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"Faith, Hope, and Charity"*: The Role of Good Faith in Construction – a Common Law Perspective

"Fe, Esperanza y Caridad"**: El papel de la buena fe en la construcción – una perspectiva desde el Common Law

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Abstract:
Issues of "good faith" in the performance of construction and engineering contracts are common. Moreover, "good faith" issues arise in most jurisdictions of the world, including common law and civil law jurisdictions. This paper considers the approach taken by English common law to the legal concept of "good faith". It considers the consequences of English law not embracing "good faith" in commercial law in any general way, including in relation to construction and engineering contracts, and some of the doctrines developed by English law to ameliorate the potentially harsh consequences of a party exercising its contractual rights in an unfair manner. Consideration is also given to the New Engineering Contract and other forms of contract which expressly require parties to act in good faith.

Resumen:
Los conflictos respecto a la "buena fe" en el desarrollo de contratos de construcción e ingeniería son comunes. Más aún, los conflictos surgen en la mayoría de jurisdicciones del mundo, tanto de *common law* como *civil law*. Este artículo aborda el enfoque asumido por el *common law* británico respecto al concepto legal de "buena fe". Toma en cuenta las consecuencias de que el Derecho inglés no acepte el concepto de "buena fe" en el Derecho Comercial en general, incluso en relación con los contratos de construcción e ingeniería, y algunas de las doctrinas desarrolladas por el Derecho inglés para aminorar las potenciales graves consecuencias de que una parte ejerza sus derechos contractuales de manera abusiva. También se aborda el *New Engineering Contract* y otras formas contractuales que requieren expresamente a las partes actuar de buena fe.

Keywords:
Construction law – Good Faith – Common Law – Express and Implied Terms – Narrow approach of English law

Palabras clave:
Derecho de la construcción – Buena fe – Derecho Anglosajón " Condiciones expresas o implícitas – Enfoque limitado del Derecho inglés

* The reference to "faith, hope, and charity" is an allusion to the biblical text of 1 Corinthians 13:13. https://www.biblegateway.com/passage/?search=1%20Corinthians%2013%3A13&version=KJV. The purpose of the allusion is, in a subtle way to make the reader reflect on the parallels between religious "faith" and teachings, and the requirements of "good faith" in construction contracts, and what "good faith" may require as a matter of detail in the particular circumstances.

** La referencia a „fe, esperanza y caridad" es una alusión al texto bíblico de 1 Corintios 13:13. https://www.biblegateway.com/passage/?search=1%20Corinthians%2013%3A13&version=KJV. El propósito de la alusión es, de una manera sutil, hacer que el lector reflexione sobre los paralelismos entre la "fe" y las enseñanzas religiosas, y los requisitos de "buena fe" en los contratos de construcción, y lo que la "buena fe" puede requerir como cuestión. de detalle en las circunstancias particulares.

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1. Introduction

One of the many fascinating aspects of Peru is its history, which dates back to the dawn of human civilization. Archaeological records tell us that the Norte Chico civilization was founded in around 3500 BC, with the construction of the first city in the Americas, located at Huaricanga. Other major centers were constructed at Bandurria, Caral, and elsewhere. There are many things we know about Norte Chico civilization, but there are also still many matters that are a mystery and may remain forever so.

What we do know is that the Norte Chico civilization engaged in construction and engineering work on a major scale. Great pyramid-shaped temples and vast sunken plazas were built during the era of this civilization, principally for religious purposes. It is self-evident that a huge quantity of resources was devoted to these substantial projects, and we can make certain inferences as to how work was carried out.

However, there are still great mysteries about these structures, just as there are with the workings of Norte Chico civilization generally. Who built these structures? What legal arrangements (formal or informal) applied to the relationships between those who built the structures, and those who engaged them to do so —assuming there was a division between the two? Did the Norte Chicans use any legal construct equivalent to a construction contract? And if there were legal relations between the various parties, did the parties seek to exercise their rights fairly, or in good faith?

We can only speculate as to such matters, and perhaps they will forever lie in a state of conjecture or opaque mystery.

This article examines the treatment accorded by English common law to the principle of "good faith", with primary reference to the construction and engineering paradigm. To a person from a civil law country, such as Peru, where good faith is stipulated in the civil code, any discussion concerning good faith is likely to relate to its application in practice, especially in the field of commerce. But as we shall see, where English common law is concerned, meditations on good faith usually involve a more fundamental concern, namely whether notions of good faith should apply *at all* to a particular commercial situation.

Good faith is a concept that one commonly encounters in relation to construction and engineering contracts. It may be written into the contract, as a legal or commercial norm. It may be implied in the contract. Or, at least in common law jurisdictions, there may be many situations where good faith has no application at all. And this, in turn, gives rise to interesting considerations of what good faith requires, and what difference (if any) it makes to the success of construction and engineering projects.

Good faith concepts are germane where construction and engineering projects are concerned. Projects are often highly complicated, requiring the use of extensive resources over a long period and involving a large and constant measure of interaction between the various protagonists. The actions and conduct of each party cannot be minutely defined in a contract, and it is for this reason that questions arise as to whether, from both a practical and legal perspective, there should be an overlaying code or spirit of behavior to which the parties are held.

2. What is "Good Faith"?

An elementary starting point for a discussion of good faith must involve some attempt at a definition, or the least a "description", of what good faith is. In this regard, I begin with the following statement from a relatively recent English case, where Leggatt J (as he then was)[1] held:

> "A duty to act in good faith, where it exists, is a modest requirement. It does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people"[2].

1 Lord Leggatt became a justice of the Supreme Court of the United Kingdom in April 2020. The Supreme Court is the apex court of the United Kingdom. We may therefore anticipate that Lord Leggatt's views on good faith are likely to become increasingly influential on English law.

2 *Astor Management AG v Atalaya Mining Plc* [2017] EWHC 425 (Comm) at [98], per Leggatt J.

So expressed, it seems clear that "good faith" contemplates three particular types of behaviors, and by implication proscribes antithetical behaviors.

The first type of behavior is honesty. Honesty means being truthful, and not being untruthful. Linguistically, and perhaps as a matter of common understanding, this aspect of "good faith" is fairly clear in its scope and its precept. It is also an aspect of behavior which, because of its seriousness, finds corresponding proscriptions in the criminal law. In this regard, the Supreme Court of the United Kingdom has held, in the context of a criminal case, that "dishonesty is by no means a defined concept. On the contrary, like the elephant, it is characterized more by recognition when encountered than by definition"[3].

The second type of behavior is conduct which would frustrate the purpose of the contract. This could occur, for example, where an exercise of a contractual power is "literally" permitted by the contract, yet it is being exercised in a way that defeats the purpose of the contract. The classic instance of this, in the construction paradigm, is where an employer uses a variation power to de-scope all of the contractor's works, to give those works to another (usually cheaper) contractor[4]. An employer will usually have the power to omit certain of the contractor's works, and there may be good reasons why the employer may wish to use this power. And the power to omit works may not be expressed to be subject to any limitations, meaning —in theory at least— that it could be used to gut the contractor's entire work scope. We may say that, in such cases, the exercise of this power in such a way defeats the purpose of the contract (at least from the contractor's standpoint). So we may say that such an exercise of power is abusive, or that such an exercise could not be made "in good faith". But as a former Chief Justice of the High Court of Australia has observed, "[i]t is possible to describe the exercise of the power as being in bad faith but that is simply a colorful way of saying that the direction was beyond power"[5]. This suggests a redundancy of the concept of "good faith" in such cases, if all that one needs to say is that, as a matter of contractual interpretation, the purported exercise of a right was not permitted by the contract itself.

The third type of behavior is that which "which would be regarded as commercially unacceptable by reasonable and honest people". It is perhaps here that, at least in the eyes of lawyers from a common law background, "good faith" starts to take on an undefinable, amorphous character. Leaving aside instances of actual dishonesty, if one were to ask the proverbial "reasonable and honest" person whether he or she regarded certain behavior as "commercially unacceptable", in any particular situation, it is likely that a variety of views and opinions may be found, perhaps with the competing views being underpinned by rational arguments. The behavior of this type may not be easily treated as of the pachyderm variety ("I can't describe it, but I know it when I see it"). And it is possibly because of the large measure of uncertainty that is opened up in this open-textured field that the common law has shrunk from embracing "good faith" in any general kind of way.

3. A Failed Fad?

In the 20th Sweet & Maxwell lecture delivered in London in 2018[6], Professor John Uff CBE QC —a man of possibly unrivaled experience in construction law— commented upon the use of "partnering" in construction and engineering projects as follows:

> "Let us look at some of the earlier attempts to find a solution to high costs and low productivity in the construction industry. For some time the supposed solution has been based on a theory that the ills of the UK construction industry could be blamed on its "adversarial" nature and that the solution was to become less adversarial and to avoid formal disputes. It was in this mindset that "partnering" became the vogue and a series of new forms of contract emerged with names such as "partnering charter". These were generally drafted as non-binding declarations of intent with the stated objective of working together in „good faith" and in an "open and trusting manner" with promises to act "fairly towards each other". The lack of any contractual force is demonstrated by the lack of reported legal cases. Sadly, but unsurprisingly, partnering now seems to have gone out of vogue and is to be down-graded to what the late and great Ian Duncan Wallace QC referred to as 'another failed fad'"[7].

3 Please, see *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67 at [48].
4 Please, see *Carr v J A Berriman Pty Ltd* (1953) 89 CLR 327.
5 Sir Anthony Mason, "Opening Address", *Journal of Contract Law*, nº25, *(*2009): 1-5.
6 John Uff CBE QC, "King's College Construction Law Association – Sweet & Maxwell 20th Annual Lecture: Is the Construction Industry Waving or Drowning?" *Construction Law Journal,* 34, N° 176 (2018).
7 Uff, "King's College Construction Law…", 177.

The problem, as Professor John Uff sees it, lies not so much in the concept of "partnering", and its subsidiary virtues of "trust", "fairness" and "good faith", but in the fact that these concepts do not seem to "bite" in any legal sense. They are aspirations.

And perhaps this is the real issue. "Good faith", by its very nature, is a shapeless concept, which seems to connote some kind of a "moral or ethical" obligation, but not a hard "legal obligation" whose breach may readily be identified, and for which a remedy may be ordered.

This does not mean, of course, that we should therefore discard "good faith" as "another failed fad". At the very least, we should attempt to try to understand –and perhaps even define– what "good faith" is, when it applies (in a legal sense), and when a contracting party has (or has not) acted in "good faith". As one sees in the teachings of religious faiths, broadly-expressed principles often require articulation at a micro-level, to address specific factual situations, in order to have a real effect.

As English common law is not codified, and there are no general statutory provisions in English law concerning good faith, our consideration of "good faith" in English law must involve an examination of the jurisprudence of the English courts to see whether "good faith" has been received as part of judge-made law. Once we do this, and therefore understand the environment in which construction contracts are made, we must then consider the extent to which express "good faith" provisions have been deployed in English construction and engineering contracts, and the reception of such provisions.

4. Implied "good faith" obligations

The implication of "good faith" obligations in many legal systems is uncontroversial for at least two reasons.

First, because it accords with the morals of the people of the country. This may be a matter of custom, religion, or what we now call "personal integrity". If one were to ask the question: should we deal with each other fairly, and in "good faith"? The answer one may receive is likely to be an instinctive "yes, of course". Putting the question in a converse fashion: "is it acceptable for people to deal with each other in a sharp or underhand way, to act in 'bad faith'?" The answer, one may predict, is likely to be "certainly not". "Good faith", as a broad concept, is overwhelmingly acceptable. How could it not be?

The second reason that "good faith" is uncontroversial as a legal concept in many countries is that it forms part of the written, statutory law of the country. For this reason alone, "good faith" cannot be controversial –because it is the law. It is therefore part of the legal fabric of the country and falls to be implied into every commercial dealing.

We may find numerous examples of "good faith" obligations in civil and commercial codes. Three illustrations are given below:

- Peru's Civil Code, Article 1362: "Contracts must be negotiated, concluded, and executed according to the rules of good faith and the common intention of the parties".
- France's Civil Code, Article 1104: "Contracts must be negotiated, formed and performed in good faith"[8].
- Qatar's Civil Code, Article 171: "A contract shall be performed in accordance with its provisions and in such manner consistent with the requirements of good faith"[9].
- Uniform Commercial Code (US), §1-304: "Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement"[10].

I am conscious that any consideration of the meaning and application of "good faith" in a civil law context is a consuming and separate exercise, and will therefore not examine the import of these provisions as understood in the civil law.

8 This article was introduced into French law by an Ordinance of 10 February 2016, as discussed in Peter Rosher, "Good faith in construction contracts: comparing French and English contract law approaches" *International Business Law Journal* 145 (2020) https://www.iblj.com/abstract.htm?ref=22020145-160

9 The codes of other Middle Eastern countries are to the same effect: see Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (United Kingdom: Wiley Blackwell, 2016) , 49-50. https://www.academia.edu/36125330/Construction_Law_in_the_arab_united_Emirates_and_the_Gulf_Michael_Grose

10 "Good faith" is defined relevantly to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing": UCC §1-201(20). Despite the simple and clear language of the UCC provisions, in their application these provisions have faced difficulties before the US courts: see Paul McMahon, "Good faith and fair dealing as an under enforced legal norm", *Minnesota Law Review nº 99,* (2015): 205.

But what I will observe, to draw a sharp distinction with the position of English law, discussed immediately below, is that these code provisions put beyond argument the existential question of whether "good faith" forms part of the commercial landscape. They do, and the code provisions stand there to be seen as prominently as the "Hollywood" sign on Mount Lee in Los Angeles. Therefore, the issue to be considered for contracting parties in such jurisdictions is: in what ways does "good faith" affect my contractual dealings?

For the English lawyer, however, the question is very much an existential one: Does any legal doctrine of "good faith" apply to my contract?

The answer one may give to this question, at least in broad and general terms, is "no". We may qualify this negative indicative with the observation that English law does not shut the door on ever implying "good faith" obligations into particular contracting arrangements, however, the extent to which the common law courts are prepared to do so is very limited[11].

To better understand the position taken by English law, the ideal starting place is the case of "Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd"[12], and in particular the judgment of Bingham LJ (as he then was), who was the most venerated and perhaps the most influential English commercial law judge in the last three decades. "Interfoto" concerned a contract for the lending of photographic transparencies. The contract in question stipulated that the borrowed transparencies were to be returned within 14 days, after which a holding fee of £5 per day plus VAT would be payable per transparency. Stiletto, who borrowed 47 transparencies, failed to read the contract, including the term regarding payment of the late fee.

As it happened, Stiletto returned the transparencies around two weeks late. "Interfoto" then sought to levy the late fee against Stiletto, which came to a total of £3,783.50 for the 47 transparencies in question. Stiletto refused to pay the late fee and sought to raise some legal arguments as to why it should not be required to do so, including that the late fee clause was particularly onerous or unusual, and it had not been fairly and reasonably brought to Stiletto's attention at the time of entering into the contract[13].

The English Court of Appeal upheld Stiletto's defense, thereby defeating the late fee clause in this particular instance. The Court of Appeal accepted, going against the conclusions of the trial judge that the late fee provision in the contract was indeed particularly onerous or unusual, and that it had not been fairly brought to Stiletto's attention at the time of entering into the contract. No argument was made that the clause was unenforceable in the circumstances due to the application of any "good faith" doctrine, and so the comments made by Bingham LJ may be seen as contextual. The key part of Bingham LJ's judgment was as follows:

> "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes 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 recognize; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as "**playing fair", "coming clean" or "putting one's cards face upwards on the table**". It is in essence a principle of fair and open dealing. In 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 transparencies were not returned in time and, when the 14 days had expired, 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 but 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. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire purchase agreements. The common law also has made its contribution,

11 Perhaps the most notable circumstance in which an obligation of good faith is clearly enshrined is insurance law. An insurance contract is treated as one requiring "the utmost good faith" on the part of the insured: see *Carter v Boehm* (1766) 3 Burr 1905 at 1909–1910, per Lord Mansfield [97 ER 1162 at 1164]; *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469 at 491 [42], per Lord Hobhouse.

12 *Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd* [1989] QB 433.

13 For a relatively recent case considering this common law doctrine, see the case *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371.

> by holding that certain classes of the contract require the utmost good faith, by treating as irrecoverable what purport to be agreed to estimates of damage but are in truth a disguised penalty for breach, and in many other ways"[14].
>
> (The emphasis is our)

"Interfoto" certainly reflected the approach of English law at the time of the judgment (delivered in 1987), and in the decades since it was handed down Bingham LJ's restatement of the law set the tone for what was to come (or rather, not to come). This wariness of "good faith" as a general legal concept had led the English courts, in subsequent decades, to view "good faith" arguments with some suspicion. In some ways this is unsurprising: English common law has, on the whole, developed through small increments rather than revolutionary, sweeping changes. The English courts are therefore naturally conservative when it comes to major legal developments, as would be the case if "good faith" became —by dint of judicial decision— an entrenched and wide-ranging legal doctrine in English law, in the same way as it is written into the codes of civil law jurisdictions. And there is also a certain empirical element to the mindset as well: for its entire history, reaching back now almost 1,000 years, English commercial law has successfully addressed the issues of the day without recourse to a general principle of good faith – so how could there now be some compelling reason for adopting good faith in this way?[15]

These reservations about the applicability of good faith have not, however, precluded subtle developments in English common law in the intervening period to give limited recognition to the application of "good faith". One notable and relatively recent case in this regard which demonstrates the evolutionary character of English law is "Yam Seng Pte Ltd v International Trade Corporation Ltd"[16]. "Yam Seng" concerned a contract under which it obtained the exclusive rights from ITC to distribute certain (no doubt delightful) fragrances bearing the brand name "Manchester United" in specified territories in the Middle East, Asia, Africa, and Australasia. The relations between the contracting parties quickly took on a malodorous air, and allegations of breach of the agreement were made by each party against the other, due to alleged deficiencies in shipping the fragrances, and other matters. These grievances eventually resulted in court proceedings in the English High Court.

By contrast with "Interfoto", where good faith was not even pleaded, in "Yam Seng" it was alleged that there was an implied term of the contract that each party would deal with each other in good faith. After an extensive review of the English case law and commentary concerning good faith, Leggatt J concluded that "the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it persists, is misplaced"[17]. His Lordship then went on to hold that "the extent to which the content of the duty to perform a contract in good faith is dependent on context"[18]. This certainly demonstrates a subtle shift in emphasis from the position as articulated by Bingham LJ in "Interfoto". The English courts will therefore not be hostile, or openly dismissive of arguments that good faith obligations are to be implied if warranted by the circumstances. But we should also acknowledge that "Yam Seng" is still many miles away from a wholesale reception of "good faith" as a foundational part of the common law.

There is one further aspect of "Yam Seng" that may be of interest to those involved in construction and engineering projects, particularly for larger, long-term contracts that may be said to be "relational" in nature. Leggatt J held:

> "In some contractual contexts, the relevant background expectations may extend further to an expectation that the parties will share information relevant to the performance of the contract such that a deliberate omission to disclose such information may amount to bad faith. English law has traditionally drawn a sharp distinction between certain relationships –such as partnership, trusteeship and other fiduciary relationships– on the one hand, in which the parties owe onerous obligations of disclosure to each other, and other contractual

14 *Interfoto Picture Library Ltd v Stiletto Visual Programs Ltd* [1989] QB 433 at 439.

15 See also *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789 at [45], per Moore-Bick LJ. Cf Steyn, "The role of good faith and fair dealing in contract law: a hair-shirt philosophy?" (1992) 58 *Arbitration* 51 at 51: "The aim of any mature system of contract law must be to promote the observance of good faith and fair dealing in the conclusion and performance of contracts. The first imperative of good faith and fair dealing is that contracts ought to be upheld. But there is another theme of good faith and fair dealing: the reasonable expectations of honest men must be protected. It occasionally requires that the law should treat contractual obligations as defeasible or that a discretionary remedy should be denied". See, further, Vasanti Selvaratnam, "Good faith: is English law swimming against the international tide?", *Lloyd's Maritime and Commercial Law Quarterly (*2020): 232.

16 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB). This case is an English contract law case, concerning the principle of good faith.

17 *Yam Seng Pte Ltd v International Trade Corporation Ltd* at [153].

18 *Yam Seng Pte Ltd v International Trade Corporation Ltd* at [154].

> relationships in which no duty of disclosure is supposed to operate. Arguably at least, that dichotomy is too simplistic. While it seems unlikely that any duty to disclose information in performance of the contract would be implied where the contract involves a simple exchange, many contracts do not fit this model and involve a longer term relationship between the parties which they make a substantial commitment"[19].

Could one add a further type of "relational" contract to the list, namely construction and engineering contracts that involve a substantial time, resource, and financial commitment of the parties? This is certainly a possibility, at least if we are considering whether such contracts are "in the zone" for "good faith" being implied into the contractual matrix of the parties. Indeed, one finds recent support from the English Court of Appeal for the notion that co-operation and open communication are highly desirable for such contracts:

> "[92] The contract before the court is a PFI contract intended to run for 25 years. It may therefore be classified as a relational contract. In recent years there has been much academic literature on relational contracts and on the question whether they are subject to special rules. See, for example, Professor Hugh Collins' paper "Is a relational contract a legal concept?" in *Contracts in Commercial Law* (Degeling and others, Thomson Reuters 2016). For good reason, none of that literature has been cited to us and I do not venture into those contentious issues.
>
> [93] I do, however, make this comment. Any relational contract of this character is likely to be of massive length, containing many infelicities and oddities. Both parties should adopt a reasonable approach in accordance with what is obviously the long-term purpose of the contract. They should not be latching onto the infelicities and oddities, in order to disrupt the project and maximise their own gain"[20].

These are powerful considerations that should weigh on the minds of all parties undertaking significant, long-term contracts. It is self-evidently better to act in good faith with one's contracting party and to communicate in a straightforward and timely way, rather than taking a bellicose approach and withholding from one's counterparty key information that is needed to ensure the successful completion of the project.

But just because acting "in good faith" is virtuous, and just because English law is no longer hostile to notions of good faith (if such hostility ever existed), it does not follow that English law will imply "good faith" obligations into relational or indeed other contracts[21]. This is why it is imperative for contracting parties, operating under English law, who wish to enshrine "good faith" as part of the fabric of their legal relationship to set out the relevant "good faith" obligations in the terms of their contract.

4.1. Express "good faith" obligations

4.1.1 The NEC form

It is certainly more common these days for "good faith" obligations, and cognate obligations, to be used in UK construction and engineering contracts. If at one point "good faith" provisions were considered by some to be a "failed fad", we may reflect that apostasy has not taken hold.

In the UK, the standard-bearer for what might be referred to as the "good faith movement", is the NEC form of contract, which was first published in the 1990s, and is commonly used, certainly in large public infrastructure projects[22]. Clause 10.2 of the current NEC form (NEC4, published in 2017) provides in this regard that:

19 *Yam Seng Pte Ltd v International Trade Corporation Ltd* at [142].

20 *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264 at [92]-[93], per Jackson LJ.

21 See, further, (i) David Mosey and Shy Jackson. "Good Faith and Relational Contracting – Do Enterprise Contracts Offer a Way Through the Woods?". *Society of Construction Law UK* SCL Paper D228. (March 2020):7-13. https://www.scl.org.uk/papers/good-faith-relational-contracting-%25E2%2580%2593-do-enterprise-contracts-offer-way-through-woods ; (ii) In adittion, *Bates v Post Office Ltd (No.3)* [2019] EWHC 606 (QB) at [702]–[721], per Fraser J; (iii) *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581 at [99]-[106], per Pepperall J. English common law has, however, shown a certain willingness to imply good faith and cognate obligations into commercial contracts in a limited sense - in relation to the exercise of discretionary powers. Thus, where a contract confers upon a party a discretion that, if exercised or not exercised, may adversely affect the other party's interests, the discretionary power must (unless the contract provides otherwise) be exercised in good faith, and not arbitrarily or capriciously *British Telecommunication Plc v Telefonica O2 Ltd* [2014] UKSC 42 at [37], per Lord Sumption JSC. See also Lord Philip Sales, "Use of powers for proper purposes in private law" (2020) 136 *Law Quarterly Review* 384.

22 The NBS, *National Construction Contracts and Law Report (2018),* 18. https://www.thenbs.com/ see that NEC contracts were the second most popular form of contract in the UK, after the dominant JCT forms. Other UK forms incorporate "good faith" obligations, however for brevity on the NEC form will be considered. See also David Mosey, "Good faith in English construction law – what does it mean, and does it matter?", *International Construction Law Review* (2015): 392-393. https://www.i-law.com/ilaw/doc/view.htm?id=358279. It may also be noted that a "good faith" clause was to be included in the proposed Australian standard form of contract AS11000: see

> "The Parties [scil. the Client and the Contractor], the Project Manager, and the Supervisor act in a spirit of mutual trust and co-operation".

Although clause 10.2 does not refer to "good faith", it is generally understood that the requirement of the parties to "act in a spirit of mutual trust and co-operation" is an equivalent, if not identical, duty.

This particular provision has attracted a sustained discussion as to its content as a contractual obligation[23]. And over the last few years, a certain amount of jurisprudence has emerged from the English courts as to the meaning of this clause.

It has been held, for example, that the duty to act "in a spirit of mutual trust and co-operation" requires a party not to say or do anything which might mislead the other party, and it may even require a party to correct a false assumption that is being made by the other party[24]. This, we may observe, is consistent with one of the basic tenets of "good faith" as discussed earlier in this paper, namely that a party is to act honestly in its dealings with its counterparty ("do not lie, do not deceive").

It has also been held that an obligation upon a contracting party to "act in a spirit of mutual trust and co-operation" does not prevent a party from relying upon any of the express terms of a contract that was freely entered into[25]. This may be quite an important matter, particularly for those who regard "good faith" as some kind of a panacea or "get out of jail free" card[26] when faced with a counterparty that is insisting on exercising its contractual rights to the letter. English contract law has hard edges to it, and parties may be held to the terms of their bargain, even if, in the particular circumstances, one party may consider the other party's enforcement of its rights to be commercially unfair or unacceptable. To illustrate this, we will consider below a case from 2017 where the High Court of Northern Ireland[27] upheld a time bar provision in a contract similar in relevant respects to the NEC form.

4.1.2. Time bars

Few contractual provisions cause more consternation than time bar provisions. A typical provision may be to the effect that if the contractor is or will be delayed or disrupted, or it will incur an additional cost, as a result of a particular event at the employer's risk, the contractor must notify the employer of the event and the contractor's potential claim in respect thereof within a particular period (e.g. 28 days), failing which the contractor's claim (or potential claim) is lost for all time, i.e. it is "time barred". Time bar provisions may be justified on the basis that they require the parties to make and address promptly claims arising from a project, rather than allowing them to be stored up until some later point in time, possibly even after the project has been completed, by which time it is impossible to manage the effects of the particular event or claim in question.

But, we must also acknowledge, time bar provisions have the potential to work what may be regarded as an injustice towards a contractor. If a contract requires notification of a claim within 28 days of an event occurring, and the contractor gives its notice on day 30, with there being no prejudice or practical consequence of this, should it be debarred from pursuing its claim? Under the letter of the contract, the answer is clear: the claim is time barred. If, however, the employer is subject to an obligation to exercise its contractual rights in "good faith", may this somehow require the employer to, as it were, waive the minor non-compliance, and to address the contractor's claim on its merits?

Alexander Di Stefano, "Good Faith in the AS11000: Has the Eagle Landed?", *Building and Construction Law Journal*, vol 33 pt 1 (Abril 2017): 33. http://sites.thomsonreuters.com.au/journals/2017/04/09/building-and-construction-law-journal-update-vol-33-pt-1/. However, the AS11000 form was not published, and it is presently unclear whether it ever will be.

23 For three recent articles, see David S. Christie, "How can the use of 'mutual trust and co-operation' in the NEC3 suite of contracts help collaboration?", *International construction law review* (2017) :94 https://www.i-law.com/ilaw/doc/view.htm?id=376379; Joseph Mante, "Mutual trust and co-operation under NEC 3&4: a fresh perspective", *Construction law journal* 34 (2018): 231; David S. Christie, "Splendid, But What Does It Actually Mean?': Good Faith and Relational Contracts in the UK Construction Industry". *Journal of Commonwealth Law* 403 vol. 1(2019). https://www.journalofcommonwealthlaw.org/article/10813-splendid-but-what-does-it-actually-mean-good-faith-and-relational-contracts-in-the-uk-construction-industry). See also Shy Jackson, "Of chocolate mousse and good faith", in Bailey (ed), *Construction Law, Costs and Contemporary Developments: Drawing the Threads Together – a Festschrift for Lord Justice Jackson* (Hart Publishing, 2018) chapter 10. https://www.bloomsburycollections.com/book/construction-law-costs-and-contemporary-developments-drawing-the-threads-together-a-festschrift-for-lord-justice-jackson/

24 *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319 (TCC) at [124], per Coulson J.

25 *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396 (TCC) at [70], per Akenhead J.

26 "Get Out of Jail Free card", Wikipedia. Last modified November 12, 2020. https://en.wikipedia.org/wiki/Get_Out_of_Jail_Free_card

27 The Northern Ireland courts fall within the overall jurisdiction of the United Kingdom, with the apex court for Northern Ireland being the UK Supreme Court, which is based in London. The practical consequence of this is that the common law of Northern Ireland is essentially the same as that for England and Wales.

This, in essence, was the issue in *Glen Water Ltd v Northern Ireland Water Ltd*[28], which concerned a PFI project for upgrading existing sludge treatment facilities in Northern Ireland. The contract in question, which used provisions similar to those in the NEC form[29], included a time bar provision requiring the contractor to give notice of it becoming aware of a "compensation event" within 21 days of that "compensation event" occurring. For the project in question, a particular event occurred which, according to the contractor, constituted a "compensation event" entitling it to approximately £4.4m. The employer denied the claim on grounds including that the contractor's notification of the event was given late. There was no suggestion by the employer that the timing of the notification had in any way caused the employer to suffer any material prejudice. Indeed, the employer and the contractor had discussed the claim before the contractor's formal notification of it was given.

Notwithstanding, it was concluded by the judge that the contractor's notification was late and that the contractor's claim was, therefore, time barred. Perhaps the contractor had a good underlying claim for the "compensation event" in question, but this mattered not. As the judge held:

> "I do have some sympathy for the [contractor's] position because the failure to notify prevents a claim being made. That may seem harsh when commercial parties anticipated that a claim might come to pass… However, I have to decide the case within the parameters of commercial and contract law. The contractual terms are clear and commercial certainty is an overarching consideration. The evidence as to the commercial context and surrounding circumstances has not remedied the defect in the letter. It seems to me likely that the notification requirement was overlooked amid a mass of claims and in the midst of an ongoing process of discussions"[30].

It should be noted that the contractor did not make any argument based on any express or implied "good faith" obligation, which could conceivably operate to preclude the employer from relying upon the time bar provision to defeat the contractor's claim. Even if a "good faith" obligation was found to exist, would it operate to preclude the employer's reliance upon the time bar provision, in these particular circumstances? No doubt ingenious arguments could be crafted for this particular situation, but perhaps the reason they were not was because of the hard-edged approach that English common law takes to "good faith" obligations.

The message is clear: if you enter into a contract, freely and with open eyes, you will be held to the terms you have agreed, even if they may hamper or disable you from claiming the contract. "Good faith" cannot, absent dishonest or similar conduct, be invoked to deny a contracting party the benefit of a clause which has been included in a contract to protect its position.

4.1.3. Scope

To conclude this discussion of express "good faith" obligations, let us consider the scope of such obligations, where they are included in a contract. Although contracts can (and sometimes do) create express obligations of good faith, they may also delineate the scope of those obligations. An obligation to act in good faith may only apply to certain conduct by a party in performing a contract, as opposed to *all* conduct. An English case that vividly demonstrates this is "Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd"[31].

"Mid Essex" concerned a catering contract for a hospital, as part of a PFI scheme32. The contract contemplated the catering contractor being paid according to the service is provided, whereby deductions from payment could be made if the quality of catering fell short of particular standards. The extent of the deductions could be enormous, and indeed the hospital sought to deduct £84,450 because a chocolate mousse was discovered in the contractor's fridge that was one day past its expiry date. Deductions of a similar financial magnitude, for other minor transgressions, were also made.

The contract in "Mid Essex" contained an express good faith obligation; however, it was not general. It provided that:

28 Glen Water Ltd v Northern Ireland Water Ltd. Neutral Citation No. [2017] NIQB 20.
29 Although it is unclear from the judgment whether the contract included a provision equivalent to NEC4 clause 10.2.
30 *Glen Water Ltd v Northern Ireland Water Ltd* [2017] NIQB 20 at [64], per Keegan J.
31 *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200.
32 PFI (or "Private Finance Initiative") is the UK's version of PPP (public-private partnerships, as they are referred to in Peru and other countries), and in fact the concept of PFI/PPP was invented in the UK.

> "the [hospital] Trust and the Contractor will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust or, as the case may be, any Beneficiary to derive the full benefit of the Contract".

It was suggested by the contractor that this express "good faith" provision operated to preclude the hospital from making the deductions that it made. This argument was rejected.

As the English Court of Appeal held (Jackson LJ giving the leading judgment), the obligation within the clause was narrow and specific, relating to the transmission of information and instructions, and not anything else (such as the making of payment deductions for shortcomings in services rendered)[33]. Accordingly, despite the magnitude of the deductions made by it, the hospital was not found to have acted in breach of any "good faith" obligation.

Perhaps the point of real interest for us coming out of the "Mid Essex" case is that the English courts recognize that if contracting parties define their express "good faith" obligations in limited or constrained terms, the courts will infer that they intended "good faith" to apply only in that limited way, and (by implication) they *did not intend* for good faith to operate as a broad, all-pervasive doctrine, applying to every facet of contractual performance[34].

5. The role of estoppel

The circumstances in which "good faith" notions may be deployed are multitudinous. English law does not, as we have seen, contemplate "good faith" acting as a panacea or "get out of jail free" card for contracting parties. Nevertheless, we must acknowledge that English law creates safety valves in other ways, through other doctrines, which in their operation may apply similarly to a "good faith" obligation.

A relatively recent illustration of the English position in this regard comes from "Rock Advertising Ltd v MWB Business Exchange Centres Ltd"[35]. The primary issue before the court concerned the enforceability of a so-called "no oral modification" clause in a property license agreement. The clause in question provided as follows:

> "This License sets out all of the terms as agreed between MWB and Licensee. No other representations or terms shall apply or form part of this License. All variations to this License must be agreed, set out in writing and signed on behalf of both parties before they take effect."

It was alleged by the licensee that the agreement had been varied by an oral, unsigned agreement between it and the licensor/property owner, which altered the payment terms under the contract.

After referring to case law, including from the US[36], the UK Supreme Court concluded that the "no oral modification" clause in question —and such clauses generally— would be upheld, even if the parties had entered into the informal, unsigned agreement to vary the payment terms of the contract. This provides a clear indication of the robust approach that English law takes to enforcing contracts. But English law also likes to leave room for exceptions, in case there are circumstances which warrant a departure from the strict application of such a contractual provision. In this regard, Lord Sumption JSC, who gave the leading judgment of the court[37], made the following observations:

> "The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to

33 A similar, narrow "good faith" obligation was found to exist in the recent Australian case of *Downer EDI Rail Pty Ltd v John Holland Pty Ltd (No.5)* [2018] NSWSC 326 at [518]-[519], per Stevenson J.

34 See also *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581 at [99]-[117], per Pepperall J.

35 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24.

36 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*[2018] UKSC 24 at [7]-[8].

37 Lade Hale, Lord Wilson and Lord Lloyd-Jones agreed with Lord Sumption. The other member of the court, Lord Briggs, delivered a separate judgment which was largely consistent with that of Lord Sumption.

> explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see *Actionstrength Ltd v International Glass Engineering SpA* [2003] 2 AC 541, paras 9 (Lord Bingham), 51 (Lord Walker)"[38].

Thus, we can see that there are "escape valves" under English common law to ameliorate the prejudice that could result from a party unfairly seeking to apply a contract to the letter. "Good faith" is not one of those escape valves, but others exist, including waiver and estoppel. Nevertheless, to understand the sense and feel of English common law, we must recognize the hegemony of the notion of "freedom of contract", and the almost overwhelming inclination of English courts to hold contracting parties to the terms of their bargain.

6. Conclusion

What I hope this discussion of "good faith" illustrates is that although the common law does not recognize "good faith" as a concept, let alone a doctrine, of universal application in the world of commercial contracts, equivalent notions are to be found in the common law. The day has not yet come when "good faith" has been embraced as an overarching principle of English contract law, and perhaps this makes English law appear something of a legal Galápagos, cut off from the many nations of the world who write good faith into their civil and commercial codes. We may only speculate as to whether this impacts upon standards of commercial behavior where English law applies[39].

And perhaps it even helps to give English law "the edge" when it comes to commercial parties choosing the law that should apply to their contractual dealings[40]. An implied obligation of good faith could be seen as creating a layer of uncertainty over the clear, black-and-white terms of a contract. As English law does not routinely (or even frequently) imply good faith obligations into commercial arrangements, this means that contracting parties do not, as a matter of generality, need to look beyond the terms of their express agreement to understand what their legal rights and obligations are.

But maybe, despite the route taken by English common law to date, there is some possibility of —if not convergence— a blunting of the edges of the common law approach, perhaps to bring it closer to the civil law position. As Sir Rupert Jackson has remarked:

> "The ever-increasing recourse by judges to good faith' may be a function of the tendency of the common law and the civil law to come together. Common lawyers and civil lawyers increasingly work together or sit together as co-arbitrators in the context of international arbitration, where most major construction disputes find their resolution"[41].

Collaboration and contextualization in this area are certainly to be encouraged. But the cynic may still ask: to what end? Does "good faith" make a difference?

I suggest that the answer is a qualified *yes*. Yes, good faith does matter in construction and engineering contracts, but it is a weak and largely ineffective tool if it simply exists in a contract as an attempt to create an abstract moral code for the contracting parties. Good faith can only be effective as an overlaying veil for an agreed set of actions and rewards that are geared towards producing collaboration between the parties42. By having these defined contractual systems for collaboration in place, and by requiring the parties to act in good faith in fulfilling those contractual systems, "good faith" may represent more of an

38 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24 at [16].

39 In this regard, perhaps the spirit of British commerce, or at least certain quarters of it, is encapsulated in a quote attributed by Eddie Jordan to Formula One impresario Bernie Ecclestone: 'A great philosophy of Bernie Ecclestone's was "Shake my hand and you've got a deal for life. Sign me a contract and I'll find a way around it"': *The Telegraph*, 3 July 2016.

40 Paul S Davies, "The basis of contractual duties of good faith", *Journal of Commonwealth Law*, (2019): 6-7.

41 Sir Rupert Jackson, "Winners, Losers and a Coda on Good Faith" (Paper D227). *Society of Construction Law*, (2020): 1-7.

42 See David Mosey, "Good faith in English construction law – what does it mean, and does it matter?" *International Construction Law Review* (2015): 392 - 402; Richard Harvey, "Good faith, contracts and procurement: analogous means to achieving legal certainty?" *Society of Construction Law Paper D21* (May 2018):8-12. https://www.scl.org.uk/papers/good-faith-contracts-procurement-analogous-means-achieving-legal-certainty

expression of a contemplated mindset, rather than a hard legal obligation. But it is through the discipline of following agreed procedures for working together, combined with a "good faith" metanoia on the part of the parties, that the riches of harmony may flow.

Let me conclude this paper by returning to Peru itself, and considering what this abundant nation –or more particularly *its people*– represent today. I can do no better in this regard than refer to the words of the great Mario Vargas Llosa:

> "A compatriot of mine, José María Arguedas, called Peru the country of "every blood." I do not believe any formula defines it better: that is what we are and that is what all Peruvians carry inside us, whether we like it or not: an aggregate of traditions, races, beliefs, and cultures proceeding from the four cardinal points. I am proud to feel myself the heir to the pre-Hispanic cultures that created the textiles and feather mantles of Nazca and Paracas and the Mochican or Incan ceramics exhibited in the best museums in the world, the builders of Machu Picchu, Gran Chimu, Chan Chan, Kuelap, Sipan, the burial grounds of La Bruja and El Sol and La Luna, and to the Spaniards who, with their saddle bags, swords, and horses, brought to Peru Greece, Rome, the Judeo-Christian tradition, the Renaissance, Cervantes, Quevedo, and Gongora, and the harsh language of Castile sweetened by the Andes. And with Spain came Africa, with its strength, its music, and its effervescent imagination, to enrich Peruvian heterogeneity. If we investigate only a little we discover that Peru, like the Aleph of Borges, is a small format of the entire world"[43].

Just as Peru has ultimately benefited from a long intermingling of peoples, languages, histories, and ideas, we may also do the same with our sharing of concepts and thought in relation to the place and role of good faith in our various legal systems. This may be particularly important for lawyers from the common law tradition where, as we have seen, a doctrine of good faith is presently a muted, marginal thing. For those who desire the introduction of a universal rule of good faith in English common law, we may do no better than to look to civilian systems of justice to understand the import, and potential benefits, of having such a contractual norm.

7. Bibliography

Christie, David S. "How can the use of 'mutual trust and co-operation' in the NEC3 suite of contracts help collaboration?", *International construction law review* (2017):94 https://www.i-law.com/ilaw/doc/view.htm?id=376379

Christie, David S. "'Splendid, But What Does It Actually Mean?': Good Faith and Relational Contracts in the UK Construction Industry". *Journal of Commonwealth Law* 403 vol. 1(2019). https://www.journalofcommonwealthlaw.org/article/10813-splendid-but-what-does-it-actually-mean-good-faith-and-relational-contracts-in-the-uk-construction-industry

Davies, Paul. "The basis of contractual duties of good faith". *Journal of Commonwealth Law*, 1, N° 1 (2019).

Harvey,Richard. "Good faith, contracts and procurement: analogous means to achieving legal certainty?". *Society of Construction Law Paper D21* (May 2018):8-12. https://www.scl.org.uk/papers/good-faith-contracts-procurement-analogous-means-achieving-legal-certainty

Jackson, Shy. "Of chocolate mousse and good faith", in Bailey (ed), *Construction Law, Costs and Contemporary Developments: Drawing the Threads Together – a Festschrift for Lord Justice Jackson* (Hart Publishing, 2018) chapter 10.https://www.bloomsburycollections.com/book/construction-law-costs-and-contemporary-developments-drawing-the-threads-together-a-festschrift-for-lord-justice-jackson/

Mante, Joseph. "Mutual trust and co-operation under NEC 3&4: a fresh perspective", *Construction law journal* 34 (2018): 231

McMahon, Paul."Good faith and fair dealing as an under enforced legal norm", *Minnesota Law Review nº 99,* (2015): 205.

Mosey, David. "Good faith in English construction law – what does it mean, and does it matter?", *International Construction Law Review* (2015): 392-393.
https://www.i-law.com/ilaw/doc/view.htm?id=358279

43 Mario Vargas Llosa. "In praise of reading and fiction" (Nobel Lecture, December 7 2010). (www.nobelprize.org).

Mosey, David and Shy Jackson. "Good Faith and Relational Contracting – Do Enterprise Contracts Offer a Way Through the Woods?". *Society of Construction Law UK* SCL Paper D228. (March 2020):7-13.https://www.scl.org.uk/papers/good-faith-relational-contracting-%25E2%2580%2593-do-enterprise-contracts-offer-way-through-woods

Rosher, Peter."Good faith in construction contracts: comparing French and English contract law approaches" *International Business Law Journal* 145 (2020) https://www.iblj.com/abstract.htm?ref=22020145-160

Selvaratnam, Vasanti. "Good faith: is English law swimming against the international tide?", *Lloyd's Maritime and Commercial Law Quarterly (*2020): 232. https://36group.co.uk/news/2020/5/good-faith-is-english-law-swimming-against-the-international-tide

Stefano, Alexander Di. "Good Faith in the AS11000: Has the Eagle Landed?". *Building and Construction Law Journal*, vol 33 pt 1 (Abril 2017): 33.
http://sites.thomsonreuters.com.au/journals/2017/04/09/building-and-construction-law-journal-update-vol-33-pt-1/

Sir Jackson, Rupert. "Winners, Losers and a Coda on Good Faith" (Paper D227). *Society of Construction Law*, (2020): 1-7, https://www.scl.org.uk/papers/winners-losers-coda-good-faith

Sir Mason, Anthony. "Opening Address". *Journal of Contract Law, 25, (*2009): 1-5.

Uff, John CBE QC, "King's College Construction Law Association – Sweet & Maxwell 20th Annual Lecture: Is the Construction Industry Waving or Drowning?". *Construction Law Journal,* 34, N° 176 (2018): 1-13. https://www.scl.org.uk/papers/construction-industry-waving-or-drowning.

Vargas Llosa, Mario. "In praise of reading and fiction". Nobel Lecture, 7 December 2010. (www.nobelprize.org).

Wikipedia. 2020. "Get Out of Jail Free card". Last modified November 12, 2020. https://en.wikipedia.org/wiki/Get_Out_of_Jail_Free_card

Wikipedia. "Get Out of Jail Free card".Last modified November 12, 2020. https://en.wikipedia.org/wiki/Get_Out_of_Jail_Free_card