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THE BINDING FORCE OF AGREEMENTS TO NEGOTIATE IN GOOD FAITH

LEON E. TRAKMAN* AND KUNAL SHARMA**

ABSTRACT. *This article evaluates the established judicial proposition that an agreement to negotiate in good faith is antithetical to the principles of the common law. English courts are reluctant to enforce such agreements on the ground that they constitute unenforceable "agreements to agree". Recently, courts have started to recognise an exception in cases where parties agree to negotiate over a term mandated by an existing agreement, such as to review a price clause or resolve a dispute by undertaking negotiations in good faith. The primary arguments against enforcing an independent agreement to negotiate in good faith are threefold. First, parties engaged in good faith negotiations are assumed to lack a serious legal intention to contract. Second, such an agreement is substantively uncertain in nature and does not promise to produce a contract. Third, the failure of parties to conclude their negotiations does not lead to an easily identifiable loss. In light of these considerations, this article considers the viability of enforcing an agreement to negotiate in good faith in the absence of a pre-existing contract. It argues that the legal obstacles to recognising agreements to negotiate have been overstated. Given the commercial value of enforcing such agreements, it proposes that agreements to negotiate in good faith should be recognised and given legal content by common law courts.*

KEYWORDS: *Contract, certainty of terms, agreement to agree, good faith.*

I. INTRODUCTION

> If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot

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> recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one can tell whether the negotiations would be successful or would fall through: or if successful, what the result would be.[1]

Non-lawyers may be forgiven for failing to immediately appreciate why agreements to negotiate in good faith are so controversial. After all, the private nature of a contractual relationship should mean that parties are free to make binding promises (with obvious exceptions, such as contracts for an illegal purpose or contracts in restraints of trade).

The common law has historically always been averse to the notion of binding agreements to negotiate in good faith. General principles of contract formation that form the foundation of private agreements dictate that, inter alia, the contracting parties must evince a clear intention to enter into legal relations with respect to terms that are certain in nature. In light of this, courts have tended to find that agreements to negotiate are not only uncertain in substance, but are also against public policy as these agreements tend to bind parties to promises which they did not intend to be legally binding.

The element of good faith in negotiating, far from making agreements to negotiate more certain, is seen as fostering imprecision. The difficulty is in deeming when negotiating conduct falls short of a legal standard of good faith.

Admittedly, good faith as an ordinary term is susceptible of widely differing interpretations. That does not, however, mean that it is incapable of being given legal content. Notably, we are not here concerned with the content of a "good faith" duty in abstract, but rather with the content of such a duty in the context of an express agreement to negotiate in good faith. This can be distinguished from an implied duty to perform contracts in good faith, though commentary on good faith performance can be useful in examining the duty of good faith with which this paper is concerned.

This paper argues that agreements to negotiate in good faith should not be summarily dismissed as lacking certainty and being offensive to public policy. There are strong commercial reasons to support the enforcement of express promises to negotiate in good faith. For example, a negotiating party may rely on promises made by the other party that it will negotiate in good faith, thereby sacrificing competing offers from interested third parties. Negotiating parties may also incur significant expenses in relation to their negotiations. Further, some civil law jurisdictions impose a number of good faith obligations on contracting parties and grant a diverse range of remedies. As a result, parties from different jurisdictions may have incompatible expectations arising from their negotiations. In addition, failed

[1] *Courtney & Fairbairn Ltd. v Tolaini Brothers (Hotels) Ltd.* [1975] 1 W.L.R. 297, 301 (Lord Denning M.R.).

negotiations may lead to complex litigation involving conflicting good faith obligations and remedies. Thus, recognition of such obligations is beneficial not only on functional grounds, but may also contribute to the harmonisation of contract law across civil and common law jurisdictions.

As such, this paper scrutinises the notion of a "good faith" duty from a historical and conceptual standpoint, proposing a legal meaning for this term in the context of agreements to negotiate. Further, it analyses agreements to negotiate by applying first principles of contract formation in English law, noting that the potential problems identified with such agreements are often overstated.

This analysis of a duty to negotiate in good faith requires consideration of three interrelated questions, considered throughout this paper. First, is there any legal basis as to why a duty to negotiate in good faith, in the absence of a pre-existing contract between the parties, ought to be recognised? Second, if so, when should such an agreement to negotiate in good faith be binding on the parties? Third, what legal consequences, if any, should flow from such an agreement to negotiate in good faith?[2]

Following this introduction, Part II of this paper sets out the key challenges to the enforceability of agreements to negotiate in good faith. Part III examines the historical and doctrinal bases of a duty of good faith, and Part IV attempts to provide legal content to such a duty in the context of agreements to negotiate. Part V then applies the general principles of contract formation to agreements to negotiate and argues that the element of good faith, as examined in the preceding parts, can be a meaningful legal concept that adds certainty to agreements to negotiate. Finally, Part VI considers potential remedies that may be available to redress a breach of an agreement to negotiate in good faith.

II. Challenges to a Duty to Negotiate in Good Faith

Recent case law has reinforced the prevailing, if increasingly judicially questioned, view that agreements to negotiate are not enforceable in English law. In April 2012, the Court of Appeal in *Barbudev v Eurocom Cable Management Bulgaria EOOD*[3] held that a side letter in which the parties agreed to negotiate for the proposed sale of a cable television and internet business was seriously intended. However, it decided that the letter was unenforceable as an "agreement to agree".[4] In June 2012, the

[2] For more on these questions in the context of English and Australian law, see E. Peel, "The Status of Agreements to Negotiate in Good Faith" in A. Burrows and E. Peel (eds.), *Contract Formation and Parties* (Oxford 2010); J. M. Paterson, "Duty of Good Faith: Does It Have a Place in Contract Law?" (2000) 74 L.I.J. 47; D. Yates, "Commentary on 'Two Concepts of Good Faith'" (1995) 8 J.C.L. 145; J. F. O'Connor, *Good Faith in English Law* (Aldershot 1990). On different meanings of "good faith" in contracts, see J. W. Carter and E. Peden, "Good Faith in Australian Contract Law" (2003) 19 J.C.L. 155.

[3] [2012] EWCA Civ 548.

Commercial Court in *Shaker v Vistajet Group Holding SA*[5] declined to enforce a letter of intent providing for the seller to return the buyer's deposit within five days if, "*despite the exercise of their good faith and reasonable endeavours*, [the parties] *fail to reach agreement, execute and deliver the Transaction Documents on or before the Cut-Off Date"*.[6] The Court held that both an agreement to use reasonable endeavours to agree and to negotiate in good faith were unenforceable because "there are no *objective criteria by which the court can decide whether a party has acted unreasonably"*,[7] since *"a duty to negotiate in good faith is unworkable because it is inherently inconsistent with the position of a negotiating party."*[8] While obiter dicta, the inference is that an agreement to use reasonable endeavours to agree constitutes an unenforceable "agreement to agree" in English law.[9]

However, in the recent case of *Yam Seng Pte Ltd. v International Trade Corporation Ltd.*,[10] the High Court held that the "hostility" of the English courts to a general duty of good faith in the performance of a contract is misplaced. Mr. Justice Leggatt considered that it was possible to imply, in some contracts, a duty to act honestly and in conformity with the parties' bargain. After examining prior English cases implying obligations of good faith into commercial contracts, the High Court found that a general duty of good faith should be implied into the long-term distribution agreement in that case, while stressing that the content and application of such a duty of good faith is dependent on the context of each case.[11] Importantly, recognition of this implied duty of good faith in performance shows curial willingness to import obligations of proper conduct into a private relationship. However, the Court did not go on to consider the enforceability of a duty to negotiate in good faith where no contractual relationship exists between the parties, this latter issue being irrelevant to the resolution of the case.

Most recently, in the case of *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd*,[12] the High Court found that a provision requiring parties to undertake "friendly discussions" prior to arbitration was an enforceable condition precedent to invoking the arbitration clause.[13]

[4] Ibid., at para. [44].
[5] *Shaker v Vistajet Group Holding SA* [2012] EWHC 1329 (Comm) (Teare J.).
[6] Ibid., at para. [3].
[7] Ibid., at para. [7].
[8] Ibid., at para. [7].
[9] Ibid., at para. [17].
[10] *Yam Seng Pte Ltd. v International Trade Corporation Ltd.* [2013] EWHC 111 at [153] (QB) (Leggatt J.). See also *Compass Group UK and Ireland Ltd. v Mid Essex Hospital Services NHS Trust* [2012] EWHC 781 (QB) (Cranston J.).
[11] *Yam Seng* [2013] EWHC 111, at para. [141]. On relational contracts, see S. Board, "Relational Contracts and the Value of Loyalty" (2011) 101 Amer.Econ.Rev. 3349; I. R. Macneil, "Contracting Worlds and Essential Contract Theory" (2000) 9 S.&L.S. 431. But see M. A. Eisenberg, "Why There Is No Law of Relational Contracts" (2000) 94 N.W.U.L. Rev. 805.
[12] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* [2014] EWHC 2104.
[13] Ibid., at para. [26].

Teare J. found that, in the context of that agreement, the particular clause stating that the parties "shall first seek to resolve the dispute or claim by friendly discussion" was intended to be binding.[14] Further, his Honour found that the clause was sufficiently certain in nature, distinguishing it from the dicta in *Walford v Miles*.[15] The Court noted that "where commercial parties have entered into obligations they reasonably expect the courts to uphold those obligations. The decision in *Walford v Miles* arguably frustrates that expectation".[16]

This was, however, a case where the dispute resolution clause was contained in an otherwise concluded contract, not one where an independent agreement to negotiate in good faith was sought to be enforced. Indeed, Teare J. appeared to endorse a rather narrow category of cases where this approach may be appropriate: "There is … much to be said for the view that a time limited obligation to seek to resolve a dispute in good faith should be enforceable."[17] This was also the basis on which the Court found the provision to be certain: "The agreement is not incomplete; no term is missing. Nor is it uncertain; an obligation to seek to resolve a dispute by friendly discussions in good faith has an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving a dispute."[18]

Despite these developments, English courts remain reluctant to enforce contractual duties to negotiate in good faith,[19] grounding their objection in freedom of contract and, especially, freedom *from* contract.[20] As Lord Ackner held in the 1992 House of Lords case of *Walford v Miles*,[21] the concept that parties "negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party".[22] Lord Ackner reasoned that an undertaking to negotiate intrudes on the freedom of parties to make negotiating concessions, to withdraw from negotiations, or to negotiate with third parties during the course of negotiations.[23] He concluded that there ought to be no contractual duty to negotiate in good faith in English law.[24]

[14] Ibid., at para. [25].
[15] *Walford v Miles* [1992] 2 A.C. 128.
[16] [2014] EWHC 2104, at para. [40].
[17] Ibid., at para. [52].
[18] Ibid., at para. [64].
[19] See Peel, "The Status of Agreements", p. 50.
[20] See *Walford* [1992] 2 A.C. 128.
[21] Ibid., at p. 138.
[22] Ibid. See also E. Peden, "Incorporating Terms of Good Faith in Contract Law in Australia" (2001) 23 Syd.L.R. 222.
[23] *Walford* [1992] 2 A.C. 128. See J. Cumberbatch, "In Freedom's Cause: The Contract to Negotiate" (1992) 12 O.J.L.S. 586; I. Brown, "The Contract to Negotiate: A Thing Writ in Water?" [1992] J.B.L. 353; E. Peel, "'Locking-Out' and 'Locking-In': The Enforceability of Agreements to Negotiate" [1992] C.L.J. 211; P. Neill, "A Key to Lock-Out Agreements?" (1992) 108 L.Q.R. 405.
[24] On the approval of *Walford v Miles* by the New Zealand Court of Appeal, see *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 N.Z.L.R. 486. See also *Elizabeth Bay Developments Pty Ltd.v Boral Building Services Pty. Ltd.* (1995) 36 N.S.W.L.R. 709. On reluctance of courts in Australia

Underlying Lord Ackner's position is the liberal rationale that parties ought to be free to adopt adverse positions in conducting negotiations, including in acquiring, disseminating, and conveying information, without fearing legal consequences. Enforcing agreements to negotiate in good faith would foster an uncertain process of contracting and lead to an uncertain result insofar as negotiations do not "promise" to produce, and may well not have the effect of producing, a binding contract.[25] The basis for honouring promises to negotiate in good faith ought to reside in morality, trust, good manners, civility, and gentility – not in contractual imperatives.[26] Furthermore, negotiating parties are more likely to arrive at a genuine understanding without being shackled by contractual duties, or by courts holding the legal Sword of Damocles over their heads.

The first objection, therefore, is one based on public policy – why should parties be bound to negotiate in good faith? In asking this question, it is important to note that we are interested in those cases in which a *promise* to negotiate can be discerned, as distinct from an implied duty to negotiate in good faith.

Rendering agreements to negotiate in good faith binding in law can also be challenged on functional grounds. A practical concern is that such binding obligations will encourage a plethora of claims by disappointed negotiators seeking remedies over negotiations that have not satisfied their expectations, whether these are realistic or not.[27]

More significantly, judges attempting to decide such claims will face challenges due to the perceived lack of a coherent dividing line between morally irksome and legally condemnable negotiating conduct.[28] After all, however distasteful may be the conduct of a party who repeatedly says "no" to all proposals, such conduct does not per se constitute bad faith. To insist otherwise would be to legitimate amorphous conceptions of "bargaining fairness",[29] and "agreements to agree".[30] Further complicating the judicial enforcement of good faith negotiations is the realisation that, should one party use a position of marketing dominance to secure a

to impose a duty to negotiate in good faith, see e.g. *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 C.L.R. 45. See also Peden, "Incorporating Terms of Good Faith in Contract Law in Australia", p. 222.

[25] See *Walford* [1992] 2 A.C. 128, at p. 138.

[26] On the moral boundaries of culpability for breach of contract, see D. Kimel, "The Morality of Contract and Moral Culpability in Breach" (2010) 21 Kings L.J. 213.

[27] See generally R. Brownsword, N.J. Hird, and G. Howells (eds.), *Good Faith in Contract: Concept and Context* (Ashgate 2006), especially ch. 1; J. Davies, "Why a Common Law Duty of Contractual Good Faith is Not Required" (2002) 8 Cant.L.R. 529.

[28] On this tension, see D. Kimel, "The Morality of Contract"; M.G. Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984) 9 Canadian Business Law Journal 385. But see P.A. Chandler and J.A. Holland, "Notice of Contractual Terms" (1988) 104 L.Q.R. 359.

[29] See J.F. Burrows, J. Finn, and S.M.D. Todd, *Law of Contract in New Zealand*, 2nd ed. (Wellington 2002), paras. [2.2.6], [6.3.3]; P. Finn, "Commerce, the Common Law and Morality" (1989) 17 M.U. L.R. 87. Brownsword, Hird, and Howells, *Good Faith in Contract*, p. 3.

[30] See *May & Butcher Ltd. v The King* [1934] 2 K.B. 17. See also *Tolaini Brothers* [1975] 1 W.L.R. 297.

negotiating advantage over the other, such action would not necessarily demonstrate bad faith in negotiations.[31] Aggressive negotiating tactics do not constitute evidence of bad faith any more than soft negotiating tactics exemplify good faith in negotiations. Good manners, civility, and gentility are not proxies for requiring negotiating fairness in law.[32] A negotiating party should not be expected to spare the feelings of the other party by showing courtesy or kindness, or by avoiding negotiating tactics that offend the other party's sensibilities. Selfishness is not coextensive with immoral conduct any more than selflessness exemplifies good faith in negotiating a contract.[33]

The second objection, therefore, relates to the substantive uncertainty of an agreement to negotiate in good faith, particularly the difficulties associated with identifying conduct that is *not* in good faith.

Finally, the question of remedies appears to pose a formidable barrier to the enforceability of agreements to negotiate in good faith. How are the frustrated expectations of a negotiating party to be compensated in cases in which the negotiations do not produce a contract? What is the appropriate remedy to address a situation in which one party acts in bad faith, given that an ultimately concluded contract is never guaranteed by an agreement to negotiate?

These issues are dealt with below.

III. Contextualising the Duty to Act and Negotiate in Good Faith

Clearly, a distinction needs to be maintained between the implied duty to perform an existing contract in good faith (post-contractual) and the potential duty to negotiate a new contract in good faith (pre-contractual). Where applicable, the former is generally considered to be implied by law. The latter involves a binding promise, itself an independent obligation, voluntarily made prior to the parties entering into a contract to perform the actual transaction which they intend to negotiate.

A starting point in considering the ambit of a duty to negotiate in good faith is briefly to consider the historical foundations of a duty to act and perform obligations in good faith in common law and civil law systems. This

[31] Ibid. See also *Socimer International Bank Ltd. (in liquidation) v Standard Bank London Ltd. (No 2)* [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep 558 at [112]; D. Cremean, "Agreements to Negotiate in Good Faith" (1996) C.D.R.J. 61; see also R. Brownsword, *Contract Law: Themes for the Twenty-First Century*, 2nd ed. (Oxford 2007), 114–20.

[32] On the threshold between negotiating (or bargaining) fairness and unfairness, see *Gillatt v Sky Television Ltd.* [2000] 1 All E.R. (Comm) 461 (court modifying contract terms on grounds of bargaining unfairness over asset valuation).

[33] See T. Sourdin, "Good Faith, Bad Faith? Making an Effort in Dispute Resolution" (2012) Australian Centre for Justice Innovation, Good Faith Paper 1, available online at www.civiljustice.info/goodf/1. See also *United Group Rail Services Ltd. v Rail Corporation (NSW)* [2009] NSWCA 177, (2009) 74 N.S.W.L.R. 618, 637–39 (Allsop P.); *Strzelecki Holdings Pty Ltd.v Cable Sands Pty Ltd.* [2010] WASCA 222, (2010) 41 W.A.R. 318 at [45], [47], [64] (Pullen J.A.), [109] (Murphy J.A.).

will allow us to consider the ways in which a duty of good faith can be extended to a promise to negotiate a new contract.

A. Duty of Good Faith in England and the United States

It is arguable that English law at one point recognised a broad duty to perform contracts in good faith, exemplified by Lord Mansfield's contention in 1766 that a duty to act in good faith is implicit in all contracts.[34] Developments in nineteenth-century English law did not clarify the uncertainty surrounding this principle. While a duty to perform contracts in good faith was based on the subjective intentions of the parties,[35] it is not clear that such a duty extended to agreements to negotiate.[36] On the other hand, more general duties to contract were implied on such functional grounds as being necessary to ensure the "business efficacy" of a contract.[37]

Whatever the relevance of these legal developments to the twentieth-century English common law,[38] the general duty to execute contractual promises in good faith has limited presence in modern English law.[39] Certainly, a duty to negotiate in good faith has not been recognised, except in some cases where it arises out of a pre-existing contract.[40] While English judges *do* recognise, as a general principle, that "a man shall not be permitted to take advantage of his own wrong",[41] they do not ordinarily impose duties to act in good faith.[42] There is also no firm line of modern cases to support such an obligation,[43] although courts have been more comfortable recognising a duty to perform certain promises in good faith.[44]

[34] See *Carter v Boehm* (1766) 97 E.R. 1162, 3 Burr. 1905, 1910. See also *Mellish v Motteux* (1792) 170 E.R. 113, 113–14, Peake at 156.

[35] See L.E. Trakman, "Pluralism in Contract Law" (2010) 58 Buff.L.R. 1031.

[36] See C.C. Turpin, "Bonae Fidei Induciae" [1996] C.L.J. 260. See also *Barbudev v Eurocom Cable Managements Bulgaria EOOD and others* [2011] EWHC 1560 (Comm).

[37] See generally *The Moorcock* (1889) 14 PD 64, at p. 68 (Bowen L.J.).

[38] See *Liverpool City Council v Irwin* [1977] A.C. 239, 261 (Lord Salmon).

[39] See *Le Walays v Melsamby* (1319) Y.B. Hil. 12 Edw. II 83–86 (Beresford C.J.). See also T.F.T. Plucknett in 65 *Selden Society* 4.

[40] See the decision of the NSW Court of Appeal in *United Group Rail* [2009] NSWCA 177, (2009) 74 N.S.W.L.R. 618, and the decision of the English High Court in *Emirates Trading Agency LLC* [2014] EWHC 2104. See also Peel, "The Status of Agreements", p. 50.

[41] See *New Zealand Shipping Co Ltd. v Société des Ateliers et Chantiers de France* [1919] A.C. 1, 9.

[42] On the distinction between good faith duties in English and codified civil law systems of Europe, see Lord Bingham in *Interfoto Picture Library Ltd. v Stiletto Visual Programmes Ltd.* [1989] 1 Q.B. 433, 439; *Director General of Fair Trading v First National Bank* [2001] UKHL 52, [2002] 1 A.C. 481 at [17].

[43] On the decline of "good faith" duties as a measure of "fair dealing" in contracting, see A.F. Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 L.Q.R. 66; P. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford 1979), 402–05. But see *Yam Seng* [2013] EWHC 111, in which the High Court implied a duty to negotiate in good faith into a long-term distribution agreement. On resistance to duties to contract in good faith in general among Australian judges, see e.g. *Service Station Association Ltd. v Berg Bennett & Associates Pty Ltd.* (1993) 45 F.C.R. 84, 91–98 (Gummow J.); *South Sydney District Rugby League Football Club Ltd. v News Ltd.* [2000] FCA 1541, (2000) 177 A.L.R. 611 at [238]–[239].

[44] But see *Interfoto* [1989] 1 Q.B. 433, at p. 439 (Bingham L.J.). On a duty to perform a contract in good faith, see *Malik v Bank of Credit and Commerce International SA (in liquidation)* [1995] 3 All E.R. 545; *Phillips Electronique Grand Public SA v British Sky Broadcasting Ltd.* [1995] E.M.L.R. 472; *Imperial*

To a greater extent, the law in the US recognises an obligation to act in good faith through a "general duty of good faith performance on each party in general commercial contracts".[45] That covenant is embodied in section 205 of the American Restatement (Second) of the law of Contracts which provides that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement".[46]

However, the American Restatement does not define a duty of good faith in contracting.[47] American judges also diverge over whether to limit a covenant of good faith to the express "wills" of the parties, or whether to imply a reasonable duty grounded in equity or the law of unconscionability.[48] Nor does the revised Uniform Commercial Code provide clear guidance over the limits of the covenant of good faith and fair dealings in respect of commercial transactions, other than by defining the concept of good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealings".[49]

As a result, the covenant of good faith and fair dealing in the US is also restricted in its scope of application, since it does not ordinarily entertain a covenant to negotiate in good faith, but relates more to an undertaking to perform an already concluded contract in good faith.[50]

B. Historical and Doctrinal Foundations of a Duty of Good Faith in Civil Law

Civil law jurists generally exhibit a greater readiness to endorse a good faith duty to negotiate, particularly so under the civil law of obligations. Admittedly, this duty as conceived in civil law jurisdictions is distinct in significant respects from our argument that a contractual promise to negotiate in good faith should be enforceable. The civil law of obligations, generally speaking, binds parties to a duty of good faith through an integrated

Group Pension Trust Ltd. v Imperial Tobacco Ltd.[1991] 1 W.L.R. 589; *Balfour Beatty v Light Railway Ltd.* (1996) 78 B.L.R. 42, 58. See also H.K. Lücke, "Good Faith and Contractual Performance" in P.D. Finn (ed.), *Essays on Contract* (Sydney 1987); R. Harrison, *Good Faith in Sales* (London 1997), 7; S.J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980) 94 Harv.L. Rev. 369.

[45] See *John B. Conomos Inc. v Sun Co. Inc.*, 831 A.2d 696, at 706 (Lally-Green J.) (Pa Sup Ct, 2003). See also T.J. Dobbins, "Losing Faith: Extracting the Implied Covenant of Good Faith from (Some) Contracts" (2005) 84 Or.L.Rev. 227.

[46] *Restatement (Second) of Contracts* § 205.

[47] See E.A. Farnsworth, *Farnsworth on Contracts*, 2nd ed. (Boston 1998), vol. 1, 328–29. But see M.A. Eisenberg, "The Duty to Negotiate in Good Faith in American Law" in C. Lockhart (ed.), *Misleading or Deceptive Conduct: Issues and Trends* (Sydney 1996), 117.

[48] See Farnsworth, *Farnsworth on Contracts*, p. 380; Dobbins, "Losing Faith", p. 227.

[49] See Uniform Commercial Code §1–201(b)(20) (UCC). See also N.W. Palmieri, "Good Faith Disclosures Required during Pre-Contractual Negotiations" (1993) 24 Seton Hall L.Rev. 70.

[50] See E.M.S. Houh, "The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?" [2005] Utah L.Rev. 1; J.E. Murray and T. Murray, *Corbin on Contracts* (St Paul, MN 2008), vol. 8, 56–94. On the common law background to the duty of "good faith" in contract law and sales in particular under the UCC, see R.S. Summers "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54 Va.L.Rev. 189–90, 195, 203.

framework of contract and tort (or delict). Often, these duties cannot be excluded by the parties. In this paper, we seek to advance an argument that the common law should recognise agreements between parties to negotiate in good faith. Conceptually, this is a very different obligation to the one imposed by the civil codes of many European countries. It is beneficial, however, to set out briefly the European treatment of good faith obligations in negotiation and performance, as this will allow us to show that such obligations can be productively incorporated into the law relating to private transactions. In particular, it illustrates that the obligation can be meaningful and legally "certain". Further, in light of a growing transnational economy, particularly including the benefits of regional cooperation within Europe, our goal should always be to pursue harmonisation of legal concepts where this would benefit our law, both in theory and in practice.

General obligations to contract in good faith have an extensive history in nineteenth-century interpretations of Roman law, upon which the civil law of obligations is based. At the outset, Roman law established an *obligatio ex bona fide*, or "obligation to act in good faith" by which parties were required to act in good conscience in fulfilling their obligations.[51] Canon law perpetuated this *obligatio ex bono fide*.[52] The rationale was that a party who had assumed an obligation to act in good faith was bound to do that which was promised.[53]

These Roman law developments were incorporated into the modern civil law systems of Western Europe at two levels, which subsist today. First, parties are subject to a general obligation to act in good faith.[54] Second, they are subject to good faith obligations in mutual dealings under specific articles of their civil law codes.[55] For example, paragraph 242 of the German Civil Code and article 1337 of the Italian Civil Code impose general obligations on parties to act in good faith.[56] German law also imposes an irrevocable duty to perform obligations in good faith, which may include an obligation that comes into existence by the commencement of negotiations. While there is no duty to conclude an agreement, the obligation

[51] See e.g. R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford 1990); S. Whittaker and R. Zimmermann, "Good Faith in European Contract Law: Surveying the Legal Landscape" and M.J. Schermaier, "*Bona Fides* in Roman Contract Law" in R. Zimmermann and S. Whittaker (eds.), *Good Faith in European Contract Law* (Cambridge 2000), chs. 1 and 2, respectively.

[52] See M.J. Schermaier, "*Bona Fides* in Roman Contract Law".

[53] See F. Pollock and F.W. Maitland, *The History of English Law before the Time of Edward I*, 2nd ed. (Cambridge 1923), vol. 1, 187–89.

[54] On good faith duties in European civil codes, see *Bürgerliches Gesetzbuch* (Civil Code) (Germany) § 242; *Codice Civile* (Civil Code) (Italy), arts. 1337, 1375; *Code Civil* (Civil Code) (France), art. 1134. See also P.B. Quagliato, "The Duty to Negotiate in Good Faith" (2008) 50 I.J.L.M.A. 213.

[55] See S. Whittaker and R. Zimmermann, "Coming to Terms with Good Faith", in Zimmermann and Whittaker, "Good Faith in European Contract Law", p. 653; Quagliato, "The Duty to Negotiate in Good Faith"; Lücke, "Good Faith and Contractual Performance".

[56] *Bürgerliches Gesetzbuch* (Germany) § 242; *Codice Civile* (Italy) art. 1137.

incurred by commencing negotiations must be carried out in good faith.[57] German law has developed a doctrine of *culpa in contrahendo* or "fault in contracting" by which a court can hold a defaulting negotiating party liable for "his creation of legitimate expectations within the other party that a contract would be concluded".[58] French law stipulates that a party is liable for negotiating a preliminary contract in bad faith, conceivably giving rise to a remedy beyond damages for breach of contract.[59]

Thus, in many European jurisdictions, the foundation of a general obligation of a legal person to act in good faith is an overarching loyalty to and respect for legal undertakings, of which obligations arising from a promise, including a promise to negotiate in good faith, are a part.[60]

In addition, civil law systems subject parties to the legal obligation to cooperate in their mutual dealings, including in negotiations. As provided in German law, "[F]rom the moment of entering into contractual negotiations a special relationship (*Sonderrechtsverhältnis*) is created between the negotiating parties by virtue of the law (*gesetzliches Schuldverhältnis*) imposing on both parties duties of protection and loyalty (*Schutzpflichten*)".[61] This conception of cooperation is also embodied in Article 1:106(2) of the *Principles of European Contract Law*, which requires that "in exercising their rights and performing their duties, each party must act in accordance with good faith and fair dealing".[62] In addition, Article 2:301(2) provides that "a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party". As long as negotiations are conducted in good faith, however, there is no obligation to conclude an agreement (Article 2: 301(2)).

Generally speaking, therefore, civil law demonstrates greater readiness than English law to recognise a duty to act and negotiate in good faith. In most cases, neither the obligation nor the relief available for default is

[57] §§242, 311(2) *Bürgerliches Gesetzbuch* (Germany).

[58] See "Case 1: Negotiations for Premises for a Bookshop" in J. Cartwright and M. Hesselink (eds.), *Precontractual Liability in European Private Law* (Cambridge 2008), 33.

[59] *Code Civil* (France), art. 1134; see also arts. 1382 and 1383 for liability for causing harm, including by negligence: see D. Tallon, "Contract Law" in G.A. Bermann and E. Picard (eds.), *An Introduction to French Law* (New York 2008), 212: M. Fabre-Magnan, "Duties of Disclosure and French Contract Law: Contribution to an Economic Analysis" in J. Beatson and D. Friedmann (eds.), *Good Faith and Fault in Contract Law* (Oxford 1995); see also N.W. Palmieri, "Good Faith Disclosures Required during Pre-Contractual Negotiations" (pre-contractual duties in Italian law).

[60] See e.g. Quagliato, "The Duty to Negotiate in Good Faith".

[61] Cartwright and Hesselink, *Precontractual Liability in European Private Law*, p. 33.

[62] See Whittaker and Zimmermann, "Good Faith in European Contract Law" and chapters by Schermaier and Gordley in the same volume; S. Vogenauer and S. Weatherill, "The European Community's Competence to Pursue the Harmonisation of Contract Law: An Empirical Contribution to the Debate" in S. Vogenauer and S. Weatherill (eds.), *The Harmonisation of European Contract Law* (Oxford 2006); K.P. Berger, "Harmonisation of European Contract Law: The Influence of Comparative Law" (2001) 50 I.C.L.Q. 877. See G. Klass, "Contracting for Cooperation in Recovery" (2007) 117 Yale L.J. 2. See also A. Duke, "A Universal Duty of Good Faith: An Economic Perspective" (2007) 33 Mon.L.R. 182.

viewed as being "contractual" in nature.[63] The rationale for that duty arguably resides in the pervasive civil law of obligations, extending beyond the boundaries of contracts and including the law of torts as common lawyers describe it.[64] This expanded conception of a civil law obligation to negotiate in good faith has also developed doctrinally, such as in the comparatively recent development of the doctrine of *culpa in contrahendo*.[65] However, as mentioned earlier, failure to comply with such obligations often results in delictual liability, which has as its close comparator the common law of tort (though the law of delict is different in significant ways to common law tort).[66]

C. Comparative Lessons and Cross-Border Contracts

While common law courts over time have come to recognise a duty of good faith in the performance of contracts, there is a marked aversion to recognising a binding duty to negotiate in good faith. A brief review of common law and civil law traditions in this area shows that this aversion is due to differences between the traditional principles of contract formation espoused in English law and the integrated law of obligations that has evolved in civil law.

English contract law requires a clear intention evinced by the parties to create legal relations. Further, the content and terms of the agreement must be certain in nature. The rules of contract law are to be distinguished from torts, such as negligence, and the law of restitution (though the latter is often identified as being "quasi-contractual"). Civil law, on the other hand, conceives of a law of obligations which can impose duties, such as of good faith, irrespective of the elements that a traditional English contract requires. While the French Civil Code requires that the subject matter of an "*avant contrat*" or advance contract, including an agreement to negotiate, must be certain, that certainty does not require that the parties conclude a further contract arising from that agreement to negotiate (Article 1129).

Given the distinctions between the civil and common law traditions, the case for rendering agreements to negotiate in good faith binding in English law must be founded in a principled and doctrinally sound argument.

Roman law, from which good faith obligations were adapted to meet the needs of European civil law codes, did not evolve into modern English law. English courts have been disinclined to deduce good faith obligations from

[63] P. Giliker, "A Role for Tort in Pre-Contractual Negotiations? An Examination of English, French and Canadian Law" (2003) 52 I.C.L.Q. 969; see also S.A. Mirmina, "A Comparative Survey of *Culpa in Contrahendo*, Focusing on Its Origins in Roman, German and French Law as well as Its Application in American Law" (1992) 8 Conn.J.Int'l.L. 77.

[64] See Cartwright and Hesselink, *Precontractual Liability in European Private Law*, pp. 457, 462.

[65] Ibid., at p. 114. See F. Kessler and E. Fine, "Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study" (1964) 77 Harvard L.Rev. 401.

[66] See note 63 above.

general principles of law such as from an *obligatio ex bona fides*. Indeed, English courts would face conceptual difficulties in deducing duties to negotiate in good faith from general code provisions, as is commonly done by civil law judges from civil law codes of obligations.[67] Insofar as English judges decide to enforce agreements to negotiate, they are likely to reason inductively from case to case, not from codified principles of law.

It is important, however, to bear in mind civil law's capacity to inculcate a broader duty of good faith transnationally. As commercial exchanges become increasingly transnational, the presence of disparate conceptions of duties and obligations can be problematic for parties and courts. Even if parties from different states insert clauses relating to choice of law and jurisdictions into the final contract that effects the actual transaction, this facility may fail to capture agreements to negotiate, unless the latter are recognised as legally enforceable free-standing agreements. If negotiating parties have different conceptions of their duties as they negotiate, especially the extent to which they are legally bound during negotiations, they are unlikely to reach consensus ad idem over the legal nature of those duties. If one of the parties fails to negotiate in good faith, despite having formally agreed to do so, it is difficult to fault either party for holding different views as to liability if the laws of different jurisdictions are so much at odds.

IV. The Content of a Duty of Good Faith

A key concern regarding the enforceability of a binding duty to negotiate in the common law is that the content of such a duty is uncertain, particularly in relation to defining and identifying conduct that is encapsulated by a duty of good faith. Critics of this duty fear that it may give too much interpretive leeway to judges, resulting in inconsistent and ideologically driven decision-making.

Provided that judges would be forced to draw a line between law and morality, some might hold that a dominant landlord who negotiates for a rent increase "at the landlord's discretion" abuses a superior bargaining position in order to exploit the vulnerabilities of dependent tenants and therefore breaches a duty to negotiate in good faith.[68] Other judges may not so hold. Does a party negotiating to sell a business who inhibits a full audit of business operations, knowing that such information is essential to the other party, cross the threshold from legally permissible but conceivably immoral

[67] On Lord Justice Bingham's differentiation between civil and common law traditions, see *Interfoto* [1989] 1 Q.B. 433, at p. 439.

[68] On limiting a landlord's right to increase rent "in its sole discretion", see *Canadian National Railway Co v Inglis Ltd.* (1992) 93 D.L.R. (4th) 461 (Ont. Gen. Div.). Cf. *Meehan v Jones* (1982) 149 C.L.R. 571. On the relationship between consent to contact and the superior bargaining position of one party, see Atiyah, *The Rise and Fall of Freedom of Contract*, pp. 5–6.

behaviour into bad faith negotiating in law? Does that seller's failure to comply with agreed-upon negotiating timelines, knowing that the prospective buyer is subject to significant time constraints, reinforce that bad faith in negotiating? Does that seller's knowing failure to provide the buyer with material information about the role of a third party in the operation of that business magnify that bad faith in negotiating?[69]

As with any legal problem, the task here is not to eliminate judicial discretion, but to harness it in a methodical and replicable way. Certainly, there are ways in which a duty of good faith can be conceptualised in a more scientific and decisive manner. This section considers a few such approaches.

A. Possible Standards of Good Faith

1. Loyalty to the contractual promise and the conduct surrounding its formation

In differentiating between moral duties and contractually binding agreements to negotiate in good faith, an initial task is to consider the nature and conduct of the parties: the negotiating strategies used, the manner in and extent to which one party allegedly obfuscated the negotiating process, the impact which that obfuscation had upon the other party, and the extent to which the obfuscating party acted knowingly in producing the consequences.

In the context of good faith performance, Hugh Collins suggests that the standard of good faith should be understood as "comprising a spectrum of norms".[70] At one end of this spectrum, good faith "merely requires honesty in fact". At the other end of the spectrum, the requirement of good faith, according to Collins, "edges close to fiduciary duties by requiring performance of the contract that takes the interests of the other party into account". On first blush, the latter conception of good faith seems extraordinary. To impose a requirement that each party must take into account the interests of the other party appears to detract considerably from the individual and self-serving basis of contractual relations. Collins, however, clarifies that a party:

> may still look primarily to his or her own interests, but in the performance of the contract and in the exercise of rights and powers conferred by the contract, that party *must not defeat or undermine the reasonable expectations of the other*. It implies a duty on each party to do what, within his reasonable powers, is necessary to permit the other party to enjoy the benefit of the contract.[71]

A starting point therefore is to consider the notions of honesty and reasonable expectations. Others have proposed comparable ways of conceptualising

[69] On the tenuous divide between promise as trust and contract, see D. Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford 2003), chs. 2–3.
[70] H. Collins, "Implied Terms: The Foundation in Good Faith and Fair Dealing" (2014) C.L.P. 1.
[71] Ibid., at p. 19 (emphasis added).

elements of good faith including cooperation between the parties in achieving contractual objectives in accordance with honest and reasonable standards of conduct that take account of the interests of the parties. Illustrations of such standards of good faith include: "(i) imposing an obligation on parties to co-operate in achieving contractual objectives (loyalty to the promise itself), (2) compliance with honest standards of conduct, and (3) compliance with standards of conduct that are reasonable having regard to the interests of the parties."[72]

The first standard, "loyalty to the promise", is based on traditional principles of freedom of contract.[73] Applied to an agreement to negotiate in good faith, it would hold that promises to negotiate in good faith are enforceable consistently with the sanctity of the parties' promises as demonstrated in the text of their agreement.[74]

Arguably, this is coherent with the notion that, in upholding a duty of good faith, the court is doing no more than that which negotiating parties would reasonably have done themselves had they contemplated the negotiating impasse. Justice Posner (of the US Court of Appeals for the Seventh Circuit) has opined:

> The concept of the duty of good faith is a stab at approximating the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute. . . . The office of the doctrine of good faith is to forbid the kinds of opportunistic behaviour that a mutually dependent, cooperative relationship might enable in the absence of [such a] rule.[75]

There are, however, some issues with Posner's conception of good faith. There is a level of artificiality in courts reframing an efficiency analysis based on cost–benefit calculations into a rationale for good faith duties. That artificiality is reflected in Justice Posner's postulation that a doctrine of good faith is designed to "reduce defensive expenditures . . . [by parties] . . . who want to minimize the costs of performance".[76] After all, good faith conduct entails more than parties wanting to minimise performance costs. Another problem lies in Posner's argument that the parties would have contracted to negotiate in good faith had they anticipated the dispute.[77] In truth,

[72] Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing", p. 69.

[73] On duties to negotiate in good faith based on party conduct, see *Aiton Australia Pty Ltd. v Transfield Pty. Ltd.* (1999) 153 F.L.R. 236, 263. See also M.P. Gergen, "The Use of Open Terms in Contract" (1992) 92 Colum.L.Rev. 997. See also *Yam Seng* [2013] EWHC 111, at para. [139], where Leggatt J. discusses the relevance of acting with "fidelity" to the promise in the context of good faith in performance of an agreement.

[74] On how failed "trust building" denigrates the freedom of contract, see Atiyah, *The Rise and Fall of Freedom of Contract*, pp. 72–73; A. Smith, *Lectures on Jurisprudence*, edited by R.L. Meek, D.D. Raphael, and P.G. Stein (Oxford 1978), 538–39. But see Kimel, *From Promise to Contract*, ch. 3.

[75] *Market Street Associates Limited Partnership v Frey*, 941 F. 2d 588, 596 (7th Circuit, 1991). See also Duke, "A Universal Duty of Good Faith", p.182.

[76] *Market Street* 941 F. 2d 588, at p. 596 (7th Circuit, 1991).

[77] On an economic efficiency of good faith in contracts, see J.N. Adams, "The Economics of Good Faith in Contract" (1995) 8 J.C.L. 126. On the economic rationality of parties choosing between contractual and

the opposite could be just as likely: had the parties anticipated the costs and benefits of negotiating in light of the circumstances that intervened, one or both may well have declined to negotiate at all, or might have negotiated on materially different terms.[78] Understandably, the fact that one or both parties might have declined to negotiate, or might have negotiated on different terms, does not imply bad faith conduct.

The second standard, compliance with "honest standards of conduct", is more controversial in the contextual interpretation of an agreement. The case for enforcing the agreement is stronger insofar as "honesty" is determined in light of party practice, trade usage, or established custom that circumscribe the reasonable boundaries of that honesty. Enforcing an agreement to negotiate in good faith based on "honesty", which the court identifies with norms of fair dealings in society at large, is less defensible on grounds that such norms are extra-contractual, residing in moral or societal values outside of law.

The third standard, compliance with standards "that are reasonable having regard to the interests of the parties", is supportable if the "interests" identified are reasonably related to the purposes or objectives of the parties, such as if negotiations are directed at securing the payment of a reasonable price for identifiable goods and services.[79] However, the standard is less supportable if courts base it on "interests" that are not ordinarily cognisable in law, such as to ensure that each party makes at least one negotiating concession to the other.[80]

As such, a court could determine that an agreement to negotiate in good faith is enforceable based on the textual interpretation of that agreement, including express terms governing the process of negotiations; it could also do so contextually by imputing objective standards of conduct to those parties in accordance with party practices, industry usages, and trade customs. In each case, a court may need to adopt one or more standards of good faith in interpreting an agreement to negotiate between those parties.

A key consideration in applying standards of good faith to agreements to negotiate is deciding the level of stringency with which to verify good faith and whether, if at all, to impute standards of negotiating fairness to the agreement between the parties.[81] There is nothing conceptually extraordinary

non-contractual alternatives, see V.P. Goldberg, *Framing Contract Law: An Economic Perspective* (Cambridge, MA 2006).

[78] See Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith", pp. 369, 373. On legal fictions applied to frustrated contracts, see L.E. Trakman, "Legal Fictions and Frustrated Contracts" (1983) 46 M.L.R. 3.

[79] See *Rainy Sky S.A. v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900; *Lloyds TSB Foundation for Scotland v Lloyds Private Banking Group Plc* [2013] UKSC 3, [2013] 1 W.L.R. 366 at [23], [45], [54].

[80] On an implied duty to "behave honestly" that includes community standards of honesty, see *Garry Rogers Motors (Aust) Pty. Ltd. v Subaru (Aust.) Pty. Ltd.* (1999) ATPR 41–703, [1999] F.C.A. 903.

[81] On the nature of negotiating fairness, see Brownsword, Hird, and Howells, *Good Faith in Contract*, pp. 114–20; H. Beale, "Commentary on Good Faith and Fairness in Failed Contract Negotiation" (1995) 8 J.C.L. 120; N. Cohen, "Two Freedoms and the Contract to Negotiate" in Beatson and

about a judge ascribing bad faith to a party who displays a clear intention to undertake to negotiate in good faith and then engages in sham negotiations, withdraws from negotiating without giving the other party reasonable notice or an opportunity to respond, unreasonably withholds consent without which the other party is unable to act, or provides false information in order to deceive the other into making negotiating concessions.[82] Nor is it implausible for a judge to differentiate between "hard bargaining" in negotiations that is in bad taste and obstructionism that constitutes bad faith in negotiating an agreement.[83] The challenge is for courts to identify duties to negotiate in good faith with the agreement of the parties, without regressing into normative determinations of bad faith which supersede that agreement.[84] This judicial challenge arises when a court stipulates that the idea that "the parties will behave honesty is so obvious that it goes without saying",[85] given that judges may well diverge over that which is "obvious".

2. Good faith according to industry standards

A further rationale by which courts could infer a duty to negotiate in good faith is to ground binding agreements to negotiate in industry customs or trade usage.[86] So long as such standards of good faith are subject to objective assessment, such as in compliance with good faith practices in an applicable industry or trade, they should serve as an objective basis by which courts would enforce a duty to negotiate. Such good faith standards could apply in the absence of an exhaustive agreement over negotiations on grounds that the parties mutually assented to negotiate in accordance with such industry practices and trade usages.[87]

A concern about courts relying on industry or trade standards to delineate bad faith negotiating conduct is that they will vary in their readiness to apply such standards, and differ in the evidentiary rules by which they admit and determine the relevance of such standards in discrete cases. For example, some judges may infer good faith duties only from industry

Friedmann, *Good Faith and Fault in Contract Law*, pp. 25–26. See generally J. Adams and R. Brownsword, *Understanding Contract Law* (London 2007), chs. 1–2.

[82] On bad faith in giving false information in negotiating, see *Yam Seng* [2013] EWHC 111, at paras. [155]–[156]. On unreasonably withholding consent, see *Gan Insurance Co Ltd. v Tai Ping Insurance Co Ltd.* (No 2) [2001] Lloyd's Rep. IR 667; *Eastleigh B.C. v Town Quay Developments Ltd.* [2009] EWCA Civ 1391, [2010] 2 P. & C.R. 2.

[83] See *Abu Dhabi National Tanker Co. v Product Star Shipping Ltd. (No 2)* [1993] 1 Lloyd's Rep. 397, 403; *Socimer International Bank Ltd. (in liquidation) v Standard Bank London Ltd.* [2008] EWCA Civ 116, [2008] Bus. L.R. 1304 at [575]–[577]. But see Brownsword, *Good Faith in Contract*, p. 197.

[84] On subjective honesty implied from voluntary negotiations, see Paterson, "Duty of Good Faith", p. 132.

[85] *Yam Seng* [2013] EWHC 111, at para. [137]. See also *Meehan v Jones* (1982) 149 C.L.R. 571 in which Gibbs C.J. endorsed a test of subjective honesty, while Mason J. endorsed both honesty and reasonableness. But see Carter and Peden, "Good Faith in Australian Contract Law", p. 3 (good faith duties in contract should be limited to "honesty", not "reasonableness").

[86] See *Abu Dhabi National Tanker* [1993] 1 Lloyd's Rep. 397, at p. 404; Peel, "The Status of Agreements", pp. 42–50.

[87] *W.N. Hillas & Co Ltd. v Arcos Ltd.* (1932) 43 Lloyd's List Rep. 359, 367.

usages that are formally endorsed by an applicable industry association, such as by an international grain or other agricultural association. Others may adopt flexible standards of good faith in negotiating based on evidence of industry usage, even if not formally endorsed by an industry association. Yet others may endorse industry usage based on evidence of its regularity of observance and perceived applicability to the facts of the case at hand.[88]

In summary, the challenge for common law judges in identifying bad faith in negotiating through trade customs and industry usages is primarily evidentiary: in establishing the nature of those customs and usages, in identifying how they relate to good faith contracting in general, and in applying them to particular cases of alleged bad faith in negotiating.

B. Giving Legal Content to a Duty of Good Faith

As noted previously, judges will face difficulties separating morally questionable conduct from judicially imputed standards of bad faith. The above discussion canvasses two broad ways in which a court can ascribe objective standards of good faith to negotiating parties. These relate to the past or contemporaneous practices of the parties and their related trade customs and industry usages.[89]

Both of these approaches are grounded in standards of good faith that are based on societal norms, such as on common decency standards which courts impute to the parties.[90] By using these approaches, however, courts can give greater specificity to the framework of good faith, as something that transcends amorphous societal norms. Even if all of the indicia encapsulated in the two approaches discussed above are not captured, they can perhaps be distilled to a binding obligation on parties to stay reasonably and honestly committed to their stipulated "common purpose".[91] The court can evaluate whether a party has deviated wilfully or recklessly

[88] On the "test" adopted by the Privy Council to govern implied terms based on party practice, see *BP Refinery (Westernport) Pty Ltd. v Hastings Shire Council* (1977) 180 C.L.R. 266 (Privy Council). On implied duties of good faith in Australian contract law, see E. Peden, "The Meaning of Contractual 'Good Faith'" (2002) 22 Aust.Bar Rev. 235; T.M. Carlin, "The Rise (and Fall) of Implied Duties of Good Faith in Contractual Performance in Australia" (2002) 25 U.N.S.W.L.J. 99. See Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?", p. 385.

[89] On implied-in-fact duties based on trade usage, see e.g. *Nelson v Dahl* (1879) 12 Ch. D. 568, 575; *Dashwood v Magniac* [1891] 3 Ch. 306, 370. On implied duties based on custom, see e.g. *Wigglesworth v Dallison* (1799) 99 E.R. 132, 1 Douglas K.B. 201, 207.

[90] On implied duties of good faith, see *Jobern Pty. Ltd. v BreakFree Resort* (2008) Aust. Contract R. 90–269, [2007] FCA 1066; M. Gordon, "Discreet Digression: The Recent Evolution of the Implied Duty of Good Faith" (2007) 19 Bond L.R. 26. But see Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?", p. 426; M. Bridge, "Doubting Good Faith" (2005) 11 N.Z.B.L.Q. 426; H. Munroe, "The 'Good Faith' Controversy in Australian Commercial Law: A Survey of the Spectrum of Academic Legal Opinion" (2009) 28 U.Q.L.R. 161.

[91] On giving legal content to the concept of good faith, consider H. Hoskins, "Contractual Obligations to Negotiate in Good Faith: Faithfulness to the Agreed Common Purpose" (2014) 130 L.Q.R. 131 (Hoskins proposes faithfulness to the common purpose as a measure of the parties' good faith obligations). See also discussion in *Yam Seng* [2013] EWHC 111, at paras. [135]–[139] (meaning of good faith performance); *United Group Rail* [2009] NSWCA 177, (2009) 74 N.S.W.L.R. 618, at para. [65] (meaning of good faith in negotiation where there is a pre-existing contractual relationship); and

from the common purpose agreed upon by the parties, taking into account the circumstances of the actual agreement, as well as the practice of the industry or trade to which the agreement relates.

Generally speaking, the greater the judicial reliance placed on social norms beyond clear evidence of the intention of the negotiating parties, the more controversial is likely to be the bad faith that is imputed to the negotiating parties.[92] For example, a duty to use reasonable endeavours in negotiating in good faith based on normal industry practice is less defensible if the negotiating practices between the parties are eclipsed by abnormal strike action in the industry to which their negotiations relate.[93] The judicial, and judicious, task is to avoid relying on tenuous conceptions of that which the court deems is "right" or "fair", "efficient" or "expedient" according to standards of negotiating fairness and efficiency which transcend any agreement between the negotiating parties. This is, admittedly, sometimes difficult for judges to avoid in construing the intention of negotiating parties. If courts insist that they are doing no more than that which the parties would have done themselves had they contemplated a negotiating impasse, those courts conceivably regress into the realm of dubious fictions.[94] If they require that the parties use "reasonable endeavours" or "best efforts" in negotiating, they risk being challenged for transforming their conceptions of communal standards of courtesy and good manners that are best left to civil society into legal determinations.[95] If they differentiate between "best endeavours" in enforcing an agreement to negotiate and "best endeavours" which they ascribe to an unenforceable "agreement to agree", they risk being accused of propagating a false distinction.[96]

Another strategic objection to courts imputing obligations to negotiate based on societal conceptions of good faith arises from a potential overabundance of interpretations of bad faith conduct that courts can impute to negotiating parties in particular cases. They can decide based on the

Emirates Trading Agency LLC [2014] EWHC 2104, at para. [53]. All of these cases emphasise the role of honesty as a constituent of good faith.

[92] On "a reasonable" duty to negotiate in good faith, see *Jobern* (2008) Aust. Contract R. 90–269, [2007] FCA 1066; *Vodaphone Pacific Ltd. v Mobile Innovations Ltd.* [2004] NSWCA 15.

[93] On the use of "best endeavours" in negotiating as an unenforceable "agreement to agree", see *Shaker* [2012] EWHC 1329, at para. [3]. On the judicial construction of enforceable agreements to "use best endeavours" in negotiating, see *Walford* [1992] 2 A.C. 128, at p. 138 (Lord Ackner). On "best endeavours", see *Multiplex Constructions* (UK) Ltd. *v Cleveland Bridge UK Ltd.* [2006] *EWHC* 1341 (TCC), 107 Con. L.R. 1; *Watford Electronics Ltd. v Sanderson Ltd.* [2001] EWCA Civ 317; 2001 1 All E.R. (Comm) 696 at [45]; *Little v Courage* [1995] C.L.C. 164 at [475]; Peel, "The Status of Agreements", pp. 40–42. On "reasonable endeavours", see *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd.* [1989] 1 Lloyd's Rep. 205, 205, 210. On "best efforts" in negotiating, see *United Group Rail* [2009] NSWCA 177, (2009) 74 N.S.W.L.R. 618.

[94] On the implication of terms based on the parties presumed intention, see *Attorney General of Belize v Belize Telecom Ltd.* [2009] UKPC 10, [2009] 1 W.L.R. 1988 at [21] (Lord Hoffman). See also *Market Street* 941 F. 2d 588, at p. 596 (7th Circuit, 1991) (Posner J.).

[95] See *Shaker* [2012] EWHC 1329.

[96] See Peel, "The Status of Agreements", p. 40 (challenging Lord Ackner's distinction in *Walford* between an enforceable duty to use "best endeavours" and an unenforceable duty to negotiate in good faith and proposing that neither should be enforceable).

subjective process of negotiations engaged in by the parties, including their stated words or clearly expressed conduct. They can impute standards of honesty, trust, and confidence to negotiating parties based on norms of conduct which they deem are just and reasonable according to the practices of parties in analogous cases. They can also base their decisions on norms of conduct which they measure according to societal standards of honesty and due diligence, the violation of which "would be regarded as commercially unacceptable by reasonable and honest people".[97] They can decide simply as they, judges, deem fit as keepers of an unexplained communal consciousness without attempting to circumscribe the nature or limits of that communal understanding. It is this last imputation of bad faith that is most suspect and least supportable in interpreting an agreement to negotiate in good faith.[98] Courts are also likely to face a formidable challenge in determining the point at which communally determined "standards of commercial dealings are so well accepted that contracting parties would reasonably be understood to take them as read".[99]

The purpose of this section has been to highlight the numerous ways in which a duty of good faith may be given content by common law courts. For our purposes, it suffices to say that courts should be able to consider a variety of indicia when applying a legal duty of good faith, including industry practice, relational history between the parties, and faithfulness to the particular framework adopted by the parties in the agreement. The overall purpose would be to ensure that the parties remain reasonably and honestly committed to the stipulated purpose,[100] which could be given certainty by including a detailed negotiating machinery within the agreement (as discussed in the next Part).

V. Agreements to Negotiate in Light of the General Principles of Contract Formation

There is sufficient authority to advance the proposition that a promise to negotiate that is part of an otherwise complete agreement can be binding upon parties to that contract. For example, a promise that requires parties to negotiate in good faith to adopt a further term after its initial expiration or a change in the price of materials can be binding. The discussion that ensues in this section and the one that follows builds upon this foundation

[97] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 A.C. 378, 389–90; *Yam Seng* [2013] EWHC 111, at para. [144].

[98] See J. Stapleton, "Good Faith in Private Law" (1999) 52 C.L.P. 1; A.M. Gleeson, "Clarity or Fairness: Which Is More Important?"(1990) 12 Syd.L.R. 305. But see *Renard Constructions (ME) Pty. Ltd. v Minister for Public Works* (1992) 26 N.S.W.L.R. 234."

[99] See *Yam Seng* [2013] EWHC 111, at para. [138]; *HIH Casualty & General Insurance Ltd. v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All E.R. (Comm) 349 at [15].

[100] Consider Hoskins, "*Contractual Obligations"*.

to explore why an independent agreement to negotiate can also be enforceable in light of the general principles of contract formation.

A. Agreements to Negotiate Based Upon Pre-Existing Contracts

It is arguable that the objections that arise in relation to independent agreements to negotiate, namely the uncertainty of the terms and lack of a serious intention to enter into legal relations, are dissipated when there is an otherwise complete and valid pre-existing agreement.

While common law courts face conceptual and practical obstacles in recognising a good faith duty to negotiate, some courts such as in *Foley v Classique Coaches Ltd.*[101] have maintained that parties who have agreed to negotiate over a term in an agreement are bound by their arrangement. Relevant to the enforcement of terms stemming from a pre-existing contract are the judgments of Lord Wright in 1932 in *W.N. Hillas & Co. Ltd. v Arcos Ltd*,[102] Lord Justice Longmore in *Petromec Inc. v Petroleo Brasileiro S.A. Petrobras (No 3)*[103] in 2005, and of the New South Wales Court of Appeal in *Coal Cliff Collieries Pty. Ltd. v Sijehama Pty. Ltd.* (Kirby P.)[104] in 1991 and *United Group Rail Services Ltd v Rail Corporate NSW*[105] (Allsop P.) in Australia.

A material issue in *Hillas v Arcos* was whether a clause in an agreement that "contemplate[d] a future bargain the terms of which remained to be settled" was enforceable.[106] Lord Wright noted that businessmen engaged in particular trades often "record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise".[107] In concluding that courts may imply terms into contracts, he held that judges should interpret contract language "fairly and broadly", consistent with the maxim that "[w]ords are to be so understood that the subject-matter may be preserved rather than destroyed".[108] At the same time, he maintained that courts must not "make a contract for the parties, or go outside the words they have used".[109]

In *Petromec*, Lord Justice Longmore similarly declared that "[i]t is not irrelevant" that an express obligation to negotiate is part of a complex agreement, but "[t]o decide that it has no legal content … would be for the law deliberately to defeat the reasonable expectations of honest

[101] See *Foley v Classique Coaches Ltd.* [1934] 2 K.B. 1; *F. & G. Sykes (Wessex) Ltd. v Fine Fare Ltd.* [1967] 1 Lloyds Rep. 53, 57 (Lord Denning).
[102] (1932) 43 Lloyd's List Rep. 359.
[103] [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121.
[104] *Coal Cliff Collieries Pty. Ltd. v Sijehama Pty. Ltd.* (1991) 24 N.S.W.L.R. 1 at [13].
[105] (2009) 74 N.S.W.L.R. 618.
[106] *Hillas* (1932) 43 Lloyd's List Rep. 359, at p. 367.
[107] Ibid.
[108] Ibid.
[109] Ibid.

men".[110] His rationale was that "[i]t would be a strong thing to declare unenforceable a clause into which parties have deliberately and expressly entered".[111]

Finally, in considering whether to enforce a promise "in good faith to consult together upon the formulation of a more comprehensive and detailed joint venture agreement" in *Coal Cliff Collieries*, President Kirby, as he then was, reflected:

> I do not share the opinion of the English Court of Appeal [in *Walford v Miles*] that no promise to negotiate would ever be enforced by a Court. I agree with Lord Wright's speech in *Hillas* that provided there was consideration for the promise in some circumstances a promise to negotiate in good faith will be enforceable depending on its terms.[112]

Similarly to the other two judgments, President Kirby held that an express promise to negotiate that is part of a comprehensive contract, in that case a joint venture agreement, should be enforceable.[113]

Relying on Kirby P.'s judgment in *Coal Cliff Collieries*, Allsop P. in *United Group Rail* provided a clear and emphatic judgment in support of a duty to negotiate in good faith; his Honour also limited his analysis to cases where a pre-existing contractual relationship existed, stating:

> It is … unnecessary to consider … a clause providing for good faith negotiations in bringing about a commercial agreement in the first instance. The concern in the present case is the express mutual promises of the parties to undertake genuine and good faith negotiations to resolve disputes arising from performance of a fixed body of contractual rights and obligations. The difference is of great importance.[114]

In the English case of *Emirates Trading Agency*, the facts of which were analogous to *United Group Rail*, Teare J. discussed the judgment of Allsop P. at some length.[115] In that case, too, the Court limited its decision to situations where there was an already concluded contract.

One could argue that these cases have not departed radically from the established position that the enforcement of agreements to negotiate is limited to a term under the pre-existing contract, and does not constitute a wholly independent agreement to negotiate. Even Leggatt J.'s decision on good faith performance in the recent case of Yam Seng applied to an established contractual relationship between the parties.[116] *This view holds that these*

[110] *Petromec Inc. v Petroleo Brasileiro S.A. Petrobras (No 3)* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121, at p. 152, quoting *Walford* [1992] 2 A.C. 128, at p. 138 (Lord Ackner). Cf. *HIH* [2003] UKHL 6, [2003] 1 All E.R. (Comm) 349, at para. [15] (Lord Bingham).

[111] *Petromec* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121, at paras. [152]–[153]. Not irrelevant for Longmore L.J. was the fact that the contract was drafted by a high-profile law firm (at paras. [152–153]).

[112] *Coal Cliff Collieries* (1991) 24 N.S.W.L.R. 1, at pp. 26–27 (Kirby P.), 40–43 (Handley J.A.).

[113] Ibid., at p. 26.

[114] *United Group Rail* [2009] NSWCA 177, (2009) 74 N.S.W.L.R. 618, at para. [69].

[115] See *Emirates Trading Agency LLC* [2014] EWHC 2104, at paras. [42]–[46].

[116] *Yam Seng* [2013] EWHC 111, at paras. [26]–[27].

courts vary in a very limited manner from Lord Ackner's rejection of a bare duty to negotiate in *Walford v Miles*.[117] However, none of the recent judgments purports to claim that an independent agreement to negotiate in good faith could never be enforceable.

Notably, Lord Wright held in *Hillas* that the option to be negotiated was part of the initial agreement and not an offer to enter into a new contract.[118] At the same time, he envisaged the parties contemplating a future bargain whose terms "remained to be settled".[119] Similarly, even though Lord Justice Longmore dealt with an express obligation to negotiate as "part of a complex agreement", he emphasised protection of "reasonable expectations of honest men", conceivably envisaging an agreement to negotiate that is independent of any pre-existing contract.[120] President Kirby also circumscribed the scope of a promise to negotiate, maintaining that it ought to be enforceable only if the parties clearly so intend and only if good consideration is given for their promises to negotiate.[121] However, Kirby P. also envisages, following Lord Wright, that, "provided there was consideration for the promise in some circumstances[,] a promise to negotiate in good faith will be enforceable depending on its terms". The inference arising from Kirby P.'s reasoning is that, so long as an agreement satisfies the elements of a contract, it should be legally enforceable.

In essence, all four cases involved agreements to negotiate that were part of a wider contractual relationship between the parties, rather than negotiations in the absence of a pre-existing agreement. Furthermore, none of the judges cited above proposed a legal standard by which to measure the nature and extent of a duty to negotiate in good faith. One may conclude, therefore, that they left intact the determination that "no agreement to negotiate in good faith is enforceable as a matter of English law".[122] On the other hand, these cases also challenged, however limitedly, the legal taboo directed against agreements to negotiate as pronounced by Lord Ackner in *Walford v Miles.* In rekindling Lord Wright's earlier heresy in *Hillas v Arcos*,[123] Lord Justice Longmore and Justice Kirby opened the door to the possibility of enforcing agreements to negotiate, conceivably as more than mere appendages to wider contractual schemes. Their reasoning reflects Lord Steyn's extra-judicial comments in which he found the

[117] See Peel, "The Status of Agreements", pp. 44–50; *Petromec* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121, at pp. 126–27.
[118] *Hillas* (1932) 43 Lloyd's List Rep. 359, at p. 367.
[119] Ibid.
[120] *Petromec* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121, at pp. 152–53.
[121] *Coal Cliff Collieries* (1991) 24 N.S.W.L.R. 1, at pp. 26–27.
[122] Peel, "The Status of Agreements", p. 50. See also Lord Justice Staughton, "Good Faith and Fairness in Commercial Contract Law" (1994) 7 J.C.L. 193; *Queensland Electricity* [1989] 1 Lloyd's Rep. 205, at p. 210 (Sir Robin Cooke); *Pacific Brands Sport & Leisure Pty. Ltd. v Underworks Pty. Ltd.* [2005] FCA 288, (2005) Aust. Contract R. 90–213 (Finkelstein J.).
[123] *Hillas* (1932) 43 Lloyd's List Rep., at p. 359.

reluctance of common law courts to enforce agreements to negotiate "surprising", "against the thread", and at variance with "the reasonable expectations of honest men".[124]

B. Agreements to Negotiate in Good Faith in the Absence of a Contract

The decisions considered above show that courts are willing to enforce promises to negotiate where the parties have evinced a clear intention to enter into legal relations that entail a "common purpose" that is otherwise certain.

If courts are to avoid regressing into arbitrary conjecture in interpreting agreements to negotiate in good faith, they ought to interpret them according to first principles governing the formation of contracts, relevantly, the serious undertaking of the parties to negotiate in good faith and the reasonable certainty of the contract terms. In light of the analysis relating to negotiation clauses enforced as part of pre-existing contracts, considered above, it can be argued that there is little justification for common law courts summarily dismissing independent agreements to negotiate in good faith as lacking legal content. The key issues are considered below.

1. Public policy – freedom from contract

The primary argument against agreements to negotiate in good faith is that they bind parties to promises that those parties never intended to be legally binding. Where the promise to negotiate is part of a more complex array of promises, courts find that parties' intentions to enter into legal relations can be more easily identified. On the other hand, courts find it difficult to discern a serious intention by parties to enter into an "agreement to agree". The analogy with agreements to agree is, however, misplaced.

An agreement to negotiate in good faith is not an agreement to conclude a further agreement.[125] It is an agreement to take a series of negotiating steps in good faith. Neither party guarantees that a further agreement will be produced. Commercially speaking, of course, they intend that a substantive contract will materialise. From a legal standpoint, however, the serious intention of parties is to enter into an arrangement requiring that they take certain steps.

Provided that parties lay out these steps with sufficient certainty, including by providing for a meaningful obligation to act in good faith, and there is satisfactory consideration, it is unclear why parties should not be able to bind themselves to the obligation to take negotiating steps that are certain.

[124] See J. Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 L.Q.R. 433. See also Steyn L.J., *First Energy (UK) Ltd. v Hungarian International Bank Ltd.* [1993] 2 Lloyd's Rep. 194, 194–96. On the reasonable assumption of honestly in fair dealings, see *HIH* [2003] UKHL 6, [2003] 1 All E.R. (Comm) 349, at paras. [15] (Bingham L.J.), [69] (Hoffmann L.J.).

[125] *United Group Rail* [2009] NSWCA 177, (2009) 74 N.S.W.L.R. 618, at para. [64].

In such a situation, the public policy argument surely disappears.[126] Indeed it appears almost contrary to public policy to thwart the clearly expressed wishes of parties to enter into legal relations with respect to certain negotiating steps.

By utilising a textual interpretation, the court can render the agreement to negotiate in good faith binding based on the parties having unequivocally so agreed, or when the court determines that a duty to negotiate in good faith is reasonably inferred from their agreement,[127] so long as their "agreement" is not contrary to law or public policy.[128] Conversely, and consistently with the interpretation of any other type of agreement, if the parties have not manifested an intention to bind themselves to negotiate in good faith, they ought not to be so bound.

2. Certainty of terms

Similarly to the public policy argument, there has been a tendency to dismiss agreements to negotiate in good faith as being uncertain in the same vein as agreements to agree. Given that the purpose of an agreement to negotiate is not to produce an agreement, but to bind parties to good faith conduct with respect to negotiations, it is difficult to see why such an agreement should be deemed incapable of being certain. This is particularly so if the legal duty of good faith is given precise content, such as an obligation on parties to reasonably and honestly pursue a stipulated common purpose.

In any particular agreement, this good faith duty could be given substantive content by setting out clear negotiating machinery for the parties to follow. This could include a negotiating agenda outlining the issues to be negotiated, attendance of specific parties at negotiating meetings, compliance with a meeting schedule, and pre-determined procedures directed at specified outcomes.

As such, it is untenable to reject agreements to negotiate in good faith as a special category, without construing the particular agreement in question. A comparable point was made by Allsop P. with respect to a promise to negotiate in good faith contained within the context of an otherwise complete contract:

[126] See Hoskins, "*Contractual Obligations*".

[127] See e.g. Peel, "The Status of Agreements", pp. 43–47. On an implied duty of a landlord to negotiate a renewal of a lease in good faith, see *Empress Towers Ltd. v Bank of Nova Scotia* [1991] 73 D.L.R. (4th) 400.

[128] See C.R. Chivers, "'Contracting Around' the Good Faith Covenant to Avoid Lender Liability" [1991] Colum.Bus.L.Rev. 359; Brownsword, Hird, and Howells, Good Faith in Contract, p. 37; B. Dixon, "Can the Common Law Obligation of Good Faith be Contractually Excluded?" (2007) 35 A.B.L.R. 110. See also *Rose* and *Frank* Co *v* J.R. *Crompton* & Bros Ltd. [1923] 2 K.B. 261; *Rose & Frank Co. v J.R. Crompton & Bros Ltd.* [1925] A.C. 445.

> . . . I [do not] find the views of Lord Ackner in *Walford v Miles* persuasive. An obligation to undertake discussions about a subject in an honest and genuine attempt to reach an identified result is not incomplete. It may be referable to a standard concerned with conduct assessed by subjective standards, but that does not make the standard or compliance with the standard impossible of assessment. Honesty is such a standard. . . . The assertion that each party has an unfettered right to have regard to any of its own interests on any basis begs the question as to what constraint the party may have imposed on itself by freely entering into a given contract. If what is required by the voluntarily assumed constraint is that a party negotiate honestly and genuinely with a view to resolution of a dispute with fidelity to the bargain, there is no inherent inconsistency with negotiation, so constrained. To say, as Lord Ackner did, that a party is entitled not to continue with, or withdraw from, negotiations at any time and for any reason assumes that there is no relevant constraint on the negotiation or the manner of its conduct by the bargain that has been freely entered into. Here, the restraint is a requirement to meet and engage in genuine and good faith negotiations.[129]

A textual argument for enforcing an independent agreement to negotiate in good faith is that a court ought to commence by interpreting that agreement, when written, according to its "plain and ordinary meaning".[130] In effect, a court will do no more than determine the nature and scope of a duty to negotiate in good faith according to these clauses.[131] Against this background, courts can identify whether one party acted in bad faith, for example, in summarily cancelling negotiating meetings knowing of their urgency to the other party.[132] This would not require the court arbitrarily to decide that particular conduct was not in good faith. Rather, the court would be required to interpret the particular clause, as in any other contractual dispute, and ascertain whether its breach constituted a failure to act in good faith, according to the legal test suggested above (or another test that common law courts arrive at through a process of interpretation and *stare decisis*).[133]

This is not dissimilar to the rationale upon which negotiation clauses that are part of pre-existing contracts are upheld. Courts construe the clause in question, in light of the rest of the agreement, according to general principles of contract interpretation. No artificial gloss is required, nor should be imposed, simply because the content of the agreement requires parties to take negotiating steps instead of some other commercial exchange.

[129] *United Group Rail* [2009] NSWCA 177, (2009) 74 N.S.W.L.R. 618, at para. [65].
[130] See e.g. S.J. Burton, *Elements of Contract Interpretation* (Oxford 2008), chs. 1–2.
[131] See e.g. N.C. Seddon and M.P. Ellinghaus, *Cheshire & Fifoot's Law of Contract*, 8th ed. (Sydney 2002), para. [6.16]; *Strzelecki Holdings* [2010] WASCA 222, (2010) 41 W.A.R. 318, at paras. [45], [47].
[132] On an express agreement to appoint an arbitrator to determine the reasonable contract price from time to time, see *Foley* [1934] 2 K.B. 1, at para. [1]. See also *Sykes* [1967] 1 Lloyds Rep. 53, at paras. [53], [57] (Lord Denning). But see *Con Kallergis Pty. Ltd. v Calshonie Pty. Ltd.* (1998) 14 B.C.L. 201.
[133] See comparable reasoning by Allsop P. in *United Group Rail* [2009] NSWCA 177, (2009) 74 N.S.W.L.R. 618, at para. [65].

VI. Remedies

As a principled matter, courts should be encouraged to enforce agreements that are intended to be binding, grounded in party practice, consistent with business practice, and the "breach" of which may cause a negotiating party material loss or harm. As a conceptual matter, liability for breach of an agreement to negotiate should be comparable to liability for other kinds of breaches for which damages or other remedies are awarded. As a functional matter, the law of contracts should be more than just a blunt instrument which ignores expenses incurred in the conduct of negotiations and consequences such as the loss of a chance to conclude an agreement with a third party "locked out" as a precondition for negotiations.[134] Finally, as a matter of fairness, a failure to ascribe legal consequences to breach of that agreement may cause the harmed party a manifest injustice; enforcement of that agreement may accord with public policy, good morals and statutes governing the legality of contracts, and the measure of damages arising from breach of contract may well be ascertainable.[135]

However, a practical problem in determining the consequences of a breach of a duty to negotiate in good faith is in determining the appropriate remedy. Agreements to negotiate in good faith promise no definitive results; they entertain no material harm; and they lead to no determinate loss that is quantifiable as damages.[136] In fact, even civil law jurisdictions struggle to arrive at easily determined remedies, despite having more firmly established doctrines of good faith governing negotiations. Indeed, the preferred civil law remedy of specific performance is unrealistic in the face of failed negotiations that can no longer be performed, or would require constant supervision. Nor are monetary awards easily determined, leading civil law courts to award reliance or expectation damages only if negotiations are close to being concluded and the claimant has a legitimate or reasonable expectation of such agreement eventuating.[137]

Although these are valid considerations, difficulty in determining the quantum of damages for breach of an agreement to negotiate in good faith is not a definitive reason to deny damages. For example, the measure

[134] See *Lam v Austintel Investments Australia. Pty Ltd.* (1989) 97 F.L.R. 458, 575 (Gleeson C.J.) (no legal duty of disclosure in a horizontally integrated relationship).

[135] For debate on these issues in relation to "fault" in contracting, see e.g. J. Edelman, "In Defence of Exemplary Damages" in C. Rickett (ed.), *Justifying Private Law Remedies* (Oxford 2008), 225. But see R. Posner, "Let Us Never Blame a Contract Breaker" in O. Ben-Shahar and A. Porat (eds.), *Fault in American Contract Law* (Cambridge 2010), ch. 1.

[136] See *Tolaini Brothers* [1975] 1 W.L.R. 297.

[137] See Cartwright and Hesselink, *Precontractual Liability in European Private Law*, pp. 455–67; S.B. Markesinis, H. Unberath, and A. Johnston, *The German Law of Contract – A Comparative Treatise* (Oxford 2006), 387. See also Berger, "Harmonisation of European Contract Law", p. 877; H. Collins, "Good Faith in European Contract Law" (1994) 14 O.J.L.S. 229. On a somewhat contentious 2011 American decision enforcing an agreement to negotiate in good faith in accordance with an expressly non-binding term sheet, giving rise to expectation damages for breach, see *SIGA Technologies Inc. v PharmAthene Inc.* (S. Ct., Delaware, CA No 2627, 24 March 2013).

of damages for so-called loss of a chance, by its very nature, is difficult to calculate, but it is still widely recognised as a head of damages.[138] As Allsop P. noted in *United Group Rail*, "The objection that no court could estimate the damages because no one could tell whether the negotiations 'would be' successful ignores the availability of damages for the loss of a bargained for valuable commercial opportunity".[139] His Honour went on to observe: "Uncertainty of proof . . . does not mean that this [agreement to negotiate] is not a real obligation with real content."[140] This sentiment was echoed by Teare J. in *Emirates Trading Agency*: "Difficulty of proof of breach in some cases does not mean that the clause lacks real content."[141] Thus, while damages are indeed difficult to establish in cases involving good faith negotiations, it is still possible for courts to arrive at an acceptable remedy.

As one of its options, a court could order specific enforcement, compelling the parties to negotiate in good faith, including possibly under judicial supervision.[142] Admittedly, this approach is limited since specific enforcement of an agreement to negotiate often arises too late to be effective or fair, namely after negotiations have failed. Alternatively, a ourt could enforce an agreement to a schedule of negotiation meetings. This again would not be a suitable commercial remedy, not least because it would be highly impracticable for a court to seek to monitor the practices of parties to ensure they conduct themselves in good faith.

While the pervasive common law remedy for breach of an agreement is a monetary award,[143] this can take a variety of forms varying from, compensation for reliance damages such as for out-of-pocket expenses in negotiating[144] to expectation damages including consequential damages.[145] For example, a court could award the interest of the claimant in full

[138] See e.g. *Petromec* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep. 121, at p. 118. See generally *Commonwealth v Amann Aviation* (1991) 174 C.L.R. 64.

[139] *United Group Rail* [2009] NSWCA 177, (2009) 74 N.S.W.L.R. 618, at para. [64].

[140] *United Group Rail* (2009) [2009] NSWCA 177, (2009) 74 N.S.W.L.R. 618, at para. [74]. See *Blackpool and Fylde Aero Club Ltd. v Blackpool Borough Council* [1990] 1 W.L.R. 1195 (and also more broadly on agreements to meet and undertake genuine and good faith negotiations). Cf. *Chaplin v Hicks* [1911] 2 K.B. 786; *Sellars v Adelaide Petroleum N.L.* (1992) C.L.R. 332, 349.

[141] *Emirates Trading Agency LLC* [2014] EWHC 2104, at para. [47].

[142] See D. Friedmann, "Economic Aspects of Damages and Specific Performance Compared" in R. Cunnington and D. Saidov (eds.), *Contract Damages: Domestic and International Perspectives* (Oxford 2008), 65.

[143] See D. Winterton, "Money Awards Substituting for Performance" [2012] Lloyd's Maritime and Commercial L.Q. 446. But see R. Stevens, "Damages and the Right to Performance: A Golden Victory or Not?" in J.W. Neyers, R. Bronaugh, and S.G.A. Pitel (eds.), *Exploring Contract Law* (Oxford 2009), 171.

[144] See *Robinson v Harman* (1848) 154 E.R. 363, 1 Ex. 850, 855. On resort to reliance damages when expectation damages are difficult to determine, see *Omak Maritime Ltd. v Mamola Challenger Shipping Co. Ltd.* [2010] EWHC 2026 (Comm), [2011] 2 All E.R. (Comm) 155. See also *Commonwealth v Amann Aviation Pty. Ltd.* (1991) 174 C.L.R. 64.

[145] On the award of a loss of profit and wasted expenditure for breach of an implied general duty to negotiate in good faith, see *Yam Seng* [2013] EWHC 111, at paras. [177]–[185], [186]–[192].

performance.[146] It could award the claimant damages for the "loss of a chance" to negotiate with a third party.[147] In exceptional cases, it could award the claimant profits the defendant made as a result of breaking off negotiations with that claimant in order to negotiate with a third party,[148] or even award punitive damages.[149] In each case, liability could derive from an actual or inferred promise not to cause such losses by breaking off negotiations, or behaving badly in other ways that constitute actionable bad faith.

Courts can also choose the type of monetary award in part based on their capacity to quantify damages. If expectation damages arising from breach of an agreement to negotiate in good faith are deemed too difficult to quantify,[150] a court can award damages to compensate the claimant for wasted expenditure incurred during sham negotiations,[151] and for the loss of an opportunity to negotiate with a third party.[152] It can require the defendant to disgorge profits, in whole or part, made as a result of engaging in duplicitous negotiations to the detriment of the claimant.[153] It can also award damages based on the defaulting party's unjust enrichment, although the likelihood of the defendant being both unjustly enriched and causing the claimant's impoverishment, such as by concluding a contract with a competitor, would be unusual.[154] These arguments support the proposition that parties may agree to a negotiating process that is determinative, the

[146] See D. Friedmann, "The Performance Interest in Contract Damages" (1995) 111 L.Q.R. 628.

[147] *Emirates Trading Agency LLC* [2014] EWHC 2104, at para. [47]: the Court noted that, in appropriate cases, damages could be awarded for loss of a chance.

[148] See *Attorney-General v Blake* [2001] 1 A.C. 268, 299 (Lord Hobhouse). See generally K. Barnett, *Accounting for Profit for Breach of Contract: Theory and Practice* (Oxford 2012); R. Cunnington, "The Measure and Availability of Gain-Based Damages for Breach of Contract", in R. Cunnington and D. Saidov (eds.), *Contract Damages: Domestic and International Perspectives* (Oxford 2008), 207, 235; D. Campbell and P. Wylie "Ain't No Telling (which Circumstances are Exceptional)" [2003] C.L.J. 605.

[149] See S. Smith "Performance, Punishment, and the Nature of Contractual Obligation" (1997) 60 M.L.R. 360.

[150] See *Walford* [1992] 2 A.C. 128, at pp. 135–38 (Lord Ackner).

[151] On the award of such expenses in part to avoid speculation over expectation damages, see e.g. *McRae v Commonwealth Disposals Commission* (1951) 84 C.L.R. 377. But see Peel, "The Status of Agreements", pp. 58–59. On unintended breach in excluding a tender bid on the erroneous assumption that it was submitted after the tender deadline, see *Blackpool* [1990] 1 W.L.R. 1195, at p. 1195.

[152] Peel, "The Status of Agreements", p. 58. Peel observes also that a claimant may seek to include in his or her reliance loss the *loss of the opportunity* to negotiate with another party and argue that this opportunity had a value which should be recognised as part of the reliance loss: Ibid., at p. 58, n. 83. Such a claim, however, could attract criticisms of uncertainty similar to claims for expectation damages.

[153] See *Attorney General v Blake* [2001] 1 A.C. 268; E. Weinrib, "Punishment and Disgorgement as Contract Remedies" (2003) 78 Chi-Kent L.Rev. 55; A. Botterell, "Contractual Performance, Corrective Justice, and Disgorgement for Breach of Contract" (2010) 16 Legal Theory 135. On the argument in support of the partial disgorgement of profits arising from breach of an agreement to negotiate, see P. Devonshire, "The Hypothetical Negotiation Measure: An Untenable Fiction" [2012] Lloyds Maritime and Commercial L.Q. 393; on "user damages", see *Stoke City Council v W. & J. Wass* [1988] 1 W.L.R. 1406, 1414.

[154] On the "Wrotham Park" measure of damages, see *Wrotham Park Estate Co. Ltd. v Parkside Homes Ltd.* [1974] 1 W.L.R. 798. See also A. Burrows, "Are 'Damages on the Wrotham Park Basis' Compensatory, Restitutionary or Neither?" in R. Cunnington and D. Saidov (eds.), *Contract Damages: Domestic and International Perspectives* (Oxford 2008), 165 See also *Restatement (Third) of Restitution and Unjust Enrichment* (2011) § 39, Comment C.

violation of which may cause one party an appreciable loss. The measurement of that loss in a contract action could depend on the remedy provided for by contract, if any, such as in a liquidated damages clause. It would also depend on the nature of the claim and the legal implications arising from it, including monetary damages not unlike the consequences of breach of other kinds of contracts.[155]

A court may well enforce an agreement to negotiate on grounds other than breach of that agreement. It may hold that the defaulting negotiator engaged in a misrepresentation that induced the innocent party to contract, or acted unconscionably in negotiating, or is estopped by the detrimental reliance of the innocent party.[156] A court may hold the defaulting negotiator liable in tort, such as under the tort of negligence for failing to exercise a duty of care towards the injured negotiating party[157]or for deceit.[158] These alternative measures of determining liability exemplify the adaptability of the common law of remedies; they serve as conceptual and functional alternatives for assessing damages for breach of an agreement to negotiate in good faith. Certainly, the possibilities are not so limited as to justify dismissing agreements to negotiate out of hand.

VII. Conclusion

This article has evaluated views on the enforceability of agreements to negotiate in good faith. In doing so, it has sought to address the legal flaws that supposedly inhere in such agreements.

It has considered arguments in favour of enforcing such agreements based on underlying principles governing the formation of contracts, not least of all "the sanctity of promises" made by negotiating parties. It has considered the argument that, by continuing to treat agreements to negotiate as unenforceable "agreements to agree", courts are likely to disappoint the expectations of parties who reasonably rely on reciprocal good faith in negotiating contracts.

As a normative matter, a negotiating party who enjoys the "positive liberty" to promise to negotiate ought also to be bound to negotiate in good faith arising from the exercise of that liberty. The legal rationale for enforcement is that the parties should be free to bind themselves to a promised process of cooperative dealing even if they do not promise to arrive at a

[155] See e.g. *East v Maurer* [1991] 1 W.L.R. 463.

[156] See *Cobbe v Yeoman's Row Management Ltd.* [2006] EWCA Civ 1139, [2006] 1 W.L.R. 2964 at [4]–[7] (Mummery L.J.) in which Court of Appeal proposed the use of proprietary estoppel to regulate pre-contractual misconduct. However, the decision was reversed on appeal to the House of Lords: see *Cobbe v Yeoman's Row Management Ltd.* [2008] UKHL 55, [2008] 1 W.L.R. 1752.

[157] On torts as a means of vindicating bad faith conduct, see J. Gardner, "What is Tort Law for? Part 1: The Place of Corrective Justice" (2011) 30 Law & Philosophy 1. See also B. Zipursky and J. Goldberg, "Torts as Wrongs" (2010) 88 Tex.L.Rev. 917; P. Giliker, "A Role for Tort in Pre-Contractual Negotiations? An Examination of English, French and Canadian Law" (2003) 52 I.C.L.Q. 969.

[158] See *Halifax Building Society v Thomas* [1996] Ch. 217.

determinative result. Viewed conceptually, parties should be bound by agreements to negotiate in good faith if they seriously so intend, if the terms of their agreement to negotiate are sufficiently clearly evinced, and if their agreement is supported by good consideration.

However, even if an agreement to negotiate in good faith is supportable conceptually and in principle, its legal enforcement should be subject to the ordinary principles of contract formation. The negotiating parties must seriously intend to conclude binding agreements to negotiate; they must agree to certain terms, including to act in good faith, and they must exchange good consideration for their promises to negotiate.

The enforceability of a good faith obligation voluntarily assumed by the parties should depend on the agreement itself, or on reasonable inferences drawn from the practices or usages of the parties, not from vague moral standards of decency or fair play. A duty to negotiate that derives from an express agreement by the parties to negotiate is more justiciable than a requirement of good faith in negotiating based on the fiction that, had the parties contemplated a negotiating conflict, they would have agreed to negotiate in good faith.

Ultimately, there are principled, conceptual, and functional arguments that support a binding duty to negotiate in good faith, however constrained that right may be in specific cases. It is undeniable that the freedom of a party not to be bound by an agreement to negotiate is no more principled than the freedom of parties to assume binding duties to negotiate in good faith. An enforceable agreement to negotiate may encourage cooperation in negotiating and promote security and stability in negotiating relationships, just as it may lead to dishonest, opportunistic, inefficient, and dysfunctional negotiations.[159] A party who uses a superior bargaining position to take negotiating advantage of the other party may justifiably be held liable for negotiating inequitably, exploiting a structural negotiating advantage which gives rise to a breach of a contract to negotiate in good faith; or that party could be deemed to have negotiated immorally, but not contrary to law.[160] The potential for judges to reach divergent results, however, is not peculiar to agreements to negotiate. Judicial interpretation of contracts necessarily entails an evaluative exercise.

Enforcing agreements to negotiate in good faith could perhaps result in some inefficient litigation by disappointed negotiating parties. However, it may also encourage good faith dealings and discourage frivolous lawsuits. If English courts are to address the economic significance of agreements to negotiate in contemporary business, including in cross-border dealings, they will be under growing pressure to reconsider their unenforceability in English law.

[159] See J. Burrows, "Contractual Co-Operation and the Implied Term" (1968) 31 M.L.R. 390.

[160] On structural inequality between negotiating parties, see e.g. *Keeley v Fosroc International Ltd.* [2006] EWCA Civ 1277, [2006] I.R.L.R. 961 (employment relations); *Lombard Tricity Finance Ltd. v Paton* [1989] 1 All E.R. 918 (consumer transactions).