

Comparative Commercial Law

**Good Faith in contract law: Two paths, two systems,
the need for harmonisation**

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1. Introduction.

In recent decades, good faith has rapidly become a key argument in European contract law. Indeed, there has developed a consensus that the presence and role of good faith is pivotal in modern contractual and civil obligations. Impetus for the introduction of such a principle has come from the current of 'good faith' that flows throughout the civil legal systems of the Member States of the European Union and is increasingly likely to become a part of English law. In particular, since the implementation of European Directives such as the Directive on Unfair Terms in Consumer Contracts, every legal system within the European Union now faces the practical challenge of coming to terms with a general notion of good faith. Significantly, according to Whittaker and Zimmermann¹, the draftsmen of the Principle of European Contract Law appear to have regarded good faith as a part of the common core of European contract law, for they included in their Principles a general provision according to which 'in exercising his rights and performing his duties each party must act in accordance with good faith and fair dealing'.

It is the intention of this paper to analyse and discuss the impact of this principle of good faith in its application to two distinct jurisdictions, the Italian and the English. A civil legal system compared to one based on common law. This paper will therefore demonstrate a clear structure. In the first part, a general overview of the history and origins of the good faith 'culture' will be presented, underlining the importance of the meaning and definition of this term. Subsequently, this paper will present an insight into countries which have adopted good faith in their systems as a core principle, focusing particular attention on the Italian legal system and the consequent differences from the English equivalent. The analysis will be developed focusing on key differences arising from doctrines of contract law such as pre-contractual liability, interpretation and performance of contract. As to the English position, where no general obligation of a good faith principle exists, arguments for and against good faith will be presented with particular respect to the impact implementation or transplantation of such a principle could have on the English legal

¹ See Whittaker and Zimmermann, *Good Faith In European Contract Law*, Cambridge University Press, 2000, Ch. I.

system. Throughout, this paper intends to demonstrate, that whilst on the one hand contrasting positions are indeed taken by the systems considered, on the other, the English legal system endeavours to achieve the same outcome by applying such principles in other ways and by other means; in effect adopting a piecemeal solution and a 'lighter' approach in addressing the problem. In light of the debate currently unfolding at a European level, concerned primarily with the possibility of introducing the concept itself in drafting the Constitution of the European Community; this reader will attempt, by way of conclusion, to ascertain if there is a real, genuine necessity for a harmonisation of the concept of 'good faith' in contract law.

2. Origins, history, meanings, definitions:

The concept of good faith is a real argument for actual debate. Its significance has been considered since the earliest ages of humanity and has been developed and enriched throughout the reception of different cultures and necessities. The purpose of this section will be to introduce the notion of good faith in the context of a general analysis of its roots and development.

Good faith has existed for millennia. The principle sees its origins in very primitive human communities. The status of being a member of any human group involving obligations, and membership of even the earliest groups must have necessitated rules of performance upon the members of those groups. The earliest primitive communities have lived in respect of certain primary rules, without which a community could not have kept a sufficient level of cohesion which was essential for its survival. Amongst communities a basic rule regarding the obligations of keeping promises must have existed and the dictum *pacta sunt servanda* describes the obligation which arises from such a principle.

The relationship of *pacta sunt servanda* with 'faith' finds its origins in ancient Roman society. The *fides* of the individual has been undoubtedly significant in the development of *bona fides* in Roman Law. At the beginning, the influence of the magistrates was limited, since Roman Law was dominated by the strict formalism of the *legis actions*. During the second and early third centuries BC, Roman society thought it necessary to allow certain claims based on contracts of sale, hire and service to be upheld by

the legal system. The principle adopted, (*iudicia bonae fidei*) added an element to *iudicia stricti iuris* which enabled a court to take into account circumstances, defences and considerations of fairness which might otherwise have been excluded. The purpose of it was to free magistrates from the strict formalism of the *legis actiones* and allow them to accord a *iudicium* with a formula which directed judges to deliver judgment, not according to strict statutory law but according to the principle of contractual faith.

In a further development of the concept, which begun with the practical contribution given to the formless Greek concept of *aequitas* by the Roman jurists, religion had an important position in relation to *pacta sunt servanda* and played a much wider role in the growth of a concept of good faith, being considered as one of the pillars in the process of its foundation. The key elements in the Christianisation of the Roman *bona fides* was the idea of good conscience. Thus, as O'Connor² points out, the combined influence of centuries of Roman Law *bona fides* with its connotations of honesty, conscientious and honourable conduct, and importance of the Church on good faith and conscience in promise-keeping, ensured that modern civil law (and international law) rules of promises and agreements would reflect these moral virtues. It must be pointed out that *bona fides* and/or *aequitas* also dominated dealings between merchants and became a fundamental principle of the medieval and early modern *lex mercatoria*. As in Roman law, the concept contributed considerably to the sort of flexibility, convenience and informality required by the international community of merchants.

Throughout the years the concept developed enormously, being differently adapted by communities and states. One of the peculiar characteristics of such a concept has been the merit of adaptability to different situations according to the possibility of a wide range of grounds for application. Due to a lack of 'proper form' or use, it has been difficult to find a specific allocation for the concept. As a result, the definition of such a principle represents one of the most difficult aspects in the reading and thus interpretation of the entire concept. There are several different possibilities. Over the centuries the reception and 'digestion' of the principle has been totally different depending mainly on the jurisdictional structure of receptionist states. As a result, it has been difficult to give a general definition of the concept valid for interpretation in multiple legal systems, thus rendering the concept in itself

² See O'Connor, *Good Faith in International Law*, Dartmouth, Aldershot, 1991, Ch.3.
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subject to different interpretations. The term ‘good faith’ has thus given rise to several strands with respect to its meaning. Firstly, it could be considered a duty to act fairly and equitably towards the other party. Secondly, it could be a duty and issue of trust and confidence between the parties involved. Thirdly, it might see the establishment of a set of standards of reasonable behaviour in contractual relations and finally, it could be defined by a set of examples of ‘bad faith’. Therefore, according to different cultures, jurisdictions, functions and scopes the term is nowadays differently associated. For example, ‘fairness’, ‘fair dealing’, ‘duty of loyalty’, ‘reasonableness’ (England, Sweden); ‘not acting in bad faith’ (US, PICC, PECL) and ‘taking into account the other party’s interests’ (Germany, Netherlands).

As a result, any possible definition is subjective and reflects a specific origin, history and function of the concept in different states. In light of these considerations therefore, it is to O’Connor that this paper refers:

“The principle of good faith in international law is a fundamental principle from which the rule pacta sunt servanda and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in international community at that time.”³

3. Civil law systems: An overview

The notion of good faith has strongly influenced contract law in civil legal systems and the consideration given to the concept assumes different importance according to the diversity of areas to which it is applied. This segment will therefore provide a general overview of the states which have embraced good faith as a central principal of their systems.

In the Republic of Germany, contractual obligations are subject to the standard of good faith. It is linked with the notion of *Treu und Glauben* and is set forth in § 242 of the Bürgerliches Gesetzbuch (BGB) which sets forth in general terms that the debtor is bound

³ See O’Connor, *Good Faith in International Law*, Dartmouth, Aldershot, 1991, Ch.8.
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to perform according to the requirements of good faith, taking into consideration general practice in commerce. Whittaker and Zimmermann explain this notion thus: *“Treue...signifies faithfulness, loyalty, fidelity, reliability; Glaube means belief in the sense of faith or reliance. The combination of ‘Treu und Glauben’ is sometimes seen to transcend the sum of its component and is widely understood as a conceptual entity. It suggests a standard of honest, loyal and considerate behaviour, of acting with due regard for the interests of the other party, and it implies and comprises the protection of a reasonable reliance. Thus is not a legal rule with specific requirements that have to be checked but may be called an ‘open’ norm. Its content cannot be established in an abstract manner but takes shape only by the way in which it is applied”*.⁴

The provision had a profound effect on the development of German contract law by the courts who created a number of obligations to ensure a loyal performance of a contract such as a duty of the parties to cooperate, to protect each other's interests and to give information.

In France also, according to article 1134, para. 3 of the French Civil Code, contracts must be performed in good faith. Though the French courts have not given the notion of *bonne foi* the same importance as the German courts, similar results were obtained by the application of a general theory of *abus de droit* which was developed at the end of the 19th century and was based on good faith. Performance of contracts in good faith has been interpreted by French jurists as implying two duties on the contracting parties (i) a duty to act loyally (obligation de loyauté) and (ii) a duty to cooperate (devoir de coopération).

In Switzerland, according to article 2 of the Swiss Civil Code, every person is bound to exercise his rights and fulfil his obligations in respect of the principle of good faith. Moreover, according to article 3, *bona fides* is presumed whenever the existence of a right has been expressly made to depend on the observance of good faith. Considering a more exhaustive and extensive analysis, references to good faith regime application can be found also in The Netherlands, Israel, Nordic Countries, United States, Australia, Belgium, Brazil and China.

The role of modern statutes, European Contract Law influence and EU Directives has altered the traditional perception and wider practice of good faith. As far as the European

⁴ See Whittaker and Zimmermann, *Good Faith in European Contract Law*, Cambridge Un. Press, 2000, pp.18-30.

Union is concerned, it must be noted that the Principles of European Contract Law impose a duty of good faith in the formation, performance and enforcement of the parties' duties under a contract. Article 1:201 provides that "(i) Each party must act in accordance with good faith and fair dealing. (ii) The parties may not exclude or limit this duty." The UNIDROIT Principles of International Commercial Contracts (Unidroit, 1994) have a similar provision to article 1:201. As a corollary of good faith, article 1:202 of the Principles of European Contract Law imposes on each party "a duty to co-operate in order to give full effect to the contract". These Principles do not have the binding force of either national law or international treaties or conventions, they aim to achieve a modern European *lex mercatoria* and to help bring harmonisation of general contract law within the European Union.

4. The Italian and English scenarios.

Under Italian law good faith plays an important role, indeed one of the most pertinent positions amongst the civil law regimes such that it is considered a fundamental pillar of the system. Noteworthy is the fact that the Italian 1942 Civil Code had been drafted in an epoch when Italian jurists were fully conscious of German case law on § 242 of the BGB. As Galgano⁵ highlights, there are two variants of good faith; subjective and objective. Subjective good faith deals with the psychological attitude of the party, ignorance of the fact there is an infringement of the rights of another or, positively, the knowledge that one is acting lawfully. Thus if a buyer of goods does not know, and has no reason to suspect, that the seller is not the true owner but a cheat, article 1153 provides that possession plus good faith on the part of the buyer gives him/her ownership, even though his predecessor in title was not the owner. Objective good faith therefore means proper behaviour, loyalty, respect for another's reliance, as a matter of social solidarity under article 2 of the Constitution.

The Italian Civil Code generally and specifically enshrines good faith in different stages of contractual relations and highlights its importance in several code articles:

⁵ See Galgano, *Diritto Privato*, CEDAM, Padova, 1981, pp. 320-326.

Art. **1175** provides that ‘the debtor and the creditor shall behave according to rules of fairness’;

Art. **1337** provides that ‘parties must behave in provides that parties must behave in good faith during the pre-contractual bargaining and contract drafting’;

Art. **1366** provides that ‘contract must be interpreted in good faith’;

Art. **1375** provides that ‘contract must be executed in good faith’;

Art. **1460** provides that ‘in contracts providing for mutual counter-performance, each party can refuse to perform his obligation if the other party doesn’t perform his own at the same time, unless different times for performance have been established by the parties or otherwise stipulated by the nature of the contract. However, performance cannot be rejected if, considering the circumstances, such rejection is contrary to good faith’.

Good faith represents one of the key principles of the Italian social and legal regime, and the role of ethics originates from the idea of an active, social moral principle, which extends its function beyond the traditional limits of *buon costume*. Nonetheless, unlike other rules, good faith doesn’t imply a specific kind of behaviour whose content has been formally pre-determined. Rather, it is a general clause which requires different positive or negative behaviours, due to the concrete set of circumstances of a given relation.

Whereas in other legal systems - particularly the German one - the reference to good faith principle allows the legislator to adapt the application of law to those justice requirements particularly felt by social awareness; contrarily under Italian law the legal application of the principle has met certain difficulties, mainly due to misunderstanding of its meaning and value. As a result, two different trends of thinking appear to be currently present in the scenario: (i) on the one hand, the duty of good faith is not recognised, and the possibility that it could be considered as an autonomous legal duty is even denied; (ii) good faith is seen as one of the paramount pillars of the entire law of obligations⁶.

Hence, although this latter position is undoubtedly dominant, as well as actually appearing the more fascinating of the two; it must be stressed that the attempt to ascribe a constitutional value to the principle of good faith has not offered tangible results thus far, as

⁶ See Bianca, *Diritto Civile*, Giuffrè, Milano, 2000, pp. 500-504.
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the rule in itself would seem to be ambiguous and substantially inadequate to be used as a general criteria of conduct.⁷

Indeed, in light of the case law, it should be stressed that good faith is not a substantial provision to be applied in concrete, but rather a 'closing clause' to the entire system of the law of obligations, a paramount principle to which judges have to effectively refer themselves to in the decision of a given legal dispute. It is a principle that has its roots and aspires to fulfil the principle of mutual solidarity, which in practice turns out to be applicable to two types of conduct: (i) the first being 'loyal behaviour', mainly applied to the process of the formation of the contract and of its interpretation; (ii) the second is the so-called '*salvaguardia*' (literally 'safeguard') in the contract performance and the obligations regime, identifiable as 'the duty of each party to honestly and loyally cooperate with each other to achieve the reciprocal aims and purposes, as set out in the contract.'

It is the opinion of this paper thence, that the definition, application and meaning of the good faith principle brings one to define it under a broader umbrella. The intention of the legislator thence, was to create a key provision capable to fill the inevitable legislative deficiencies which would eventually occur from time to time. In other words, to set up a paramount principle which would enable the identification of further prohibitions and duties other than those provided by the law, thus achieving the so called 'closure' of the legislative system and providing a general tool to compensate the gaps that would occur in any given social and economic situation.

The picture under English law is vastly different. To ascertain the presence, function or even scope of a good faith principle it must be noted that, unlike the above discussed civil law systems and few common law jurisdictions such as the United States, there is no general clause or general principle of good faith which applies, even for a particular area of English law. As O'Connor discusses, "many rules of English law expressly refers to good faith, and many rules reflect the substantive of the principle, but it is submitted that these 'normal' rules are not properly subsumable under the principle. The function of the principle can hardly be to provide a common denominator for a large number of the 'ordinary' rules of English law"⁸. As a result, it is clear that good faith is not a general requirement of English

⁷ Ibid. pp.503.

⁸ See O'Connor, *Good Faith in English Law*, Dartmouth, Aldershot, 1990, pp.100-102.
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law. This was discussed by Bingham L.J. in the well-known case *Interfoto Picture Library v. Stiletto Visual Programmes*, where he referred to the civilian idea of good faith: “This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as ‘playing fair’, ‘coming clean’ or ‘putting one’s cards face upwards on the table’. It is, in essence a principle of fair and open dealing. In many civil law systems...the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of fairness.”⁹

Such an attitude is most clearly demonstrated in contract law where the basic approach is inclined to enhance commerce, supporting a *laissez-faire* regime which has party autonomy as its predominant value. One of the main features of English contract law is the protection of freedom of contract principle as a starting point and main pillar of the entire discipline. Parties, as pointed out by Atiyah, deal with each other ‘at arm’s length’¹⁰ and should be free to contract without interference from the state and free to include terms and conditions in their contract unless they are ‘illegal or immoral’. This principle, as well as certainty of contractual obligations, is to be considered as a key point of English contract law. The underlying idea is that the consensus is geared entirely towards an approach which could favour businessman regardless of the fact that the bargaining power of parties or contract in itself are unequal. Such a position is indicative of the reasons why English contract law is often seen and used as a point of reference in international dealings.

5. Contract law: A comparison.

The following section will seek to compare different stages of contract law under both the Italian and English systems. The stages considered will be negotiations and pre-contractual liability, performance and interpretation of contracts.

⁹ *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.*, [1988] 1 All E.R. 348.

¹⁰ See Atiyah, *The Rise and the Fall of Freedom of Contract*, pp. 402-405.

5.1.Negotiations and pre-contractual liability

Under Italian law, since negotiations are purely preparatory, they cannot themselves impose any obligation to conclude a contract. Similarly partial agreements on particular points with a view to forming a contract, are not binding. Only the final agreement covering all aspects of the case gives rise to a contract and makes it binding on the parties. Nevertheless, though it is true that the negotiations do not impose any duty to conclude the contract, it is also true that “the parties, in the conduct of negotiations and the formation of contract, shall conduct themselves according to good faith”¹¹ (article 1337, Civil Code). Good faith in this case has to be intended as ‘loyal behaviour’ which entails the liability of the reasonable man (article 1366, 1375). The Italian Civil Code of 1942 was the first code to contain a specific provision on pre-contractual good faith.

A breach of that duty of reasonable behaviour gives rise to the so-called pre-contractual liability or *culpa in contrahendo*, so-called to be distinguishable from contractual liability which arises in cases of breach of contract already concluded.

Although there may not yet be a contractual relationship, there is already a specific relationship which involves the duty of the parties to behave loyally. A common case of such a duty occurs when one of the parties breaks off the negotiations without just cause when they have reached a stage that the other party may reasonably expect that a final contract will be concluded. Another case is the breach of confidentiality, which arises from the duty of the party not to reveal to any third party information about the progress of negotiations where that information might put the affair at risk. Thirdly, cases of pre-contractual liability are covered by article 1338 of the Civil Code. If one party during negotiations knows of some impediments which would render the contract void or voidable and doesn’t inform the other party, that is in itself a breach of their duty.

In cases of pre-contractual liability the guilty party is bound to compensate the other party but only for the damages actually suffered (negative interest). On the contrary, the benefit which the innocent party would have received from the contract, if it had been validly concluded, is not recoverable (positive interest).

In contrast, English law deals with pre-contractual stage in a different way. Under English law, there is no such a general duty to negotiate in good faith. During preliminary

¹¹ See *Codice Civile Commentato*, Ed. Simoni, 2001.
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stage of contracting process the provisions of freedom of contract clearly appears and, as Atiyah points out, each party relies on his own skill and judgement, and owes no any fiduciary obligation to the other.¹²In addition, prior to acceptance, any offers can be revoked, even though relied upon. As to consideration of a duty of information, parties are not bound to any duty of information to the other, just relying only on his own sources of information. English contract law does not, in general, require someone to disclose facts to the other party, with the exception of contracts *uberrime fidei* contracts, even if that knowledge would have materially influenced his decision to contract. Each party must study the situation, assessing the future possibilities, relying on his own sources and skills. The only limitations to this market bargaining is that there must be no fraud or misrepresentation. Indeed this paper considers it important to note that at this the pre-contractual stage of contract, there can be seen the greatest divergence between the two systems.

5.2. The interpretation of the contract and the principle of good faith.

Interpretation of the contract can be seen to be the search for the meaning of the agreements between the contracting parties on the basis of what they have said and done.

Once again, under Italian law, a contract may be interpreted by the parties themselves or by the court, in case of dispute. The rules of interpretation are the same for both. A set of ten articles deals with contract interpretation. The first group (articles 1362-65) deals with subjective interpretation, the aim of which is to discover the real intentions of both contracting parties. The second set of articles (articles 1367-71) deals with objective interpretation and aims to give, since the real common intention is unascertainable, the meaning which is most reasonable and equitable. Between these two groups is article 1366, which applies to both groups and is concerned with objective good faith. The interpretation of contract must give preference to proper behaviour. In ascertaining the intention of the parties, good faith requires that the parties' declarations should be interpreted as coming from reasonable people. According to Galgano,¹³ each party must act in good faith, but each party must interpret the other's party acts in good faith. Conclusively, if the contract is still

¹² See Atiyah, *The Rise and the Fall of Freedom of Contract*, pp. 402-405.

¹³ See Galgano, *Diritto Privato*, CEDAM, Padova, 1981, pp. 325-327.

ambiguous and unclear, good faith requires that it should be interpreted so as to appear as a proper and fair economic operation.

By comparison with English law, the criteria of contracts interpretation are significantly different. There is no reference to good faith, throughout this stage of contract law, as to ascertaining the intention of the parties. The process can be divided in two parts, interpretation and construction¹⁴. Interpretation is the method whereby courts give meaning to the language used by the parties, aiming to ascertain the true meaning of the words as used by the parties. Construction, on the other hand, means giving legal effect or meaning of the words. The two processes are closely linked. The main provision set forth by the interpretation of contracts is based on the intention of the parties as evidenced by the contract itself. The approach is objective; the parties' subjective intentions are significant, but not decisive. The courts are allowed to look beyond the literal words in cases of technical words, ambiguities or absurdities going back to the surrounding circumstances¹⁵. According to Sir Christopher Staughton, four main principles of interpretation can be identified: (i) to look for the intention of the parties by considering the wording of the contract; (ii) reference to the surrounding circumstances (i.e. "the factual matrix"); (iii) consideration by the judge of other meaning in case of absurd conclusion and finally (iv) the court is entitled to look at evidence of how the market works.¹⁶

This analysis has led this reader to the position that there are few linkages or similar provisions between the systems compared. While, under Italian law, good faith can be considered as a pillar provision, the starting point of the entire stage, being the principle considered as a key factor to ascertain intentions and meaning, contrarily under English law, the approach seems more 'practical', mainly based on factual experience and circumstances. However, a reference to similar provisions can be noticed, under both systems, in the objective approach the courts should adopt in attempting to reach a conclusion as to the presumed intention of the parties. Good faith, under article 1366, requires that parties' intentions should be interpreted as coming from reasonable people. A similar provision is

¹⁴ See Patterson, *Interpretation and Construction of Contract*, 62 Col L.R. 833 and Farnsworth, *Meaning in the Law of Contract*, [1967], 76 Yale Law Journal 939.

¹⁵ See Lewison, K., *The Interpretation of Contract*, Sweet & Maxwell, 1997, pp.1-10.

¹⁶ "How do the Courts Interpret Commercial Contracts?", [1999], C.L.J., pp. 303-313.

contained, under English law, as regards the objective approach the court should adopt to reach a conclusion as to the presumed intention of the parties. The approach will be to consider what would have been the intention of reasonable persons in the position of the parties to the contract. Here, English law applies the same rule and reaches the same results without making reference to good faith principle. Rather, it refers to the idea of 'reasonableness' of behaviour which conceptually can be linked to the good faith principle.

5.3 Performance.

The natural end of the contract comes with the performance of the terms laid down in that contract. That normally means the precise performance of whatever was promised: in quality, quantity and place.

The Italian Civil Code stipulates, in two related articles (1375, 1175) that apply to all contracting parties, that "the contract must be performed in good faith" or "according to the rules of propriety". The performance of the contract, like its formation and its interpretation, must take place with the honest cooperation of both parties to achieve the reciprocal benefits agreed in the contract. According to Bianca¹⁷, only following this way can the contract play its part as a useful private mechanism in the context of 'social solidarity', which is a duty of all citizens under article 2 of the Constitution. Moreover, the Code does not simply require both parties to cooperate properly in the performance of the contract. It also lays down the required standards of care. The standards vary from contract to contract and are laid down by statutes of the parties themselves. There are two basic standards: the ordinary and general standard for non-business contracts and the special and precise standard for all promises undertaken by the promising in his/her professional or business capacity. The basic standard is the care of reasonable individual (*bonus paterfamilias*); the higher standard is the skill and care of professional man, being this one not 'ordinary'. In addition, there are more precise standards laid down by statutes in special cases in place of the first two general standards.

Under English law, the absence of a general principle of good faith is even reflected in this stage of contract law where a duty to perform contracts in good faith is not required.

¹⁷ See Bianca, *Diritto Civile*, Giuffrè, Milano, 2000, pp. 500-502.
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Parties are entitled to exercise their rights arising under the contract or under the law of breach of contract for whatever reason they choose. As L.J. Potter remarks, in denying the significance of a party's purpose in considering the legitimacy of a purported termination of a contract, "there is no general doctrine of good faith in English law of contract. The plaintiffs are free to act as they wish provided that they don't act in breach of contract"¹⁸. As a result, parties are entitled to exercise their rights, arising from a contract or other instrument, even for bad reason or no reason at all.

6. Good faith in English law? An analysis:

In the light of the above analysis, it could seem that any reference to a good faith doctrine appears extraneous to English law. Due to the importance of the topic and the possible changes that could arise from it, over the years different arguments and positions have been taken with regards to the possibility and utility of adopting a good faith regime in English law.

Mainly due to a lack of any recognized principle, the expression 'good faith' appears in isolated instances of English contract law. Insurance contracts are the main example of a small groups known as contracts *uberrime fidei* or of 'utmost good faith', according to which a duty of disclosure is required. Moreover, further references can be found in the Commercial Agents Regulations 1993. Implied terms may also be considered as a vehicle for good faith in English law. For example, in *Malik v. Bank of Credit and Commerce International SA*,¹⁹ the device of the implied term was used to incorporate a duty not to damage the relationship of trust and confidence between employer and employee. Furthermore, Sir Thomas Bingham M.R., in *Phillips Electronique v. BSKyB*,²⁰ stated, "For the avoidance of doubt we would add that we would, were it material, imply a term that BSB should act with good faith in the performance of this contract". A duty of good faith was also considered between mortgagors and mortgagees as to consent to letting the mortgaged property in *Pension Trust Ltd v. Imperial Tobacco Ltd*²¹; a breach of such a

¹⁸ *James Spencer • Co. Ltd. v. Tame Valley Padding Co. Ltd.* , Court of Appeal, 8 April 1998.

¹⁹ [1995] 3 All. E.R. 545.

²⁰ [1995] E.M.L.R. 472, *The Independent* , October 31, 1994.

²¹ [1991] 1 W.L.R. 589.

duty, otherwise unworkable, required proof of dishonesty or improper motive. As far as the construction contract stage is concerned, it was stated by Sir Thomas Bingham in *Balfour Beatty v. Light Railway Ltd* : "...the employer was not only bound to act honestly but also bound by contract to act fairly and reasonably even where no such obligation was expressed in the contract...If the contractor can prove a breach of this duty it will be entitled to a remedy."²²

Pursuant to the implementation of European Directives there is now an incremental requirement of good faith in English law. The Unfair Terms in consumer Contracts Regulations 1999 oblige good faith in the requirement of 'fairness'. As noted above, good faith can also be found in the Commercial Agents (Council Directive) Regulations 1993. In addition, further references can be found in the EU Directive on Distance Selling now implemented in the United Kingdom in the Consumer Protection (Distance Selling) Regulations 2000.

The increasing necessity of addressing the issue has not been without consequence. Although the prevalent view is still towards a rejection of any good faith principle, there exists a minority view of supporters, which claim that good faith is an idea whose time has come. The view against the adoption of a general principle of good faith is based on the fact that English contract law is premised on adversarial self-interest dealing; that good faith concept is a vague idea, which threatens to import an uncertain discretion in English law (Italian concept of judge discretion according to good faith); that good faith represents a challenge to the autonomy of contracting parties; and, that a general doctrine cannot be adequate when contracting contexts vary so much. As Lord Ackner in *Walford v. Miles* pointed out: "The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiation...A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating party. Is there where uncertainty lies..."²³. According to his view, self-interest of the parties would be limited, and it would change the adversarial nature of English contract law, as well as undermine freedom of contract. Due to a lack of certain meaning of good faith, problems would arise for judges in defining the context of

²² [1996] 78 B.L.R. 42, pp.58.

²³ [1994] 1 All E.R. 453, pp.460-461.

application. The final argument against such an overarching principle is that good faith would encourage judges to become too interventionist in their dealing with the parties.

In the *Interfoto* case, Sir Thomas Bingham noted that English law has developed 'piecemeal solutions' to arrive at the same results in response to problems of unfairness. Such a view can be read as a neutral position towards a good faith regime. According to this trend, there is a strong equivalence ('theory of equivalence') between the piecemeal approach adopted by English law and a general doctrine of good faith. As a result, advantages of such an approach would be flexibility granted to courts in dealing with new situations on a case-by-case approach and the possibility of leaving intact freedom of contract principle as well as principle of certainty.

On the other hand, although the positive view, as noted before, is shared by no more than a minority of contract law lawyers; it represents an important starting point for a possible new scenario that could influence, the entire contract law regime. According to Raphael Powell,²⁴ the adoption of a good faith regime would be beneficial in that it would enable the English courts to avoid 'having to resort to contortions and subterfuges in order to give sense to their sense of justice of the case' and it would be more powerful than the favoured actual tools for dealing with perceiving unfairness.

Provided that English law already tries to regulate bad faith dealings, adopting a general principle of good faith would help judges to deal directly with unfairness rather than as covertly as the actual situation; secondly, appealing to the broader umbrella of good faith, judges could justify a one-off decision dealing with hard cases or extend the range of an already recognized principle (for example the range of equitable estoppel into pre-contractual dealings or the principle of economic duress of some form of economic pressure); thirdly, it could contribute to a culture of trust and co-operation that would enhance the autonomy of contractors giving parties greater security and flexibility and finally, it could bring the law much more closely into position with the protection of 'reasonable' expectations.

7. Concluding remarks:

²⁴ See Powell, R., *Good Faith in Contracts*, 1956.
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In retrospect, this paper has shown that, whereas the principle of good faith in Italian law is considered as a pillar of the entire system, English law is still reluctant with respect to the possibility of adopting it even as a general principle. By means of solution or compromise, a piecemeal approach has been developed and adopted to deal with problems of unfairness arising from contract law and it is still considered by the majority of doctrine as the best solution to preserve the unique characteristics of the English legal system. Although to date, having considered its advantages and disadvantages, this approach has succeeded, it must be noted that English contract law is becoming increasingly exposed to the influence of the European Community and the predominantly civilian systems of its members because of the perceived importance of its harmonisation as a result of developments in the single market. In addition, there is also a significant movement towards the development of a common core of principles in European contract law which, according to European Community recommendations, should bring several benefits: significant facilitations of cross-border trade, strengthening of a single European market, provisions of an infrastructure for European Community laws governing contract and of guidelines for national courts and legislatures, and the construction of a bridge between common law and civil law systems. Within such a scenario moreover, wider international initiatives, such as the Unidroit Principles for International Commerce Contracts, the United Nations (Vienna) Convention on Contracts for the International Sale of Goods (the 'CISG'), and growing numbers of international standards of contracts are prevalent.

In conclusion therefore, it is the opinion of this paper that, in the light of the previous analysis, there appears to be a clear the position adopted by English law which can be considered 'out-dated' although it retains 'merits' allowing it to adapt to new situations. Not to mention the flexibility which has been provided to courts and have proved to be capable of succeeding and reaching almost the same results of a good faith regime by other means. Maintaining the application of such an approach could lead English law to be isolated from the dominant European trends, especially in light of the Italian stance reflecting a closer affinity to the European position as a general standard of behaviour. By way of summation thence this paper purports that, there would appear to be an increasing necessity for harmonisation since sooner or later the English system must face its divergence from its

European neighbours. Transplantation of the idea however, for this reader, would have no merit, for the concept itself has no natural outgrowth within the society and hence no tradition within its legal system. Good faith would indeed be useful as an almost umbrella principle, significantly aiding the gradual adoption of the harmonisation process.

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