‘Good Faith in Commercial Agreements and Dispute Resolution – A Comparative and Transactional Perspective’

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Relevance for Corporate Lawyers, Litigators, and Arbitrators
How is This Relevant to Me? – Part I

• Corporate lawyers and litigators need to know how good faith is addressed in different countries where disputes over commercial agreements might be adjudicated or arbitrated:
  – Good faith accepted in international commercial law (eg UNIDROIT Principles of International Commercial Contracts, UNCITRAL and CISG), civil law systems (eg Europe), and one major common law country (ie USA)
  – Good faith remains controversial in other common law countries and locations for international dispute resolution (eg UK, Canada, Australia, Singapore, Hong Kong)

• Emerging cross-jurisdictional trends on good faith:
  – Significant judicial developments in last 5 years in UK, Canada, Australia, HK, and Singapore (and also cross-fertilisation of judicial and academic views across countries)
  – Incorporation of ‘good faith’ obligations expressly in government/industry standards (eg tenders/construction contracts)
  – So, lawyers and multinational companies need to engage with how good faith is treated across different jurisdictions for both business and dispute resolution purposes
How is This Relevant to Me? – Part II

• Various commercial and practical implications for lawyers and clients:
  – Commercial clients and lawyers desire certainty and locking up relevant rights expressly by agreement where possible (or advising accurately after the event)
  – Clause saying ‘[My client] can [unilaterally] do X’ risks being read as ‘[My client] is [only] able to do X provided that they are acting honestly, cooperatively, non-arbitrarily, without ulterior motives, and reasonably’
  – Emerging limits on capacity to manage good faith through clever drafting techniques
  – Implications for drafting at time contract entered into but also for litigators advising, after the balloon has gone up, on what the client’s options and prospects are

• Move from ‘old’ to ‘new’ thinking on good faith affects:
  – Negotiating options (for clients) and drafting approaches (for lawyers) on good faith
  – Updating of standard agreements (for clients) and transactional and opinion precedents (for lawyers)
  – Pleadings and arguments in litigation and other dispute resolution
  – Advice to clients in litigation and other dispute resolution
The Meaning and Limits of Good Faith
Modern Routes for Contractual Good Faith

- **‘Express/implied terms’ jurisprudence:**
  - Eg implication by law/fact, business efficacy etc
  - Focus on whether specific term in/out of the contract
  - Corresponding implications for capacity to exclude good faith

- **‘Underlying doctrines of contract’ jurisprudence:**
  - Eg non-arbitrary/capricious/ulterior exercise of contractual rights (ie ‘implicit good faith’: Peden/Carter, Socimer etc)

- **‘Related obligations’ jurisprudence:**
  - Eg implied terms of cooperation, best endeavours, non-frustration, mutual fidelity to the bargain etc

- **‘Interpretation/construction’ jurisprudence (also part of ‘implicit good faith’):**
  - Eg giving effect to reasonable expectations of parties

- Contractual good faith has three elements:
  - #1 co-operation in achieving the contract’s mutual outcomes
  - #2 honesty
  - #3 reasonableness having regard to the parties’ interests under the contract

- Contractual good faith also has limits:
  - Implied terms can’t override express contractual rights
  - Implied terms can’t override legitimate commercial interests
  - Implied terms can be excluded, within limits
Modern Content of Good Faith

• **#1 Honesty:**
  – Broader than just avoiding fraud and deception
  – Disclosure of information at all stages? (commercial-in-confidence v precipitously ‘showing your hand’ v being at risk of bad faith through inadequate or untimely disclosure, especially when the business relationship is breaking down)
  – Reputational and legal risk/impossibility of attempts to exclude

• **#2 Legitimate expectations of the parties:**
  – No arbitrary act, capricious intent, improper purposes, or ulterior motives (eg convenient excuses to terminate)
  – Good faith cannot trump parties’ legitimate commercial expectations

• **#3 Fidelity to the mutual bargain:**
  – Cooperation in achieving mutual benefits
  – Non-frustration of other parties’ capacity to gain contractual benefits
  – **Problem:** extent to which this requires consideration of other parties’ interests
  – **Mitigation:** good faith cannot override a party’s legitimate commercial interests

• **#4 Reasonableness:**
  – **Problem:** lack of certainty as to meaning and knock-on effects
  – 4 possible meanings: (i) just rational, (ii) objectively reasonable, (iii) reasonable under the contract, or (iv) reasonable as incorporated within contract law doctrines?
  – Over-reach/subjectivity by some courts produces both unclear law and lack of clarity for litigators and judges and arbitrators
Traditional Common Law Position

- No general duty to perform contracts in good faith
- Contract law addresses unfairness from the bottom up (ie specific remedies) not from the top down (ie imposition of overarching good faith principle as an act of judicial moralism)
- Obligations to negotiate in good faith seen as uncertain, unenforceable and said to be “inherently repugnant to the adversarial position of the parties when involved in negotiations” : per Lord Ackner in Walford v Miles [1992] 2 AC 128, 138
- Good faith obligations can only be implied by law, fact, or implication in limited circumstances
- Good faith implied by law in particular categories of contracts eg contracts of employment, contracts involving fiduciaries, joint ventures, long-term relational contracts, franchising contracts - BUT NOT commercial agreements generally
- Good faith is implied as a term in fact only under strict conditions: essential to make the contract work, and for business efficacy
- Good faith requires less than would be required by a duty to be reasonable which in turn is less than would be required by a fiduciary duty
- Contract law is potentially prepared to recognise lesser implied terms (eg cooperation, best endeavours etc) that are enforceable
- Implied terms (including good faith) can be excluded by agreement
‘In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as “playing fair”, “coming clean” or “putting one’s cards face upwards on the table”. It is in essence a principle of fair and open dealing ... English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.’

(emphasis added)
Now – *Greenclose Ltd v National Westminster Bank* [2014] EWHC 1156 (Ch)

‘So far as the [implied] “Good Faith” condition is concerned, there is no general doctrine of good faith in English contract law and such a term is unlikely to arise by way of necessary implication in a contract between two sophisticated commercial parties negotiating at arms’ length. Leggatt J’s judgment in *Yam Seng Pte Ltd v International Trade Corporation Ltd* … is not to be regarded as laying down any general principle applicable to all commercial contracts.’

(per Andrews J at [150] but query tension with Leggatt J in *Yam-Seng Pte Ltd International*)
Singapore and Hong Kong Judicial Positions Reflect This

• ““(A)n overriding principle that in making and carrying out contracts parties should act in good faith” ... is not an obligation recognised by Hong Kong law.’ (GDH Ltd v Creditor Co Ltd [2008] 5 HKLRD 895)

• ‘(W)e cannot accede to the appellant’s argument that this court should endorse an implied duty of good faith in the Singapore context.’ (Ng Giap Hon v Westcomb Securities [2009] SGCA 19)
‘(T)he principle of good faith should be seen not as an implied term, but rather as a principle that governs the implication of terms [and] the construction of contracts generally.’

(emphasis added)

- Prof Elisabeth Peden
Recent UK Decisions – A More Nuanced Approach to Good Faith?

• **‘Implicit Good Faith’:** Contractual discretions to choose between options affecting other contractual parties ‘will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused’ (Socimer International Bank v Standard Bank London [2008] EWCA Civ 116 per Rix LJ at [66], reinforced in Mid Essex Hospital Services NHS Trust v Compass Group UK [2013] EWCA Civ 200 per Jackson LJ at [83])

• **Implied Obligation of Good Faith:**
  - Recognition of implied duty of good faith seemingly “in any ordinary commercial contract”, extending to honest provision of information: Leggatt J in Yam Seng v International Trade Corporation [2013] EWHC 111 (QB) at [119-154;156]
  - An innocent party’s choice not to terminate the contract for repudiatory breach is conditioned by the need to act in good faith as same essential concern that decision-maker’s power should not be abused: Leggatt J in MSC Mediterranean Shipping Co v Cottonex Anstalt [2015] EWHC 283 (Comm) at [97-98] applying Socimer

• **Negotiating in Good Faith:** A time-bound and pre-arbitration dispute resolution clause in an existing agreement to try to resolve a dispute by friendly discussions in good faith is enforceable: Emirates Trading Agency v Prime Mineral Exports Private [2014] EWHC 2104 (Comm) per Teare J at [63-64] (relying on Australian and Singaporean authority)

• **Overarching Organising Principle of Good Faith and Fair Dealing?**
  - ‘(T)here is in my view nothing novel or foreign to English law in recognising an implied duty of good faith in the performance of contracts’ (Leggatt J in Yam Seng, 2013 at [145;150])
  - ‘Fundamentally I consider that the law is already slowly developing in a way which can accommodate the concept of good faith within contract law’ (Lady Justice Arden, Singapore Academy of Law, 2013)
  - ‘The true ground for implying terms into contracts is always good faith and fair dealing, though the distinction between terms implied in fact and terms implied in law signifies different meanings of the kaleidoscopic idea of good faith’ (Hugh Collins, Vinerian Professor of English Law, All Souls College, Oxford, Implied Terms: The Foundation in Good Faith and Fair Dealing)

• **Is there a split in the English Courts over whether Leggatt J is right or wrong in his views?**

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Boundaries of Good Faith – Example 1 (UK, 2008)

- Defaulting bank owed US$24.5M at termination date to another bank on forward sales of securities
- Portfolio to be valued at termination
- **Clause 14(a)(bb):** ‘The value of any Designated assets liquidated or retained and any losses, expenses or costs arising out of the termination or the sale of the Designated assets shall be determined on the date of termination by Seller.’

Issues:
- #1: Must any valuation be objective and reasonable according to market value (under an implied term); or alternatively
- #2: Is the Seller’s valuation subjective but still conditioned by ‘implicit good faith’ (ie rational, non-arbitrary, non-capriciousness etc)

Result: implied term neither necessary nor certain but ‘implicit good faith’ incorporated and that regarded as enough protection

Boundaries of Good Faith – Example 2 (UK, 2013)

- **Clause 3.5**: ‘The Trust and the Contractor will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust or, as the case may be, any Beneficiary to derive the full benefit of the Contract.’
- **Clause 5.8**: Trust/Beneficiary has discretion to assess Contractor’s performance according to agreed Service Level Specification and Trust can levy deductions for non-performance
- Also a simple entire agreement and exclusion clause
- Cranston J found breach of good faith under clause 3.5 and breach of implied term of ‘implicit good faith’ affecting clause 5.8
- Result overturned on appeal:
  - “I start by reminding myself that there is no general doctrine of “good faith” in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract” per Jackson LJ at [105] but also quoting Yam Seng without qualification or comment (see also Beatson LJ who likewise cited Yam Seng at [150])
  - Good faith in clause 3.5 confined to the two stated purposes – ie did not apply to clause 5.8 on calculating service failure points
  - Clause 5.8 contains an absolute contractual right, unfettered by ‘implicit good faith’ even if it applied
  - ‘Implicit good faith’ not excluded by the exclusion/entire agreement clause, if it otherwise applied
  - Context: Trust is a public body, delivering vital public services, and hence entitled to expect high standards from contractors in serving the public
  - So no room for concept of good faith if an absolute contractual right as opposed to exercise of a discretion to choose between options that could affect interest of both contractual parties
- *(Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland [2013] EWCA Civ 200)*
Boundaries of Good Faith – Example 3 (UK, 2013)

- Contract for gas servicing and works for housing portfolio
- **Clause 1.1:** ‘The Partnering team members shall work together and individually in the spirit of trust, fairness and mutual cooperation for the benefit of the Term Programme, within the scope of their agreed roles, expertise and responsibilities as stated in the Partnering Documents …’ (emphasis added)
- **Clause 13.3:** ‘(T)he Client may terminate the appointment … at any time during the Term or as otherwise stated by the period(s) of notice to all other Partnering Team members stated in the Term Partnering Agreement.’

**Issues:**
- #1: Did clause 1.1 apply to termination under clause 13.3?
- #2: Alternatively, did an implied term of good faith control termination under clause 13.3?

**Result:** No, on both counts, yet see Akenhead J’s description at [46] of Leggatt J’s judgment in *Yam Seng* as “extremely illuminating and interesting [and] of general application to all commercial contracts [but] I do not see that implied obligations of honesty and fidelity to the contractual bargain impinge in this case at all”

**(TSG Building Services v South Anglia Housing [2013] EWHC 1151 (TCC))**
Scenario 1

• Other commercial party’s proposed clause:
  – ‘In resolving all disputes under this Agreement, the parties agree to negotiate and otherwise act in good faith, which includes being honest and reasonable towards each other’

• Lawyer’s preliminary advice:
  – Agreement to negotiate in good faith is void for uncertainty and hence unenforceable
  – But no harm agreeing, because good faith implied in all or most commercial agreements anyway
  – No further drafting improvements needed

• Good or bad advice?
Is an Agreement to Negotiate in Good Faith Enforceable? - New v Old Law

- UK, 1992: No, as implied term – too vague and uncertain:
  - Walford v Miles (HL) but agreement to use best endeavours is enforceable, as no guaranteed result and can be time-limited

- Singapore, 2008: No, as express term – too vague and uncertain (but obiter):
  - Clause: ‘Any dispute arising out of or in connection with this Agreement ... shall be referred to executive representatives of the Parties for settlement through friendly consultations between the Parties [and arbitration, failing time-bound agreement]’
  - Singapore High Court, Insignia Technology v Alstom Technology

- Australia, 2009: Yes, as express term:
  - Clause: ‘(T)he dispute or difference is to be referred to [the Parties’ representatives] who must meet and undertake genuine and good faith negotiations with a view to resolving the dispute or difference [and failing resolution, then referred to mediation and then arbitration]’
  - NSW Court of Appeal, United Group Rail Services v Rail Corporation NSW, referring to Australian and UK cases

- Singapore, 2012 and later: Yes, as express term, in rent reviews and other ADR contexts:
  - Clause: ‘Prior to [end of term] the Lessor and the Lessee shall in good faith endeavour to agree on the prevailing market rental value [and referred to valuers if disagreement]’
  - Singapore Court of Appeal, HSBC Institutional Trust Services v Starhill Global Real Estate Investment Trust, 2012, referring to UK and Australian cases, applied to enforceable multi-tiered dispute resolution clauses in later Singapore cases

- UK, 2014: Yes, as express term and with time limit, in ADR context:
  - Clause: ‘In the case of any dispute or claim [under the Long Term Contract] ... the Parties shall first seek to resolve the dispute or claim by friendly discussion [before referral to arbitration]’
  - England and Wales High Court, Emirates Trading Agency v Prime Mineral Exports, 2014, distinguishing Walford v Miles, referring to Australian and Singapore cases
Scenario 2

- Existing commercial agreement says:
  - ‘*Entire Agreement*: This agreement contains the entire understanding of the parties with respect to its subject matter. All previous conduct, representations, and agreements, express or implied, are superseded and of no effect.’

- Preliminary advice:
  - All implied terms and any other relevance of good faith are both effectively excluded

- Good or bad advice?
Question: Do ‘Entire Agreement’ and Exclusion Clauses Automatically Exclude Implications of Good Faith? Answer: No

• 2014, Canada: No:
  – Clause: ‘[No] agreements, express, implied or statutory, other than expressly set out [in this Agreement]’
  – Moreover, parties cannot exclude new duty of honest performance (but might control its scope)
  – Canadian Supreme Court, Bhasin v Hrynew

• 2013, UK: No:
  – Combined entire agreement and exclusion clause: “Contract” means the agreement between [the parties] … and for the avoidance of doubt all other terms, conditions or warranties implied by law … are excluded from the agreement’
  – As worded, such a clause does not exclude ‘implicit good faith’ (and hard to exclude anyway): UK Court of Appeal, Mid Essex Hospital Services NHS Trust v Compass Group per Jackson LJ at [83]

• 2003 and 2004, Australia: No:
  – ‘I find arresting the suggestion that an entire agreement clause is of itself sufficient to constitute an “express exclusion” of an implied duty of good faith’ (Finn J, GEC Marconi Systems v BHP Information Technology, approved on this point in Bhasin)
  – Clause: ‘To the full extent permitted by law and other than as expressly set out in this Agreement, the parties exclude all implied terms, conditions and warranties’ (Trial judge said Yes in Vodafone Pacific v Mobile Innovations, but overturned on appeal)

• Inherent limits under contract law and legislation:
  – Legislation might prohibit implied terms or else prohibit exclusion of good faith (eg Australian Franchising Code)
  – Attempts to exclude good faith must try to navigate laws on unfair contract terms, unconscionability
  – Contract law limits exclusion clauses under various doctrines (eg void as against public policy)

• **Exclusion clause**: ‘To the full extent permitted by Law and other than as **expressly** set out in this Agreement the parties exclude all implied terms, conditions and warranties.’ (emphasis added)

• ** Entire agreement clause**: ‘This agreement contains the entire agreement of the parties with respect to its subject matter. It sets out the only conduct relied on by the parties and supersedes all earlier conduct by the parties with respect to its subject matter.’

• **Governing law clause**: Contract law of NSW

• **Other clauses** containing absolute discretions

• **Result:**
  - Trial judge implied good faith despite the exclusion clause
  - Overturned on appeal

• **Vodafone Pacific v Mobile Innovations** [2004] NSWCA 15
Emerging/Comparative Position – Part I

• Still no general and broad duty of good faith yet in commercial contracts in UK, Canada, Australia, Singapore, HK; see by way of example:

  ‘I do not regard the decision in Yam Seng Pte ltd v International Trade Corporation as authority for the proposition that in commercial contracts it may be taken to be the presumed intention of the parties that there is a general obligation of “good faith”’: Norris J in Hamsard 3147 Ltd v Boots UK Ltd [2013] EWHC 3251 (Pat) at [85-86]

• In appropriate contexts, good faith can be implied into contracts as a matter of law, fact, or construction (all common law countries – but interpretations and applications differ)

• New openness towards good faith as a primary organising principle, manifested through secondary legal routes (Yam Seng in UK, Bhasin in Canada, United Group Rail and Paciocco in Australia)

• Good faith manifests itself in these secondary routes, for example:
  – An express or implied term of a contract (all common law countries)
  – ‘Implicit good faith’ considerations conditioning contractual powers/discretions (UK)
  – Implied duty of honest performance in all contracts (Canada, arguably elsewhere)
  – Implied duties of cooperation (all common law countries)
  – Implied obligation not to withhold consent unreasonably (all common law countries)
  – An element whose absence/breach can constitute unconscionable business conduct (Australia)
  – An element in ‘unfair contract terms’ laws (UK, Singapore)
Emerging/Comparative Position – Part II

• "Negotiation in good faith" clauses are not inherently uncertain and unenforceable (UK, Australia, and Singapore)

• Good faith at least means honesty and probably means more, but disagreement on its scope across jurisdictions

• Drafting to constrain good faith has its limits:
  – Simple ‘entire agreement’ clauses do not exclude good faith (UK, Canada, Australia)
  – Exclusion clauses have their exceptions (UK, Canada, Australia)
  – Good faith is not just a term in or out of the contract (Australia/Canada v UK positions)
  – Excluding good faith’s core element of honesty is legally doubtful and commercially unworkable (UK, Canada, and Australia)
  – Excluding broader aspects of good faith or conditioning the core obligation of honesty are both possible (UK, Canada, and Australia)
  – Franchising contracts have a mandatory and non-excludable good faith obligation (Australia)
  – ‘Implicit good faith’ won’t necessarily qualify genuinely unqualified (i.e., absolute) contractual rights: context is everything
Supreme Court of Canada in *Bhasin v Hrynew* 2014 SCC 71 (Nov 2014)

- ‘There is a general organising principle of good faith that underlies many facets of contract law.’
- ‘It is appropriate to recognise a new common law duty that applies to all contracts as a manifestation of the general organising principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.’ (emphasis added)
- ‘Because the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it.’

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‘(G)ood faith ... is a conception that has been recognised (though not by all courts in Australia) as an implication or feature of Australian contract law attending the performance of the bargain and its construction and implied content ...

The usual content of the obligation of good faith is [1] an obligation to act honestly and [2] with a fidelity to the bargain; [3] an obligation not to act dishonestly and not to undermine the bargain entered or the substance of the contractual benefit bargained for; and [4] an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.

None of these obligations requires the interests of a contracting party to be subordinated to those of the other. It is good faith or fair dealing between the parties by reference to the bargain and its terms that is called for, be they both commercial parties or business dealing with consumers.’ (emphasis added)
Negotiating Stances, Drafting Options, and Litigation Risk
Client’s Considerations on Good Faith

• #1: Relevant industry standard/expectation? eg mining JVs, relational contracts, franchising
• #2: Relevant client preference/need? eg public v private sector contexts
• #3: Desired governing law for dispute resolution and its treatment of good faith: UK, NY, HK
• #4: Inclusion of ‘good faith’ preference in instructions to lawyers
• #5: Effective multiple combination of clauses for exclusion, eg:
  – ‘entire agreement’ clause
  – ‘sole discretion’ clause
  – ‘negation of implied terms’/exclusion clause (ie not just good faith?)
  – ‘no other/additional obligations’ clause (ie to cover things beyond implied terms)
  – ‘no other dilution of our client’s position by operation of law, to the extent it can be excluded’ clause (ie to maximise exclusionary effect)
  – knock-on effect of mixed express/silent treatment of good faith throughout agreement
• #6: Other means/doctrines that condition exercise of contractual rights and surrounding conduct – unfair, arbitrary, unreasonable, and unconscientious exercises of powers and discretions
• #7: Supervening regulation by law regardless of parties’ private agreement:
  – limiting doctrines eg limits on exclusion clauses
  – legislative intrusion eg ‘unfair contract terms’ and ‘unconscionable conduct’ laws
  – other regulation eg codes of conduct
Alternative Drafting Approaches to Good Faith

• #1: Use ‘choice of governing law’ clause as default position:
  – cross-border transactions (e.g., law of NY, UK, Australia, Singapore)
• #2: Remain silent – leave it to courts to imply down the track
• #3: Impose express, general, and undefined good faith obligation on some/all parties
• #4: Impose express, general, and defined good faith obligation on some/all parties
• #5: Define/confine good faith throughout the contract:
  – Say what it means, to whom it applies, and when it applies
  – Only some parties and only in some contexts?
  – Only for some stages of the contract?
• #6: Exclude good faith (and related obligations) to the extent lawfully possible
• ‘The parties warrant that they shall perform all duties and act in good faith.

Acting in good faith includes:

(a) being fair, reasonable, and honest;
(b) doing all things reasonably expected by the other party and by the Subcontract; and
(c) not impeding or restricting the other party’s performance.’
Practical Implications – Law Firms and Their Managing Partners, Risk Partners & Practice Group Leaders

• Review firm-wide uniformity of approach to good faith in standard precedents across different practice areas
• Update standard opinion bank precedents, transactional precedents, and accompanying guidance notes
• Ensure transactional guidance notes for precedents include reference to:
  – Updated cross-jurisdictional account of the law on contractual good faith
  – How the different routes for good faith affect contractual interpretation
  – Alternative negotiation stances on good faith for clients
  – Alternative drafting approaches to good faith
  – Relevance and limits of various contractual devices in this context eg choice of law, entire agreement, exclusion of implied terms, one-sided discretions etc
• Include new understanding of the nuances of good faith in law and practice in ongoing development and training across the firm
• Stay in touch with cross-jurisdictional case law and academic views (because UK, Canadian, Australian, and Asia-Pacific courts refer to both)
Practical Implications – Litigators and Arbitrators

• Consider the different routes for good faith when giving formal opinions on prospects or making determinations:
  – Eg implied term or ‘implicit good faith’

• Recognise the emerging limits on excluding good faith:
  – Simple ‘entire agreement’ clauses
  – Inadequately worded exclusion clauses
  – Minimum non-excludable content of good faith?

• Be aware of the debate in UK Courts on good faith and choose your Division of the High Court accordingly

• Consider cross-jurisdictional case law

• Frame pleadings, arguments and decisions accordingly
Significant Recent Cases on Good Faith

• **UK:**
  - *Yam Seng v International Trade Corp* [2013] EWHC 111 (QB) (on good faith generally and implied duty of honesty in providing information)
  - *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWCH 3251 (Pat) (no general obligation of good faith in commercial contracts)
  - *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland* [2013] EWCA Civ 200 (express good faith obligation)
  - *Bristol Groundschool v Intelligent Data Capture* [2014] EWHC 2145 (Ch) (implied good faith obligation accepted post-*Yam Seng* for relational contract)
  - *TSG Building Services v South Anglia Housing* [2013] EWHC 1151 (TCC) (general express good faith clause not construed to apply to specific termination clause rights, and no implied good faith obligation affecting termination)
  - *Acer Investment Management v Mansion Group* [2014] EWHC 3011 (QB) (no implied good faith obligation)
  - *Greenclose Ltd v National Westminster Bank* [2014] EWHC 1156 (Ch) (‘implicit good faith’ will not condition an unqualified option to extend or not)
  - *Myers v Kestrel Acquisitions* [2015] EWHC 916 (Ch) (no implied good faith obligation)
  - *MSC Mediterranean Shipping Co v Cottonex Anstalt* [2015] EWHC 283 (Comm) (good faith conditioning choice to terminate for repudiatory breach)

• **Canada:**
  - *Bhasin v Hrynew* 2014 SCC 71 (general organising principle of good faith and specific implied obligation of honest contractual performance)

• **Australia:**
  - *United Group Rail Services v Rail Corporation NSW* [2009] NSWCA 177 (enforceable express obligation to negotiate in good faith to resolve disputes)
  - *Paciocco v ANZ Banking Group* [2015] FCAFC 50 (on good faith as an organising principle)

• **Singapore:**
  - *Ng Giap Hon v Westcomb Securities* [2009] SGCA 19 (on implied good faith)
  - *HSBC Institutional Trust Services (Singapore) v Toshin Development Singapore* [2012] SGCA 48 (enforceable express obligation to negotiate in good faith to resolve disputes)
Key References

- Rt Hon Lady Justice Arden, ‘Coming to Terms with Good Faith’, Singapore Academy of Law, 2013
- E. Peden, ‘“Implicit Good Faith – or Do We Still Need an Implied Term of Good Faith?”’ (2009) 25 Journal of Contract Law 50

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