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Beyond Relational Contracts: Implied Good Faith as the Pillar of Contractual Equilibrium in English Contract Law

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Abstract

This article examines the evolving role of good faith in the performance of commercial contracts under English law, advocating for its recognition as an implied duty in all commercial agreements. Drawing on the recognition of good faith in relational contracts, as seen in *Yam Seng* and subsequent cases, the article argues that English contract law, which has traditionally not recognised an implied duty of good faith in contractual performance, should incorporate such a duty in commercial contracts to better reflect the needs of modern commercial relationships. This duty would help maintain the contractual equilibrium throughout the life of the contract. By offering protection against opportunistic behaviour, the implied duty of good faith is presented as a critical mechanism for preserving the balance of interests and supporting the shared objectives of the contracting parties.

Keywords

Relational contracts, relational contract theory, classical contract theory, presentiation, good faith, contractual equilibrium, english contract law, commercial contracts

1. Introduction

The concept of good faith plays an integral role in ensuring fairness and cooperation in contractual relationships. Despite its widespread acceptance in other jurisdictions and its limited recognition in English law, good faith has not been embraced as a general principle governing the performance of contracts.¹ English contract law continues to prioritise freedom of contract and the pursuit of self-interest, often at the expense of the mutual objectives underlying commercial agreements. This approach has resulted in a fragmented framework, where the implied duty of good faith is acknowledged only in specific contexts, such as relational contracts.

The landmark decision in *Yam Seng* introduced a nuanced understanding of good faith in English law, emphasising the importance of ‘fidelity to the parties’ bargain’

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¹ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433.

and the preservation of contractual equilibrium.² Justice Leggatt's observations underscore that contracts are more than isolated promises; they represent a dynamic framework designed to achieve shared objectives. Yet, the absence of a general doctrine of good faith leaves English law ill-equipped to address the complexities of modern commercial relationships, where flexibility and cooperation are often critical to successful performance.

The resistance to recognising a general duty of good faith in English law is often rooted in the principle of freedom of contract and the adversarial nature of market transactions. In *Walford v Miles*, the House of Lords dismissed the idea of a duty to negotiate in good faith, famously describing it as 'inherently repugnant to the adversarial positions of the parties'.³ This decision underscores the traditional view that contracting parties are entitled to pursue their self-interest. However, this article contends that this perspective misconstrues the role of good faith in contractual performance. While good faith does not require altruism or loyalty, it fosters a collaborative framework that aligns the parties' actions with the shared objectives of the contract, thereby mitigating opportunism without undermining autonomy.⁴

Justice Leggatt's reasoning in *Sheikh Al Nehayan* further illuminates the significance of good faith as a relational principle. While he affirmed that parties are generally free to pursue their own interests and do not owe a duty of loyalty to one another, he stressed that conduct undermining their common purpose constitutes a breach of good faith.⁵ This interpretation highlights good faith's dual function: it preserves contractual autonomy while simultaneously ensuring adherence to the mutual aims that underpin the agreement.

In essence, parties to a contract are not merely negotiating specific terms but are establishing a structural framework that gives rise to reasonable expectations and reflects their overarching objectives. Accordingly, good faith becomes indispensable, serving as a critical mechanism for maintaining or restoring contractual equilibrium when unforeseen challenges arise in commercial agreements. By fostering cooperation and flexibility, good faith supports the attainment of the parties' shared objectives and strengthens the relational foundation of the contract itself.

This article argues that English contract law should recognise an implied duty of good faith in all commercial contracts, extending beyond its current application to relational agreements. Such a duty would not only promote fairness and cooperation but also serve as a mechanism for maintaining the contractual equilibrium throughout the lifecycle of a contract. By providing protection against opportunistic behaviour and fostering trust, good faith can enhance the adaptive and collaborative practices essential for contemporary commerce.

² *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).

³ *Walford v Miles* [1992] 2 AC 128.

⁴ See *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm); *CPC Group Ltd v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535 (Ch); *Compound Photonics UK Ltd, Re, Faulkner v Vollin Holdings Ltd* [2022] EWCA Civ 1371.

⁵ *Al Nehayan v Kent* [2018] EWHC 333 (Comm) 167-174.

This article is structured as follows. The article is structured to critically examine the role of good faith in English contract law and its potential as an implied duty across all commercial contracts. The analysis unfolds across six substantive sections, each building upon the last to provide a comprehensive framework for understanding this pressing legal issue.

First, the article explores *classical and relational contract theories*, offering a foundational understanding of these paradigms. It begins by discussing the limitations of classical contract theory in addressing the complexities of modern commerce, followed by an exploration of the rise of relational contract theory. This section critiques the concept of presentation and highlights the pivotal role of good faith within relational contracts as a counterpoint to classical principles.

The discussion then transitions to *relational contracts in English contract law*, focusing on their evolving nature and judicial recognition. This section examines the courts' acknowledgment of relational contracts and the role good faith plays in their framework. It also considers the broader implications and challenges of applying relational contract principles in commercial settings, paving the way for future legal development.

The article next explores *contractual equilibrium*, a key concept in commercial transactions. This section underscores the interplay between stability and adaptability in contracts and highlights how good faith serves as a mechanism for preserving equilibrium. By balancing the risks and expectations of contracting parties, this concept aligns with the realities of commercial relationships.

Building on this foundation, the article addresses *good faith and commercial contracts*, focusing on its broader implications and the potential benefits of recognising an implied duty of good faith. This section connects previous discussions of good faith in relational contexts to its broader applicability in commercial law.

The penultimate section, *the case for implied good faith in all commercial contracts*, synthesises the arguments presented earlier. It critiques the limitations of the breach-compensation paradigm and contractual certainty, offering insights from other jurisdictions that have embraced good faith. This section presents an argument for English contract law to evolve in alignment with modern commercial needs and international practices.

Finally, the *conclusion* ties together the insights from the analysis, reaffirming the necessity of recognising an implied duty of good faith in English contract law. This would not only align with the reasonable expectations of contracting parties but also enhance the stability, fairness, and adaptability of commercial relationships in an increasingly complex legal and economic landscape.

2. Classical and Relational Contract Theories

This section critically examines classical and relational contract theories, alongside the concept of presentation, to illuminate the nature of relational contracts and provide a foundation for the subsequent analysis of good faith. It explores how these

theories address the complexities of modern commercial transactions and their implications for the evolving dynamics of contractual relationships.

2.1. *Classical Contract Theory and Its Limitations*

Classical contract theory treats agreements as rigid frameworks of predefined rights and obligations formed through the voluntary consent of the parties. This model places paramount importance on certainty, predictability, and the protection of contractual expectations. By adhering to the principle of *pacta sunt servanda* (the sanctity of contracts) it ensures that agreements are strictly enforceable as written, irrespective of the burdens or inequities that may arise during performance. Courts, under this approach, focus on the literal terms of the contract, refraining from inquiring into substantive fairness or the adequacy of consideration.

The strength of classical theory lies in its ability to provide stability in discrete transactions, which are characterised by immediate exchanges. However, its strict adherence to the written terms often results in commercially unreasonable outcomes, as it fails to accommodate the dynamic and interdependent nature of modern business relationships. The principle of absolute sanctity assumes that all aspects of a contractual relationship, including future contingencies, can be addressed at the time of contract formation. This notion, known as *presentiation*, requires the parties to plan for all eventualities and to bear the risks associated with unforeseen changes.

In traditional contract law, the classical or absolute theory posits that contracts are formed through the voluntary agreement of the parties, based on mutual promises. Under this framework, the focus lies heavily on the intentions or will of the contracting parties. A contract is seen as a tool for the exchange of rights and duties that are clearly defined at the moment of agreement.⁶ In other words, the contract represents a formalisation of the parties' mutual obligations, which should be strictly adhered to, regardless of the eventual outcome. This view underlines the sanctity of contracts, emphasising that once the parties have agreed upon terms, these terms must be enforced without interference, even if they lead to burdensome or unreasonable results.⁷ The classical theory upholds that the legitimacy of the parties' expectations must be preserved to prevent uncertainty, which could disrupt both the individual parties and the broader economic market. For this reason, the law protects these expectations by enforcing contractual obligations, viewing them as binding promises that must be fulfilled.⁸

However, the classical model's limitations have become more apparent in contemporary commercial environments. The assumption that contracts are static and based on precise agreements made in a single moment ignores the reality that business

⁶ Hugh Collins, *Is A Relational Contract A Legal Concept?* in *Contract in Commercial Law*, 39 (Toronto, Thomson Reuters, 2016).

⁷ Robert Scott, *The Case for Formalism in Relational Contract* 94 *Northwestern University Law Review* 847 (2000).

⁸ TT Arvind, *Contract Law*, 10 (Oxford, OUP, 2022).

relationships are dynamic and often evolve over time. This static view of contracts can be problematic when it leads to commercially unreasonable outcomes or fails to account for the complexities of long-term or ongoing relationships. The classical model places heavy emphasis on the written terms of the agreement, relegating the parties' behaviour during the contract's performance to a secondary role. While the language of the contract is seen as the definitive guide to the parties' rights and obligations, this view tends to neglect the relational dynamics that often underpin commercial transactions.⁹

Despite its theoretical appeal, presentation relies on a legal fiction that cannot fully account for the inherent unpredictability of future events. Classical theory's focus on individual utility maximisation and rigid risk allocation fails to reflect the cooperative mechanisms often necessary for long-term commercial success. As contracts increasingly involve complex, forward-looking arrangements, the limitations of classical theory have become evident, necessitating alternative frameworks to address the evolving needs of modern commerce.

2.2. *The Rise of Relational Contract Theory*

In contrast, relational contract theory offers a more flexible and context-sensitive perspective. It contends that contracts should not be viewed merely as bundles of rights and duties but rather as mechanisms designed to achieve specific commercial objectives. Rather than focusing solely on the written terms, relational contract theory emphasises the relationship between the parties and the mutual goals they intend to achieve through the contract. Under this view, the core of the contract lies not just in the explicit terms but in the commercial understanding and the evolving relationship between the parties. Thus, the law should focus on protecting the mutual expectations of the parties, whether these expectations are expressly written or implied.¹⁰

One key feature of relational contract theory is the recognition that the parties' relationship is not confined to the initial terms of the agreement but evolves over time as circumstances change. While contracts may allocate rights and obligations to address foreseeable events, the unpredictable nature of business transactions means that many aspects of the relationship are implied rather than expressly stated. Contract law, therefore, should be concerned with the broader relationship, rather than the rigid enforcement of a static document. For example, in long-term commercial contracts, such as those common in supply chains or joint ventures, both parties expect to collaborate and adjust terms as necessary to reflect changes in market conditions, technological advancements, or other contingencies.

From a classical perspective, courts generally refrain from questioning the adequacy of consideration or the fairness of the agreement, emphasizing that the contract

⁹ Mindy Chen-Wishart, *Contract Law*, 634 (Oxford, OUP, 2022).

¹⁰ David Campbell, *Contractual Relations: A Contribution to the Critique of the Classical Law of Contract*, 125 (Oxford, OUP, 2022).

is the result of a voluntary, arm's-length transaction. The courts maintain that they should not interfere with the terms agreed upon by the parties, as doing so would undermine the freedom of contract principle. However, this approach can overlook situations where the parties' bargaining positions were unequal or where unforeseen circumstances make the contract's performance unduly burdensome. There are, of course, exceptions to this rule, such as in cases of undue influence, duress, or unconscionability, but these exceptions have historically been narrow.¹¹

In many modern contracts, particularly those involving complex transactions or ongoing relationships, the element of risk is ever-present. Unlike simple contracts with immediate exchanges, most commercial agreements inherently involve uncertainty regarding future events. The allocation of these risks has evolved, and relational contract theory suggests that contracts should serve as mechanisms for risk-sharing, allowing flexibility and cooperation between the parties. In contrast, classical contract theory views risk allocation as a fixed and static arrangement, where each party assumes responsibility for certain outcomes defined in advance. This contrasts with the dynamic and cooperative approach advocated by relational contract theorists, who argue that contracts should allow room for renegotiation and adaptation as circumstances change over time.

Therefore, relational contract theory offers a more dynamic perspective, emphasising that contracts are not static bundles of rights but instruments for achieving shared commercial objectives. It views contracts as evolving relationships rather than isolated transactions, acknowledging that the broader societal and relational context plays a pivotal role in shaping obligations. This theory rejects the rigid finality of presentation, recognising that no contract can anticipate every contingency or fully define the parties' future commitments at the outset. Unlike classical theory, which treats contracts as discrete and self-contained, relational theory posits that they are embedded within a larger framework of cooperation and mutual expectations. It highlights the role of implied obligations arising from the nature of the relationship itself. The express terms of a contract serve as a starting point, but the true essence of the agreement often lies in the parties' shared understanding and their capacity to adapt to changing circumstances. A key feature of relational contracts is their flexibility in accommodating unforeseen developments. Rather than imposing static obligations, these contracts encourage renegotiation and cooperation to address challenges that emerge during performance. This approach aligns with the realities of contemporary commerce, where long-term relationships often require ongoing collaboration and adjustment.

As Ian Macneil observes, contractual behaviour in relational settings often reflects a cooperative dynamic absent in classical models. This cooperation is not merely a matter of legal obligation but stems from the practical need to maintain contractual equilibrium and ensure mutual benefit over the life of the agreement. By prioritising

¹¹ Hugh Collins, *Discretionary Powers in Contracts in Implicit Dimensions of Contract: Discrete, Relational and Network Contracts*, 219 (London, Hart Publishing, 2003).

the relationship itself, relational theory provides a more nuanced framework for understanding and managing the complexities of modern contractual arrangements.¹²

2.3. *The Concept of Presentation: A Critique*

The classical contract model is built on the idea of ‘presentation’, a term used to describe the process of anticipating all aspects of the contract, including future contingencies, at the time of formation. The classical view holds that the contract should reflect all foreseeable events and obligations, even those that might arise in the future. This approach assumes that, through careful negotiation and foresight, the parties can bring the future into the present by defining every possible eventuality at the time of agreement. The concept of strict liability, which is central to classical contract law, also stems from this idea: once a party has assumed an obligation, they are held accountable for its performance, regardless of the challenges they face later.

However, the concept of presentation is flawed in that it assumes an unrealistic level of foresight and control over future events. In the real world, parties cannot account for every potential change in circumstances that may arise during the life of the contract. Over time, the limitations of presentation have become increasingly evident. While it may work for discrete transactions, such as a one-time sale of good, it is ill-suited for long-term commercial relationships, where changes in the business environment, market conditions, or technology can significantly alter the parties’ expectations.

Presentation assumes a level of certainty and control that simply does not exist in the modern, interconnected commercial world. Contracts that seek to anticipate every possible future contingency may become outdated or overly rigid, making them difficult to enforce effectively when circumstances change. A rigid approach to risk allocation, as advocated by classical contract law, is not appropriate for many types of modern business relationships. Instead, a more flexible and cooperative approach is necessary to allow the parties to adapt and renegotiate as their circumstances evolve.¹³

Moreover, presentation fails to recognise that relationships between parties are often ongoing and involve a degree of cooperation that extends beyond the terms of the initial contract. The classical model’s insistence on complete specificity at the time of contract formation does not account for the evolving nature of such relationships.

Indeed, presentation, the hallmark of classical contract theory, seeks to confine the future effects of a transaction to those defined at its inception. It assumes that contracts can be complete at the moment of formation, allocating risks and benefits

¹² Ian Macneil, *Relational Contract Theory: Challenges and Queries* 94 *Northwestern University Law Review* 877 (2000); Ian Macneil, *A Primer of Contract Planning* 48 *Southern California Law Review* 627 (1974).

¹³ Ian Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations*, 19 (Connecticut, Yale University Press, 1980).

through precise and exhaustive planning. While this approach works in the context of immediate, isolated exchanges, it proves inadequate for contracts that span extended periods or involve interconnected relationships. Modern commercial transactions reject the rigidity of presentation, favouring flexibility and adaptability. Relational contract theory acknowledges that complete presentation is unattainable, as no party can fully foresee or address every eventuality. Instead, relational contracts provide mechanisms for cooperation and renegotiation, allowing parties to adjust their commitments in response to unforeseen changes. This pragmatic approach reflects the dynamic nature of commercial relationships, where cooperation and shared risk allocation often take precedence over rigid adherence to predefined terms.

The failure of presentation underscores the limitations of classical contract theory in addressing the realities of modern commerce. By treating contracts as static instruments of risk allocation, classical theory overlooks the evolving nature of business relationships and the broader context in which they operate. Relational theory, by contrast, embraces the concept of ‘futureness’, the idea that contracts must remain open to adaptation as circumstances unfold. This forward-looking perspective ensures that contracts remain fair, efficient, and aligned with the parties’ shared objectives over time.¹⁴

2.4. *Relational Contracts and the Role of Good Faith*

Relational contract theory emphasises the importance of good faith as a cornerstone of cooperative relationships. In contrast to classical theory, which views contracts as static legal arrangements, relational theory sees them as ongoing processes of mutual planning and adjustment. Good faith becomes particularly relevant in managing the inherent uncertainty and risk of commercial agreements, as it obliges parties to act fairly and reasonably in addressing unforeseen challenges.

Relational contract theory acknowledges the challenges and proposes a more adaptable approach. By focusing on the relationship rather than the strict enforcement of predetermined obligations, relational contract theory allows for a more dynamic approach to risk allocation. In this model, the parties are expected to cooperate, share risks, and adjust their expectations over time. This flexible approach aligns more closely with the realities of modern business relationships, where changes are inevitable and collaboration is key to ensuring long-term success.¹⁵

In relational contract theory, the concept of good faith plays a crucial role in facilitating cooperation and flexibility. Parties are expected to act in good faith, especially when unforeseen circumstances arise that affect their ability to perform their obligations. Unlike classical contract law, which treats performance as an all-or-nothing proposition, relational theory recognises that business relationships are fluid and that both parties may need to modify their obligations to reflect new realities.

¹⁴ Ian Macneil, *Contracts: Adjustment of Long-Term Relations under Classical, Neoclassical and Relational Contract Law* 72 Northwestern University Law Review 854 (1978).

¹⁵ Macneil, *supra* note 14.

This cooperative approach is not only more realistic but also more effective in managing the inherent risks and uncertainties that accompany modern commercial transactions. Thus, while classical contract law's emphasis on presentation and strict adherence to terms remains influential, its shortcomings have become increasingly apparent in contemporary commercial contexts. The relational model, with its focus on cooperation, adaptation, and good faith, offers a more nuanced and effective framework for addressing the complexities of modern business relationships.

Under the relational framework, the express terms of a contract are not the sole determinants of the parties' obligations. Instead, their conduct, practices, and the surrounding context also play a significant role. This shift reflects the understanding that contracts are social institutions as well as legal instruments, facilitating exchange and fostering collaboration between parties. It prioritises cooperation and fairness, and provides a more holistic approach to contract law, one that aligns with the realities of modern commerce. The rigid, all-or-nothing principle of *pacta sunt servanda* has increasingly been replaced by a more flexible, pragmatic approach. Standards such as good faith, fairness, and reasonableness have gained prominence, even within common law systems. These principles acknowledge that the rights and obligations outlined in a contract must remain appropriate and aligned with the parties' economic interests throughout its lifespan.

As a result, relational contract theory offers a compelling critique of classical contract law, highlighting its failure to account for the complexities of modern commercial relationships. By emphasising the importance of context, cooperation, and adaptability, it provides a robust framework for addressing the challenges of contemporary contract law and ensuring the equitable allocation of risks and benefits in commercial agreements.

3. Relational Contracts in English Contract Law

Relational contracts have emerged as a significant concept within English contract law, especially in contexts requiring long-term collaboration and adaptability. These agreements challenge traditional contractual norms, emphasising the ongoing relationship between the parties over the precise delineation of terms at the outset.

This section examines the concept of relational contracts within English law, emphasising the intersection of these agreements with the principle of good faith. The discussion explores the defining characteristics of relational contracts, their legal implications, and the evolving judicial recognition of their unique requirements.

3.1. *The Nature of Relational Contracts*

Relational contracts are defined by their inherent flexibility, often characterised by the absence of 'presentation', or the comprehensive specification of obligations and contingencies at the time of formation. Unlike traditional contracts, which seek to exhaustively define the rights and duties of the parties, relational agreements

deliberately leave terms open-ended, enabling parties to adapt to changing circumstances. For instance, such contracts may delegate discretionary powers, incorporate renegotiation clauses, or omit detailed provisions regarding future performance. This fluid structure reflects their broader purpose: fostering sustained collaboration in complex and unpredictable environments.¹⁶

Key to understanding relational contracts is their emphasis on mutual trust, cooperation, and shared objectives. The parties are often engaged in a relationship where predictable performance and candid communication are vital to achieving the agreement's goals. While longer duration is frequently associated with relational contracts, it is not the sole defining criterion. The defining hallmark lies in the nature of the relationship itself, marked by interdependence, loyalty, and a mutual commitment to achieving outcomes that transcend individual transactions.¹⁷ Courts assess the substantive dynamics of the relationship, focusing on the degree of interdependence, loyalty, and reliance rather than simply the temporal scope.

These agreements often involve substantial informal communication and predictable conduct that aligns with the parties' mutual expectations. The courts have acknowledged that relational contracts often involve significant informality in their written terms. This informality is not indicative of a lack of seriousness or enforceability but rather of the parties' anticipation of evolving circumstances that cannot be foreseen at the time of contracting. The agreements are thus less about rigid terms and more about the parties' expectations of cooperation and fair dealing, which are seen as fundamental to the contract's success.

3.2. *Judicial Recognition and the Role of Good Faith*

Judicial recognition of relational contracts within English law has catalysed the evolution of implied duties of good faith. The seminal case of *Yam Seng* underscored that such duties could arise as a matter of fact in relational agreements. Justice Leggatt emphasised that these contracts, by their nature, depend on trust and confidence, necessitating collaboration beyond the explicit terms of the written document.¹⁸ He argued that the duty of good faith serves to reflect the parties' presumed intentions and to align their conduct with widely accepted norms of commercial behaviour. This judgment marked a significant departure from the traditional reluctance of English law to recognise a general duty of good faith, offering a nuanced framework for implying such obligations in specific contexts. The judgment emphasised that implied duties of good faith serve to uphold the parties' original contractual equilibrium. This

¹⁶ Richard Speidel, *The Characteristics and Challenges of Relational Contracts* 94 *Northwestern University Law Review* 823 (2000).

¹⁷ Ewan McKendrick, *The Regulation of Long-term Contracts in English Law Good Faith and Fault in Contract Law*, 305 (London, Clarendon Press, 1995).

¹⁸ *Yam Seng*, *supra* note 2, at 193-219.

approach draws on the principles from cases like *Attorney General of Belize and Investors Compensation Scheme*.¹⁹

This principle was reinforced in *Bates v. Post Office Ltd*, where the court elaborated on the characteristics of relational contracts, identifying mutual trust, high levels of communication, and expectations of loyalty as central elements. The case further confirmed that the duty of good faith, though not a general requirement in English law, may be implied in such contracts to preserve their intended equilibrium. The court's reasoning underscored that relational contracts are distinct from transactional agreements, which are typically confined to one-off exchanges and require less interdependence.²⁰

Subsequent rulings have expanded upon these principles. In *Essex County Council v. UBB Waste*, the court identified the agreement in question as a paradigm example of a relational contract, requiring an implied duty of good faith.²¹ Similarly, in *Cathay Pacific Airways* the court recognised that long-term agreements necessitating sustained cooperation inherently justify the implication of such duties.²² In *Al Nehayan v. Kent*, Justice Leggatt reiterated the importance of fidelity to the relationship's spirit, emphasising that good faith obligations arise from the parties' shared purpose and the reasonable expectations inherent in their cooperation.²³ These judgments collectively reflect the judiciary's growing recognition of the normative obligations inherent in relational contracts.

3.3. *The Broader Implications of Relational Contracts*

Despite the increasing acknowledgment of relational contracts, their treatment under English law remains complex. The recognition of relational contracts reflects a broader shift in the judicial approach to commercial relationships. While English contract law remains deeply rooted in principles of certainty and autonomy, the growing acknowledgment of good faith in relational contexts introduces a measure of flexibility aimed at accommodating the realities of modern commerce. This development, however, is not without its challenges. Courts have been cautious to ensure that the implication of good faith duties does not undermine the predictability and enforceability of contractual agreements. As such, implied duties must satisfy established tests, such as business efficacy and the officious bystander standard, to ensure that they reflect the parties' original intentions. Even within relational contracts, implied duties are construed narrowly, tailored to reflect the specific context and mutual expectations of the parties.

¹⁹ *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 W.L.R. 1988; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896.

²⁰ *Bates v Post Office Ltd (No.3)* [2019] EWHC 606 (QB) 702-721, 724-732.

²¹ *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC), 113.

²² *Cathay Pacific Airways Ltd v Lufthansa Technik AG* [2020] EWHC 1789 (Ch), 185-218.

²³ *Al Nehayan*, *supra* note 7, at 173.

Good faith in relational contracts extends beyond mere honesty, requiring parties to act with integrity, cooperate, and avoid conduct that would be deemed commercially unacceptable by reasonable and honest individuals. This standard does not prohibit the pursuit of individual interests but mandates that such pursuits be tempered by a commitment to the agreement's broader objectives. Courts have recognized that relational contracts, by their nature, demand a higher standard of conduct than is required in traditional arm's-length transactions. The principle of good faith thus serves as a vital mechanism for balancing self-interest with the mutual trust essential to the effective operation of relational agreements.

Relational contracts also challenge traditional conceptions of contractual finality. They underscore that a contract is not merely a static legal instrument but an evolving relationship shaped by mutual reliance and reciprocity. By emphasising the relational dynamics between parties, these agreements highlight the importance of ongoing reciprocity and cooperation in achieving their intended outcomes. The values inherent in relational contracts – honesty, loyalty, and shared purpose- permeate the parties' interactions, influencing both the formation and performance of their obligations. As courts continue to grapple with the complexities of relational contracts, they must navigate the tension between the need for adaptability and the foundational principles of English contract law.

3.4. *Contemporary Challenges and Future Directions*

The increased recognition of relational contracts has not been without controversy. As observed in *Candey* there has been a surge in claimants seeking to classify their agreements as relational to invoke the implied duty of good faith. This trend underscores the potential for uncertainty, as the boundaries of relational contracts remain fluid and context-dependent.²⁴ The Court of Appeal noted that there has been an 'avalanche of claimants in recent years trying to show that the contract into which they seek to imply the term is a relational contract, thereby bringing with it the implied obligation of good faith'.²⁵ Critics argue that the lack of clear criteria for determining relationality risks undermining the predictability central to English contract law. Proponents, however, contend that such flexibility is necessary to address the unique demands of long-term commercial relationships.²⁶

The absence of a general duty of good faith in English law reflects a deliberate policy choice aimed at preserving party autonomy and minimising judicial interference in commercial transactions. Nonetheless, the implication of good faith in relational contracts signals a recognition that certain relationships demand a higher

²⁴ *Candey Ltd v Bosheh* [2022] EWCA Civ 1103.

²⁵ *Candey*, *supra* note 24, at 31.

²⁶ See *UTB v Sheffield United* [2019] EWHC 2322; *Taqi Brahtani v Rockrose UKCS8 LLC* [2020] EWHC 58; *Phones 4U Ltd (In Administration) v EE Ltd and others* [2023] EWHC 2826 (Ch); *Mackie Motors (Brechtin) Ltd v RCI Financial Services Ltd* [2023] EWCA Civ 476.

standard of conduct to function effectively.²⁷ Courts have emphasised that such duties are not imposed lightly; they arise only where the nature of the agreement and the parties' reasonable expectations warrant them.

As the doctrine develops, the challenge will be to strike a balance between fostering cooperation and maintaining the clarity and certainty that underpin English contract law. This delicate equilibrium will likely continue to shape the trajectory of relational contracts, influencing their role in the broader landscape of commercial relationships. As courts continue to grapple with the complexities of relational contracts, the balance between certainty and adaptability remains a central challenge. This evolving doctrine highlights the enduring tension within English contract law: accommodating the realities of modern commercial relationships while preserving its foundational principles.

Indeed, relational contracts represent a nuanced departure from conventional contract law, emphasising flexibility and cooperation over rigid formalism. The principle of good faith serves as a critical tool in aligning these agreements with their underlying relational dynamics.

4. Contractual Equilibrium

This section explores the concept of contractual equilibrium, examining its role in commercial agreements and the function of good faith in preserving or restoring this balance. Contractual equilibrium is essential for sustaining the mutual objectives of the contracting parties and ensuring the long-term viability of their relationship.

In the context of commercial agreements, contractual equilibrium refers to the balance of interests and expectations that underpin the parties' bargain. This equilibrium embodies the alignment of benefits and obligations agreed upon at the outset. It reflects the shared understanding of the legitimate expectations each party holds regarding the outcomes and benefits they anticipate from the contract. The success of a contract depends on the stability of this equilibrium, which requires maintaining a harmonious balance between the parties' interests throughout the life of the agreement.

However, contracts are rarely static instruments. Over time, the parties' incentives may evolve, and external factors may disrupt the delicate balance of their initial agreement. The concept of equilibrium is therefore inherently dynamic, encompassing not only the balance of interests at the time of contract formation but also the mechanisms necessary to sustain that balance amidst changing circumstances. Stability, in this context, is not synonymous with rigidity. Instead, it signifies the preservation of the parties' underlying expectations, even as the contract adapts to unforeseen developments.

²⁷ Melvin Eisenberg, *Why There Is No Law of Relational Contracts* 94 Northwestern University Law Review 805 (2000).

4.1. *Stability and Adaptability in Contractual Equilibrium*

Contractual stability is a cornerstone of equilibrium. It ensures that the legitimate expectations of the parties – whether economic, social, or operational- are upheld throughout the duration of their relationship. Stability is not limited to the fulfilment of specific contractual terms; it also encompasses the continuity of the relationship itself, enabling the realisation of the broader objectives underlying the contract.

To achieve this, contracts must incorporate a degree of flexibility. This adaptability is particularly critical in commercial transactions, where unpredictable economic, political, and regulatory changes are the norm. Flexibility allows the contract to evolve in response to such changes, preserving its core purpose and the equilibrium it was designed to achieve. The interplay between stability and flexibility highlights the dual nature of equilibrium as both a dynamic and a predictable framework.²⁸ Rather than being a static arrangement of rights and duties, equilibrium in modern commercial contracts is better understood as an evolving relationship. This perspective aligns with relational contract theory, which views the contract as a framework for ongoing cooperation and mutual benefit. By fostering adaptability, this approach enhances stability, enabling the contract to withstand challenges that might otherwise disrupt its balance.²⁹

4.2. *The Role of Good Faith in Preserving Equilibrium*

Good faith is integral to maintaining contractual equilibrium. It acts as a guiding principle, requiring the parties to cooperate, exercise fidelity to their original bargain, and refrain from conduct that would undermine the relationship's foundational balance. At its core, good faith embodies the mutual restraint of self-interest within the bounds of the agreed framework. Without such restraint, a meaningful bargain-based on reciprocity and shared intentions-would be unattainable.

The principle of good faith obliges parties to engage in a manner that respects the balance of their respective performances. This includes addressing unforeseen circumstances that may disrupt the original equilibrium. For example, as articulated in Article 6.2.2 of the UNIDROIT Principles, an unforeseen change of circumstances can fundamentally alter the contractual equilibrium, either by increasing the cost of one party's performance or by diminishing the value received by the other. In such cases, renegotiation or judicial intervention may be necessary to restore balance.

Good faith further prevents one party from exploiting the other's vulnerabilities. For instance, compelling a party to continue performing under an unbalanced contract -where one party faces excessive burdens while the other derives disproportionate

²⁸ David Campbell, *The Relational Constitution of the Discrete Contract* in *Contract and Economic Organisation: Socio-Legal Initiatives*, 40 (Dartmouth, 1996).

²⁹ David Campbell, *Good Faith and the Ubiquity of the Relational Contract* 77 *Modern Law Review* 475 (2014).

benefits- violates the principle of good faith. Such conduct undermines the mutual trust and cooperation essential to sustaining the contractual relationship.

When one party unilaterally ends the contract, the other may suffer significant disruptions, especially if they have invested considerable resources based on the expectation of the relationship's continuity. These investments often require substantial time to recover, and reallocating them to alternative ventures is rarely straightforward. Moreover, identifying a new, suitable commercial partner is often a challenging and time-intensive process.

In such scenarios, the absence of good faith exacerbates the negative consequences of termination. The party initiating termination may unfairly benefit from the other's difficulties, undermining the mutual commitment that the contract was intended to foster. Good faith, therefore, demands a balanced and equitable approach to termination, ensuring that neither party unjustly capitalises on the other's misfortune.

4.3. Balancing Stability and Risk in Commercial Contracts

The balance of reciprocal performances is a fundamental principle of contractual equilibrium. Denying this balance effectively reduces a commercial contract to an aleatory agreement, where outcomes are dictated by speculation and risk rather than mutual understanding. Most commercial contracts establish pricing and performance terms based on the conditions prevailing at the time of contract formation. These terms often include mechanisms to adjust for changes in the value of the underlying goods or services, reflecting the expectation that the contract will remain economically balanced over time.

When disruptions occur, good faith obliges the parties to act reasonably and equitably. This does not mean that parties are required to mitigate each other's challenges, but they are expected to refrain from exploiting such challenges to their own advantage. By adhering to these principles, the parties can preserve the equilibrium that underpins their relationship, even in the face of unforeseen difficulties.

Contractual equilibrium is ultimately rooted in the parties' shared objectives and rational intentions. At the time of contract formation, both parties voluntarily agree to a framework that balances their interests and anticipates foreseeable risks. However, no contract can account for every eventuality. The principle of good faith bridges this gap, ensuring that the parties remain committed to their original objectives even as circumstances evolve.

In commercial transactions, good faith serves as the mechanism through which parties uphold their legitimate expectations. It ensures that the contract remains a viable and equitable framework for achieving their mutual goals. Without this principle, the absence of equilibrium would undermine the very foundations of the agreement, rendering the contract incapable of fulfilling its intended purpose.

5. Good Faith and Commercial Contracts

The concept of good faith occupies a pivotal yet contested position in English contract law. Building on the theoretical and practical considerations outlined in the previous section, this part explores the role of good faith in commercial contracts, addressing its evolving application and theoretical underpinnings. By examining key case law and doctrinal developments, this section argues that the duty of good faith, while not universally implied, serves as a vital mechanism for maintaining contractual balance and upholding reasonable expectations in commercial relationships. It contends that good faith is not merely an ancillary principle but a dynamic concept capable of reconciling the autonomy of contracting parties with the need for cooperative engagement.

Historically, English contract law has resisted imposing a general duty of good faith, rooted in its incremental development and emphasis on individualism. However, judicial decisions, particularly in the context of relational contracts, indicate a gradual acceptance of good faith as an implied obligation where the nature of the agreement and the parties' presumed intentions warrant it.³⁰ In *Yam Seng*, Justice Leggatt recognised good faith as integral to the performance of relational contracts, though he stopped short of endorsing a universal duty. Instead, he framed good faith as a context-specific standard derived from shared values and norms, ensuring fidelity to the agreement without undermining contractual autonomy. The duty, he argued, is assessed objectively – asking whether reasonable and honest individuals would consider specific conduct commercially unacceptable given the circumstances.

This recognition of good faith as an implied obligation has practical implications for the interpretation of contracts. For instance, it obliges parties to refrain from conduct that undermines the agreed terms or negotiated benefits, as illustrated in *Bristol Groundschool*. Here, a party's unauthorised access to confidential information, intended to safeguard its position in a deteriorating relationship, was deemed a breach of the implied duty of good faith. Such decisions underscore that good faith, though context-dependent, serves as a safeguard against opportunistic behaviour.³¹

Building on this foundation, subsequent cases have clarified and expanded the scope of good faith. In *Bates*, the court recognised the relational nature of the contract and imposed a comprehensive duty of good faith, encompassing obligations of transparency, cooperation, and mutual trust. This judgment highlighted that good faith is not a vague or all-encompassing standard but a principle that can be tailored to the specific dynamics of a contractual relationship.³² Similarly, in *Brooke Homes*, the court distilled the duty of good faith into four key principles: acting honestly, adhering

³⁰ *Phones 4U*, *supra* note 26, at 723.

³¹ *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch).

³² *Bates*, *supra* note 20, at 743-767.

to reasonable commercial standards of fair dealing, maintaining fidelity to the contractual purpose, and upholding legitimate expectations.³³

The duty of good faith extends beyond general obligations to specific circumstances where one party wields discretionary power. The *Braganza* principle establishes that such discretion must be exercised rationally, honestly, and for the purpose for which it was conferred. By requiring decisions to be reasonable and free from arbitrariness or caprice, this principle ensures that contractual discretion respects the legitimate interests of both parties. While the application of the *Braganza* duty is confined to particular contexts, such as subjective decision-making that risks conflicting interests, it exemplifies the broader role of good faith in safeguarding fairness and coherence within contracts.³⁴

Good faith is inherently tied to the context in which a contract operates. Relational contracts, characterised by ongoing collaboration and mutual reliance, are especially conducive to the implication of good faith obligations. However, even in more discrete agreements, the reasonable expectations of the parties, shaped by shared values and norms, can justify the application of good faith principles.³⁵ This aligns with the broader aims of contract law: to honour the parties' intentions and provide a framework for addressing unforeseen developments without destabilising the contractual equilibrium.³⁶

The reluctance of English law to adopt a general duty of good faith reflects its commitment to incremental evolution and its prioritisation of clarity and predictability.³⁷ Justice Leggatt articulated three key reasons for this caution: the law's preference for gradual development, its ethos of individualism, and concerns about the potential uncertainty that a broad duty of good faith might introduce.³⁸ Nonetheless, the growing recognition of good faith in specific contexts suggests that this principle is becoming increasingly significant in preserving contractual integrity.

Commercial contracts cannot foresee or account for every eventuality. Consequently, their language often requires interpretation in light of unforeseen circumstances. Good faith serves as a stabilising mechanism, ensuring that such interpretation respects the parties' shared intentions and the original equilibrium of the agreement. This function was particularly evident during the COVID-19 pandemic, when the UK government's *Code of Practice for Commercial Property Relationships* urged parties to act in good faith to navigate economic challenges. By

³³ *Brooke Homes (Bicester) Limited v Portfolio Property Partners Limited* [2021] EWHC 3015 (Ch) 104.

³⁴ *Braganza v BP Shipping Limited* [2015] UKSC 17; See, *Hunters Franchising Limited v Brybond Limited, Stephen Paul Berson* [2022] EWHC 3195 (Comm).

³⁵ *Western Broadcasting Services v Seaga* [2007] UKPC 19.

³⁶ Ewan McKendrick, *Good Faith in the Performance of a Contract in English Law in Comparative Contract Law British and American Perspectives*, 197 (Oxford, OUP, 2016).

³⁷ *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (Trading As Medirest)* [2013] EWCA Civ 200.

³⁸ *Yam Seng*, *supra* note 2, at 123.

framing landlords and tenants as ‘economic partners’, the Code emphasised the cooperative essence of good faith in sustaining business continuity.³⁹

In practice, good faith promotes adherence to reasonable commercial standards, prevents opportunistic conduct, and fosters cooperation – all essential for achieving the intended objectives of a contract.⁴⁰ The High Court’s decision in *Al Nehayan* affirmed that good faith does not require one party to subordinate its interests to another but demands integrity and adherence to the shared purpose of the agreement. This nuanced approach reconciles the principle of freedom of contract with the cooperative norms that underpin many commercial relationships.⁴¹

Ultimately, the implied duty of good faith represents a vital tool for maintaining contractual balance and ensuring fidelity to the parties’ intentions. By aligning with reasonable expectations and fostering cooperation, good faith contributes to the resilience and adaptability of commercial contracts. Its gradual integration into English law reflects the evolving recognition of this principle as essential for addressing the complexities of modern commercial relationships while preserving the foundational ethos of contractual autonomy.

5.1. *Practical Applications of Good Faith in Commercial Contracts*

The practical application of good faith in English law remains fragmented, with courts addressing the concept in specific contexts but avoiding its universal recognition. Despite this hesitation, judicial decisions have increasingly highlighted the value of good faith in fostering equitable commercial practices. An implied duty of good faith in all commercial contracts could provide a consistent framework for addressing scenarios where strict adherence to express terms undermines fairness and collaborative intent.

Judicial interpretations of good faith often emphasise reasonable standards of behaviour, fidelity to contractual purposes, and the alignment of conduct with justified expectations. For instance, in *Berkeley Community Villages*, the court described good faith as adherence to reasonable commercial standards of fair dealing, fidelity to the agreed common purpose, and consistency with the claimant’s justified expectations.⁴² Similarly, in *CPC Group Ltd* the duty of good faith was tied to the spirit of the contract, requiring fair dealing and loyalty to the relationship’s foundational objectives. These interpretations underscore the relational aspects of commercial agreements, which demand more than mere mechanical compliance with terms.⁴³

³⁹ Ministry for Housing, Communities and Local Government, *Code of Practice for Commercial Property Relationships during the COVID-19 Pandemic*, (June 2020), updated 6 April 2021, at para.14; available at <https://www.gov.uk/government/publications/code-of-practice-for-the-commercial-property-sector/code-of-practice-for-commercial-property-relationships-during-the-covid-19-pandemic> [1 November 2024].

⁴⁰ *Astor Management AG v Atalaya Mining plc* [2017] EWHC 425 (Comm).

⁴¹ *Al Nehayan*, *supra* note 5, at 167–174.

⁴² *Berkeley Community Villages Ltd v Pullen* [2007] EWHC 1330 (Ch).

⁴³ *CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch).

However, the absence of a general duty leaves gaps in addressing opportunistic conduct. In *Bates*, the obligation to refrain from commercially unacceptable conduct was described as central to the implied duty of good faith in relational contracts. Yet, courts have often stopped short of extending this principle universally, favouring doctrines like estoppel or duress to resolve disputes. This fragmented approach creates uncertainty and undermines the broader benefits of good faith as a unifying standard in commercial dealings.

Several situations illustrate how an implied duty of good faith could address practical challenges in contract enforcement. In cases of procedural technicalities, such as time-bar clauses, strict enforcement often results in unfair outcomes. For example, a contractor may miss a deadline for notifying a claim due to unforeseen circumstances, despite the employer suffering no prejudice. While current law prioritises the clarity of express terms, good faith could mitigate the harshness of such outcomes by balancing procedural compliance with substantive fairness.⁴⁴

Similarly, long-term contracts often involve investments predicated on mutual trust and collaboration. In *Baird Textile Holdings Ltd*, a supplier relied on a longstanding relationship, only to face abrupt termination without recourse under the express terms.⁴⁵ An implied duty of good faith would discourage opportunistic behaviour by ensuring that contractual practices align with relational expectations, even in the absence of explicit provisions. By requiring adherence to the original contractual intent, good faith would promote equitable application of termination provisions and address disputes arising from informal deviations, such as alternate payment arrangements. In such cases, strict enforcement of contractual terms can lead to unjust outcomes, particularly when one party retroactively insists on compliance after benefiting from a practical departure. While the doctrine of estoppel offers some recourse, its limited flexibility underscores the need for good faith to recognise the realities of modern commercial relationships and prevent unjust enrichment.

The reluctance of English law to universally embrace good faith reflects concerns about undermining contractual certainty. However, as Justice Leggatt noted in *Yam Seng*, good faith introduces no greater uncertainty than the process of contractual interpretation itself. Jurisdictions like the United States and Canada have successfully integrated good faith into their legal systems without compromising contractual stability, demonstrating its compatibility with robust commercial frameworks. Fragmented and context-specific applications of good faith in English law highlight the need for a universal implied duty. Such a standard would deter opportunistic behaviour, align contractual enforcement with contemporary commercial realities, and foster trust and cooperation. By balancing fairness and predictability, an implied duty of good faith would not only enhance the integrity of individual agreements but also reinforce the relational foundations essential for the long-term success of commercial contracts in An Interconnected Economic Landscape.

⁴⁴ *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd* [2007] EWHC 447.

⁴⁵ *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274.

6. The Case for Implied Good Faith in All Commercial Contracts

The implications of incorporating an implied duty of good faith into English contract law extend beyond theoretical alignment with fairness; they also address practical deficiencies in the existing legal framework. This section explores how good faith could resolve key challenges within contract law by reassessing its foundational principles, situating English law within a comparative international context, and examining its compatibility with the need for contractual certainty. Through this lens, it becomes evident that good faith is not merely a doctrinal innovation but a necessary evolution to enhance the functionality and fairness of commercial contracts.

6.1. *Reassessing the Breach-Compensation Paradigm*

The remedial framework of contract law is fundamentally oriented toward compensating the injured party for the loss of their expectation interest. In doing so, it seeks, albeit with varying degrees of success, to provide a coherent structure for addressing the consequences of non-performance resulting from a breach. A nuanced understanding of this framework necessitates an appreciation of the law's recognition of the mutual interests of both parties to the contract, rather than a singular focus on the injured party. In commercial settings, the actual performance of obligations often supports long-term partnerships, trust, and synergies that monetary compensation cannot adequately replicate.⁴⁶

Compensatory damages constitute the predominant remedy for breach of contract, functioning as the default response available as of right. By contrast, an injured party pursuing enforcement of contractual obligations must present a compelling argument to displace this default position. Ordinarily, contracting parties endeavour to achieve their expectations through the performance of the obligations outlined in their agreement. However, when a breach occurs, and the matter shifts to legal remedies, the nature of expectation fulfilment changes markedly.⁴⁷ Rather than compelling performance of the breached obligation, the law typically substitutes it with compensatory damages, a remedy aptly characterised by Lord Diplock as a substituted obligation.⁴⁸ Compensatory damages frequently fail to capture the broader implications of non-performance, such as reputational damage, or the disruption of future business opportunities.⁴⁹

For commercial parties, compensatory damages do not represent a true substitute for performance. This is because such parties are primarily concerned not with the act of performance itself, but with the realisation of their anticipated profits. Performance is merely a means to that end – a necessary cost incurred to achieve the desired

⁴⁶ Chen-Wishart, *supra* note 9, at 532-541.

⁴⁷ MA Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law* 93 California Law Review 975 (2005).

⁴⁸ *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) 848H.

⁴⁹ David Campbell, *Contractual Relations*, *supra* note 10, at 249.

profit. Thus, the central focus of contract remedies lies in safeguarding the expectation interest, rather than an interest in the fulfilment of contractual obligations.⁵⁰

This distinction underpins the fundamental principle of contract remedies. Where a party suffers a loss due to a breach, they are entitled so far as monetary compensation permits to be placed in the position they would have occupied had the contract been performed. Accordingly, the law prioritises the protection of the expectation interest, framing compensatory damages as the primary mechanism for redressing losses while recognising the economic realities that drive commercial transactions.⁵¹ Recognising an implied duty of good faith offers a more effective and equitable alternative to the breach-compensation paradigm. Good faith compels parties to act reasonably and consistently with the original equilibrium of the contract, respecting mutual interests and expectations. This approach prioritises cooperation and fairness, discouraging opportunistic breaches that prioritise short-term cost savings over the broader benefits of performance. In doing so, it shifts the focus from remedial measures to proactive adherence to the spirit of the agreement, promoting stability in commercial relationships.

If the system of damages achieves its intended purpose, namely, providing adequate compensation, the injured party should, in principle, be indifferent between the breaching party's performance and the payment of damages. The foundational objective of contract law remedies is to place the claimant in the position they would have occupied had the contract been duly performed. This principle assumes heightened significance in complex economies characterised by innumerable exchanges of varying intricacy. The law of contract should address this problem by incentivising adjustments to obligations through private negotiation, minimising reliance on legal enforcement mechanisms.⁵²

An implied duty of good faith in the performance of contracts offers an alternative framework that aligns with the realities of modern commerce, where contracts frequently serve as frameworks for sustained collaboration rather than one-off exchanges. This doctrine emphasises maintaining the equilibrium that underpins reasonable expectations and encapsulates the mutual interests of the contracting parties. Such an approach could mitigate the reliance on breach and subsequent compensation by fostering actions that align with the shared objectives of the parties. The breach-compensation framework, while foundational, is insufficient in addressing the nuanced and relational dynamics of commercial transactions. Its reliance on damages as the default remedy overlooks the broader economic and relational value of performance. By embedding an implied duty of good faith into contract law, the legal system can better protect the mutual interests of contracting parties, reduce the adversarial nature of breach remedies, and create a framework that prioritises cooperation. This shift

⁵⁰ Hugh Beale and Tony Dugdale, *Contracts between Businessmen: Planning and the Use of Contractual Remedies* 2 *British Journal of Law and Society* 45 (1975).

⁵¹ David Campbell, *Better Than Fuller: A Two Interest Model of Remedies for Breach of Contract* 78 *The Modern Law Review* 296 (2015).

⁵² Campbell, *supra* note 10, at 252.

would enhance the utility of contracts as instruments for both economic and relational success in a complex and dynamic market environment.

6.2. *Good Faith Recognised in Other Jurisdictions*

When a legal system diverges considerably from the experiences of other jurisdictions, recognising this disparity may prompt a reassessment of its own position. This is not to suggest that legal systems should uncritically follow the majority; there may be valid reasons for a particular jurisdiction to maintain its own distinctive rules. However, such differences should be reasoned and justified, rather than merely asserted. For English contract law to retain its standing in international commercial transactions and remain a leading legal framework, it must consider the practices of other legal systems and make the necessary adaptations, particularly regarding the concept of good faith.

Most civil law systems acknowledge some form of duty of good faith. For instance, the French Civil Code mandates that agreements must be performed in good faith, while the German Civil Code requires contracts to be executed in accordance with good faith and fair dealing, taking into account customary business practices.⁵³

Many common law jurisdictions also recognise the duty of good faith in commercial transactions. In the United States, §§ 1-201(19) and (20) of the Uniform Commercial Code impose an obligation of good faith in the performance or enforcement of contracts, defining good faith as honesty in the conduct of the relevant transaction. Furthermore, the Restatement (Second) of Contracts, Section 205, states that ‘every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.’ Similarly, the Supreme Court of Canada has recognised a new common law duty of honest performance in contractual obligations. The court described good faith as a general organising principle, applicable to all contracts, requiring parties to act honestly in the performance of their contractual duties, although not in the negotiation process. This duty means that parties must not lie or knowingly mislead one another regarding matters directly related to the performance of the contract.⁵⁴

Good faith has been explicitly integrated into English law through the implementation of the EU Directive on Unfair Terms in Consumer Contracts, as embodied in the Consumer Rights Act 2015 (CRA). Under the CRA, non-core terms in consumer contracts that are deemed unfair, defined as being ‘contrary to the requirement of good faith’ and creating a ‘significant imbalance in the parties’ rights and obligations’, are rendered invalid.⁵⁵ This incorporation reflects an acknowledgment of good faith

⁵³ Article 1134 of the French and Belgian Civil Codes; Article 2 of the Swiss Civil Code; Article 1375 of the Italian Civil Code; Article 242 of the German BGB (Civil Code); Article 313 of the German Civil Code. See also, Article 1.106 (1) of the Principles of European Contract Law; and Article 1.7 of the UNIDROIT Principles of International Commercial Contracts.

⁵⁴ *Bhasin v Hrynew* [2014] SCC 71.

⁵⁵ The Consumer Rights Act 2015, S. 62(4).

as a normative standard for fairness and balance in consumer transactions. Notably, the principles enshrined in the CRA are expected to retain their significance and continue to influence English contract law in the post-Brexit legal landscape, underscoring the enduring relevance of good faith in the regulation of consumer relationships.⁵⁶

The principles underpinning good faith are particularly critical in addressing the dynamic and unpredictable nature of commercial relationships. Commercial agreements are particularly susceptible to the risks posed by economic, or other shifts. Where such changes are foreseeable and not extraordinary, the parties are generally expected to account for these within the contract's provisions. Different legal systems have addressed these challenges through various mechanisms. For example, English common law's doctrine of frustration, the American concept of commercial impracticability, the German principle of *Wegfall der Geschäftsgrundlage*, and the French doctrines of *Force Majeure* and *Imprévision*, alongside the Swiss doctrine of faultless impossibility, have all been applied nationally and internationally. These doctrines address changes in economic, technological, legal, or business conditions that arise after the contract is made, rendering performance either legally or physically impossible, excessively challenging, impractical, or financially prohibitive, or eliminating the performance's original utility for one or both parties. The application of these principles seeks to restore the contractual equilibrium originally intended by the parties, which forms the foundation of the agreement and ensures that their interests remain aligned. English law's reluctance to embrace good faith more broadly risks leaving its framework ill-suited to modern commercial realities, undermining its role as a global leader in contract law.

6.3. Contractual Certainty

Contractual certainty, while essential, cannot be an end in itself. Contractual certainty, while essential, should not be pursued at the expense of fairness or adaptability. In commercial transactions, where predictability is paramount, parties often opt for flexible standards, such as obligations to cooperate, to use best efforts, or to act in good faith.⁵⁷ As Justice Leggatt observed in *Yam Seng*, the concept of good faith introduces 'no more uncertainty than is inherent in the process of contractual interpretation'. This illustrates that the perceived vagueness of good faith is no greater than that of other well-established legal standards.

The traditional critique of good faith asserts that it imposes undue restraint on self-interest, potentially stifling the autonomy of contracting parties. However, this view overlooks a crucial benefit: good faith mitigates the risk of opportunism and exploitation, thereby providing contracting parties with greater security. By fostering trust and reducing the likelihood of predatory behaviour, the imposition of good faith duties may encourage parties to engage in transactions they might otherwise avoid due to perceived risks. In this way, good faith not only preserves fairness and integrity but

⁵⁶ Chen-Wishart, *supra* note 9, at 622.

⁵⁷ Chen-Wishart, *supra* note 9, at 624.

can also enhance contractual freedom by enabling parties to undertake ventures that rely on mutual confidence and cooperation. Thus, far from undermining autonomy, good faith enriches it by creating an environment in which parties are more willing to engage in innovative and potentially rewarding collaborations.⁵⁸

7. Conclusion

This article has argued for the recognition of an implied duty of good faith in the performance of *all* commercial contracts within English law. The analysis underscores that good faith is not merely a doctrinal nicety but a critical mechanism for maintaining and restoring the equilibrium foundational to successful commercial agreements. By fostering cooperation, discouraging opportunistic behaviour, and ensuring fidelity to the original bargain, an implied duty of good faith safeguards the mutual objectives and expectations of contracting parties, particularly in the face of unforeseen circumstances that challenge the integrity of the contractual relationship.

The jurisprudence exemplified by cases such as *Yam Seng* highlights the risks of the current framework's reluctance to embrace good faith. Without an explicit duty, parties may exploit the absence of safeguards to engage in behaviour that destabilises contractual relationships, undermining the trust and balance upon which commercial transactions are built. This article has demonstrated that commercial parties, as *rational actors*, inherently operate with an expectation of mutual cooperation and adherence to shared goals, implicitly recognising good faith as part of the concessions embedded within their bargain. By codifying this implicit understanding into an explicit legal standard, English law would reflect and reinforce the cooperative dynamics that underpin commercial activity.

While English contract law has limited the application of good faith to relational contracts or specific statutory contexts, this article has argued for a broader, universal application. Such an approach would align English law with the practices of other jurisdictions and the evolving nature of commercial relationships in a globalised market. Recognising good faith as an implied duty in all commercial contracts would not only meet the reasonable expectations of contracting parties but also provide a more equitable, adaptive, and pragmatic framework for addressing contractual disputes. By doing so, English law would strengthen its reputation as a leading framework for international commerce, one that balances the imperatives of certainty and flexibility with fairness and cooperation.

⁵⁸ Chen-Wishart, *supra* note 9, at 626.