The "Duty to Cooperate" in English and French Contract Law: One Channel, Two Distinct Views

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In *Yam Seng Pte Limited v International Trade Corporation Limited,*[1] Leggatt J argues, in the steps of Lord Steyn,[2] that good faith may be implied in fact "in any ordinary commercial contract based on the presumed intention of the parties",[3] which is to be objectively ascertained "… by attributing to [the parties] the purposes and values which reasonable people in their situation would have had".[4] He contended that a number of *duties* could be derived from good faith, among which are "duties of cooperation" in the performance of contracts.[5] The background against which Leggatt J built his argument about the relationship between good faith and the "duty to cooperate" is particularly interesting. He emphasized that "[it] would be a mistake … to suppose that willingness to recognize a doctrine of good faith in the performance of contracts reflects a divide between civil law and common law systems or between continental paternalism and Anglo-Saxon individualism".[6] The main reason he gives is "[the] fact that such a doctrine has long been recognized in the United States".[7]

On the one hand, his reasoning may be criticized from a contextual perspective as the notion of good faith seems to have taken solid ground in United States law primarily as a result of the efforts of the "father" of the Uniform Commercial Code, Karl Llewellyn (1893-1962), rather than as a result of a natural evolution of the common law in the United

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1 [2013] EWHC 111 (QB).

2 J. Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men", *Law Quarterly Review,* CXIII (1997), p. 433. See also J. Steyn, "The Role of Good Faith and Fair Dealing in Contract Law: A Hair Shirt Philosophy", *Denning Law Journal* [1991], p. 131.

3 *Yam Seng*, note 1 above, at [131].

4 Ibid., at [144].

5 Ibid., at [145]; Leggatt J argued that good faith also implies that a party to a contract which takes decisions affecting both parties should exercise its power honestly and reasonably. He also underscores that onerous terms on which a party seeks to rely must be brought to the attention of the other party.

6 Ibid., at [125].

7 Ibid.

States.[8] Llewellyn himself was influenced by German law[9] in which good faith plays a key role.[10] On the other hand, assuming that good faith has the same implications in all systems of the continental tradition is also problematic — much ink, for example, has been spilled on delineating the diverse scopes of good faith in the various Member States of the European Union.[11] The notion of good faith is not homogenous within the continental tradition itself and any generalization underestimates the legal cultural diversity, which exists even on the same continent.

This article examines the nuances of cooperation in the English and the French legal landscape which may provide insights into Leggatt J's reasoning. Cooperation can be understood as a (casual) expectation from the parties, but also, in a legal dimension, as a "duty to cooperate" that is considered here. English law has been traditionally hostile to the notion of good faith, which, in turn, sheds light on why the relationship between good faith and the "duty to cooperate" is uncertain. In parallel, cooperation itself seems to be a well-established, autonomous duty from the nineteenth century, despite a fairly limited scope of application. Moreover, it is interesting that courts may be willing to imply a duty of good faith in fiduciary relationships and in certain types of contracts where good faith is characterized as a duty of cooperation.[12] The first category is not controversial, for English law has long recognized fiduciary relationships as special relationships whose scope may potentially be broad, and which require the highest degree of care. The latter category, as explained below, appears fuzzier.

By contrast, in the French legal tradition, there is debate over whether the "duty to cooperate" is an element of good faith: we will see that the relationship between cooperation, loyalty, and good faith is unclear. Some French authorities are convinced that it is not accidental that the "duty to cooperate" was not explicitly consecrated in the text of the *ordonnance* n° 2016-131 of 10 February 2016, which implemented a reform of the French law of contract. Instead of a "duty to cooperate", however, the new French legislation endorses a minimalist definition of good faith which, as explained below, permits a much broader application of the principle.[13]

[8] It has been asserted that Llewellyn was "primarily responsible for the Code's adoption of a general obligation of good faith". See P. MacMahon, "Good Faith and Fair Dealing as an Underenforced Legal Norm", *Minnesota Law Review,* XCIX (2015), p. 2060.

[9] See M. Ansaldi, "The German Llewellyn", *Brooklyn Law Review,* LVIII (1992), p. 705, J. Whitman, "Commercial Law and the American *Volk*: A Note on Llewellyn's German Sources for the Uniform Commercial Code", *Yale Law Journal,* XCVII (1987), p. 156.

[10] From reallocating risks in contracts to serving as a foundation to develop jurisprudential solutions. See W. Ebke and B. Steinhauer, "The Doctrine of Good Faith in German Law", in J. Beatson and D. Friedmann (eds.), *Good Faith and Fault in Contract Law* (1995).

[11] See S. Whittaker and R. Zimmermann (eds.), *Good Faith in European Contract Law* (2000); J. Cartwright and M. Hesselink (eds.), *Precontractual Liability in European Private Law* (2011).

[12] See, for instance, *Globe Motors v TRW Lucas Varity Electric Steering* [2016] EWCA 396 [67]. See also *Yam Seng*, note 1 above, at [131].

[13] Article 1104 of the French Civil Code provides: "Contracts must be negotiated, formed, and performed in good faith. This provision is a matter of public policy".

GOOD FAITH IN *YAM SENG*

Before engaging in comparative analysis, Leggatt J's propositions about good faith and cooperation in *Yam Seng* require examination.[14] In that case Leggatt J opened a "Pandora's box" by trying to persuade the English legal community, which is traditionally hostile[15] to the notion of good faith, that the principle exists in English law:

> I doubt that English law has reached the stage, however, where it is ready to recognize a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty (of good faith) in any ordinary commercial contract based on the presumed intention of the parties.[16]

Leggatt J argued that there is "nothing novel or foreign to English law in recognizing an implied duty of good faith in the *performance* of contracts".[17]

He is not the first to take such a bold step. In *Good Faith in English Law,* for example, O'Connor had argued that good faith exists in the common law because honesty, fairness, and reasonableness are all principles of English law and, at the same time, they are "universally accepted and distinctive moral elements associated with good faith".[18] Other authors have engaged in functional comparisons to conclude that the absence of a general principle of good faith in English law is "partly compensated by the law of remedies, which greatly limits the possibility of abuse of rights".[19]

Leggatt J, however, identified two main aspects of good faith in English law — the observance of "standards of commercial dealing which are so generally accepted that the contracting parties would reasonably be understood to take them as read"[20] and "fidelity to the parties' bargain".[21] He contended that the question of fidelity to the bargain is a matter of construction, which in turn explained cases in which "terms requiring cooperation in the performance of the contract have been implied",[22] such as *Mackay v Dick.*[23]

Leggatt J underscored that good faith is "sensitive to context";[24] thus the expectations for a "simple exchange" differ from the expectations regarding "longer term relationships between the parties".[25] The latter, sometimes called "relational contracts", require a "high

[14] The decision concerned an exclusive distributorship agreement for certain fragrances with the brand name "Manchester United" in specified territories in the Middle East, Asia, Africa and Australasia.

[15] The classic example is *Walford v Miles* [1992] 2 AC 128, 138 where good faith was declared "unworkable in practice"; For many, good faith is irreconcilable with the fundamental values of the common law such as legal certainty and the pursuit of self-interest which characterizes market economies. See, for instance, M. Chen-Wishart, *Contract Law* (5th ed.; 2015), p. 216.

[16] *Yam Seng,* note 1 above, at [131].

[17] Ibid., at [145]; Emphasis added.

[18] J. F. O'Connor, *Good Faith in English Law* (1990), p. 10.

[19] D. Friedmann, "Good Faith and Remedies for Breach of Contract", in J. Beatson and D. Friedmann (eds.), *Good Faith and Fault in Contract Law* (1995), p. 425.

[20] *Yam Seng,* note 1 above, at [138]; One of these standards, according to Leggatt J, is the "expectation of honesty".

[21] Ibid., at [139].

[22] Ibid.

[23] (1881) 6 App Cas 251.

[24] *Yam Seng,* note 1 above, at [141].

[25] Ibid., at [142].

degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty … which are implicit in the parties' understanding and necessary to give business efficacy to the arrangements".[26] For Leggatt J, examples of such contracts included joint venture agreements, franchise agreements, and long-term distributorship agreements.[27]

Some common law scholars have commended Leggatt J's approach but criticized him for not going far enough. Collins, for instance, argued that it is "regrettable" that in spite of making "ambitious claims about good faith and relational contracts", Leggatt J based his decision "on the narrow ground of actual dishonesty".[28] He underlined that "there is a class of contracts where intensified duties of loyalty and cooperation arise".[29] These duties "require loyalty to the aims of the joint project".[30] Campbell, on the other hand, emphasized that "Leggatt J emphatically shows that untrammelled self-interest is not and cannot be the basis of the English law of contract…".[31] Yet, he is troubled that "Leggatt J is unable to tell us why it is right to go further in this particular case, but not in most others".[32] In particular, he is worried that Leggatt J did not clearly express the difference between relational and discrete contracts, which induced legal uncertainty.[33] The relational/discrete contract distinction was drawn by one of the "fathers" of relational contract theory, Ian Roderick Macneil (1929-2010).[34]

Whereas, in principle, we share Collins' and Campbell's concerns, these authors have unrealistic expectations of a decision by the High Court. Given the traditional English hostility towards good faith, it seems probable that grounding the decision on a duty of cooperation implied *by law*, as suggested by Collins,[35] would have caused quite a stir. It seems that by attributing good faith and, by consequence, a "duty to cooperate" to the presumed intentions of the parties, Leggatt J was paying his due respects to the fundamental principle of "freedom of contract". Unlike terms implied in law which traditionally operate as default rules for entire categories of contract, terms implied in fact are necessary for a particular contract.[36] In parallel, it should also be noted that legal theorists have not managed to draw a clear distinction between relational and discrete

[26] Ibid.
[27] Ibid.
[28] H. Collins, "Implied Terms: The Foundation in Good Faith and Fair Dealing", *Current Legal Problems*, LXVII (2014), p. 329.
[29] Ibid.
[30] Ibid.
[31] D. Campbell, "Good Faith and the Ubiquity of the "Relational" Contract", *The Modern Law Review,* LXXVII (2014), p. 490.
[32] Ibid., p. 489.
[33] Ibid., p. 490.
[34] See I. R. Macneil, "Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a 'Rich Classificatory Apparatus'", *Northwestern University Law Review,* LXXVIII (1981), p. 1018; Macneil, "Restatement (Second) of Contracts and Presentation", *Virginia Law Review,* LX (1974), p. 586.
[35] Collins, note 28 above, p. 329.
[36] As M. Chen-Wishart asserts regarding terms implied in fact: "The reasoning is that whether through forgetfulness, lack of time, or bad drafting, the parties have failed to include a term which *they would have done*, had they thought about it, or had the time to draft it properly", Chen-Wishart, note 15 above, p. 392.

contracts for decades.[37] Considering the inductive reasoning and the case by case approach of the common law, it does not seem unusual that Leggatt J did not offer a clear definition.[38]

However, Leggatt J's use of the term "good faith", as well as the association of good faith with cooperation, may be misleading from a comparative Anglo-French perspective, particularly because Leggatt J himself situated his argument in the long-standing debate about the common law/civil law divide, as mentioned above. We will see below that

> cooperation has different doctrinal foundations and scope in England and in France;
>
> whereas the relationship between cooperation and good faith is uncertain in both jurisdictions, the French "duty to cooperate" lives in the shadow of good faith and may remind English lawyers of the stringent standards of care and loyalty expected in fiduciary relationships. By contrast, the English "duty to cooperate" has a life of its own;
>
> the duty of good faith à *l'anglaise* could essentially be an extended "duty to cooperate". In that sense, the good faith "practiced" by some English judges could differ in important ways from "French" good faith.

COOPERATION – LONG-ESTABLISHED "ENGLISH" DUTY WITH LIMITED SCOPE

We turn to the scope and nature of the "duty to cooperate" in the English tradition to demonstrate that, even from an English perspective, Leggatt J seems to go too far in his reasoning about the role of good faith in English law. This inquiry will also serve as the foundation for the comparison with French law below.

It has already been suggested that the "duty to cooperate" is a distinct duty in the common law which is independent from good faith: "[the duty] does not need the label of good faith to signal its core concerns or guide its application".[39] An historical examination reveals that it is a long-established duty with a relatively limited scope whose essence is intimately tied to notions such as "workability" and "necessity". This duty is illustrative of the well-established common law value of commercial sensibility.

[37] It has been asserted: "One of the causes for this typical vagueness [of the relational contract] has been the tendency of leading relational theorists to refrain from a 'positive' definition of the constitutive elements of a relational contract. Instead, a 'negative' definition was commonly adopted, according to which a relational contract is a contract, the nature of which departs substantially from the nature of a discrete, one-shot commercial bargain". See Y. Adar and M. Gelbard, "The Role of Remedies in The Relational Theory of Contract — A Preliminary Inquiry", *European Review of Contract Law,* VII (2011), p. 409.

[38] Moreover, speaking extra-judicially, he clarified: "In truth, there is no hard and fast distinction: the extent to which a contract has 'relational' features is a matter of degree. But the term 'relational contract' is a useful label to identify contracts which are towards one end of the spectrum". See Mr Justice Leggatt, "Contractual Duties of Good Faith", Lecture to the Commercial Bar Association, 18 October 2016.

[39] J. M. Paterson, "Good Faith Duties in Contract Performance", *Oxford University Commonwealth Law Journal*, XIV (2014), pp. 293-294.

The Origins of 'English' Cooperation

Cases in which a "duty to cooperate" was implied, including *Yam Seng*, generally refer to *Mackay v Dick*[40] as authority for the principle, even though the decision itself does not explicitly use the term "cooperation", which may be the root of the misuse (or at least the loose use) of terms this article purports to shed light on. The case concerns a contract for the sale of an excavating machine. The buyer was only liable to pay for the machine if it excavated a certain amount of clay within a given time at a railway cutting that the buyer was engaged in constructing. If the machine failed the test, the buyer was entitled to return the digger within two months, without paying the contract price. The buyer failed to provide the necessary facilities to test the machine and purported to reject the machine. The seller sued for the contract price. The House of Lords held that the seller was entitled to be paid.

Lord Blackburn and Lord Watson reached the same conclusion on somewhat different grounds. Lord Blackburn underlined:

as a general rule ... where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is *necessary* to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances.[41]

He based his reasoning on an English case from 1469 concerning the famous bell of Mildenhall because,[42] in his words, "it is on it that the different digests laying down the principle are all founded, and because [he thought] it is obvious good sense and justice".[43] It is worth highlighting that a key factor in the English case, as summarized by Lord Blackburn, was the particular skill of the defendant who was a brazier (a person making articles from brass). The court concluded that it was on him to weigh and put the bell into the fire.[44] Common law digests generally include the case concerning the bell of Mildenhall in their section on conditions.[45]

In that light, it should be noted that in *Mackay v Dick* Lord Watson referred to a passage from *Bell's Principles*, one of the first treatises on Scots law: "If the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished. If the creditor had done all that he can to fulfil a condition which is ineumbent on himself, it is held sufficient implement".[46] He also emphasized that this is a "doctrine borrowed from the civil law, which has long been recognized in … [Scotland]".[47] Indeed, the quoted 'Scottish' passage immediately invokes former Article 1178 of the French Civil Code enacted in 1804:

[40] (1881) 6 App Cas 251.
[41] Ibid., p. 263; Emphasis ours.
[42] The case was reported in the Yearbooks of Edward IV (Year 9th). The plaintiffs brought the bell of Mildenhall on their own costs to the defendant in Norwich where it was supposed to be weighed and put into the fire, so that the defendant could make a tenor to agree with the other bells. The weighing was necessary, so that the new tenor could agree with the other bells. The contract did not explicitly state who was supposed to weigh the bell and put it into the fire.
[43] *Mackay*, note 40 above, p. 264.
[44] Ibid., p. 263.
[45] See for instance K. D'Anvers, *A General Abridgment of the Common Law* (1713), II(1), p. 109.
[46] Ibid., p. 270.
[47] Ibid.

"A condition is deemed fulfilled where it is the debtor, bound under that condition, who has prevented it from being fulfilled".

While we discuss the doctrinal underpinning of "French" cooperation below, it should be stressed at this stage that French doctrine is still ambivalent about the link between former Article 1178 and performance in good faith. Demolombe, who wrote one of the first major treatises on French law post-codification, had suggested that Article 1178 had to be examined in connection with former Article 1134, which required performance in good faith, because the debtor's prevention of the fulfillment of the condition amounts to bad faith.[48] In more modern times, the French *Cour de cassation* has been criticized when it reverted to Article 1134 without considering Article 1178.[49] Even if we are to assume that this specific rule on conditions is illustrative or closely tied to the principle of good faith, reasoning by analogy — that the existence of a similar rule in English law evidences that good faith exists in English law (in the steps of Leggatt J in *Yam Seng*, for instance) — seems overly ambitious because, as we will see below, good faith in the French tradition is a fundamental principle which guides the entire lifecycle of the contract.

It is also worth pointing out, of course, that one can find other examples of common law cases from the nineteenth century in which courts implied terms requiring cooperation. For instance, in the Australian case *Butt v M'Donald*[50] it was underlined that "[it] is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are *necessary* on his part to enable the other party to have the benefit of the contract".[51] Both the rule in *Mackay* and the rule in *Butt* use necessity as a criterion. However, the rule in *Butt* seems to go further because a party has to do everything necessary to enable the other "to have the benefit of the contract" rather than do what is necessary to merely enable performance.

Indeed, in the 1960s, Burrows argued that the duty of cooperation may cover two main sets of circumstances — situations where A interferes with B's "enjoyment of the subject-matter of the contract" and situations where A interferes with the "actual performance of the contract promises".[52] By examining a series of cases, Burrows concludes that the first aspect of the duty (no interference with the other party's enjoyment of the subject-matter) is rarely recognized by the common law in practice:

> … the courts have demonstrated that they regard freedom of trade and competition and the right to make a profit out of one's property as of paramount "social desirability." A man cannot be expected to let his own business interests suffer just because he might by so doing make things a little less profitable for the other party to one of his contracts.[53]

[48] See C. Demolombe, *Cours de Code Napoléon* (1869), III, p. 331.

[49] In that light, see B Mallet-Bricout, "La condition suspensive, «réputée accomplie», relative à l'obtention d'un prêt bancaire, dans une vente immobilière. Subtiles nuances ou éternelles incertitudes? (À propos de deux décisions de la 3e Chambre civile de la Cour de cassation)", *RJT*, XLIII (2009), p. 311.

[50] (1896) 7 QLJ 68.

[51] Ibid., pp. 70–71; Emphasis ours.

[52] J. F. Burrows, "Contractual Co-operation and the Implied Term", *Modern Law Review,* XXXI (1968), p. 390.

[53] Ibid., p. 395.

He underlined that whereas the second aspect of the duty (no interference with the other party's performance of what is promised) is more common, it does not go much further "than absolute necessity".[54]

In that light, *Mona Oil Equipment v Rhodesia Railways*[55] provides ample illustration of the unwillingness of some English judges to go beyond "absolute necessity". Notably, Devlin J underlined:

> It is, no doubt, true that every business contract depends for its smooth working on co-operation, but in the ordinary business contract, and apart, of course, from express terms, the law can enforce co-operation only in a limited degree — to *the extent that is necessary* to make the contract *workable*. For any higher degree of co-operation the parties must rely on the desire that both of them usually have that the business should get done.[56]

In the said case, the defendants did not do anything to remove a misunderstanding that had arisen, but Devlin J held that "the removal of misunderstanding is quite beyond the reach of implied contractual obligation".[57]

Cooperation Nowadays

It seems difficult to identify a coherent conception of cooperation which emerges from contemporary English case law primarily because of the unclear relationship between cooperation and good faith.[58] It is obvious, however, that unlike Leggatt J, many English judges are reluctant to recognize and apply a "duty to cooperate", or, at least, walk on eggshells when confronted with the notion. English judges remain committed to objective interpretation of agreements and the test of necessity set forth in the "early days" of "English" cooperation. At the same time, some courts may be more willing to imply a duty of good faith if it is essentially characterized as a "duty to cooperate".[59]

Express provisions

There are modern cases in which parties expressly refer to an obligation to cooperate or act in good faith in their long-term agreement, but courts construe the obligation rather narrowly. For instance, *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services NHS Trust*[60] concerned an agreement for the supply of services which contained a clause requiring parties to "cooperate in good faith".[61] Jackson LJ, however, quashed the position of the trial judge that the obligation applied to the contract as a whole:

[54] Ibid., p. 404.
[55] [1949] 2 All ER 1014.
[56] Ibid., p. 1018; Emphasis ours.
[57] Ibid.
[58] As seen in the cases we discuss below, one cannot find a consistent use of the terms even in express provisions. In *Compass*, the contract required parties to "cooperate in good faith". In *Portsmouth*, parties had to "deal in good faith and in mutual cooperation", which suggests these are separate duties. In *Bristol*, only a good faith obligation was mentioned.
[59] Per Beatson LJ in *Globe Motors v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 at [67].
[60] [2013] EWCA Civ 200.
[61] Clause 3.5 of their agreement stipulated: "The Trust and the Contractor will cooperate with each other in

> … in my judgment care must be taken not to construe a general and potentially open-ended obligation such as an obligation to 'co-operate' or 'to act in good faith' as covering the same ground as other, more specific, provisions, lest it cut across those more specific provisions and any limitations in them.[62]

The submission that the contract contained an implied term of good faith was also rejected. Jackson LJ concluded that an "important feature" of cases in which such a term was implied was that they contained terms allowing one of the parties to exercise discretion, which did not "involve a simple decision whether or not to exercise an absolute contractual right", but rather "making an assessment or choosing from a range of options, taking into account the interests of both parties".[63] In essence, this means that a party will not "exercise its discretion in an arbitrary, capricious or irrational manner".[64]

A similar conclusion was reached in *Portsmouth City Council v Ensign Highways,*[65] which concerned a long-term contract for the maintenance of a highway, which contained a clause under the heading "Liaising and Partnering" stating that the parties "shall deal fairly, in good faith and in mutual co-operation with one another ...". The court rejected both the argument that the clause applied to the rest of the agreement, as well as the argument that good faith was implied. It should be noted that it is likely that *Compass* and *Portsmouth* would have had a different outcome in France because, as we will see below, good faith is a key principle of French law applying to contracts no matter if parties have explicitly agreed on its application. In addition, the explicit referral to good faith and cooperation might indicate to a French judge that these principles are of importance to the parties.

There are cases reminiscent of *Mackay v Dick* because they involve conditional obligations, such as *Bristol Rovers v Sainsbury's Supermarket*.[66] A key difference between the two cases, however, is that in *Mackay,* the contract was entered into via exchange of letters, whereas *Bristol Rovers* concerns a contract with lengthy and detailed express provisions. The case shows that if a provision requiring good faith in the performance contradicts the black letter requirements of a specific provision, the specific provision may trump the "good faith requirement".

Notably, Bristol Rovers had undertaken to sell a football stadium subject to conditions precedent. One was obtaining a permission which did not contain time restrictions on deliveries. Both parties could terminate the agreement if such a permission was not obtained within a certain date. The agreement contained a clause requiring "all reasonable endeavours" and a clause "requiring good faith" in the parties' respective obligations. Sainsbury's did not manage to obtain a permit without time restrictions. Then, as there was an explicit clause requiring them to appeal the decision by the local authority only if they had more than a 60% chance of success, they terminated the agreement by notice. In the meantime, Bristol Rovers managed to obtain a permission without the limitation on deliveries. They argued the agreement was terminated in breach of contract.

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".

62 *Compass*, note 60 above, at [157].

63 Ibid., at [83].

64 Ibid.

65 [2015] EWHC 1969 (TCC).

66 [2016] EWCA Civ 160.

Both the High Court and the Court of Appeal ruled in favor of Sainsbury's because they had complied with the provision requiring them to appeal the local authority's decision only if they had a 60% chance of success or more. Floyd LJ emphasized: "I have great difficulty in understanding on what principle it can be held that [Sainsbury's] reliance on that contractual provision can lack good faith".[67] Moreover, he also held that "all reasonable endeavours" could not be understood to require Sainsbury's "to give consent to Bristol" to file its own application before the local authority.[68]

In other words, absent the 60% test, the case would have had a different result. Moreover, theoretically, if neither the 60% test nor the two general obligations requiring good faith and reasonable efforts were part of the contract, Bristol Rovers could have invoked *Mackay v Dick* and argued a duty of cooperation was implied given the conditional obligation.

No express provisions

Recent case law demonstrates that English courts may establish a "duty to cooperate" in certain agreements even if there is no express provision to that effect. However, it seems difficult to identify a clear-cut rule on which courts rely to identify agreements to which such a duty is relevant. By contrast, we will see below that while French law is also hesitant about the types of agreements to which cooperation applies, the problem is less palpable because of the overreaching duty of good faith which governs the entire lifecycle of all types of contracts.

Leggatt J's approach in *Yam Seng*[69] certainly appears more generous compared to the approach taken in *Mackay* and *Mona Oil*. It stands apart for a number of reasons. First, Leggatt J stated that good faith and, by consequence, a "duty to cooperate" can be implied in a specific category of contracts — relational agreements,[70] which he himself defined as contracts requiring "a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements".[71] Leggatt J drew the conclusion that the contract in question is a relational agreement based on the context.[72] In that light, it is interesting that he took care in describing the emotions

[67] Ibid., at [98].
[68] Ibid., at [97].
[69] *Yam Seng*, note 1 above.
[70] Relational theory is associated with the work of Stewart Macaulay and Ian Roderick Macneil. See S. Macaulay, "Non-Contractual Relations in Business: A Preliminary Study", *American Sociological Review*, XXVIII (1963), p. 55; S. Macaulay, "The Use and Non-Use of Contracts in the Manufacturing Industry", *Practical Lawyer*, IX (1963), p. 13; S. Macaulay, "An Empirical View of Contract", *Wisconsin Law Review,* [1985], p. 465. See I. R. Macneil, "Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a 'Rich Classificatory Apparatus'", *Northwestern University Law Review*, LXXVIII (1981), p. 1018; I. R. Macneil, "Restatement (Second) of Contracts and Presentation", *Virginia Law Review,* LX (1974), p. 586.
[71] *Yam Seng*, note 1 above, at [142].
[72] He sided with Lord Hoffmann's famous restatement of the principles of interpretation in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896. Hoffmann argued in favor of purposive (contextual) rather than literal interpretation. His views were challenged in *Arnold v Britton* [2015] UKSC 36.

and feelings of the parties throughout the development and downfall of their business relationship, which is not typical of English decisions.[73]

Second, Leggatt J was concerned about the dishonesty of one of the parties to the agreement, which he chose to address via the principles of good faith and cooperation: "In some contractual contexts the relevant background expectations may extend further to an expectation that the parties will share information relevant to the performance of the contract such that a deliberate omission to disclose such information may amount to bad faith".[74] Leggatt J implied a degree of cooperation which seems substantially higher from the test of necessity and workability which prevails in English case law. The agreement could still be performed despite the dishonesty — it would just not be as profitable as originally intended. Moreover, unlike French law which imposes a duty to disclose at the negotiation stage, as we will see below, English law is concerned with non-disclosure in limited cases.[75] In addition, as cooperation is a long-established duty in the English tradition, Leggatt J could have skipped the reference to good faith, which is a contentious notion from an English perspective, but he did not.

Cases following *Yam Seng* are considerably less bold in their propositions on cooperation and good faith. Furthermore, courts take extra care when implying duties of cooperation. In *Swallowfalls Ltd v Monaco Yachting*,[76] for instance, the Court of Appeal found a "duty to cooperate" requiring the confirmation of the achievement of milestones and the counter-signature of stage certificates in a shipbuilding contract and its associated loan agreement. It held that such "proposed implied term is an ordinary implication in any contract for the performance of which co-operation is required". It emphasized that "[a] shipbuilding contract is such a contract since … the builder only earns a stage payment when the buyer's representative signs a certificate that the relevant stage or milestone has been achieved".[77] It further clarified: "… if the buyer proposes a variation and the builder notifies the buyer of the impact in price, performance and delivery, the buyer must co-operate to agree, propose an alternative solution or abandon the proposed variation".

Because of the wording, it seems somewhat unclear whether the Court of Appeal held that such a duty is implied in all shipbuilding contracts, which would mean that it established a general principle of cooperation applicable to specific categories of contracts, or that it merely implied such a duty in the case at hand because of the circumstances, i.e. that payment depends on the signature of certificates, which can be seen as a conditional obligation. It is worth mentioning that the court explicitly stated that "[the] implied term

[73] "To begin with, the business relationship between the parties was a warm one ...", *Yam Seng*, note 1 above, at [2]; "Mr Tuli broke down, he felt angry and outraged at what he regarded as unwarranted attacks on his integrity. Those feelings were equally apparent when he gave evidence", Ibid., at [9]; "He said that at this meeting Mr Tuli for the first time was cold and brisk", Ibid., at [56], etc.

[74] *Yam Seng*, note 1 above, at [142].

[75] English law relieves non-disclosure in *uberrimae fidei* contracts, fiduciary relationships, etc. However, it has not embraced a general duty to disclose. One of the most striking cases, from a French perspective, is *Keates v Cadogan* (1851) 10 CB 591. The claimant had entered into a lease agreement, but the property was uninhabitable. The defendant had not informed the claimant about its poor condition during the negotiations. Yet, the court found that there was no obligation to inform the tenant during the negotiation stage. Overall, English law tends to respond to active misrepresentations, but the doctrine of misrepresentation itself has a fairly narrow scope. For instance, it is relatively difficult to prove misrepresentation when statements of opinion turn out to be inaccurate, when somebody makes a statement of intention and subsequently changes their mind, etc.

[76] [2014] EWCA Civ 186.

[77] Ibid., at [32].

as to co-operation will do *all that is required* to make the contract *work*",[78] which seems to go a step further than the tests established in *Mackay* and *Mona Oil* discussed above. Indeed, imposing a duty to "agree, propose an alternative solution or abandon the proposed variation" seems to go beyond workability or necessity because it may be realistic to expect that in many cases a shipbuilder can continue construction even if the buyer has not responded to a proposed variation. It should also be noted that French courts can reach the same result as the Court of Appeal by relying on the general duty of good faith without explicitly referring to cooperation.

In *Globe Motors v TRW Lucas Varity Electric Steering*,[79] in turn, Beatson LJ seems to have lent his support for Leggatt J's approach in *Yam Seng*:

> … in certain categories of long-term contract, the court may be more willing to imply a duty to co-operate or, in the language used by Leggatt J in *Yam Seng …* a duty of good faith. Leggatt J had in mind contracts between those whose relationship is characterized as a fiduciary one and those involving a longer-term relationship between parties who make a substantial commitment.[80]

However, it appears that his view of good faith is much narrower — for Beatson LJ, good faith is characterized as a "duty to cooperate". Moreover, he explicitly referred to post-*Yam Seng* cases in which English courts refused to imply a duty of good faith in longer-term relationships, thus stressing the principle's limits — *Carewatch Care Services Limited v Focus Caring Services Limited*[81] and *Acer Investment Management Ltd v Mansion Group Ltd.*[82]

It is interesting that in both *Carewatch* and *Acer,* the High Court considered *Yam Seng* and recognized the principle it established. Nevertheless, in both cases the judges found that the rule was not applicable in the circumstances at hand. In *Carewatch*, a key factor was the fact that the franchising contracts in question contained "very detailed express terms" and that the judge could not identify a "clear lacuna" that had to be filled.[83] In *Acer*, the judge was not convinced that an agreement between distributors and their financial advisor was relational because the parties did not regard it as exclusive and they could terminate it upon notice.[84]

Another important example is provided by *Nazir Ali v Petroleum Company of Trinidad and Tobago,*[85] which concerned a long-term relationship between an employer and an employee. Even though the Privy Council did not consider if the contract was relational, it could be regarded as one. Yet, even if it is not, employment contracts are governed by a duty of good faith.[86] The employee had worked for the company for eleven years when he received a scholarship in the form of a loan by the company to study. The agreement contained a clause stipulating that loan repayment would be waived if the employee returned to work for the company for five years after he graduated. A year and a half

78 Ibid., at [35]; Emphasis ours.
79 [2016] EWCA 396.
80 Ibid., at [67]; Note he did not establish the rule was applicable in the case at hand.
81 [2014] EWHC 2313 (Ch).
82 [2014] EWHC 3011 (QB).
83 *Carewatch,* note 81 above, at [109].
84 *Acer*, note 82 above, at [109].
85 [2017] UKPC 2.
86 See *Yam Seng*, note 1 above, at [131].

after his return, he received, along with other employees, a notice inviting him to consider redundancy, which he accepted. The company sought repayment of the loan, which it set off against the redundancy money. The employee claimed the redundancy money without the offsets and argued that two terms were to be implied in the loan agreement: one requiring the company to allow him to work for five years if he wished to do so and another that repayment of the loan would be waived if the company terminated his employment for reasons other than dishonesty. In other words, the employee maintained that the company owed him duties of cooperation.

The Privy Council underlined with reference to the rule in *Mackay v Dick*: "There are many other examples of such implied terms in cases where the co-operation of one party to a contract is essential to the performance by the other of his obligations".[87] However, it also seems to have resonated the words of Devlin J cited above: "Whilst the principle is well understood, the content of any term to be implied must be tailored to the *necessity* of the particular case".[88] The Privy Council relied on the restatement of the rules of implication laid out in *Marks and Spencer v BNP Paribas Securities Services Trust*[89] to conclude that a "duty to cooperate" can be implied only if it is *necessary to make the contract work*.[90] This would be the case if the terms is (a) so obvious that it goes without saying (b) it is *necessary to give the contract business efficacy*.[91] The Privy Council held that both terms failed the necessity test. The first one "[went] further than could be necessary to achieve the objective of the contract'.[92] The second one was 'too narrowly expressed".[93]

At the same time, the Privy Council recognized that a broader term was implied: it was necessary for the company not do anything "of its own initiative" to "prevent" the employee from proving his services.[94] However, it did not follow that "in every case of dismissal for redundancy the employer can be said to have 'prevented' the employee from continuing to work for him so as to trigger the implied term of co-operation which must be read into the contract in the present case".[95]

Leggatt, as Lord Justice of Appeal, has reiterated his views on relational contracts and the role of good faith in *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent*, which concerned an oral joint venture agreement:[96]

> … 'relational' contracts involve trust and confidence but of a different kind from that involved in fiduciary relationships. The trust is not in the loyal subordination by one party of its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of cooperation. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith.[97]

87 Ibid., at [8]; Emphasis ours.
88 Ibid., at [9].
89 [2015] UKSC 72.
90 [2017] UKPC 2 [7]; Emphasis ours.
91 Ibid; Emphasis ours.
92 Ibid., at [10].
93 Ibid., at [11].
94 Ibid.
95 Ibid., at [18].
96 [2018] EWHC 333 (Comm).
97 Ibid., at [167].

He defined the contract between the parties as relational because of the "nature of their relationship".[98] Notably, it seems that a key factor in the decision was the friendship between them. Leggatt LJ explicitly emphasized that "… [the] collaboration was formed and conducted on the basis of a personal friendship and involved much greater mutual trust than is inherent in an ordinary contractual bargain between shareholders in a company".[99] What is more interesting, from a comparative perspective, is that similarly to his approach in *Yam Seng*, he tied the notion of cooperation to good faith although he did not refer to it as a stand-alone duty. In this context, good faith can be understood as an extended "duty to cooperate".

INTERIM CONCLUSION

Overall, the "duty to cooperate" is most eagerly established with regard to conditional obligations. Faithful to the objective approach to the interpretation of contract, common law judges consider the literal meaning of the terms and the relationship between the various provisions in context in order to decide if a "duty to cooperate" is necessary to make the agreement work and to delineate its implications. Absent an explicit provision requiring performance in good faith, many English judges are cautious to refer to the notion of good faith and would rather revert to the principle of cooperation.

Compared to other judges, Leggatt LJ seems eager to establish the notion of "relational contract" in English law and to affirm a broader conception of good faith, which encompasses a "duty to cooperate". In that light, Beatson LJ's account of Leggatt J's approach in *Globe Motors* discussed above may be taken as a favourable nod to Leggatt, but also as subtle critique. Beatson LJ's claim that good faith can be established in certain long-term contracts when characterized as a "duty to cooperate" appears less ambitious than Leggatt LJ's view. Hence, it may be more acceptable to an English audience because, as seen above, the "duty to cooperate" is long-established and relatively flexible, but still confined within limits. At this stage, of course, it seems premature to predict whether Leggatt LJ's notion of relational contract and conception of good faith will gain more support in the future. The fact that he is Lord Justice of Appeal may pave the way.

Having established the scope and doctrinal underpinning of cooperation in the English tradition, we turn to the French legal landscape.

COOPERATION – A COMPLEX DUTY WHICH LIVES IN THE SHADOW OF "FRENCH" GOOD FAITH

Good faith is a key principle of French contract law, which has been examined extensively in case law and which has been codified following the 2016 reform. At the same time, we will see that the explicit recognition of a "duty to cooperate" by the French judiciary happened later than in England. Although the scope of this duty and its relationship with good faith, as well as its relationship with other duties derived from good faith. are subject to debate, it is clear that cooperating à *l'anglaise* and cooperating à la *française* entail different things.

[98] Ibid., at [173] and [174].
[99] Ibid., at [173].

Scope of "French" Good Faith

In the French legal tradition, good faith is an ever-changing notion — a "*concept mou*"[100] (malleable concept) — that has evolved over time and attracted much commentary. Although not formally declared as a general principle of law in *ordonnance n°* 2016-131 of 10 February 2016, which implemented a major reform in the French law of obligations, informally it is understood to be one because it appears in a chapter entitled "Preliminary Dispositions", which precedes the rules on contract.[101] Some leading French authorities have asserted that good faith can now be considered as a "guiding principle" (*principe directeur*) of the law of contract.[102] Others perceive good faith as a duty. Although there is no reference to an actual *duty* of good faith in the French Civil Code itself, it has been suggested that good faith "creates a duty that precedes, and perhaps outlives, a valid contract".[103] This in turn implies a broader scope for good faith because, from a French perspective, a "duty" means a general principle while an "obligation" derives from the contract itself.[104] In other words, following the reform, good faith has gained in normative force and value.

The current Article 1104 of the French Civil Code provides, in a minimalist formula, that "[c]ontracts must be negotiated, formed and performed in good faith". Prior to the 2016 reform, former Article 1134(3) required that "[a]greements be performed in good faith". There was not an explicit requirement for negotiation in good faith, although judges occasionally provided relief on the basis of former Article 1382, which applied to liability in tort.[105] Moreover, even though there was not an explicit requirement for formation in good faith in the prior version of the French Civil Code, French courts had developed a jurisprudential solution that has now been enshrined in the new Article 1112-1.[106] This Article imposed a duty of disclosure on the parties during the pre-contractual phase: "The party who knows information which is of decisive importance for the consent of the other, must inform him of it where the latter legitimately does not know the information or relies on the contracting party (…)".

One notes several important differences between English and French law. Unlike English good faith whose existence is constantly disputed by academics and judges, French good faith is recognized as a key principle of the French law of contract. In addition, particularly as visible from *Yam Seng*, even those who support "English" good faith are keen to apply the principle to the *performance* stage only. By contrast, "French" good faith covers the whole life of the contract and thus has a larger scope. Moreover, the explicit recognition of a duty of disclosure illustrates the weight French legislators put on this aspect of good

[100] See B. Fauvarque-Cosson, *La Réforme du Droit Français des Contrats: Perspective Comparative* (2006), pp. 147-166.

[101] For a discussion, see M. Mekki, "The General Principles of Contract Law in the 'Ordonnance' on the Reform of Contract Law", *Louisiana Law Review*, LXXVI (2016), pp. 1193-1211.

[102] See G. Chantepie and M. Latina, *La réforme du droit des obligations* (2016), p. 99.

[103] Mekki, note 101 above, p. 1207.

[104] Ibid.

[105] It stated: "Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it". See also O. Deshayes, "Le dommage précontractuel", *RTD*, (juin 2004) *com*, p. 195.

[106] The French *Cour de cassation* has explicitly referred to an "obligation to enter the contract in good faith" (*obligation de contracter de bonne foi*). See *pourvoi n°* 87-14294; In addition, French law recognizes diverse vitiating factors such as error, fraud, violence, etc. See, for instance, M. Fabre-Magnan, *Droit des obligations : 1 – Contrat et engagement unilatéral* (2016), pp. 363-420.

faith. This approach differs from the English "piecemeal" approach — unless faced with an *uberrimae fidei* contract,[107] English judges can only provide relief based on the doctrine of misrepresentation, which has a relatively limited scope.[108]

It should be underscored that, unlike the "duty of loyalty" which is an element of French good faith explicitly referred to in the French Commercial Code, the "duty to cooperate" is not explicitly stipulated in French legislation.[109] As explained below, the "duty to cooperate" in French law is a vague notion which has been embraced by leading French authors and appears in French case law without, however, having a life of its own.

Moreover, following the reform which broadened the scope of good faith, some authors have pondered why the new Article 1104 on good faith does not explicitly stipulate a "duty to cooperate", unlike modern model rules for contract.[110] According to Mustapha Mekki, three reasons explain why the "principle of cooperation" was not enshrined in the new *ordonnance*.[111] The first is technical because the duty of cooperation does not apply to all contracts. The second is political as it would lend too much power and discretion to judges.[112] Ultimately, "a consecration of the principle of cooperation is likely not necessary because it is implied in the principle of good faith when circumstances demand it".[113] We will see below that judicial references to the "duty to cooperate" are inconsistent particularly because of the doctrinal overlap between the "duty of loyalty" and the "duty to cooperate" and the unclear role assigned to the "duty to cooperate".

"French" Good Faith in Practice

The meaning of "French" good faith seems as malleable as its scope. Good faith is traditionally seen as a standard of behavior: "an element of contractual interpretation which allows [judges] to impose a certain behaviour on the parties".[114] It often reminds common lawyers of the reasonable person standard.[115] Indeed, as explained above, one aspect of good faith identified by Leggatt J in *Yam Seng* was the observance of generally

[107] While English law does not recognize a general duty of disclosure, it imposes such a duty in *uberrimae fidei* contracts. The classic example is the insurance contract. See *Pan Atlantic Insurance v Pine Top Insurance* [1995] 1 AC 501.

[108] It is fairly difficult to argue misrepresentation of future intentions, for instance. One exception is *Edgington v Fitzmaurice* (1885) 29 Ch D 459 where at 483 Bowen LJ held: "There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else".

[109] For example, Art. L134-4 of the French Commercial Code applicable to commercial agencies states: "The relationship between the commercial agent and the principal is governed by a duty of loyalty and a mutual duty of information".

[110] Note, for instance, that Article 5.1.3 of the Unidroit Principles 2016 explicitly stipulates such a duty: "Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations". Similarly, Art. III–1:104 of the Draft Common Frame of Reference states: 'The debtor and creditor are obliged to co-operate with each other when and to the extent that this can reasonably be expected for the performance of the debtor's obligation". Article IV.6.9 (b) of the Principles of European Contract Law provides: "Each party is under a good faith obligation to cooperate with the other party when such cooperation can reasonably be expected for the performance of that party's obligations".

[111] Mekki, note 101 above, p. 1209.

[112] Ibid.

[113] Ibid.

[114] Fabre-Magnan, note 106 above, p. 96.

[115] R. Brownsword, *Contract Law: Themes for the Twenty-First Century* (2d ed; 2006), p. 29.

accepted standards of commercial dealing. However, from the 1950s onwards French judges began deriving a number of duties on the basis of good faith — for instance, a "duty of loyalty" (*devoir de loyauté*), a "duty of cooperation" (*devoir de co-opération*), etc.[116]

The notion of cooperation was originally introduced by René Demogue in his famous *Traité des obligations en général*. He emphasized the co-operative nature of contracts and considered that the parties to a contract form *a sort of microcosm*, a small society in which "each must work towards a common purpose which is the sum (or more) of the individual purposes pursued by each".[117] Demogue emphasized that the idea of good faith did not solely imply the pursuit of the purpose of the creditor (promisee), but had to take into account other interests.[118] He underlined that the contractual obligation resulted in duties for the promisee too — for instance, she should not overburden the promisor, she should facilitate performance through positive acts, and she should not refuse to accept performance.[119] For Demogue, this was the idea of solidarity between the promisor and the promisee in the name of the "social interest".[120]

Indeed, contractual solidarity was the primary value of an entire French doctrinal movement from the late nineteenth-early twentieth century represented by François Gény (1861-1959), Léon Duguit (1859-1928), and Gounot (?) (*solidarisme contractuel*). These authors advocated party equality in sharp contrast to the values of liberal individualism which dominated the French stage in the nineteenth century.[121] In more modern times, there has been a revival of solidarity in doctrinal literature as visible from the work of Jamin and Mazeaud.[122] Solidarity, however, plays a humbler, even non-existent, role in court practice than in doctrinal writing.[123]

In parallel, it should be stressed that the relationship between duties inspired from the solidarist movement, such as the "duty to cooperate" as well as the "duty of loyalty", as well as their relationship with good faith appear uncertain, which may be striking for English lawyers who are often under the impression that continental legal systems are tidier than the common law.[124]

[116] Fabre-Magnan, note 106 above, p. 96.

[117] R. Demogue, *Traité des obligations en général* (1931), VI, p. 9*:* "Les contractants forment une sorte de microcosme. C'est une petite société où chacun doit travailler pour un but commun qui est la somme ou avantage des buts individuels poursuivis par chacun".

[118] Ibid, p. 16.

[119] Ibid, p. 17.

[120] Ibid, p. 18.

[121] Note that English law departed from liberal individualist values much later with the work of Lord Denning and the implementation of legislation such as the Unfair Contract Terms Act 1977.

[122] C. Jamin, "Plaidoyer pour le solidarisme contractuel" in *Le contrat au début du XXIème siècle : Etudes offertes à J. Guestin* (2001); D. Mazeaud, "Loyauté, solidarité, fraternité, la nouvelle devise contractuelle? " in *L'avenir du droit : Mélanges en hommage à F. Terré* (1999).

[123] On the limited importance of contractual solidarity in French law, see J. Cédras, "Le solidarisme contractuel en doctrine et devant la Cour de cassation" in *Rapport 2003 de la Cour de cassation* (la Documentation française, 2004), pp. 186-204; See also D. Mazeaud, "La bataille du solidarisme contractuel: du feu, des cendres, des braises" in *Mélanges J. Hauser* (2012).

[124] It has been argued: "English contract law has not been rich in its theoretical content: one would not commend English law for its conceptual elegance". See E. McKendrick, "Contract: Rich Past, an Uncertain Future?", *Current Legal Problems*, L (1997), p. 56.

Loyalty

Some authors have defined loyalty as "contractual sincerity" in the formation stage and "contractual good faith" in the performance stage.[125] It is specifically mentioned in some legislative provisions with respect to certain fiduciary relationships.[126] In practice, French courts often establish a "duty of loyalty" in relationships — notably, in insurance contracts, commercial agencies, and employment contracts — where a party to the contract deprives the other party of the intended benefit of performance of the contract. The breach of the "duty of loyalty" may be evaluated from the perspective of legislation, the terms of the contract itself and/or circumstantial evidence, as explained below.

In principle, the French "duty of loyalty" is characteristic of contractual relationships in which trust between the parties is crucial. It may remind common lawyers of the fiduciary duties that exist in specific contracts in English law.[127] In *Bristol and West Building Society v Mothew,* for instance, the Court of Appeal held that "[the] distinguishing obligation of a fiduciary is the obligation of loyalty".[128]

It may not be surprising for English lawyers that commercial agencies are an area in which French courts are particularly eager to enforce a "duty of loyalty". Both the United Kingdom and France have transposed Directive 86/653 on the coordination of the laws of the Member States relating to self-employed commercial agents, which imposes an obligation to act in good faith.[129] Moreover, the common law has long recognized the "duty of loyalty" as a fiduciary duty. It should be pointed out, however, that whereas the United Kingdom transposed the Directive almost verbatim,[130] France seems to have gone further. Article L134-4 of the French Commercial Code defines the commercial agency as a contract in the "common interest of the parties". It also states: "The relationship between the commercial agent and the principal is governed by a duty of loyalty and a mutual duty of information". It should be noted that the Directive refers to good faith rather than to loyalty. Moreover, Article L134-4 imposes an obligation to act as a "good professional" as well as the following specific requirement: "The principal must make sure that the commercial agent is able to perform its agency".[131] This aspect of the provision may remind common lawyers of the obligation to make the contract work, which was established in *Mackay v Dick* discussed above. The main difference is that it forms part of a set of duties, which operate together.

[125] See G. Cornu, *Vocabulaire juridique* (6th ed; 2004) p. 552.

[126] Loyalty is especially relevant to specific fiduciary relationships, such as the provision of investment services, where the necessity to facilitate the performance of the contract may even demand that the interests of the contracting party be taken into consideration. Article L533-1 of the French *Code monétaire et financier* states: "Investment service providers act in an honest, loyal, and professional manner, which favours market integrity". Loyalty is also expected in commercial agencies pursuant to Art. L134-4 of the French Commercial Code.

[127] For example, the Companies Act imposes various duties on directors, the Financial Conduct Authority Handbook requires high standards of care for investment managers, etc.

[128] [1998] Ch 1, 18.

[129] In the United Kingdom, the Directive was implemented as the Commercial Agents (Council Directive) Regulations 1993; In France, the Directive was initially implemented as *La loi du 25 juin 1991 relative aux rapports entre les agents commerciaux et leurs mandants*, but currently forms part of the French Commercial Code. See Article L134-1 and subsequent.

[130] Regulations 3 and 4 concerning good faith copy Articles 3 and 4 of the Directive.

[131] "*Le mandant doit mettre l'agent commercial en mesure d'exécuter le mandat*".

Recent case law by the *Cour de cassation* pertaining to commercial agencies is remarkable from a comparative perspective. In a Decision of 20 September 2016, the court affirmed that the breach of the "duty of loyalty" in a commercial agency constitutes serious misconduct, which puts an end to the mandate of common interest.[132] This conclusion should be contrasted with *Crocs Europe BV v Craig Lee Anderson & Anor t/a Spectrum Agencies*[133] where the principal appealed a first-instance decision on two separate grounds: (1) the duty of good faith under The Commercial Agents (Council Directive) Regulations 1993, Regulation 3; and (2) the common law fiduciary duty of loyalty.[134] It was held that these duties "co-exist"[135] and emphasized that an "agent owes a duty of loyalty to his principal" and that "a single act of an agent may be of so serious a nature as to be incompatible with the continuance of the principal/agent relationship".[136] However, "not every duty owed by a fiduciary is a fiduciary duty …".[137] Regarding Regulation 3, the court held that "[a breach] of the duty of good faith goes to the root of the contract entitling the innocent principal to decide whether or not to terminate"[138] and that "[there] is no basis for holding that [Regulation 3] goes further and implies [the obligations it sets out] as fundamental conditions into the agency contract so that breach of them would always be repudiatory".[139]

In light of this discussion, it is interesting that one may see a certain parallel between the requirements for commercial agencies stipulated in Article L134-4 of the French Commercial Code and Leggatt J's reasoning in *Yam Seng* — particularly his emphasis that relational contracts require "a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty …",[140] as well as his conclusion that the breach of this duty was repudiatory.[141] In fact, one may speculate that Leggatt J's relational contract involves or even goes beyond the most stringent requirements of good faith and loyalty for commercial agencies under English law.

A second area in which French courts have applied a "duty of loyalty" is director's duties to shareholders. In a Decision of 27 February 1996,[142] the French *Cour de cassation* established fraud (*réticence dolosive*)[143] because the company director had breached a "duty of loyalty" to a partner in the company. In particular, he had taken advantage of privileged

[132] *Chambre commerciale, pourvoi n°* 15-12994; "*[Le] manquement...à son obligation de loyauté était constitutif d'une faute grave portant atteinte à la finalité du mandat d'intérêt commun"*; See also 22 November 2016, *Chambre commerciale, pourvoi n°* 15-17131 in which the court underscores that a breach of the "duty of loyalty" constitutes serious misconduct.

[133] [2012] EWCA Civ 1400.

[134] Ibid., at [3].

[135] Ibid., at [22].

[136] Ibid., at [24].

[137] Ibid.

[138] Ibid., at [35].

[139] Ibid., at [45].

[140] *Yam Seng*, note 1 above, at [142].

[141] Ibid., at [171].

[142] *Chambre commerciale, pourvoi n°* 94-11241.

[143] Fraud is one of the vitiating factors under French law. Former Article 1116 of the French Civil Code, which was relevant at the time, stated: "Fraud is a ground for annulment of a contract where the schemes used by one of the parties are such that it is obvious that, without them, the other party would not have entered into the contract. It may not be presumed and must be proved". Note that following the 2016 reform, fraud is governed by current Articles 1137 and 1138. Article 1138 now states: "Fraud is equally established where it originates from the other party's representative, a person who manages his affairs, his employee or one standing surety for him".

information that he had hidden from another partner to acquire the shares of the latter at a certain price and resell them at a higher price whereas the selling partner would not have contracted at the agreed price if he had known this information. It may be striking for an English audience[144] that this is the first decision in which the French *Cour de cassation* established that a director owed a "duty of loyalty" to a shareholder,[145] which, in turn, sparked wide press coverage.[146]

Furthermore, on occasion French courts seem to treat loyalty and good faith as two separate categories. For example, in a Decision of 30 October 2007,[147] the French *Cour de cassation* established that a consulting company was in breach of an "obligation of independent advice" (*obligation d'indépendance dans les conseils donnés*) because it did not disclose to a company which it was consulting that its president had become an employee of a competitor. In turn, for the court, this meant that the consulting company failed to provide "loyal" and "good faith" performance, as required by the terms of the agreement, in which the consultant had committed to "respect the professional, ethical and independence standards in the given advice, to accomplish its missions in a spirit of rigorous independence to the third persons and in the best interests of his client as well as to inform him of his personal and financial interests likely to influence the course of a mission".

This case seems peculiar because the *Cour de cassation* based its conclusion on the specific wording of the agreement rather than on the former Article 1134 of the French Civil Code, which required performance in good faith. In fact, it deemed that "the mere fact that the head of a company enters into an employment contract with a company competing with the one on whose behalf that company is carrying out a consulting assignment is, on its own, insufficient to characterize a failure to fulfill the duty to loyalty of this company" pursuant to Article 1134. In other words, the decision shows that even though good faith is a guiding principle of the French law of contract, the precise wording in the agreement is of utmost importance: parties can agree to higher standards of conduct (and of good faith). This is consistent with the method of subjective interpretation of contracts by which French law abides.

Cooperation

French scholarship seems divided on the definition and scope of cooperation. Some authors have underlined: "The principle of cooperation refers to the idea that good faith cannot be reduced to the absence of bad faith because good faith presupposes active conduct that concerns, at least in part, the interests of the other party. Although the duty of cooperation can be seen as relevant to all contracts, it is especially important when the parties are

[144] The duty of loyalty can be currently found in Chapter 2 of Part 10 of the Companies Act 2006, but it was recognized in the common law as early as the nineteenth century. See, for instance, J. Lowry, "The Duty of Loyalty of Company Directors: Bridging the Accountability Gap Through Efficient Disclosure", *Cambridge Law Journal*, LXVIII (2009), pp. 607-622.

[145] "*devoir de loyauté qui s'impose au dirigeant d'une société à l'égard de tout associé, en particulier lorsqu'il en est intermédiaire pour le reclassement de sa participation*".

[146] See O. Camoin, "Le devoir de loyauté du dirigeant reconnu par la Cour de cassation", *Les Echos* (Paris, 14 October 1996).

[147] *Chambre commerciale, pourvoi n°* 06-20944.

pursuing a common interest or goal".[148] Other authorities contend that these contracts imply the strong *affectio contractus* that can be found in concession agreements, franchise agreements and supply contracts.[149] Yet, some authors assimilate the notion of good faith with loyalty and derive a duty to collaborate or cooperate from a duty of loyalty.[150] For some scholars, the "duty to cooperate" is limited to certain contracts that have a strong feature of "relationship" — for example, relational contracts, alliance agreements or cooperation agreements, employment contracts, and so on.[151]

As mentioned above, French legislation does not explicitly mention the term cooperation. Case law, however, shows that the duty can take many forms and may be relevant to many types of contracts — franchise agreements, commission-affiliation agreements, commercial agencies, leases, insurance contracts, service agreements, etc. Furthermore, we will see below that the scope of cooperation in the French tradition seems broader than cooperation in the English tradition. It may imply different things depending on the specific circumstances. In some instances, courts have concluded that the contracting party should provide all requisite documents or administrative authorizations for the performance of the contract. Another form is to reason *a contrario*: courts may imply that the party refrains from making the performance of the contract more difficult. A third aspect of the duty is the promotion of meaningful communication between the parties. Generally, French legal practice appears inconsistent regarding the legal basis of the duty and its relationship with other duties, such as the "duty of loyalty".[152]

In recent years, for instance, the French *Cour de cassation* has identified a "duty to cooperate" both in franchise[153] and in commission-affiliation[154] agreements because the contracts were entered into 'in the common interest of the parties', as specified in Article L330-3 of the French Commercial Code.[155] These decisions do not explicitly refer to good faith. Yet, in a Decision of 29 March 2017, the *Cour de cassation* has derived a "duty to cooperate" in a franchise agreement on the basis of former Article 1134(3) of the French Civil Code, which required performance in good faith.[156] The same decision identifies loyalty and cooperation as duties "associated with good faith". At the same time, the court concluded that the fact that the franchisor was forced to remind the franchisee on three occasions during a three-year period of its obligation to communicate its monthly summary of purchases did not violate Article 1134 because one could identify rare omissions rather than a "definitive and constant refusal".

148 Mekki, note 101 above, p. 1208.

149 J. Mestre, "L'évolution du contrat en droit privé français" in *L'évolution contemporaine du droit des contrats* (PUF, 1986), pages 41 and 51; See also C. Guelfucci-Thibierge, "Libres propos sur la transformation du droit des contrats", *RTD civ,* VI (1997), p. 357.

150 See Y. Picod, *Le devoir de loyauté dans l'exécution du contrat* (1989) p. 11. See also J. Mestre, "D'une exigence de bonne foi à un esprit de collaboration", *RTD civ*, LXXXV (1986), p. 101.

151 See Y. Lequette, 'Bilan des solidarismes contractuels' in *Mélanges P Didier: Etudes de droit privé* (2008), p. 247.

152 Note that the question is not conclusively resolved even from a scholarly perspective. Some authors assimilate the notion of good faith with loyalty and derive a duty to collaborate or cooperate from a duty of loyalty. See Y. Picod, *Le devoir de loyauté dans l'exécution du contrat* (LGDJ, 1989), p. 11. See also J. Mestre, "D'une exigence de bonne foi à un esprit de collaboration", note 150 above, p. 101; For other authors, the "duty to cooperate" is limited to certain contracts that have a strong feature of 'relationship'. See Lequette, note 151 above, p. 247.

153 Decision of 25 March 2014, *Chambre commerciale*, *pourvoi* n° 12-29675.

154 Decision of 7 October 2014, *Chambre commerciale, pourvoi* n° 13-23119.

155 The Article is applicable to clauses of exclusivity.

156 *Chambre commerciale, pourvoi n°* 15-25742.

In a similar fashion, in a case of 15 September 2009 concerning a commercial agency agreement,[157] the *Cour de cassation* emphasized in light of former Article 1134 of the French Civil Code that "like any convention, the mandate … should be performed in good faith". It also underlined that the duties of loyalty and cooperation should be considered in that regard. The agreement in question contained an explicit clause stating that the agent would not receive an indemnity if the contract was terminated for serious misconduct (*faute grave*). The agent in question had not kept his contractual obligation to bring 10 contracts per month during the last 5 months of the commercial agency and he behaved aggressively with the clients. Similarly to the case concerning the franchise agreement mentioned above, the *Cour de cassation* also relied on the repetitiveness of contractual omissions as a criterion of evaluation of good faith (*caractère répétitif des manquements contractuels and leur accumulation*). It concluded that the agent's actions constituted breach of contract, which allowed the agency's termination, but they did not constitute serious misconduct, which meant that the indemnity had to be paid. It is also interesting that the *Cour de cassation* based its decision on the French Civil Code rather than Article L134-4 of the French Commercial Code, which imposes an explicit obligation of loyalty, as discussed in the previous section.

The *Cour de cassation* has also considered the "duty to cooperate" in the context of leases. In a Decision of 11 February 2016, the *Cour de cassation* referred to a "duty to cooperate" in a lease agreement as "a corollary of the principle of good faith in the performance of contract", without considering a duty of loyalty.[158] In the said decision, cooperation was implied because a contractual amendment providing for works to be done to adapt the premises for cooking against compensation and increase of rent was signed. In a Decision of 13 November 2013, the *Cour de cassation* also referred to a "duty of cooperation" in a lease agreement which resulted from former Article 1134 of the French Civil Code, without referring to a duty of loyalty.[159] This time the "duty to cooperate" meant that the promisee had to "take into account the financial situation" of the other party to the agreement.

The *Cour de cassation* has also referred to a "duty of cooperation" by virtue of the specific contractual obligations in an insurance agreement.[160] The *Cour de cassation,* by contrast, has stated that in establishing a "duty of cooperation" along with a "duty to inform" in a consulting agreement, the court of appeal violated former Article 1147 of the French Civil Code.[161] Recently, the *Cour de Cassation* concluded that a client owed a duty of cooperation to his lawyer which consisted in disclosing relevant information to him.[162] It is interesting that the court discussed this duty in light of the same Article. In this sense, it is difficult to draw a distinction between these cases and to understand why a "duty to cooperate" was implied in the latter, but not in the former. The nature of the relationship between the parties may hold the key to the distinction.

157 *Chambre commerciale, pourvoi n°* 08-15613.
158 *Troisième Chambre civile, pourvoi n°* 14-24241.
159 *Troisième Chambre civile, pourvoi n°* 12-23373.
160 Decision of 8 September 2016, *Deuxième Chambre civile, pourvoi n°* 15-23068.
161 Decision of 3 April 2013, *Chambre commerciale, pourvoi n°* 12-13079; Former Article 1147 stated: "A debtor (promisor) shall be ordered to pay damages, if there is occasion, either by reason of the non-performance of the obligation, or by reason of delay in performing, whenever he does not prove that the non-performance comes from an external cause which may not be ascribed to him, although there is no bad faith on his part".
162 *Première Chambre civile,* 15 May 2015, *pourvoi n°* 14-17096.

Beyond these contracts, the "duty to cooperate" also appears in employment contracts and service agreements, especially in the field of information technology. Generally, courts seem to interpret it as the need for communication to define the needs of the user and the choice of adequate solutions. The precise legal basis of the duty in these contracts as well as the relationship with loyalty, however, appear unclear. For example, the Court of Appeal of Paris referred to an obligation of cooperation (*obligation de collaboration*) in an agreement for the search engine optimization of a company's website and concluded that the client complied with it because it was evident from the email exchange that it had provided the website's key words and contents to the service-provider.[163] By contrast, the Court of Appeal of Limoges emphasized that there is "an obligation of loyalty and an obligation of cooperation which is incumbent on the customer as part of the study prior to the provision of IT services".[164] However, it did not explain what these obligations implied in the case at hand. In an earlier case, the Court of Appeal of Paris stressed the need for "promotion of a managerial state of mind" *(promotion d'un* état *d'esprit managérial),* which meant that the management had to hold a briefing.[165]

Finally, it should also be mentioned that explicit "clauses of cooperation" have become common in French commercial practice. In principle, in respect of the principle of freedom of contract, French courts give effect to such provisions. Decision of 15 March 2017 by the *Cour de cassation*[166] is particularly interesting for our discussion because it concerned a distribution agreement explicitly governed by the "principles of cooperation". The court emphasized that from this clause as well as from the general economy of distribution agreements, it followed that the supplier had to maintain stock which allows fast delivery to the customers. In other words, arguably, even absent such an explicit provision, the court could have reached the same conclusion based on the type of agreement.

Overall, the French "duty to cooperate" is multi-faceted and may be established in various types of contracts, which are not necessarily long-term or relational. It lives in the shadows of good faith and loyalty. It is important to highlight that unlike Leggatt LJ who applied a "duty to cooperate" based on context in situations where there was a very brief written agreement (*Yam Seng*) or merely an oral contract (*Sheikh*), the French "duty to cooperate" is traditionally established by virtue of the applicable legislation or the concrete written provisions in the contract.

CONCLUSION

The two sides of the Channel have different views of the "duty to cooperate". In England, cooperation appears to be a long-established, autonomous duty with a limited scope. At the same time, it has an uncertain relationship with good faith because of the traditional English hostility towards the latter notion. When confronted with contractual provisions, which explicitly refer to cooperation and/or good faith, English courts tend to interpret them rather narrowly. Absent an express provision, many English judges tend to imply such duties only in cases when they are necessary to make the contract work.

163 *Cour d'appel de Paris*, 13 May 2016, *pourvoi n°* 14-22497.
164 *Cour d'appel de Limoges*, 21 December 2015, *pourvoi n°* 14-01136.
165 *Cour d'appel de Paris*, 13 December 2010, *pourvoi* n° 10-13410; Note that the decision does not explicitly refer to the term "cooperation".
166 *Chambre commerciale, pourvoi* n° 15-16292.

By contrast, the status of the "duty to cooperate" in France is unclear due to its complex and uncertain relationship with the "duty of loyalty" and good faith. As seen above, the principle emerged from the writings of the French solidarist movement. It may appear in various contracts by virtue of applicable legislation or the concrete provisions of the contract, and it may have a broad scope. Meanwhile, in the French tradition, good faith is considered as one of the guiding principles of contract law, which has gained in normative force and value following the 2016 reform of the law of obligations. French courts tend to interpret the principle as a general standard of conduct of the parties in the life of the contract. Unlike English courts, they are particularly concerned with disclosure at the negotiation stage.

In light of our comparison, it appears that the good faith "practised" by Leggatt J in *Yam Seng* and *Sheikh* not only goes beyond the traditional English approach, but also beyond the French approach. His version of cooperation is reminiscent of the English fiduciary duties and the French "duty of loyalty". Of course, the fact that Leggatt is currently Lord Justice of Appeal may pave the way to a wider recognition of the notion of "relational contract" and may breathe more life into the principle of good faith in the English tradition. Yet, cases, such as *Globe Motors*, serve as a reminder that the principle needs to operate within narrow limits to curtail the inevitable hostility towards it — so long as good faith operates as a "duty to cooperate", albeit extended, it has a better chance at gaining impetus.