 articles and books on the subject: K D Brouthers, Lance Eliot Brouthers and Phil C Harris, "The Five Stages of Co-operative Venture Strategy Process" (1997) 23 *Journal of General Management No 1*, 39–42 at 39 citing E Anderson, "Two Firms, One Frontier: On Assessing Joint Venture Performance", *Sloan Management Review* (Winter 1990), 19–30, n. 1. For important best practice manuals, see J Bennett and S Jayes, *Trusting the Team: The Best Practice Guide to Partnering in Construction* (Reading: Centre for Strategic Studies in Construction, 1995) and a companion publication by the same authors, *The Seven Pillars of Partnering: A Guide to Second Generation Partnering* (London: Thomas Telford Publishing, 1998); J Barlow *et al.*, *Towards Positive Partnering: Revealing the Realities in the Construction Industry* (Bristol: The Policy Press, 1997). See also *Construction Procurement by the Government: An Efficiency Unit Scrutiny*, requisitioned by Cabinet (London: HMSO, 1995).

[164] E Mills, "Teams with Common Goals", *Building*, 18 August 1995, 25 referring to an American definition. Another definition can be given: "Partnering is a generic term, covering many forms of co-operation. Certain key elements apply to all types of partnering, in particular trust, goodwill and each partner's commitment to project success": *Partnering in the Public Sector*, Members' Report CPN717L, Construction Productivity Network, Workshop Report (London: CIRIA, 1997), 2. See more recently *Partnering in the Public Sector: A Toolkit for the Implementation of Post Award, Project Specific Partnering on Construction Projects* (Loughborough: European Construction Institute, 1997). See also C A Libbey, "Working Together while Waltzing in a Minefield, Successful Government Construction Contract Dispute Resolution with Partnering and Dispute Review Board" (2000) 15 *Ohio State Journal on Dispute Resolution* 825. For a discussion of the importance of trust in partnering, see J S Busch and N Hantusch, *"I Don't Trust You, but Why Don't You Trust Me? Recognising the Fragility of Trust and its Importance in the Partnering Process"* (2000) 55(3) *Dispute Resolution Journal* 56

[165] See discussion below.

interface are great. The importance of objectives, not only in drafting or contractual terms, but also in management terms, is underscored throughout. Lastly, with regard to resources, the relational view of contracting too is concerned with efficiency in terms of resource use.

This is not to say that partnering without more either fits or is indeed the only "fit" for the NEC. However, it bears some resounding similarities to the NEC on key issues. In fact, Roe has already noted that many features of the NEC either lend themselves directly or are similar to partnering.[166] The features Roe[167] refers to, namely, the commitment to co-operation,[168] early warning,[169] and the pre-pricing of variations,[170] all suggest partnering. Early experience under the form has confirmed that the NEC is being used for work under partnering agreements usually under the target contract options.[171] It may even be suggested that what clause 10.1 anticipates itself is the notion of partnering. It was Latham, in his recommendation on partnering, who referred to contract conditions that supported partnering specifically those that imposed:

(1) a specific duty to deal fairly with each other in an atmosphere of mutual co-operation[172];
(2) firm duties of teamwork;
(3) "win-win" situations;
(4) speedy dispute resolution;
(5) interlocking documents and risk allocation choices;
(6) predetermined adjudication; and
(7) incentives.[173]

[166] See Sally Roe, "Partnering in Construction": a paper given to the Society of Construction Law in London in November 1995, 15. Another contract which has lately been released and which proceeds upon the assumption that the parties are partners is the IChemE Standard Form, see C Wilcock, "IChemE Standard Forms—Model Conditions?" Construction Law, December/January 1994/1995, 171.

[167] See Sally Roe, "Partnering in Construction", a paper given to the Society of Construction Law in London in November 1995, 15.

[168] ECC, cl. 10.1.

[169] ECC, cl. 16.

[170] ECC, cl. 61.

[171] Tom Nicholson, "NEC—an Update", *Proceedings of the Institution of Civil Engineers* 120 (November 1997), 186–187. The fit between the NEC and partnering has further improved since the release of NEC Partnering Option X12 in June 2001. See e.g. J Bennett and A Baird, *NEC and Partnering: The Guide to Building Winning Teams* (London: Thomas Telford Books, 2001). See also "Partnering Standard Forms", *Clifford Chance Construction Newsletter*, Autumn 2001.

[172] Organisational researchers have done interesting studies in regard to how best to foster co-operation. One study dealing with such mechanisms as between "individualist" and "collectivist" cultures demonstrates how management must be flexible in reward and incentive structures to maximise co-operation. See in particular Chen *et al.*, "How Can Co-operation Be Fostered? The Cultural Effects of Individualism-Collectivism", 23–2 *Academy of Management Review* (April 1998) 285–304. For a study of similar content, specific to the European construction industry, see T Särkilahti, "Long Term Co-operation Between Main Contractor and Its Suppliers in Construction", in D A Langford and A Retik (Eds), *The Organisation and Management of Construction: Shaping Theory and Practice*, Vol 2 (Finland: E&FN Spon, 1996).

[173] Latham Report, recommendation 19, para. 6.47. Latham, too, endorsed the NEC in meeting his assumptions for a modern form of contract.

Latham, it appears, drew upon Baden Hellard, in formulating his recommendation.[174] Many of these features are shared with the NEC. Others, too, have singled out or favoured the NEC as an appropriate vehicle for partnering[175] and the NEC has been used on partnered projects.[176] However, it would be wrong to assume that the NEC is a partnering charter, rather, the form would operate best in conjunction with such a separate document.[177] Whether the NEC form itself is chosen as the preferred form of procurement to tie to a partnering arrangement would depend upon what it is being compared to.[178] Success in partnering suggests that it is more likely to be achieved when the contract is one which contains simplified contract language and is less rather than more adversarial.[179]

Perhaps the feature that most obviously commends the NEC as an appropriate form to tie to a partnering arrangement is the attempt the form

[174] The Latham Report cites Baden Hellard viz teamwork and co-operation not confrontation and conflict. Therefore it is reasonable to assume that he may have drawn upon Baden Hellard in formulating the content of other aspects of his recommendations, especially given their similarity to Baden Hellard's: see R Baden Hellard, *Project Partnering: Principle and Practice* (London: Thomas Telford, 1995), 36, defining the partnership charter as one that "... attempts to create an environment where trust and teamwork prevent disputes, foster a cooperative bond to everyone's benefit, and facilitate completion of a successful project". Baden Hellard, too, writes that "[p]artnering is choosing to live by the spirit rather than the letter of the law ...", 35. It is of course the "spirit ... " that is invoked in cl. 10.1, ECC. While the Latham Report drew upon Baden Hellard, the partnering method owes much to US Army Corps of Engineers early practices, D Gowan, "Joining Forces", *Proceedings of the Institution of Civil Engineers* 102 (November 1994), 186–187.

[175] See National Economic Development Council, *Partnering in the Public Sector* (London: NEDC, 1992), which favoured the NEC; *cf.* National Economic Development Council, *Partnering, Contracting without Conflict* (London: NEDC, 1991), which favoured the 1981 ICE process plant conditions.

[176] AMEC Civil Engineering has been working under the ECC conditions in the construction of Terminal 5 at Heathrow Airport, and the Channel Tunnel Rail Link. J Moss refers to the ECC as a "non-adversarial" contract: "Partnering in Civil Engineering—A Contractor's View", at The Building of Construction Law: a paper presented at the Tenth Annual Construction Conference on 19 September 1997, by the Society of Construction Law and the Centre of Construction Law and Management (London: King's College, 1997). While partnering has offered significant benefits in the AMEC construction programme there have also been difficulties to overcome. In particular, inadequate attention was given to teambuilding and education prior to the start of work; to record keeping, and to certain leadership issues, see Moss, above. See generally on problems associated with partnering, H Schultzel and V P Unruh, *Successful Partnering: Fundamentals for Project Owners and Contractors* (New York: John Wiley and Sons, 1996), 52–73.

[177] Baden Hellard, *supra*, note 174 at 2, states the BPF form, RIBA Plan of Work, and ISO 9000 are all "management systems" but alone are not enough and partnering must be added separately to them for maximum benefit. Similarly, see S Roe, "Partnering in Construction": a paper given to the Society of Construction Law in London in November 1995, 8 who writes: "[t]he focus on co-operation in partnering can obscure the need for a partnering agreement to allocate risk like any other contract. Risk identification and allocation is one of the most important aspects of partnering."

[178] Moss, *supra*, note 176, has noted the problem posed by non-standard partnering charters: "Generally, clients are using standard forms of contract with an additional Partnering Agreement. There is very little uniformity of approach, some partnering agreements are intended to be legally binding and others a statement of intent but specifically detailed as non-binding. Many of these partnering agreements are incompatible with the main formal contract. I do not believe there has been a major financial failure on a partnered contract, when there is it will be a new challenge to unravel these incompatibilities." This problem is exacerbated by the difficulties involved in addressing partnering at the subcontractor level.

[179] See the CRINE report, *Cost Reduction for the New Era* (London: Institute of Petroleum, 1994); and also on the link between good faith and partnering: A J Heal, "Construction Partnering: Good Faith in Theory and Practice" (1999) 15 Const LJ 167.

makes to reduce adversariality[180] and replace it with co-operation. The point is made routinely that partnering agreements will expressly require co-operation between the parties, and a "non-adversarial" form of contract may also be expected.[181] This is one of the stated drafting objectives in the form. The NEC also seeks to achieve increased co-operation through its adjudication procedures. Although other forms of contract, e.g. the BPF and ACE systems introduced adjudication earlier than the NEC, it has been observed that the "NEC has developed the principles and applications still further".[182] While the NEC has not mandated adjudication in any quality assurance or total quality management[183] plan, such an initiative could be designated in the works information.[184]

It should be noted that partnering is one strategy among many that builds on a co-operative owner/contractor relationship to maximise outcomes in the construction industry. Alliances—be they general ("strategic") or specific ("project")—are becoming very common. There is a wide literature on the variety of such strategies demonstrating that most strategies reflect or include the principles of partnering.[185]

### Flexibility

Relational contracts and the NEC are both flexible. Professor Ewan McKendrick has succinctly put the reason why relational contracts are flexible:

[180] This has been discussed in detail as one particular rationale in American partnering: R J Stevenson, *Project Partnering for the Design and Construction Industry* (New York: Wiley, 1996).

[181] See e.g. C Meara, "Choose Your Partners", *Building*, 3 November 1995, 35; "non-adversarial" is not defined but it is expected that the target cost option for example would qualify. "The benefit of a target cost approach is that the relationship begins to change. Teamwork begins to replace the more common adversarial and claims-conscious attitudes": A Helmsley, "Incentives for Teamwork", *Building*, 12 January 1996, 25. It is interesting to note that partnering is considered by some to be a form of alternative dispute resolution, see e.g. R G Taylor and B Hinkle, Jr, "How to use ADR Clauses with Standard Form Construction Industry Contracts" [1996] ICLR 56; *cf.* A H Gaede, Jr, "Partnering, Preventing and Managing Claims" [1995] ICLR 80.

[182] Baden Hellard, *supra*, note 174 at 106. More recently, other standard forms have released contracts aimed specifically at project partnering. See e.g. *Clifford Chance Construction Newsletter*, *supra*, note 171, describing ACA PCP2000 and JCT Practice Note 4, in addition to NEC Partnering Option X12.

[183] Baden Hellard refers to this as "contract management adjudication": *ibid.* 98–112.

[184] Moss, *supra*, note 176, equates DBFO with partnering even though the contract is not formally partnered because "the partnering ethos has been adopted between other interested parties and it is showing the benefits of a partnering approach".

[185] See J J Myers, *infra*, note 191, which emphasises the variety of skills necessary to really profit from collaborative strategies; M Jeffries *et al.*, "The Justification and Implementation of Project Alliances —Reflections from the Wandoo B Development" (2001) 7 *Journal of Construction Procurement*, No 2, 31; D Jones, "Keeping the Options Open: Alliancing and Other Forms of Relationship Contracting with Government" (2001) 17 *Building and Construction Law* 153, for an overview of different strategies as well as an insightful review of some problems and solutions in this area; D Wilson and L Bruce, "The Private Finance Initiative, Public Procurement and the Construction Industry" [2000] ICLR 569; J J Reuer, "Contractual Renegotiations in Strategic Alliances" (2002) 28(1) *Journal of Management* 47; P Dussauge and B Garrette, *Cooperative Strategy: Competing Successfully through Strategic Alliances* (West Sussex: John Wiley & Sons, 1999); J Child and D Faulkner, *Strategies of Co-operation : Managing Alliances, Networks and Joint Ventures* (New York: Oxford University Press, 1998).

> "A relational contract may have no clearly defined beginning or duration and the specifications relating to the subject-matter of the contract, its quantity and price may be phrased in rather vague terms. At the moment of entry into the contract, the parties are unlikely to be able to foresee all of the events which may impinge upon performance of the contract . . . Contracting parties who anticipate that their relationship will endure for a long period of time are therefore likely to have to phrase their contractual obligations in rather vague, aspirational terms to enable them to deal with future, as yet unidentified problems."[186]

This manifests itself in not only vague language but also the use of open terms,[187] grants of discretion, and various adjustment mechanisms. In the context of the NEC illustrations of each of these characteristics can be demonstrated.

Flexibility in new contractual models has also been held out in support of a move away from traditional tests based on foreseeability. Thus:

> "flexible clauses are seen as an important means of reaching simulated reflexive results in legal practice. The theories on soft law similarly rest strongly on the assumption that law has become more flexible, thereby allowing for the party-based implementation mechanisms considered "soft". The occurrence of such a development towards abandoning the traditional market-oriented value of foreseeability in favour of greater flexibility seems obvious . . . ."[188]

The increased flexibility in this respect can come in different forms including general clauses importing "good faith" or "public policy" concepts.[189] Where flexibility poses a perceived increase in procedural risk in Wilhelmsson's view it can and should simply be met by new organisational solutions.[190] In the case of the NEC the introduction of a new adjudicatory mechanism would be precisely one such type of solution.

## Disputes

The theoretical co-operative and relational model advanced here for the NEC is wholly consistent with the notion of third party adjudication. In contrast to traditional paradigms and contractual structures which focus upon arbitral dispute resolution, the NEC focuses on adjudication. The most telling limitation of traditional dispute settlement from a relational point of

[186] McKendrick, *supra*, note 126 at 311–313.

[187] See M P Gergen, "The Use of Open Terms in Contract" (1992) 92 Columbia L Rev 997. Gergen prefers the use of the phrase "open terms" to "incomplete" or "relational" contracts, at 999. See also J Broome, *The NEC Engineering and Construction Contract: A User's Guide* (London: Thomas Telford Books, 1999), 14–32. Broome outlines research on how the application of the NEC shows a high degree of flexibility.

[188] T Wilhelmsson, "Questions for a Critical Contract Law", in T Wilhelmsson (Ed), *Perspectives of Critical Contract Law* (Aldershot: Dartmouth, 1993), 37. "Soft law is characterized by rules which have at least a quasi-legal character, as developed on the basis of some statutory mandate or by the participation of some authority", at 35. Wilhelmsson gives an interesting example of this tendency in s. 36 of the Nordic Contract Acts giving the courts a general power to adjust contracts on the basis of unfairness; and also relies upon P S Atiyah's *From Principles to Pragmatism* (Oxford: Clarendon Press, 1978) and G H Treitel's *Doctrine and Discretion in the Law of Contract* (Oxford: Clarendon Press, 1981) for additional support, at 37.

[189] Wilhelmsson, *ibid.* at 36.

[190] *Ibid.* at 38.

view is that it is often not invoked (indeed by contractual stipulation often cannot be invoked) until after the relationship between the parties has been brought to an end. Thus the utility in any relational sanctions that could have been brought to bear in settling the dispute has for the most part been lost.[191] As Scott writes, the

> "co-operative model argues instead for immediate authoritative resolution of disputes while tempering the influence of the continuing relationship that can be used to discipline evasion. A permanent contract referee is thus a more sensible means of exploiting the considerable power of the long-term relationship . . . a single continuing arbiter who can minimise both information and enforcement problems . . . [and he] has the distinct advantage of complementing rather than undermining the social controls that promote patterns of conditional co-operation."[192]

It is interesting to ponder whether classical notions of contract perpetuate conflict or disputes.[193] One reason for this antagonism could be the inability of the classical and neo-classical contract theories to address the present in anything other than the past. These theories are necessarily limited by their premise upon returning *ex ante* to the parties' promises to resolve the dispute.

In contrast, relational contract theory does not presuppose that it is the previous promise that should govern—or serve as the norm—but instead the operative norms would be to preserve the relationship and harmonise conflict.[194] In this way the dispute may not crystallise as might be supposed under neo-classical theory. The relational model can thus be seen to be consistent with the new emphasis upon dispute avoidance in the NEC as well.

The NEC supports adjudication in contrast to the traditional contract model of third-party arbitration. The weakness of arbitration in the traditional forms from a relational point of view is that it often cannot be invoked until after the relationship between the parties has been brought to an end. Thus the utility in any relational sanctions that could have been brought to bear in settling the dispute during the course of the enduring relationship will have been lost.[195] The NEC three-tiered dispute resolution and avoidance procedures therefore complement rather than undermine the contractual and social controls thereby serving to promote party co-operation.[196]

The adjudicatory model that the NEC introduced is a precursor to the introduction of adjudication through the HGCRA. The move away from the quasi-arbitral role of both the architect and engineer in historical terms has been discussed. The NEC took this evolutionary change to a logical

[191] See J J Myers, "Why Conventional Arbitration is Not Effective in Complex Long-Term Contracts", in Nichlisch, *supra*, note 130 at 503.

[192] R E Scott, "Risk Distribution and Adjustment in Long-Term Contracts", in Nichlisch, *supra*, note 130 at 99.

[193] 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, 883–884.

[194] *Ibid.* 895.

[195] See Myers, *supra*, note 191 at 503.

[196] See Scott, *supra*, note 192 at 99.

conclusion by isolating the adjudicator's role from his precursors. Today, in the most recent amendments to the Second Edition of the NEC, the intervention of the adjudicator is preceded by a formal meeting procedure as a first-tier form of dispute resolution. The adjudicator thus enters the setting at the second tier in what is a three-tier process of dispute avoidance and resolution. The adjudication provisions in the NEC were part of an early trend towards alternative forms of dispute resolution in standard forms.[197]

The NEC makes intelligent choices with regard to the avoidance and management of disputes. The discussion has shown how a diverse number of choices have been made by the drafters that should serve both these ends. In the first instance the conscious attempt by the drafters to purposefully address these objectives began the distancing of the NEC from many traditional forms.[198] When greater co-operation, clearer allocation of risk, simpler language, clearer communication, and management procedures were added to these goals the NEC moved well beyond them. While these were the broad contours, which the drafters pursued across the form as a whole, additional, discrete choices removed the NEC further from many other forms. These choices ranged from the introduction of the schedules of cost components through to the use of activity schedules and removal of legal content to the works information. The combination of both general and specific choices by the drafters will serve to significantly diminish the role of conflict on site.[199] Once again the NEC was premised upon such objectives. The discussion here has shown how these goals are supported by some commentators through their opinions and by some others through their research. It is true this support and research is not always unequivocal or without qualification but the foundation has been laid in the process for both a more empirical and rational assessment of the choices that have traditionally been made only in the abstract. The NEC has moved contract drafting ahead by a generation in this regard.

## Conclusion

The foundation for all parties' actions in the NEC save the adjudicator is *co-operation*. The significance of beginning the contract with an affirmation of co-operation and imposing such an obligation upon the parties in clause 10 cannot be overstated. It has been shown how co-operative attitudes improve project success.[200] While some may argue that such a clause is devoid of

[197] See e.g. JCT 81, cll. 4.30–4.37; NSC/C, cl. 24; DOM/1 and cl. 59; GC/Works/1 3rd.

[198] Some commentators see disputes as more likely to arise under traditional United Kingdom rather than other forms of contract, see P Capper, "Management of Legal Risks in Construction", 3, citing Thompson and Perry, *Engineering Construction Risks*, 36.

[199] Bearing in mind the argument made above regarding the aptness of the NEC for partnering, it has been noted that partnering is itself an outgrowth of alternative dispute resolution. "Partnering is a dispute prevention technique that is an overlay for an underlying contractual relationship." The choices made by the NEC drafters regarding disputes are central to the whole system. A J Heal, "Construction Partnering: Good Faith in Theory and Practice", 15 Const LJ, No 3, 167.

[200] See the reference to P W G Morris and G H Hough, *Preconditions*, *supra*, note 123.

content it has been argued here to the contrary that it has the fullest possible meaning because it underscores the necessity for action with regard to every single obligation otherwise imposed upon those named in the contract.

Working back from jurisprudence which has developed the meaning of co-operation in law it has been argued that the NEC case for recognition and inclusion of an express duty of co-operation was not only warranted but also fully justified. It was argued that the duty in clause 10.2 to co-operate takes future cases arising under the NEC out from under narrower interpretations which have implied the term effectively as one necessary only to ensure the fulfilment of preconditions to performance.[201] The express duty to co-operate in the form permits one to make use of co-operative jurisprudence that may be helpful to elaborate upon the meaning of the term as well as to circumvent those limitations inherent in the cases. It can be expected that situations will arise in construing the NEC where it will be unclear who bears a particular risk and even the extent to which it should be borne if a shared risk. In these situations it has been argued that resort may be had to important *norms* based upon *co-operation*, *fairness* and even *good faith* to clarify these responsibilities in a *relational* context. It is quite likely that when the drafters fixed upon the concept of co-operation they were unaware of the growing influence of these topics in relation to it as theoretical constructs for modern models of the law of contract(s).[202] For this reason particular attention has been devoted to those models which emphasise co-operative and relational conduct over long periods of time and which involve not only the interests of the parties to the contract but those of others as well. The NEC has been situated in the context of these models and evaluated as a tool of co-operation in particular with the aim of achieving results in accordance with the purposes of the contract, the goals of the management model it prescribes and the industry in which it is used. The NEC is a precursor to what are forecast here to be wider similar trends in industry.[203]

A relational emphasis may be seen in how the NEC prioritises values over hard and fast rules. In close analysis of the provisions in the NEC time and again, whether through the activity schedules, the programme requirements or otherwise, the *interdependence* of individuals in social and economic

[201] E.g. *Mackay* v. *Dick* (1881) 6 App Cas 251 (HL); *Luxor (Eastbourne) Ltd* v. *Cooper* [1941] AC 108 (HL); *Barque Quilpué Ltd* v. *Brown* [1904] 1 CLR 632 at 647; and *London Borough of Merton* v. *Stanley Hugh Leach Ltd* (1985) 32 BLR 51.

[202] See notably Wilhelmsson, *supra*, note 78 at 17–21. P W G Morris, *The Management of Projects*, forecasts "[c]ontracting may begin to become less exclusively focused on the short term and concern itself more with the greater benefits that can result from longer term 'relationship' contracting", at 291.

[203] S A Algasoff and P McDermott, "Relational Contracting: A Prognosis for the UK Construction Industry?" in *East meets West: at Proceedings of CIBW 92 Procurement Systems in Hong Kong, 4–7 December, 1994*, by the Department of Surveying, Hong Kong University (Hong Kong: Department of Surveying, Hong Kong University, 1994), 11 at 16, have suggested, relying upon work by R G Eccles, "The Quasi Firm in Construction" [1981] *Journal of Economic Behaviour and Organisation* 2, that relational contracting is at work in the house building sector and that it is set to expand to other sectors if adversarialism in the industry is better addressed.

relationships has come out. Similarly, to work in these relationships, it has been shown how *trust* and *mutual responsibility* are essential. The key elements in the context of the NEC once again are those of co-operation, fairness and good faith. Indeed, the Latham Report and much of what passed into law pursuant to the HGCRA has been premised upon the need for greater fairness.[204] Good faith and fairness play a significant role in law in many jurisdictions currently and their influence can be expected to increase. The construction contract is more amenable to invoking notions of good faith and fairness than other contracts because of its long-term character. In the case of the NEC the express obligation to co-operate calls both concepts of fairness and good faith in aid.[205] The concepts have been shown to be consistent with both the institution of contracting as well as the duty of co-operation at law. They have been used to explain on the one hand why the contract is binding and on the other hand still providing a worthy justification for it. This view transcends once again subjective views of fairness basing it instead in the mutually agreed co-operative venture set out in clause 10 of the NEC. The perspective is consistent with the central role given to the contract here.

The research reviewed here suggests that people neither plan as carefully nor pay as much attention to their contractual obligations as has been assumed and rather it is *relations* which influence parties' attitudes toward contractual obligations and performance. By keeping the lines of communication open and relationships on track when disputes arise the NEC is profiting from the insights this research has revealed. These insights are seen not only in the tiered dispute procedures but in other aspects of the contract as well, such as the detailed quotation procedure in the form, the assumptions about equality the procedure makes and how it takes advantage of the parties' willingness to renegotiate in the face of changed circumstances.

Research also suggests that people will perform contracts because of the *relational* sanctions operating. One of the important ways in which these sanctions operate today under the NEC is through the role of the adjudicator. Relational sanctions are reflected both in the number of internal remedies for breach available in the contract as well as 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. Parties' continuing relationships mean that compromises are arrived at based upon their understood interdependence. The NEC has built upon this process of understanding and now more accurately reflects the relational norms existing in

[204] It has been argued that both the Scheme for Construction Contracts and the HGCRA legislation itself both clearly serve to emphasise a greater interest in the issue of fairness.

[205] The theoretical framework outlined for the NEC is postulated in terms of both co-operation—the express statement thereof in cl. 10.1—and good faith and fairness impliedly influencing the interpretation and application of the form.

construction. However, the NEC has taken the trend further than most. The three-tier process is consistent with the theoretical explanation developed for the NEC. The explanation is posited upon construction projects involving long term complex relations where parties will often have to continue to perform their substantive obligations under the contract even after disputes have arisen between them. By conceding this and expressly allowing for it in the dispute tiers, the overall objectives of the contract can ultimately be best safeguarded whilst the parties continue to work on their projects and toward resolution of their differences.

## CORRIGENDA

We regret that in part 1 of this article ([2003] ICLR 128–153) a computer error caused some cross-references in the notes to be wrongly printed. The notes affected and the correct cross-reference are set out below:

Notes 40 and 41, the references to "note 24" should read "note 36".
Notes 49, 50, 51, 53, 55, 56, 64, 75, 78, 131, 134 and 136: the references to "note 35" should read "note 47".
Notes 57 and 76: the references to "note 39" should read "note 51".
Notes 74, 77, 97, 101, 137: the references to "note 42" should read "note 54".
Notes 87, 132, 133: the references to "note 64" should read "note 76".
Note 93: the reference to "note 77" should read "note 89".
Note 94: the reference to "note 74" should read "note 86".
Note 100: the reference to "note 62" should read "note 74".
Note 108: the reference to "note 28" should read "note 40".
Note 118: the reference to "note 103" should read "note 115".
Note 120: the reference to "note 52" should read "note 64".
Note 124: the reference to "note 91" should read "note 103".
Note 129: the reference to "note 115" should read "note 127".
Note 135: the reference to "note 34" should read "note 46".
Note 137: the reference to "note 61" should read "note 73".
Notes 137 and 144: the references to "note 87" should read "note 99".
Note 141: the reference to "note 126" should read "note 138".
Note 143: the reference to "note 50" should read "note 62".
Note 145: the reference to "note 131" should read "note 143".