

The duty to perform commercial contracts in good faith: a critical analysis of the recent developments and the impact on loan agreements

The Implied Duty to Perform Contracts in Good Faith

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Luca Morrone

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Abstract

Il presente articolo “*The Implied Duty to Perform Contracts in Good Faith*” costituisce la seconda di tre parti dell’elaborato “*The Duty to Perform Commercial Contracts in Good Faith: a Critical Analysis of the Recent Developments and the Impact on Loan Agreements*”, il quale analizza il dovere di agire secondo buona fede nei rapporti commerciali (il cosiddetto “*duty of good faith*”) e, in particolare, nei contratti di finanziamento disciplinati dal diritto inglese.

Dopo aver svolto un’introduzione a carattere storico-dottrinale sul principio di buona fede, questa parte dell’articolo si prefigge lo scopo di identificare e delineare le connotazioni giuridiche che ha assunto ad oggi il dovere di agire secondo buona fede nelle relazioni contrattuali. Nello specifico, vengono individuati nei cosiddetti “*relational contracts*” e nelle “*contractual discretions*” i due principali ambiti di applicazione della buona fede. Mentre i relational contracts costituiscono una tipologia di contratti aventi caratteristiche quali la lunga durata, una molteplicità di obblighi contrattuali, requisiti di collaborazione fra le parti e la necessità di variare i termini contrattuali nel corso della loro durata, le *contractual discretions* rappresentano un istituto tipicamente anglosassone che permette ad una delle parti contrattuali di valutare discrezionalmente le modalità di esercizio del diritto contrattuale, piuttosto che l’eventualità di esercitarlo. Successivamente, si compie una riflessione a carattere pratico sul significato e sul valore giuridico dell’obbligo contrattuale di agire secondo la buona fede al fine di esprimere delle valutazioni finali in relazione alla necessità o meno dell’introduzione del dovere di buona fede nel diritto contrattuale inglese.

Per completezza di informazione, si vuole precisare che la dottrina citata nel presente elaborato non tiene conto della recente sentenza della *High Court*, pronunciata in Marzo 2019, nel caso *Bates v Post Office Limited - Judgment No. 3* [2019] EWHC 606 (QB).

For the sake of completeness, it is clarified that the present study does not take into account the recent High Court decision in *Bates v Post Office Limited - Judgment No. 3* [2019] EWHC 606 (QB) of March 2019.

1. The implied duty to perform contracts in good faith

Historically, English law refused to recognise obligations to act in good faith both in the negotiation (*Walford v Miles* [1992] 2 AC 128 [138]) [1] and the performance of commercial contracts (*Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1988] 1 All ER 348, CA, Bingham LJ [439]) [2]. However, the judicial attitude towards the introduction of a duty to fulfil contractual obligations in good faith appears to be changing.

Having assessed the importance of developing the doctrine of good faith in accordance with the traditional features of English contract law in the previous publication, this second part of the article will examine the recent judicial developments relative to the notion of good faith. The analysis will not only clarify such notion's present function but also determine the extent to which the current legal framework provides for desirable solutions and achieves adequate standards of certainty and predictability.

The starting point of the investigation is inevitably represented by the controversial judgment of Leggatt J in *Yam Seng (Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111) [3] which, although a first instance decision, has already been cited in more than thirty cases.

In the case at hand, Yam Seng (a company registered in Singapore) had entered into a distribution agreement with ITC pursuant to which the latter had agreed to grant Yam Seng exclusive distribution rights of Manchester United fragrances in certain duty-free outlets in China and Singapore and in non-duty-free outlets in China.

Soon after the contract was entered into between the parties, several problems arose. Aside from repeated delays in the delivery of the orders under the agreement, Yam Seng became concerned that the products were also sold in Singapore outside the duty-free outlets at a lower price. ITC responded with several false statements and the final breakdown of the business relationship was later marked by ITC's request to Yam Seng to return the distribution rights in Hong Kong and Macau.

As a result, Yam Seng terminated the agreement claiming damages for breach of contract and misrepresentation. The judge allowed both claims finding, *inter alia*, a breach of an implied duty to act in good faith by ITC.

From a practice-oriented standpoint, the important legal aspects that stem from the decision may perhaps be grouped in two paramount matters, which will be analysed in turn.

Firstly, the legitimacy of the legal process and rationale adopted by the judge to imply an obligation to perform commercial contracts in good faith, which has fundamental consequences on the scope of application of the doctrine. Secondly, the definition of the notion of good faith, which will inevitably determine whether the doctrine may assume an integral role in the substantive law of contract.

1.1 The implication of the duty in *Yam Seng*

The first problematic aspect of Leggatt J's decision relates to the judge's controversial application of the rules of construction to imply in the contract between Yam Seng and ITC an obligation to act in good faith.

While the judge substantially imposed a duty of honesty and fair dealing term *in fact* (namely, as examined in the first part of the article, on the basis of the specific circumstances of the case), he also stated that the term could be applied in “*any ordinary commercial contract based on the presumed intentions of the parties*” (*Yam Seng Pte Ltd* [131]) [4].

In that context, the intentions of the parties were associated to the parties’ background “*of shared values and norms of behaviour*” (*Yam Seng Pte Ltd* [134]) [5] that include at least “*an expectation of honesty*” (*Yam Seng Pte Ltd* [135]) [6], “*fidelity to the parties bargain*” (*Yam Seng Pte Ltd* [139]) [7] as well as “*other standards of commercial dealings which are so generally accepted that the contracting parties would reasonably be understood to take them as read without explicitly stating them*”. (*Yam Seng Pte Ltd* [137]) [8] Those features were recognised to form part of the duty of good faith (*Yam Seng Pte Ltd* [140]) [9].

From a technical point of view, it is worth stressing that the judge applied both the test for implication *in fact* set out in the previous publication and the decision in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10 [10], which equated the process of *contractual interpretation* with that of *implication* under a single test enquiring into the reasonableness rather than the necessity of an implied term.

While the such approach was later held to be wrong by the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited* [2015] UKSC 72 [11], the judge held that in both instances the test was satisfied and the parties were subject to a requirement to perform the contract in good faith (*Yam Seng Pte Ltd* [137]) [12].

Conversely, with reference to the more restrictive test for the implication of terms *in fact*, the above-mentioned aspects of good faith were considered both obvious reflection of the parties’ expectations and necessary to give business efficacy to the contract. As the judge observed, “*as a matter of construction, it is hard to envisage any contract which would not be understood as requiring honesty [and fidelity to the parties’ bargain] in its performance*” (*Yam Seng Pte Ltd* [138]) [13]. However, as sensibly objected by Carter and Courtney, this model of implication suffers from evident technical problems.



On the one hand, the judge held that the good faith term was implied *in fact* due to the specific circumstances of the case. On the other hand, the implication *in fact* depended on general background expectations which may be assumed to be present in the vast majority of contractual relationship. The net result is the implication *in fact* of a default rule for all contracts that, as such, should have been implied *in law* (Carter and Courtney, 2016) [14]. Interestingly, the same judge more recently advocated extra-judicially the recognition of a duty to perform in good faith as a default rule in all commercial contracts (Leggatt, 2016) [15], perhaps suggesting the fact that a broader function for it was envisaged.

In addition, one problematic aspect of the decision consists in the fact that the judge recognised that the “*relevant background expectations*” of the parties vary with context and, as a consequence, that the duty may give rise to further specific implied duties in certain factual circumstances. Among them, he recognised the existence of a category of contracts – which was identified as “relational” – presenting enhanced requirements of good faith (*Yam Seng Pte Ltd* [141]-[143]) [16]. As such, it may legitimately be assumed that these contracts include a default requirement to be performed in good faith.

In light of the above discussion, the judgement clearly presents a questionable application of the rules of construction creating difficulties in the definition of the precise scope of application of the duty of good faith. As Whittaker sensibly observed, the model adopted by Leggatt J does “*not reflect the piecemeal or incremental approach typical of common law development*” (Whittaker, 2013) [17].

Moreover, the judge departed from the traditional approach to implication of terms aimed at ascertaining the actual intentions of the parties to a significantly more purposive approach. It thus becomes of paramount importance to consider the judicial interpretations of the decision so as to determine the ambits of commercial contracts where the obligation applies. Although not all those ambits exclusively insist on the decision in question, they will now be analysed in turn.

1.1.1 Is there a general duty of good faith in commercial contracts?

As a preliminary matter, the perhaps most significant judicial reaction to *Yam Seng* was represented by the judgment in the case *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789 [18]. While at first instance Leggatt J had implied duty of good faith in a contract for carriage recognising an “*increasing recognition in the common law world of the need for good faith in contractual dealings*” (*MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2015] EWHC 283 [97]) [19], the Court of Appeal firmly rejected such approach.

In doing so, it recognised a “*real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreement*” (*MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789 [45]) [20].

It follows that, at present, there is no general implied obligation of performing commercial contracts in good faith and, in line with the recent decisions of the Supreme Court, it is unlikely that such position will change in the near future.

1.1.2 Relational contracts

However, a major shift toward the implication of an overarching duty of good faith could be observed in the so-called “*relational contracts*”. Leggatt J described them as contracts involving “*a longer term relationship between the parties which they make a substantial commitment*” (*Yam Seng Pte Ltd* [142]) [21] and which may require “*a high degree of communication, co-operation and predictable performance based on mutual trust and confidence and involving expectations of loyalty*” (*Yam Seng Pte Ltd* [142]) [22].

According to the Judge, the benefit of the principle of good faith would be more evident in this category of contracts as those higher expectations “*of cooperation and loyalty*” (Leggatt, 2016 at [31]) [23] cannot be fully expressed at the time of execution and are “*implicit in the parties’ understanding and necessary to give business efficacy to the arrangement*” (*Yam Seng Pte Ltd* [142]) [24]. Similarly, Campbell noted that the recognition of a category of relational contracts would be advantageous to particular contractual relationships requiring a degree of flexibility in performance (Campbell, 2014) [25].

In line with those arguments, the introduction of a duty of good faith would enable contracts to be expressed in a shorter form and leave scope for variations, safeguarding the common purpose of the contract and reducing negotiation costs (Leggatt, 2016 at [30]) [26].

While the above arguments certainly further a legitimate purpose, a fundamental limitation of the theory of relational contracts consists in the lack of agreement on the features that distinguish such contracts from “non-relational” contract and the approach that modern contract law should adopt in their respect. Although long duration of a business relationship was identified as synonym for relational contracts, such aspect alone may not necessarily be sufficient: as pointed out by Goetz and Scott, “*temporal extension per se is not the defining characteristic*” (Goetz and Scott, 1985) [27].

For instance, a long-term landlord and tenant contract may involve limited contact whereas an agreement to refurbish one room in a property for two weeks will probably involve a significant degree of communication (Eisenberg, 1999) [28]. This problem also arose in *Acer Investment Management Ltd & anr v Mansion Group Ltd [2014] EWHC 3011 (QB)* [29], where a long-term agency agreement was not found to amount to a relational contract. Accordingly, it emerges that long duration of a contractual relationship may not necessarily represent a distinctive feature.

The extended duration was only one of the attributes that was recognised as characteristic of relational contracts. Macneil, one of the most prominent contributors to the development of the doctrine of relational contracts, critically observed that these agreements are antithetical to contracts for the performance of single and discrete obligations, which display a precise commencement and termination and allocation of rights and duties, have defined subject matter and involve limited contact between the parties (McKendrick, 1999) [30].

In line with that, it seemed that certain contracts were more likely to be characterised as relational such as “*joint venture agreements, partnerships, agency agreements, franchise agreements, distributorship agreements and leases*” (Ter, Kah Leng, 2014) [31]. Leggatt J clearly endorsed a similar approach (*Yam Seng Pte Ltd [142]*) [32].

However, even this characterisation presents certain shortcomings as any agreement creates or reflects some form of cooperation and, accordingly, virtually all contracts would be capable of being considered relational (Eisenberg, 1999) [33]. Moreover, an expectation of cooperation may clearly exist even where the contract carefully plans the substance of the transaction. Thus, it may legitimately follow that even this approach does not provide for a conclusive parameter to distinguish relational contracts.

Other specific features that scholars identified include: the use of open terms correlated to a high degree of discretion during the performance of the contract; a requirement of cooperation stemming from shared risks and likely variations to the terms of the contract throughout its duration (Speidel, 2000) [34], the incentive of the parties to preserve the relationship (Austen-Baker, 2009) [35], or the production of profits that fuels the continuation of the relationship (Collins, 2016) [36]. **In light of the variety of features identified, it may be sensible to conclude that all contracts present a certain degree of relationality or, as explained by Professor Campbell, that all contract are relational (Campbell, 2014 and 2017) [37].**

Not surprisingly, the judicial approach to the recognition of these contracts has not been unanimous and uncontroversial, the main question being that most contracts present relational features. Such difficulty was reflected in several decisions that highlighted the legal uncertainty surrounding the characterisation of a contract as relational. To illustrate that, it may be worth considering two recent decisions.

In *Carewatch Care Services Ltd v Focus Caring Services Ltd & Ors* [2014] EWHC 2313 [38], an argument that a franchise agreement amounted to a relational contract was rejected. On the contrary, the judge in *Bristol Groundschool Ltd v Intelligent Data Capture Ltd (Bristol Groundschool Ltd v Intelligent Data Capture Ltd and others* [2014] EWHC 2145 [196]) [39] applied *Yam Seng* and held that a joint venture agreement was a relational contract and subject to an implied duty of good faith, with no satisfactory explanation being provided.

Furthermore, it is worth considering that the distinction between “relational” and “non-relational” agreements inevitably requires a purposive and flexible judicial approach to the construction of contracts which, as explained in the first part of the article, is of doubtful consistency with the recent decisions of the Supreme Court.

In summary, while the implication of a duty of good faith in relational contracts may certainly entail some beneficial effects, these are most probably outweighed by the significant uncertainty that affects the recognition of such special contractual relationships. The number of features which may legitimately define relational contracts is potentially unlimited, as well as the norms seeking to regulate their functioning.

The academic attempts to rationalise the doctrine resulted in a multitude of theories presenting substantial overlaps and inconsistencies. Similarly, the judicial effort to develop a consistent approach was not successful.

To conclude, the recognition of a class of relational contracts seems more likely to stimulate litigation than to incentivize cooperation between parties and, as concluded by Tan, will represent a significant challenge for the courts (Tan, 2016) [40].

That challenge may even be exacerbated by the recent decision in *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent* [2018] EWHC 333 at [174] [41] where Leggatt J stated that the duty of good faith in relational contracts satisfied the test for the implication *in law*, meaning that all relational contracts would be subject to a default duty to act in good faith. The decision represents a turning point in the future approach to this category of contracts and accordingly further judicial guidance is necessary.

1.1.3 Contractual discretions

The duty to act in good faith is also of central importance in the context of the exercise of contractual discretions (*Yam Seng Pte Ltd* [145]) [42]. Defined by Daintith as “*a legally constituted power of decision, vested in one of the contracting parties, which they alone may exercise*” (Daintith, 2005) [43], contractual discretions are becoming an increasingly common feature of contracts (*Braganza v BP Shipping Ltd* [2015] UKSC 17 [15]) [44].

Critically, while such powers of decision may assure greater flexibility and prove particularly effective to cope with unforeseeable circumstances, they are affected by an inherent risk of being exercised in an abusive manner. As a result, the courts have stressed in multiple occasions that the use of these powers may not be unfettered.

In *Paragon Finance plc v Nash* [2002] 1 WLR 685, a couple was no longer able to afford the mortgage payments as a result of a unilateral increase of the interest rate by the lender pursuant to a clause in the agreement. In that case, the court recognised an implied duty that the contractual power to vary the interest rate could not “*be exercised dishonestly, for an improper purpose capriciously or arbitrarily*” (*Paragon Finance plc* [32]) [45].

However, such duty only required the lender not to act in a way in which “*no reasonable lender, acting reasonably, would*” (*Paragon Finance plc* [40]) [46], with its discretion not being limited by a general requirement of reasonableness. Rather, as confirmed in *Paragon Finance v Pender* [2005] EWCA Civ 760 [120], it was perfectly legitimate to raise the interest rates if the decision was based on genuine commercial interests [47].

Such approach was confirmed in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116 at [66], which, clarified additionally that the notion of reasonableness is to be assessed using its public law meaning. Such approach, in line with the so-called *Wednesbury* test (*Associated Provincial Picture Houses v Wednesbury Corporation* [1947] EWCA Civ 1) [48], requires the decision to be reasonable for the party exercising the power as opposed to the court [49].

This paved the way to the most significant judicial development in the Supreme Court decision in *Braganza v BP Shipping Ltd* where the so-called “*Braganza duty*” was established to regulate contractual discretions.

The case concerned the performance of a discretionary power under a contract of employment and, in reviewing the meaning of reasonableness, the court held that not only the second but also the first limb of the *Wednesbury* test applied. Namely, not only the parties had to avoid exercising their power so as to achieve a result “*so outrageous that no reasonable decision-maker could have reached*” (*Braganza v BP Shipping Ltd* [2015] UKSC 17 [24]) [50], but also, they should have taken into account only relevant matters and excluded the irrelevant ones.

Having examined the connection between the notion of good faith and the exercise of contractual discretions, from a practice-oriented point of view, it is of critical importance to determine the scope of application of the *Braganza duty*.

To do so, two matters need to be considered. **Firstly, the duty only applies when a term of the contract confers an absolute contractual discretion as opposed to a right to act in a determinate manner**, such as when it allows the party to decide whether to exercise a contractual right or not (*Shurbanova v Forex Capital Markets Limited* [2017] EWHC 2133 (QB); *Mid Essex Hospital Services NHS Trust v Compass Group* [2013] EWCA Civ 200) [51], or to exercise a binary decision to terminate the contract or not (Richardson, 2017; *Monde Petroleum Sa V Westernzagros Ltd* [2016] EWCH 1472 (Comm)) [52].

Secondly, where it is established that the case concerns an absolute contractual discretion, the duty will only apply in certain contexts. Critically, *Braganza* concerned an employment contract but the Court did not exclude the possibility that the duty could apply in other contexts as well [53]. On the one hand, in *Lehman Brothers v Exxonmobil Financial Services* [2016] EWCH 2699 [54] it was decided that the application of a public law test was not appropriate in a case involving business parties legitimately entitled to pursue their commercial interests. On the other hand, in *Watson v Watchfinder.co.uk* [2017] EWHC 1275 [55] the court held that the duty applied even in the commercial context in a case concerning a clause that allowed the exercise of a share option with the consent of the majority of the board of directors.

To reconcile the decisions, the existence of an evident conflict of interest between the board and the shareholders perhaps represented a decisive factor for the application of the duty. In a similar manner, in *BHL v Leumi ABL Limited* [2017] EWHC 1871 (QB) [56] a clause of a receivable finance agreement entitling one party to claim an indemnity up to a certain percentage of the fees recovered, was held to be subject to the *Braganza duty*.

Despite the fact that the company had a contractual right to claim up to the set percentage, the judge considered that it failed to exercise any actual discretion by simply charging the maximum amount permitted. What the decision perhaps evidenced is a judicial willingness to explore the purpose of contractual discretions as well as the subjective reasons behind a decision.

Thus, it clearly emerges that the circumstances of each case are decisive to determine the application of certain limitations on the performance of contractual discretions and the courts are prompt to inquire into the appropriateness of the parties' decisions even in the commercial context. In connection with the above discussion, McKendrick submitted that the element of good faith does not provide for any additional requirement in contractual discretions (Mckendrick, 2016) [57].

However, as correctly explained by Leggatt J extra-judicially, the above-mentioned implied duties may be considered as an expression of the doctrine of good faith which – in line with an increasingly consolidated judicial approach – may properly be considered as a default rule (Leggatt, 2016 [50]) [58]. The less convincing aspect of the judge’s reasoning is that the situation “*where a party has freedom to act in a way that affects the other party’s right, not because the contract expressly says so, but because the contract is silent on the point*” (Leggatt, 2016 [54]) [59] should be treated as contractual discretions and, accordingly, be subject to an implied duty of good faith on the basis that they both leave something unstated (Leggatt, 2016 [55]) [60].

The crucial distinction is that in contractual discretions the parties identify and single out a particular aspect of their relationship to be decided at a certain point and therefore expect that matter to be decided in accordance with certain standards. *Vice versa*, in the case of the *exercise of a freedom* that is permitted on the basis that the contract fails to regulate it, the same may not be sustained with the same confidence. It thus follows that the implication of a duty to perform commercial agreements in good faith finds legitimate expression in contractual discretions but most probably not in the context of what may be called “*non-excluded freedoms*”.

1.2. The content of the duty

A second controversial aspect of the approach adopted by Leggatt J in *Yam Seng* relates to the content of the implied duty of good faith.

In support of the implication of such duty Leggatt J has stated both judicially and extra-judicially that other jurisdictions have introduced the doctrine of good faith and, accordingly, English law appears to be “*swimming against the tide*” (*Yam Seng Pte Ltd* [124]; Leggatt J, 2016 [16]) [61]. While the usefulness of a comparative approach has already been successfully challenged at European level (Teubner, 1998) [62], primarily due to the fact that most legal systems achieve fairness through a variety of legal doctrines and interpretations of good faith (Zimmermann and Whittaker, 2000) [63], the judge’s comparative argument suffers from important deficiencies also because of the multifaceted nature that the notion of good faith has assumed in other common law jurisdictions, including those mentioned by the judge.

For instance, it is true that the recent Canadian decision in *Bhasin v Hrynew* [2014] 3 SSC 71 [64] adopted an approach similar to that in the *Yam Seng* case, but the obligation was a general norm of contract law which is applicable notwithstanding the intentions of the parties rather than an implied term. Similarly, in the United States the doctrine of good faith evolved during decades adopting multiple connotations with the courts endorsing different interpretations ranging from the use of good faith to exclude offensive behaviours of bad faith to its application to contracts conferring discretions (Burton, 2016) [65].

Equally, the adoption of the duty of good faith has been subject to significant criticism due to its inconsistent interpretations in Australia (Hill, 2013) [66]. Clearly, when mentioning the adoption of the doctrine in other jurisdictions, Leggatt J simplified the question and failed to take into account the variety of forms and functions that good faith assumed in other jurisdictions.

What perhaps emerges is that one of the main characteristics of good faith is its intrinsically subjective nature and, as Brownsword suggested, its close relationship with the context where it develops (Brownsword, 2001) [67]. Rather, one more important aspect that should be taken into consideration is the possibility to conciliate the notion of good faith with existing rules (McKendrick, 1999) [68].

One additional difficulty in relation to the judge's approach is that in seeking to determine the content of the duty Leggatt J resorted, *inter alia*, to the interpretations of the concept of good faith when included by the parties to a contract as an express term (*Yam Seng Pte Ltd* [140]) [69].

Apart from the variety of meanings that the notion may assume when framed in an express term depending on the factual circumstances of each case, this approach is clearly not correct on the basis that, as firmly established by the Supreme Court, implication and interpretation are two distinct construction tools (*Marks and Spencer plc*) [70].

As stressed by Lord Neuberger, the implication of terms depends on the necessity to give business efficacy to the contract, whereas the interpretative process only focuses on the presumed intentions of the parties (*Marks and Spencer plc* at [22] - [32]) [71]. In line with the distinct rules that underlie those two construction processes, different definitions of good faith inevitably follow and, as a result, a mutually applicable approach does not seem legally legitimate and desirable.

Having identified two distinct problems of the approach adopted by Leggatt J in *Yam Seng* in seeking to define good faith, it is then necessary to analyse the meaning attributed to such concept in the case. As anticipated above, the judge implied *in fact* a duty to act in good faith which comprehended the two main features of “*honesty* (*Yam Seng Pte Ltd* [141]) [72] [and] *fair dealing*” (*Yam Seng Pte Ltd* [150]) [73] and “*fidelity to the parties' bargain*” (*Yam Seng Pte Ltd* [139]) [74].

Moreover, in seeking to define the standards of commercial dealing that such notion of good faith aims to safeguard the judge explained that “*not all bad faith conduct would necessarily be described as dishonest. Other epithets which might be used to describe such conduct include “improper”, “commercially unacceptable” or “unconscionable”*” (*Yam Seng Pte Ltd* [138]) [75].

The critical aspect of the reasoning is the fact that all these requirements of good faith are “*sensitive to context*” (*Yam Seng Pte Ltd* [141]) [76]. While the notion of good faith was relied on to find two specific duties of major practical value to the case at hand, it is difficult to identify the specific content of such implied duty of good faith and, most importantly, to delineate the possible forms that it may assume.

Thus, despite attempts of the judge to circumscribe the meaning of good faith to the requirement of honesty in the performance of the contract, the final result is the promotion of the implication of specific terms based on an abstract new doctrine rather than on the established rules of construction. This approach would provide judges with significant flexibility and discretion to achieve fair results with a virtually unlimited number of expressions of the duty. However, while it would not be legitimate to assume that the doctrine of good faith is not compatible with English law, it may be confidently submitted that the concept developed in *Yam Seng* is likely to “*create an undesirable state of uncertainty.*” [77].

1.3 Is the implied duty of good faith necessary?

In light of the above discussion, one question that spontaneously arises is the extent to which the introduction of a duty to perform contracts in good faith may be beneficial to English law. Emblematic in that respect was the extra-judicial comment of Lord Steyn: “*I have no heroic suggestion for the introduction of a general duty of good faith in our contract law. It is not necessary*” (Lord Steyn, 1997) [78].

Leggatt J explained the recognition of a duty of good faith in the performance of contracts through the need to protect the “*expectation of honesty* [and] “*other standards in commercial dealings*” [79] which are intrinsic to the intentions and understandings of the parties and, as such, not stated in the contract (*Yam Seng Pte Ltd* [138]) [80].

Extra-judicially, the judge stressed the importance of good faith on the basis that it would promote cooperation between the parties as well as the integrity and effectiveness of contracting (Leggatt J, 2916 [24]-[30]) [81], which, it believes, would lead to a reduction of the costs of negotiating contracts and simplify business (Leggatt J, 2016 [30]) [82]. While these arguments in support of the adoption of good faith lack empirical support, the analysis of some recent decisions implying the duty may provide for some suggestions as to the need to introduce good faith in English commercial law.

As explained by Carter and Courtney, the implication of an obligation to perform the contract in good faith was not necessary to decide the *Yam Seng* case, as the conduct of the defendant on its own could have amounted to repudiation of the contract, and that would have been a preferred basis for the decision (Carter and Courtney, 2016) [83].

The availability of alternative legal solutions to the implication of a duty of good faith finds additional support in Whittaker's analysis which considered that, although no claim for deceit was advanced by the claimant and the remedies available would have been different, fraud would have been an option open to claimant (Whittaker, 2013) [84]. Similarly, Jackson, argued that in *Yam Seng* the implication of good faith did not offer any additional solutions to those already provided by the rules of contract and tort law and would not even be beneficial in the context of construction contracts (Jackson, 2018) [85].

Furthermore, duress was described by Tall as a suitable alternative to achieve a fair result (Tall, 2018) [86] in a recent case decided by Leggatt J (*Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent* [2018] EWHC 333 [174]) [87] who, instead, identified a relational contract and preferred to imply a duty of good faith. In a similar way, in *MSC Mediterranean*, the Court of Appeal did not consider “*necessary or desirable to resort to it* (i.e. good faith) *in order to decide the outcome of the* (present) *case*” (*MSC Mediterranean Shipping Company S.A. v Cottonex Anstalt* [2016] EWCA Civ 789, parenthesis added) [88].

A sensible conclusion to the matters examined in this section is perhaps represented by the views authoritatively expressed by McKendrick according to which the majority of the rules and principles of English contract law already incorporate requirements of good faith and achieve outcomes similar to those of other jurisdictions which include notions of good faith (McKendrick E, “Good Faith: A Matter of Principle?” in Forte A, *Good Faith in Contract and Property Law* (1st edn, Hart Publishing 1999) Ch. 3, 41) [89].

In line with that, although is not possible to provide a definitive answer on the actual need of English commercial law to adopt a doctrine of good faith, it can confidently be submitted that the judge in *Yam Seng* did not succeed in advancing a persuasive case for a change in the law, and, at present, the risks certainly prevail over the potential benefits.

In seguito sarà pubblicata la terza parte.

The third extract will than be released.

SUGGESTED READING

1. *Walford v Miles* [1992] 2 AC 128 [138].
2. *Interfoto Picture Library Ltd* (n 40), Bingham LJ [439].
3. *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111.
4. *Ibid* [131].
5. *Ibid* [134].

6. Ibid [135].
7. Ibid [139].
8. Ibid [137].
9. Ibid [140].
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