Tuesday, 31 October 2023

Gaillard Lecture 2023

Reasonableness and good faith in International Arbitration Law

The Rt. Hon. Lord Neuberger of Abbotsbury

1. It is an honour to have been asked to give this lecture. Emmanuel Gaillard was an outstanding figure in the arbitration world – in the first rank, as a writer of stimulating articles, as an inspiring teacher in Science Po, Harvard and Yale, as a legal business developer, as a superlative advocate, as a very effective cross-examiner, and as an outstanding – many would say the outstanding – arbitrator of his time. Having built up Sherman & Sterling's arbitration practice from nothing, he set up a new practice, but tragically died a few months later after falling ill in the middle of a cross-examination. He was accurately described as "not just a brilliant advocate, arbitrator and academic but a passionate manager, mentor and entrepreneur – fully engaged with all aspects of legal practice as well as the theory behind it and playing a transformative role in young practitioners' careers"[1] . He was a major player on the international stage, but, as was also said of him, "his quintessentially French style, as well as his frequent references to French culture, contributed to his role as a national poster boy."[2]

2. I had the pleasure of seeing Emmanuel Gaillard in action as an advocate in 2018 in Hong Kong. He made a brilliant job of a very difficult case – his combination of Gallic charm, intellectual rigour, command of language and turn of phrase was almost mesmeric in its effect. As a presiding arbitrator listening to an advocate, one does not expect to feel like a fly trapped in a spider's web, but that is how I felt.

3. In an interview with Neil Kaplan[3], Gaillard observed that he was in some respects more of a common lawyer than a civil lawyer. Although his specific reasons, his love of cross-examining witnesses and his belief that costs should follow the event, were not in point for present purposes, his observation is very much in point in the light of the topic of my lecture this evening - reasonableness and good faith in international arbitration law. In the field of commercial law, English lawyers, indeed common lawyers generally, are very keen on invoking reasonableness, and that even more siren concept, common sense, whereas traditionally, we have recoiled from invoking good faith in contrast to the highly significant part it plays so far as civil law is concerned.

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[1] Alison Ross, Global Arbitration Review Obituary 16 April 2021

[2] *Ibid*

[3] Interview with Neil Kaplan for Delos Dispute Resolution

4. Casting one's eyes more widely, there is undoubtedly a difference of approach between the common law, with its judge made law built up on a case-by-case basis over the centuries, and civil law systems, where the law is laid down in detailed codes which then have to be applied by judges.

5. The great English essayist, lawyer and scientist, Francis Bacon wrote in 1620[4], "*Those who have handled sciences have been either men of experiment or men of dogmas. The men of experiment are like the ant, they only collect and use; the reasoners resemble spiders, who make cobwebs out of their own substance.*" It is something of a caricature, but I suggest that common lawyers are the experimenting ants who collect and use, developing the law on a case-by-case basis, preferring empirical, concrete solutions, whereas civil lawyers are the reasoning spiders who make cobwebs out of their own substance, in the form of codes, proceeding deductively from broad first principles.

6. Another way of describing the distinction is that the civil law system is top-down, whereas the common law works on a bottom-up basis. The civil law has broad principles such as good faith imposed as over-arching philosophical rules, which the courts then have to apply. The principles are inevitably general and broad-brush because they have to be applied in literally millions of different circumstances. The common law develops principles by reference to the facts of individual cases, and any principle derived from a case therefore tends to be relatively specific and limited. Hence what common lawyers call estoppel is just one facet of the multi-faceted principle of good faith in civil law, whereas as the common law courts have developed the law, there are more than five types of estoppel[5].

7. This indeed reflects the constitutional differences between the United Kingdom and its European neighbours, and indeed virtually every other democratic country in the world. Almost all democratic countries have an overriding constitution, by which I mean a single document which sets out, sometimes in detail sometimes not, the fundamental governmental rules which are entrenched, in the sense that they cannot be easily changed, and which are overriding in the sense that they bind not only the judiciary and the executive, but also the legislature at least to some extent.

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[4] F Bacon, *The New Organon* (Book One), 1620

[5] Estoppel by deed, estoppel by record, estoppel by convention, waiver estoppel, estoppel by representation, estoppel by convention and proprietary estoppel

By contrast, the UK system has developed on a piecemeal basis, with principles and practices being introduced, modified and ditched as and when political social or economic pressures require, with parliament able freely to override or ignore them – a make it up as you go along constitution.

8. So, in a country with such informal constitutional arrangements, it should come as no surprise if our law relating to the very important subject of contracts is nowhere codified but instead is based centuries of judge-made law. There have of course been occasional parliamentary interventions on what appears to be a characteristically haphazard basis on random topics, such as frustration, misrepresentation, and land contract formalities – and more recently, to a significant extent arising from EU directives, protection for consumers and the like.

9. When it comes to the basic attitude of common law judges to contract law, it has been consistent since the days of Lord Mansfield, possibly the greatest English Chief Justice (although ironically a Scotsman and allegedly a Jacobite[6]), in the second half of the 18th century, English judges have prided themselves on a pragmatic and commercial approach to contract law. Thus, in one case[7], Lord Mansfield famously observed that:

"*The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules, easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case*".

10. More recently, the approach of English judges was well expressed by the late Lord Goff in the following terms[8]:

"*Our only desire is to give sensible commercial effect to the transaction. We are there to help businessmen, not to hinder them*: *we are there to give effect to their transaction, not to frustrate them*: *we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil.*"

11. Two relevant and important points about the English approach can be confidently identified, one a point of principle, the other more a point of practice First, to express it in modern parlance, English law pays great

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[6] E Heward, Edmund *Lord Mansfield*: *A Biography of William Murray 1st Earl of Mansfield 1705–1793 Lord Chief Justice for 32 years* (1979) p 129

[7] *Hamilton v Mendes* (1761) 2 Burr 1198, 1214

[8] R Goff, *Commercial Contracts and the Commercial Court* [1984] LMCLQ 382, 391

respect to party autonomy; in other words, judges are reluctant to interfere with, or gloss, what the parties have written or said. Secondly, English law recognises the importance of certainty to people in commerce, and that therefore the law has to be as clear and predictable as possible. As a result of these two rules, the common law is relatively reluctant to impose any moral standards on the parties, other than expecting them not to behave dishonestly. More broadly, the common law approaches most questions arising out of contractual negotiations and agreements with a view to minimising judicial interference. Thus, as has recently been re-emphasised by the UK's top court, the courts will give great weight to the words the parties have used when deciding what a contract means[9], a term will only be implied into a contract if the contract is unworkable or incoherent without the term[10], and the law does not recognise a free-standing duty to negotiate in good faith[11].

12. More specifically, as I have mentioned, the courts of England have rejected the notion that the general principle of good faith had a part to play in the context of the law of contract – unless of course the parties have agreed in their contract that they would act in good faith, in which case of course, consistent with its general approach to commercial contracts, the common law would recognise that that is what the parties had agreed and would give effect to it. So, when interpreting a contract, "*the court is [simply] concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean'*"[12].

13. This is of course in marked contrast to the civil law approach where most contractual codes expressly incorporate a requirement of good faith into the law. It is not much of an exaggeration to say that English contract law allows parties a blank canvas on which to carry on their negotiations and to make pretty well whatever agreements they wish, and thus accords the parties great flexibility. By contrast, civil law systems impose an overriding, non-derogable duty of good faith on those in a contractual relationship – or even on those contemplating such a relationship, Article 1102 of the French Civil Code, while stating that parties are free to contract as they wish, also asserts that they may not derogate from public policy

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[9] *Arnold v Britton* [2015] AC 1609

[10] *Marks and Spencer plc v BNP Paribas Securities (Jersey) Ltd* [2016] AC 742

[11] See e.g. *B J Aviation Ltd v Pool Aviation Ltd* [2002] EWCA Civ 163

[12] *Chartbrook Ltd v Persimmon Homes Ltd*, [2009] 1 AC 1101, (and see Footnote 7, para 15)

(*ordre public*), and the Code then goes on to state that contracts must be negotiated, executed and performed in good faith[13]. To the same effect, the German Civil Code requires contracting parties to perform their obligations in good faith and in accordance with general custom and practice[14]. The Spanish Civil Code also has relevant provisions in that it stipulates that rights must be exercised in accordance with the requirements of good faith, and negates abuse of rights or antisocial exercise of rights[15].

14. Accordingly, when compared with the common law approach to commercial contracts, civil law is more concerned with the behaviour of the parties in negotiations and in performance, and courts can sometimes invoke it to override or to limit the effect of express terms. Consequently, the importance of party autonomy and predictability is reduced, and the outcome of a number of civil law cases, which in common law courts would be resolved by reference to what the parties had agreed, would turn on the view of the court as to whether a party had acted in accordance with what the law on good faith requires.

15. Consistent with this approach, it seems to me that, when working out what a contract means, a common law court's approach can in practice be said to involve asking what reasonable people in the position of the parties would have meant, whereas a civil law court ultimately asks itself what the two contracting parties subjectively intended – based on their *volonté psychologique*, reflected in the UNIDROIT Principles of International Commercial Contracts[16]. Again, consistently with that, when called on to interpret a contract, the common law excludes what was said in the pre-contractual negotiations, whereas such negotiations can be taken into account – and can be crucial - in a civil law dispute on contractual interpretation[17]. Characteristically, the common law approach is said to be justified by pragmatism and certainty at least as much as by principle[18].

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[13] Article 1104

[14] Article 242. 1. Similarly, Article 5(3) of the Swiss Constitution requires all public and private entities to act in good faith. And see Art 1375 of the Civil Code of Quebec 1991 to similar effect

[15] Article 7

[16] See footnote 10, para 39

[17] *Ibid*, paras 28 ff

[18] *Ibid*, para 35

16. More generally, in the civil law system, leading academics have said that[19], in the field of contract law there is an "*omnipresent obligation of good faith*", and that[20] good faith is the primary "*means through which the moral rule was made to infiltrate the positive law*". And while acknowledging its subjectivity, another leading academic has described the role of good faith when it comes to the judicial determination of contractual issues as "*irremplaçable*", as it enables judges to penalise those who game their contractual arrangements to obtain an unjustified profit[21]. Thus, pulling out of negotiations without what the court regards as a good reason, not disclosing relevant information to the other party without being misleading or in breach of an express term, not assisting the other party to perform the contract, exercising a termination right in accordance with the contractual provisions, insisting on performance of the contract when circumstances have significantly changed, could all represent breaches of good faith in many civil law systems, when in common law, they would not normally be regarded as providing any cause of action or giving rise to a defence. Further, the French civil code[22] entitles a party for whom "*unforeseeable*" "*circumstances*" renders contractually performance "*excessively onerous*", the right to seek renegotiated terms, and if renegotiation fails either party "*may ask the court to revise or terminate the contract*".

17. In a recent in-depth paper, the UK Financial Markets Law Committee, when discussing the civil law concept of good faith, observed that "*[t]he duty of good faith eludes definition. Its elusiveness is part of the key to its evolution*"[23]. In case that appears to be a biased assessment by a group of disapproving common lawyers, I should add that, closer to home, immediately after referring to "*the acceptance of the principle of good faith in international arbitration*", the very experienced Spanish international commercial arbitrator Bernardo Cremades has written that "*[n]evertheless, it is not clear what the concept of good faith actually means*"[24], and he cites the late Professor Luis Díez-Paczo's description[25] of good faith as "*one of the most difficult [concepts] to grasp within civil law*", which "*has given rise to the longest and most passionate controversy*".

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[19] C Valcke, *United Rentals v Ram Holdings as Transplant Failure: Strategic Ambiguity, Good Faith and the Forthright Negotiator Principle in US Contract Law* AAper Rev. Int'l Bus. & Trade L 2008, p 76

[20] F Terré (with Simler and Lequette)., 1971/1993, *Droit civil – Les obligations*, 5th edn. Paris: Dalloz

[21] J Mestre *Pour un principe directeur de bonne foi mieux precisé*, revue Lamy Droit Civil no 58, March 2009

[22] Article 1195

[23] FMLC *Duties of Good Faith in Wholesale Financial Contracts* (November 2022)

[24] B Cremades *Good Faith in International Arbitration* (2012) 27 AM U Int'l Rev

[25] In *La Doctrina de los Propios Actos* (1963) pp 134-135

The Dutch Professor Hesselink has described[26] good faith as "*a norm the content of which cannot be established in an abstract way but which depends on the circumstances of the case in which it must be applied*". And the Professor Terré of France has said that[27] "*[i]t will be up to the judges seized to rule on a case by case basis, taking into account the nature of the contractual relationship and the attitude adopted by each of the contracting parties*". I have to admit that this description brings to mind the remarks of my former colleague Lord Sumption in his retirement speech, when he listed the various judicial expressions which really meant "*we can do what we like*"[28]. A kinder way of putting the point is that "*[i]n reality [good faith] may have many [meanings], depending upon the contractual setting and the act to be performed, or not performed*"[29].

18. The draft Common Frame of Reference for European Private Law[30] suggests that good faith could be defined as "*a standard of conduct characterised by honesty, openness, and consideration for the interests of the other party*", and goes on to provide that it would be contrary to good faith "*for a party to act inconsistently with that party's prior statements or conduct when the other party has reasonably relied on them to that other party's detriment*". The common law would agree with honesty and inconsistency, but it would in general balk at openness and consideration, subject always to the terms of the contract concerned.

19. To import good faith into English law contracts in cases where the parties have not agreed that their relationship will be governed by good faith would seem to traditional common lawyers to breach a number of important rules and practices of English contract law. First and most fundamentally, it would be inconsistent with the two basic rules I have already mentioned, namely, respect for party autonomy and the quest for certainty: the court would be imposing its own assessment of morality and contractual activism on the parties, which would eat away at their freedom and also leave them unsure what the effect would be. Secondly, to impose a duty of good faith on contracting parties it would involve implying a term into their contract, and to do this in almost all cases where it could be sought to be done would be contrary to principle: a term can

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[26] M Hesselink *The Concept of Good Faith* in A Hartkamp & ors *Towards a European Civil Code* (4th rev) (2011)

[27] Footnote 21, para 596

[28] Lord Sumption's Valedictory Remarks – YouTube https://www.youtube.com/watch?v=hAaifpvjKHY

[29] Per Susan Keifel, *"Good Faith in Contractual Performance"* Judicial Colloquium Hong Kong September 2015

[30] 2009

only be implied if the contract would be unworkable or incoherent without the term (and the term is not inconsistent with an express term) [31].

20. Having said this, it is ironic that Lord Mansfield, widely seen as the father of modern English commercial law, suggested that good faith was "*the governing principle applicable to all contracts and dealings*" [32]. However, as Lord Hobhouse said 245 years later "*Lord Mansfield's universal proposition did not survive. The commercial and mercantile law of England … prefer[ed] the benefits of simplicity and certainty*" [33]. This traditional common law view was emphasised recently by the Court of Appeal in the MSC Mediterranean case, where it was said that there was "*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*" [34] - a characteristically common law view.

21. The origins of the introduction of the requirement of good faith in civil law are variously claimed to be based on the 13th century theological writings of Thomas Aquinas, common humanity, the philosophical writings of Aristotle in the 4th century BCE, and on an idealised version of justice and fairness. It is also forms part of the Islam Shari'a principles of "*no harm and no reciprocated harm*" and "*no harm no foul*" [35]. In the end, whether based on religion, philosophy or decency, good faith in the civil law word seems to involve an element, albeit a limited element, of the parties looking out for each other, and having to act with a degree of mutual reliance and mutual cooperation. It has been the subject of an enormous amount of academic writing.

22. The stark difference in approach between civil law and common law is well illustrated by reference to the attitude to pre-contract negotiations. The traditional common law attituded is to be found in the robust observation of Lord Ackner in the 1996 House of Lords case of *Walford v Miles* [36]:

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[31] *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72, para 21

[32] *Carter v Boehm* (1766) 3 Burr 905

[33] *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co* [2001] UKHL 1

[34] *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2017] 1 All ER (Comm) 483, para 45, and see also *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200

[35] M S Abdel Wahab, *reflections on the Principle of Good Faith,* New York Dispute resolution Lawyer Vol 13

[36] [1992] 1 AC 128, 138

"*[T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it is appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen negotiations by offering improved terms.*"

By contrast, as I have mentioned, at least some civil law systems recognise that there is a legally recognised duty on parties to negotiate in good faith, so that each must deal with the other party in a spirit of cooperation and goodwill[37]. Article 1112 of the French Civil Code provides in terms that negotiations "*must mandatorily satisfy the requirements of good faith*", so that a party that breaks of negotiations "*without legitimate reason"* can be liable for breach of good faith. More specifically, Article 1112 also provides that *"a party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information*".

23. The contrast of approach between the civil and common law is also well illustrated[38], albeit in less bleak, and more informative, terms in the English Court of Appeal *Interfoto* case a few years earlier. In that case, the plaintiff's standard terms for hiring out certain products were contained in a delivery note, and they included a provision which meant that the defendant would have to pay a very substantial premium if the products were returned late, which, owing to an oversight, they were. Bingham LJ said this[39]:

"*[I]n most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise … . It is in essence a principle of fair and open dealing. In such a forum it might, I think, be held on the facts of this case that the plaintiffs were under a duty in all fairness to draw the defendants' attention specifically to the high price payable if the [products] were not returned in time and … to point out to the defendants the high cost of continued failure to return them. English law has, characteristically, committed itself to no such overriding principle*".

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[37] See eg R Karim, *Negotiating the Contract* (2000 ed) pp 445-446 (although this is a fairly limited factor in some civil law systems – e.g. in Germany)

[38] *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433

[39] *Ibid*

24. However, while the common law has generally rejected the notion of good faith applying to contractual relationships, it has developed specific doctrines or rules which, when taken together, can fairly be said to go a significant way in filling the hole which a civil lawyer may feel exists in a legal system which does not imply a duty of good faith into contract law. That point was made in the *Interfoto* case, where Bingham LJ explained [40] that English law "*has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could be given. Thus, equity has intervened to strike down unconscionable bargains. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways*".

25. That very point was demonstrated by the outcome of *Interfoto* case, where the Court of Appeal held that the defendant could escape liability for the increased sum by relying on the judge-made rule that "*where a condition is particularly onerous or unusual the party seeking to enforce it must show that that condition … was fairly brought to the notice of the other party*" [41].

26. A significant example of a common law principle which might at first sight appear to go a significant way to reflecting the principle of good faith can be traced back 150 years, when in *Mackay v Dick* [42] the House of Lords laid down the proposition that "*[i]t is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract*". But it is clear from subsequent cases that this duty is a much more limited than a civil lawyer might expect. Thus, as Cooke J said in the English High Court:

"*[T]he law can only enforce a duty of co-operation to the extent that it is necessary to make the contract workable. The court cannot, by implication of such a duty, exact a higher degree of co-operation than that which could be defined by reference to the necessities of the contract. The duty of co-operation or prevention/inhibition of performance is required to be determined, not by what might appear reasonable, but by the obligations imposed upon each party by the agreement itself*" [43].

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[40] *Ibid*

[41] *Ibid* per Dillon LJ

[42] (1881) 6 App Cas 251, 263.

[43] Per Cooke J in *James E McCabe Ltd v Scottish Courage Ltd* [2006] EWHC 538 (Comm) at [17], endorsed in *The Law Debenture Trust Corporation plc v Ukraine* [2019] 2 WLR 717 at [207]

In the end, I suggest that the common law view of contractual parties' duty to co-operate (where it is not an express term of the contract) is that it has to be an implied term and a term can only be implied to the extent that it is strictly necessary to make the contract work, or to enable the contract to be coherent.

27. Another development in the English courts is that, despite the strong words of Lord Ackner in *Walford*[44] , there is a duty to negotiate in good faith in cases where the parties are already in a contractual relationship and the contract contains a term requiring some sort of renegotiation, even if it has no express parameters. That was the case in the *ABP* case[45] where Rose J held that a contractual obligation to renegotiate a contract in certain circumstances was enforceable, but the contract in question included a "*safety net*" of an arbitration clause. And the Australian courts have recognised as enforceable a contractual term which required the parties to "*undertake genuine and good faith negotiations with a view to resolving the dispute*"[46]. (And Singapore has adopted the same approach[47]). In the Australian case, Alsop P said that "*where commercial parties have entered into obligations, they reasonably expect the courts to uphold those obligations*". In other words, this is not an exception to the normal approach of the common law: it is merely an application of its desire to give effect to what the parties have agreed, and shows that there are occasions where the common law courts will invoke good faith, but only where it is necessary to do so in order to give effect to the parties' intentions.

28. Another area where the common law invokes good faith in the contractual context is where one of the parties to the contract is given a discretion. In one case[48], a charterparty gave the shipowner the right to refuse to obey the charterer's instruction to load or discharge at a particular port if the shipowner considered it dangerous, and there was an issue whether the shipowner's statement that it considered the nominated port dangerous was challengeable by the charterer, and if so on what basis. The Court of Appeal said that it was challengeable on the basis that:

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[44] See footnote 15 above

[45] *Associated British Ports v Tata Steel UK Ltd* [2017] 2 Lloyd's Rep 11. And see *Petromec Inc v Petroleo Brasileiro SA Petrobas* (No 3) [2006] 1 Lloyd's Rep 161, and *cable & Wireless plc v IBM United Kingdom Ltd* [2002] EWHC 2059 (Comm)

[46] *United Group Rail Services Ltd v Rail Corpn New South Wales* (2009) 74 NSWLR 618

[47] *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Developments Singapore Pte Ltd* [2012] 4 SLR 378

[48] *Abu Dhabi National Tanker Co v Product Star Shipping Ltd* (No.2) [1993] 1 Lloyd's Rep 397, 404

"*Where A and B contract with each other to confer a discretion on A, that does not render B subject to A's uninhibited whim. In my judgment, the authorities show that not only must the discretion be exercised honestly and in good faith, but, having regard to the provisions of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably.*"
This approach has been approved and effectively adopted in a number of subsequent cases where one party is required by the contract to exercise a power which affects the other party under the contract[49].

29. In one of those cases, the *Braganza* case[50] in the Supreme Court concluded that the approach in such cases should, in addition to involving good faith, be close to the public law test of reasonableness or rationality which, as the Court said, "*has … in recent years played an increasingly significant role in the law relating to contractual discretions, where the law's object is also to limit the decision-maker to some relevant contractual purpose*"[51]. Traditionally, English courts are very comfortable with the concept of reasonableness, and it is interesting to see that the exercise of discretion in Braganza was quashed by the majority of the Supreme Court, on grounds that, although it was reached in good faith, it was unreasonable "*having been formed without taking relevant matters into account*"[52]. Reasonableness plays a very important part in common law more generally, and I have already mentioned the role of the notional reasonable observer as the arbiter of assessing what the contract means.

30. The yardstick of reasonableness is often invoked in common law contracts. For instance, if one party requires the other party's consent before it can take a particular course, it is very often provided that such consent is not to be "*unreasonably withheld or delayed*". If a party has to do its best to achieve and aim, the contract will often require him to use all "*reasonable endeavours*". Reasonableness is invoked by the courts if a contract is silent on an issue such as price: the law will imply a reasonable price, which had to be determined by a court if the parties cannot agree it. And reasonableness is regularly invoked by common law judges to justify limiting the extent of legal rights granted by a contract.

31. The fact that the common law invokes reasonableness in many circumstances whereas civil law tends to focus on good faith leads may

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[49] See e.g. *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] Bus LR 1304

[50] *Braganza v BP Shipping Ltd* [2015] 1 WLR 661

[51] *Ibid*, para 27, quoting from *Hayes v Willoughby* [2013] 1 WLR 935, para 14

[52] *Ibid*, para 42

be said to support the proposition that the common law is practical and objective in its approach, whereas civil law tends to prefer a rather more subjective and moral analysis. I am not sure how strong that very sweeping assessment is, or how far it can be taken, but it seems to me to have some force. Having said that, it is fair to say that, while the concept of reasonableness can fairly be said to be objective, an assessment of reasonableness can equally fairly be said to be subjective.

32. Turning to a rather different aspect, the common law's invocation of equity is often cited as a partial equivalent of civil law good faith, and the equitable rule against unconscionable bargains was, it will be remembered, an example cited in the *Interfoto* case by Bingham LJ[53]. However, the English courts have traditionally been chary of holding that equitable principles should be applied to commercial contracts. In a lecture in 2018[54], Lord Briggs cited an article by that master of equity, Lord Millett, who he said had suggested that the "*uncontrolled extension*" of "*equitable doctrines, remedies and principles … into the commercial field … was in danger of doing more harm than good*" and "*would undermine both the desirable certainty of English commercial law and the valuable role performed by equity in regulating the conduct of professional trustees and other true fiduciaries, practising in the commercial sphere*". While Lord Briggs appears to have agreed with this, he also made, and developed, the point that, particularly with the increasing role of professional fiduciaries in fields such as financial services, equity had an important part to play in commercial law, and, more particularly, some equitable principles were of value generally and others had a part to play in limited circumstances – a familiar common law trope as you will have gathered.

33. Thus, the equitable remedy of rectification should be available in relation to all commercial contracts – i.e. where it is established that the written contract does not in fact record what the parties agreed and intended. And estoppel (which basically involves holding a person to their promises or statements where it would be inequitable to permit that person to resile from them) is another important example of an equitable principle[55] which can be invoked in a commercial context, although it may often be harder to invoke it in such a context than in a non-commercial

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[53] See footnote 17

[54] Lord Briggs of Westbourne, *Equity in Business* The Denning Society Annual Lecture, 8 November 2018

[55] To be accurate, there is more than one type of estoppel (see footnote 5) and not all estoppels are equitable in origin

context[56]. However, equitable rules that contractual time limits should not be treated as being strictly binding generally have no place in commercial contracts.

34. The possibility of a general implication of good faith into common law commercial contracts was suggested ten years ago by Leggatt J (now in the Supreme Court) in the *Yam Seng* case , in the subsequent *MSC Mediterranean* case[58], and then the *Al Nehayan* case[59] where he seems to have limited the suggestion to so-called relational contracts. The eight or nine ingredients of a relational contract were then identified by Fraser J in *Bates v Post Office*[60]. Although there are some supporters for this development there are also some critics. I must confess to being in the latter camp. In Yam Seng, it seems to me that Leggatt J's notion of good faith was little more than honesty and lack of bad faith, and anyway as has been pointed out by Professor O'Sullivan[61], the facts were exceptional as the agreement was "*skeletal*" and home-made, and anyway "*the two specific terms implied [by Leggatt J] readily satisfy the usual tests for implication of terms*". As for the concept of a relational contract, it is vague and as Professor O'Sullivan has said, the various suggested criteria represent "an unhelpful structure, lacking certainty and likely to generate increased litigation"[62].

35. I have rather arrogantly been equating common law with English law and have not referred to much Commonwealth law. In Australia, the High Court, observed in 2014[63] that "*whether there is a general obligation to act in good faith in the performance of contracts [and] whether contractual powers and discretions may be limited by good faith and rationality requirements are still open questions*", but it is unclear quite how wide a concept of good faith was there contemplated. However, Australian courts have generally adopted the same approach as English courts when it

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[56] Cf *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752 and *Thorner v Major* [2009] 1 WLR 776

[57] *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB)

[58] See footnote 21

[59] *Al Nehayan v Kent* [2018] EWHC 333 (Comm)

[60] *Bates v Post Office (No 3 common issues)* [2019] EWHC 606 (QB)

[61] J O'Sullivan *Good Faith and Endeavours Obligations in Property Contracts*, Blundell Lectures (48th series, June 2023), para 57

[62] *Ibid*, para 61

[63] *Commonwealth Bank of Australia v Barker* [2014] HCA 32 [42], [107]

comes to good faith in commercial contracts[64]. The Singapore Court of Appeal has held that there is no general duty of good faith to be implied into commercial contracts[65], and the New Zealand Supreme Court has not accepted an invitation to take a different course[66]. By contrast, the Canadian Courts appear to have been more prepared to go down the good faith road – but quite how far remains unclear not least given the sharp difference of opinion in the 2020 *Callow* decision[67].

36. I briefly referred earlier to the importation of good faith into international arbitration. This did not go unchallenged. In an article written some 35 years ago[68], the late Michael Mustill, a commercial lawyer of the first rank, then a judge, and later an international arbitrator, protested strongly at the invocation of *lex mercatoria* in international arbitration. I am not sure how much of a problem it is. Most commercial arbitrations involve applying the law of a specified jurisdiction, and if that jurisdiction recognises good faith, then it must be followed, and per contra if it does not recognise good faith, then that must be followed. ICSID arbitrations are different, but they will normally involve public law-type questions, where civil and common law appear, at lest from my experience to adopt fairly similar approaches in practice if not in nomenclature. However, I accept that there is a residual, but significant, group of arbitrations, where there can be room for argument whether or not *lex mercatoria* in general, and good faith, in particular, should be applied. The jurisdictions which are most relevant to the dispute should, I suggest, influence, possibly decisively, the resolution of the issue. The identity of the arbitrators will, I suspect, play a significant part, and, if both co-arbitrators come from similar jurisdictions, one can see a fairly strong argument for saying that this is not unreasonable.

37. As a common lawyer, I have to accept that, at least subject to one point, it can be argued with force that various international conventions on contract law involve the invocation of good faith, and that is a significant factor in favour of invoking good faith in an arbitration where the arbitrators are not required to apply the law of a non-good faith jurisdiction. Thus, the

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[64] See generally *Council of City of Sydney v Goldspar* [2006] FCA 472, T*rans Petroleum (Australia) Pty Ltd v White Gum Petroleum Pty Ltd* [2012] WASCA 165; *Starlink International Group Pty Ltd v Coles markets Pty Ltd* [2011] NSWSC 1154; *David A Harris Pty Ltd and David Harris v AMP Financial Planning Pty Ltd* [2019] VSC 24, and for exceptions which reflect English case see *Bundanoon Sandstone Pty Ltd v Cenric Group Pty Ltd* [2019] NSWCA 87 and *Renard Constructions (ME) Pty Ltd v Minister of Pub lic Buildings and Works* (1992) 26 NSWLR 234

[65] *Ng Giap Hon v Westcombe Securities Pte Ltd* [2009] 3 SLR(R) 518

[66] *Bathurst Resources Ltd v Buller Coal Ltd* [2021] NZSC 85

[67] *C.M. Callow* Inc. v. Zollinger 2020 SCC 45

[68] M Mustill *The New Lex Mercatoria*, in a Liber Amicorum for Lord Wilberforce (1987)

UN Convention on Contracts for the International Sale of Goods stipulates[69] that, in interpretating the Convention, "*regard is to be had*" to, among other things, "*the observance of good faith in international trade*". And the UNIDROIT Principles requires[70] "*[e]ach party [to] act in accordance with good faith and fair dealing in international trade*". And of course, EU contract-related legislation often includes good faith requirements.

38. However, things are not quite so simple as they appear. As I have mentioned, courts in many common law jurisdictions now appear to accept that good faith may have a part, albeit a very limited part, to play in the law of contract. However, before the civil lawyers claim victory, even where good faith can be invoked in the English courts, it has to be said that the common law idea of good faith appears to be very pallid when compared with the full-blown civil law version. Thus, in a case where the parties had expressly agreed that good faith would apply to their relationship, the Court of Appeal said that, just like any other contractual provision, "*an express clause in a contract requiring a party to act 'in good faith' must take its meaning form the context in which it is used*", so that other cases involving different contracts and different circumstances are "*of limited value*". In those circumstances, the Court said "*apart from the 'core' duty of honesty and (depending on context) a duty not to engage in conduct which could be characterised as bad faith, any further requirements of an express duty of good faith must be capable of being derived … from the other terms of the contract in the particular case*"[71].

39. In other words, unless the express contractual terms indicate otherwise, an express agreement that one or all of the parties will act in good faith will apparently be limited to requiring honesty and lack of bad faith, but nothing more. This seems to me to indicate a distaste on the part of common law judges for a wide-ranging role for good faith in the contractual context, even where the parties have specifically agreed that it is to apply. It at least arguably goes a little further and suggests that, unless the contractual context otherwise indicates, an express obligation of good faith does not add much, as, even without a good faith provision, the common law (or perhaps a civil lawyer would say "*even the common law*") expects parties to act honestly and not in bad faith. Another formulation, in the *CPC* case[72], where the parties agreed to "*act with the utmost good faith*

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[69] Article 7(1)

[70] See para 14, Article 1.7

[71] Per Snowden LJ in *Faulkner, Sachs (the Minorities) v Violin Holdings Ltd, Re Compound Photonics Group Ltd* [2022] EWCA (Civ)1371, paras 147, 148 and 243

[72] *CPC Group Ltd v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535 (Ch), para 246

towards each other", was held to mean that they had agreed "*to observe reasonable commercial standards of fair dealing and to be faithful to the agreed common purpose and to act consistently with the justified expectation of the parties*". But I am not sure that to an English lawyer, "*fair dealing" means more than honesty, and the "common purpose*" and the "*the justified expectation of the parties*", can, as I see it, only be assessed by reference to the terms of the contract.

40. Perhaps unsurprisingly, a 2017 Paris institutional arbitration tribunal took a rather different view[73] when giving effect to an English law contract which provided that "*in carrying out their obligations under the contract, the parties shall act in accordance with good faith and fair dealing*". The tribunal said that "*such references … must be given their full importance*", and after pointing out that "*the contract is not a standard English law contract and has been entered into between parties that are both coming from civil law countries*", the tribunal concluded that it could "*refer to the UNIDROIT principles, which are unequivocally recognised as embodying these principles of law*" – i.e. a full throttle assumption of good faith.

41. But it would be wrong to give the impression that arbitration tribunals are obsessed with invoking good faith at every opportunity. In a 2020 London institutional award, where UAE law applied, the tribunal said that "*[t]he fact that the Claimant invoked its contractual right cannot in itself be deemed as a manifestation of good faith*", and "*[t]he agreement sets out, in sufficient detail, sophistication and clarity the obligations of both parties … , and the Claimant has not deviated from what was contractually agreed*", and so no breach was found against the Claimant.

42. In summary terms, the role of good faith in civil law is both wider and deeper than in the common law. In civil law good faith is a general principle which cannot be contracted out of, and which can impose significant duties on the parties that can go further than what is necessary to enable the contract to be performed according to its terms. The common law has specific and relatively limited doctrines which can be seen as aspects of good faith, and which are subject to well-established rules, and, although in certain specific instances common law does invoke good faith, when it does so, good faith must be expressly or impliedly required by the terms of the contract, and the concept of good faith is normally more limited.

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[73] Private communication

43. However, there is more similarity between the two systems than first appears. In an impressive comparative analysis of French, German and English cases on contract law[74], Professor Valcke discussed those who think that civil law and common law are converging and those who think they are diverging and concluded that "*convergence theorists are right from the standpoint of the outcome of judicial decisions, whereas divergence theorists are right from the standpoint of what appears to go on in the jurists' minds*", and in many ways, especially to a pragmatic common lawyer, and certainly to the litigants, it is the ultimate decisions that matter.

44. Having contrasted the spidery men of dogmas and the ant-like men of experiment, Francis Bacon continued[75]

"*But the bee takes a middle course: it gathers its material from the flowers of the garden and of the field, but transforms and digests it by a power of its own. Not unlike this is the true business of philosophy; for it neither relies solely or chiefly on the powers of the mind, nor does it take the matter which it gathers from natural history and mechanical experiments and lay it up in the memory whole, as it finds it, but lays it up in the understanding altered and digested. Therefore from a closer and purer league between these two faculties, the experimental and the rational (such as has never yet been made), much may be hoped.*"

45. I believe that both the common law ant and civil law spider have each tended to develop bee-like qualities partly through the passage of time and partly through the two systems learning from each other, particularly thanks to the increasing internationalisation of law, which is most conspicuously evidenced by the growth international commercial arbitration. The common law has developed and expanded rules which reflect civil law good faith, and has occasionally embraced good faith, while civil law still pays great respect to the importance of freedom of contract and party autonomy. I think Emmanuel Gaillard would have approved.

David Neuberger
31st October 2023

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[74] C Valcke, *Convergence and Divergence Between the English, French, and German Conceptions of Contract*, Legal Studies Research Series No 08-14

[75] See footnote 1

Gaillard Lecture with The Rt. Hon. Lord Neuberger of Abbotsbury

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