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ARTICULATING CONTRACTUAL GOOD FAITH: THE EVOLVING CIVIL AND COMMON LAW DIMENSION

Abstract

While the operation of contract law tends to be appreciated through its inherent twofold rationale, informed by autonomy and institutional standards, recurring concerns arise around the ratio of certainty to fairness in contractual transactions. In critically weighing the contract-law commitments to both autonomy- and policy-oriented normative values, a particular regard is given to the recent focus on good faith obligations in common law jurisdictions. Specifically, of notable importance is how considerations of good faith have developed over the last decade in Australia, Canada as well as England and Wales. Yet, the approach to and the degree of acceptance of good faith in commercial contexts in either jurisdiction diverge – ranging from industry-specific statutory regulation articulating good faith and relational contracts, through the recognition of a general organising principle of good faith, to the engagement with implied duties of good faith. In order to capture the potentialities of these developments to influence contract law in terms of enhancing commercial morality, it is necessary to investigate them from a combined civil–common law perspective. On the one hand, the civilian conceptualisations of good faith have arguably impinged upon the way in which the notion evolves in the common law of contract. On the other hand, the departure from the nineteenth-century classical paradigm of the Anglo-American contract law is parallelised with what symptomises the process of decodification in civil law systems. And on this basis, in view of the growing weight of the jurisprudential component of contract law, the common law's manner of reasoning appears likely to affect continental contract laws under decodification. Within

such an intertwined context, critical insights are offered into the role for and the valences of the currently evolving good faith obligations in policing commercial contracts.

KEYWORDS

contract law, good faith, civil law, common law

SŁOWA KLUCZOWE

prawo umów, dobra wiara, *civil law*, *common law*

I. INTRODUCTION

What arguably characterises contract law as a rules-based structure governing commercial transactions is its ever-evolving nature.[1] This derives from an implicit engagement of contract law with the actuality and changing modes of transacting.[2] Yet, it is through its inherent rationales that the contract law's dynamics is sought to be captured and appraised. An account shared across jurisdictions,[3] the regulation of transactions is driven by a combination of a range of normative factors.[4] Specifically, in defining the determinants of legal developments in the area of contracts, the primary focus is on a balancing of internal tensions within contract law between its underlying values and norms.[5] Among the competing norms entailing such tensions, the dichotomy of freedom of contract and certainty versus fairness and justice appears to be foregrounded.[6] Viewed in

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[1] Larry A DiMatteo, *Principles of Contract Law and Theory* (Edward Elgar Publishing 2023) *xvii*. See also Ryan Catterwell, 'Autonomy and Institutionalism in the Law of Contract' (2022) 42(4) Oxford Journal of Legal Studies 1067.

[2] Roger Brownsword, Rob AJ van Gestel and Hans-W Micklitz, 'Introduction – Contract and Regulation: Changing Paradigms' in Roger Brownsword, Rob AJ van Gestel and Hans-W Micklitz (eds), *Contract and Regulation: A Handbook on New Methods of Law Making in Private Law* (Edward Elgar Publishing 2017) 1; DiMatteo (n 1) 59.

[3] This is inasmuch as contract law varies in a number of respects in each legal tradition. See Mariana Pargendler, 'The Role of the State in Contract Law: The Common-Civil Law Divide' (2018) 43(1) The Yale Journal of International Law 143.

[4] Catterwell (n 1) 1072. See also Jessica Viven-Wilksch, 'The Importance of Being Relational: Comparative Reflections on Relational Contracts in Australia and the United Kingdom' (2022) 73(AD2) Northern Ireland Legal Quarterly 94, 98, 102–7.

[5] DiMatteo (n 1) 58.

[6] ibid 68, 74; Catterwell (n 1) 1067, 1072; Rebecca Stone, 'Putting Freedom of Contract in its Place' (2024) 16(1) Journal of Legal Analysis 94; Aditi Bagchi, 'Contract as Exchange' (2025) 113

this light, contract law involves, and is informed by, both autonomy-oriented and policy-oriented, non-autonomy normative values.[7]

While this twofold rationale remains central to policing contracts, recurring concerns arise around the ratio of certainty to fairness in commercial transactions. An instantiation of and a significant contribution to the ongoing debate is the recent critical focus on good faith obligations in common law jurisdictions. Of notable importance is how considerations of good faith have developed over the last decade in Australia, Canada as well as England and Wales. Still, the formulation and degree of acceptance of good faith in commercial contexts in either jurisdiction diverge – ranging from industry-specific statutory regulation articulating good faith and relational contracts, through the recognition of a general organising principle of good faith, to the engagement with implied terms of good faith.[8] Given the common law's classically restrictive approach to good faith,[9] the apparent move towards its acknowledgement in the several jurisdictions reflects a shift in relevance within the yet prevalent individualistic position into a more flexible and axiologically informed standards-based framing.

In order to draw in-depth, generalisable insights into the potentialities of these developments to influence contract law in terms of enhancing commercial morality, they need to be investigated from a combined civil–common law perspective. On the one hand, the civilian conceptualisations of good faith have arguably impinged upon the way in which the notion evolves in the common

California Law Review (forthcoming). See also Bill Dixon, 'Common Law Obligations of Good Faith in Australian Commercial Contracts – a Relational Recipe' (2005) 33(2) Australian Business Law Review 87.

[7] See Catherine Mitchell, 'The Common Law of Contract: Essential or Expendable?' in Andrew Johnston and Lorraine Talbot (eds), *Great Debates in Commercial and Corporate Law* (Red Globe Press 2020) 21, 41; Catterwell (n 1) 1069.

[8] For a general overview of the recently emerging good faith models in the common law of contract, see Magda Raczynska, 'Good Faiths and Contract Terms' in Paul S Davies and Magda Raczynska (eds), *Contents of Commercial Contracts: Terms Affecting Freedoms* (Hart Publishing 2020); Viven-Wilksch (n 4) 94–124; Jan Halberda, 'Winds of Change in Common Law Jurisdictions: The Concept of Good Faith and Fair Dealing in the Performance of Contracts' in Cerian Griffiths and Łukasz Jan Korporowicz (eds), *English Law, the Legal Profession, and Colonialism: Histories, Parallels, and Influences* (Routledge 2024).

[9] See generally Pargendler (n 3) 152; Raczynska (n 8) 65, 87–88; Paul S Davies, 'Excluding Good Faith and Restricting Discretion' in Paul S Davies and Magda Raczynska (eds), *Contents of Commercial Contracts: Terms Affecting Freedoms* (Hart Publishing 2020); Paula Giliker, 'Contract Negotiations and the Common Law: A Move to Good Faith in Commercial Contracting?' (2022) 43 Liverpool Law Review 175; John Cartwright, 'Good Faith in English Contract Law: Lessons from Comparative Law?' in Edwin Peel and Rebecca Probert (eds), *Shaping the Law of Obligations: Essays in Honour of Professor Ewan McKendrick KC* (Oxford University Press 2023) 28.

law of contract.[10] On the other hand, at a broader level, the departure from the nineteenth-century classical paradigm of the Anglo-American contract law is parallelised with what symptomises the process of decodification in civil law systems. And on this basis, in view of the growing weight of the jurisprudential component of contract law, the common law's manner of reasoning appears likely to affect continental contract laws under decodification.[11]

The aim of this article is to explore the role for and the valences of the currently evolving good faith obligations in policing commercial contracts while contextualising them within the intertwined dimension of civil and common law. Employing such a complex perspective is intended to emphasise the implications of how various normative and axiological accounts of commercial contract law interrelate and thereby concretise the premises underlying good faith contracting. The initial section exposes the recent legal developments in good faith in common law jurisdictions. The focus is on the manner and extent in which the civil law constructs contribute to shaping good faith obligations within the Anglo-Saxon legal framing. In the next section, an extended context of the civil–common law interrelations is demonstrated through the parallel strands of divergence from twofold nineteenth-century paradigms in contract laws. This shows that the jurisprudential constituent of the law of contract is becoming more prominent. Thus, the last section examines the ramifications of a jurisprudentially oriented understanding of contract regulation in both civil law and common law, by centring attention on the most problematised areas of contracting which involve obligations of good faith.

II. GOOD FAITH-RELATED INNOVATIONS IN COMMON LAW JURISDICTIONS: AN OVERVIEW

A cross-jurisdictional perspective is of special pertinence to the enquiry into the intricacies of the recent developments in contract-law good faith. On that

[10] Bogna Kaczorowska, 'Zależności między dorobkiem kontynentalnego prawa prywatnego a common law na przykładzie kryterium dobrej wiary w dziedzinie umów zobowiązaniowych' (2021) 89 Studia Iuridica 125.

[11] Wojciech Dajczak, 'Amerykańska zapowiedź "śmierci umowy" na tle tradycji romanistycznej' in Franciszek Longchamps de Bérier (ed), *Dekodyfikacja prawa prywatnego: Szkice do portretu* (Wydawnictwo Sejmowe 2017) 89, 101–2; Franciszek Longchamps de Bérier, 'Decodification of Contract Law' in Chen Su, Franciszek Longchamps de Bérier and Piotr Grzebyk (eds), *Theory and Practice of Codification: The Chinese and Polish Perspectives* (Social Sciences Academic Press 2019) 145–8 ('Decodification of Contract Law'); Franciszek Longchamps de Bérier, 'Common law a dekodyfikacja i globalizacja prawa' in Franciszek Longchamps de Bérier (ed), *Dekodyfikacja prawa prywatnego w europejskiej tradycji prawnej* (Wydawnictwo Uniwersytetu Jagiellońskiego 2019) 27, 47–51 ('Common law').

premise, the emerging innovations within the common law jurisdictions can be appreciated against the backdrop of the approaches under the civilian legal systems. Dichotomising between civil and common law refers here to the general characteristics of the two legal traditions and their intrinsic discourse and reasoning.[12] In these terms, the civilian tradition covers legal systems that trace their origins to Roman law, whereas the common law tradition – those historically deriving from English law.[13] As far as the sources of law are concerned, the legal authority in the civil law systems is provided by a structured set of general rules of law.[14] However, while the codification is perceived to be characteristic of the modern civilian tradition, it is argued that the centrality of the civil code does not cause but rather follows from the inherent civilian outlook.[15] At the same time, a common law system, in a wider sense,[16] is identified as judge-made law whereby the legal rules are found in the decisions of the courts, and not in any legislative enactment.[17] Importantly, most of the core general rules of contract law

[12] See Longchamps de Bérier, 'Common law' (n 11) 26; Lionel Smith, 'Civil and Common Law' in Andrew S Gold and others (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press 2021); John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (Hart Publishing 2023) 3–15.

[13] Longchamps de Bérier, 'Common law' (n 11) 26; Smith (n 12) 228; Cartwright (n 12) 3, 9, 13. See also Martin A Hogg, 'Codification of Private Law: Scots Law at the Crossroads of Common and Civil Law' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing 2017) 107.

[14] Cartwright (n 12) 16. See also Eva Steiner, 'Challenging (Again) the Undemocratic Form of the Common Law: Codification as a Method of Making the Law Accessible to Citizens' (2020) 31(1) King's Law Journal 27.

[15] Smith (n 12) 227–8. See also Franciszek Longchamps de Bérier, 'Evolution of Roman law' in Wojciech Załuski, Sacha Bourgeois-Gironde and Adam Dyrda (eds), *Research Handbook on Legal Evolution* (Edward Elgar Publishing 2024). This point is going to be discussed further in section III below exploring the process of decodification in contract law.

[16] In a narrow sense, common law is contrasted with equity. Historically, the dichotomy denotes the two principal sources of rules and remedies coexisting in the judge-made law of England. Within this distinction, common law is understood as the law found in the line of modern developments from old decisions of the King's courts – a particular group of courts which were established in England from the twelfth century. A jurisdiction separate from the common law courts, the courts of equity, evolved from the late fourteenth century. In several common law jurisdictions, major law reforms were initiated in the late nineteenth century to assimilate common law and equity courts, and their respective procedures. This led to the emergence of a single new court structure with the form of superior court now typical in common law jurisdictions. Under the reformed modern court structure, both the rules of common law and equity continue to be developed and applied. See PG Turner, 'Fusion and Theories of Equity in Common Law Systems' in John CP Goldberg, Henry E Smith and PG Turner (eds), *Equity and Law: Fusion and Fission* (Cambridge University Press 2019) 1; Cartwright (n 12) 3, 5–9; Julius AW Grower, 'Contract | Equity' in William Day and Julius Grower (eds), *Borderlines in Private Law* (Oxford University Press 2024).

[17] Cartwright (n 12) 3–5, 13–14, 16–21.

in common law jurisdictions are based in the case-law.[18] Nevertheless, legislative intervention that changes or adds to the common law rules of contract is not without consequence.[19] Broadly, the emerging approaches to good faith in contract across common law jurisdictions represent diverse positions from cautious, yet much questionable, judicial articulation to attempts at direct recognition in statutory instruments. A deeper apprehension of their complexity and underpinnings is contingent on taking the confrontation with civilian good faith as the point of departure.

Conceptualised and operating in the Roman legal discourse since third century BC, good faith envisaged the characteristics of honesty and fidelity.[20] With a prominent contribution of the peregrine praetor to developing the legal concept of *bona fides*, the Roman law of contract was modernised through the introduction of the *ex fide bona* clause, empowering the judge to apply his equitable discretion.[21] In the classic period, the Roman jurists' engagement with explicating good faith gave emphasis to pre-legal fundamental values, whose content – informed mostly by Stoicism – was synthesised in the Ulpian's *praecepta iuris*: *honeste vivere*, *alterum non laedere*, *suum cuique tribuere*.[22] The classic perception of *bona fides* was embraced by Roman law of the Christian period, and in the late Middle Ages became a principle of the *lex mercatoria*.[23] The nineteenth-century codifications enshrined good faith, while seeking to reconcile it with legal certainty.[24] Crucially, the development and refinement of the content and scope of the

[18] ibid 4–5.

[19] ibid.

[20] Wojciech Dajczak, 'Zobowiązania' in Wojciech Dajczak, Tomasz Giaro and Franciszek Longchamps de Bérier, *Prawo rzymskie: U podstaw prawa prywatnego* (Wydawnictwo Naukowe PWN 2018) 463, 527. See also Daniele Bertolini, 'Decomposing *Bhasin v Hrynew*: Towards an Institutional Understanding of the General Organizing Principle of Good Faith in Contractual Performance' (2017) 67(3) University of Toronto Law Journal 348, 351–2, 381–91; Anthony Gray, *Good Faith and Relational Contracts: Theory, Practice and Future Developments* (Hart Publishing 2024) 4–13.

[21] Wojciech Dajczak, *Dobra wiara jako symbol europejskiej tożsamości prawa* (Drukarnia i Księgarnia Świętego Wojciecha 2006) 7–9; Dajczak (n 20) 527; Bertolini (n 20) 251–2, 381–2, 382–8.

[22] Dajczak (n 21) 8–11; Dajczak (n 20) 527–8.

[23] Dajczak (n 20) 528; Richard RW Brooks, 'Good Faith in Contractual Exchanges' in Andrew S Gold and others (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press 2020) 497, 497; Cartwright (n 9) 27.

[24] Dajczak (n 20) 528–9; Pargendler (n 3) 150–1; Jonathan Ainslie, 'Good Faith and Relational Contracts: A Scots-Roman Perspective' (2022) 26(1) Edinburgh Law Review 29, 30–1. Importantly, an extensive explication of good faith in normative terms was provided under the no-longer-in-force Polish Code of Obligations of 1933 – *Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 października 1933 r. – Kodeks zobowiązań* (Decree of the President of the Republic of Poland of 27 October 1933 – Code of Obligations) (Journal of Laws No 82 item 598, as amended).

good faith principle in the modern codified civil law systems have translated into a diversity of normative accounts.[25] Insofar as the expansive approach to good faith in contract is what arguably distinguishes the civilian legal tradition from the largely restrictive common law position,[26] the focus now falls on the recent shifts in the latter, as exemplified by Australia, Canada, and England and Wales. These involve a diverse range of legal developments, whereby the concept of good faith in contract performance has been gaining critical attention, mostly over the last decade, across common law jurisdictions. Yet, they are viewed in a broader context of the common law's historical instantiations of good faith duties in contract performance.[27] To the extent that the evolving approaches to good faith vary among the respective laws of contract, a consequential aspect of these innovations is how they are affected by the civilian conceptualisations of good faith, and how the comparative perspective embracing Commonwealth and American laws, aside from international instruments, features in the gradual recognition of good faith in common law jurisdictions.[28]

The interwar Polish codification was based on an eruditely applied, advanced comparative method based on a sovereign investigation into foreign legislations, see Wojciech Dajczak, 'Kodeks zobowiązań jako lekcja metody prawnoporównawczej' (2014) 23(4) Kwartalnik Prawa Prywatnego 829. This point is going to be discussed further in section IV below.

[25] Cartwright (n 9) 27–8. See also, generally, Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000); Dajczak (n 20) 528–9.

[26] Pargendler (n 3) 145–6, 150–2. See also Giliker (n 9) 176; Cartwright (n 12) 11, 66–70; Halberda (n 8) 235; Christina Perry, *Good Faith in Contract Law* (Edward Elgar Publishing 2024) 188–9.

[27] This is illustrated by the eighteen-century cases: *Carter v Boehm* (1766) 3 Burr 1905, 1910; *Boone v Eyre* (1777) 126 Eng Rep 160. See Mindy Chen-Wishart and Victoria Dixon, 'Good Faith in English Contract Law: A Humble "3 by 4" Approach' in Paul B Miller and John Oberdiek (eds), *Oxford Studies in Private Law Theory: Volume I* (Oxford University Press 2020) 187; Lorna Richardson, 'Good Faith and the Duty to Co-operate in Long-term Contracts' in Andrew Hutchison and Franziska Myburgh (eds), *Research Handbook on International Commercial Contracts* (Edward Elgar Publishing 2020) 36; Daniel Markovits, 'Good Faith as Contract's Core Value' in Stefan Grundmann and Mateusz Grochowski (eds), *European Contract Law and the Creation of Norms* (Intersentia 2021) 47; Raczynska (8) 81; David Campbell, *Contractual Relations: A Contribution to the Critique of the Classical Law of Contract* (Oxford University Press 2022) 146; Cartwright (n 9) 31; Halberda (n 8) 237; George Leggatt, 'The Emerging Concept of a Relational Contract in English Law' in Maren Heidemann (ed) *The Transformation of Private Law – Principles of Contract and Tort as European and International Law: A Liber Amicorum for Mads Andenas* (Springer 2024) 455–6.

[28] Halberda (n 8) 236, 250–3. See also Therese Wilson, 'The Challenges of Good Faith in Contract Law Codification' in Mary Keyes and Therese Wilson (eds), *Codifying Contract Law: International and Consumer Law Perspectives* (Routledge 2014); Ewan McKendrick, 'Good Faith in the Performance of a Contract in English Law' in Larry A DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford University Press 2016) 198–9; Rosalie Jukier, 'Good Faith in Contract: A Judicial Dialogue between Common Law Canada and

In addressing good faith duties in Commonwealth laws, American contract law serves as an essential point of reference.[29] The reason lies in the fact that the concept of good faith is recognised in the United States.[30] While the good faith-related line of argumentation arose in American jurisdictions in early cases at the turn of the twentieth century,[31] the doctrine of good faith performance developed and gained wide acceptance largely under two model law instruments[32] – the Uniform Commercial Code,[33] which has been enacted into statutory law throughout the states, and the non-binding *Restatement (Second) of Contracts*.[34] Both the UCC[35] and the *Restatement*[36] expressly impose a general mandatory duty of good faith in contract performance and enforcement. In consequence, it stands as an axiom that the implied covenant of good faith and fair dealing is a part of every contract.[37] Not without significance is the impact the civil law approach has had upon the perception of good faith duty in the UCC.[38] Thus, the adoption of

Québec' (2019) 1(1) Journal of Commonwealth Law 83; Raczynska (n 8) 87; Lisa Spagnolo, 'The International Dimensions of Australian Contract Law' in John Eldridge and Timothy Pilkington (eds), *Australian Contract Law in the 21st Century* (The Federation Press 2021).

[29] Halberda (n 8) 236, 250–1.

[30] ibid. See also Shannon Kathleen O'Byrne and Ronnie Cohen, 'The Contractual Principle of Good Faith and the Duty of Honesty in *Bhasin v Hrynew*' (2015) 53(1) Alberta Law Review 1, 21–33; Pargendler (n 3) 151; Nicholas Reynolds, 'Two Views of the Cathedral: Civilian Approaches, Reasonable Expectations, and the Puzzle of Good Faith's Past and Future' (2019) 44(2) Queen's Law Journal 388, 392; Markovits (n 27) 48; Giliker (n 9) 176; DiMatteo (n 1) 28, 42; James Gordley, *Foundations of American Contract Law* (Oxford University Press 2023) 179.

[31] This is exemplified by the case *Kirke La Shelle Co. v Paul Armstrong Co.*, 188 N.E. 163, 167 (N.Y. 1933). See Steven J Burton, 'History and Theory of Good Faith Performance in the United States' in Larry A DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford University Press 2016) 210–4; Howard Hunter, 'The Implied Obligation of Good Faith' in Michael Furmston (ed) *The Future of the Law of Contract* (Informa Law 2020) 6–7; Markovits (n 27) 47; Halberda (n 8) 245.

[32] See Burton (n 31) 211; McKendrick (n 28) 198; Ewan McKendrick, 'Reply to Steven J Burton, "History and Theory of Good Faith Performance in the United States' Law" in Larry A DiMatteo, Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford University Press 2016) 223; Hunter (n 31) 7–8; Markovits (n 27) 47; Giliker (n 9) 176; Cartwright (n 9) 28; Halberda (n 8) 236, 250–1.

[33] American Law Institute, National Conference of Commissioners on Uniform State Laws, Uniform Commercial Code: Official Draft. Text and Comments Edition (1952).

[34] American Law Institute, *Restatement (Second) of Contracts* (1981).

[35] UCC § 1-304 (formerly § 1-203).

[36] American Law Institute, *Restatement (Second) of Contracts* (1981) § 205.

[37] Charles L Knapp and others, *Problems in Contract Law: Cases and Materials* (Aspen Publishing 2023) 497; Mark J Loewenstein, 'Reflections on the Implied Covenant of Good Faith and Fair Dealing under Delaware Law: The Case of Sandbagging' (2024) 48 Delaware Journal of Corporate Law 1, 2.

[38] On to what extent the UCC drew on the German law provisions embracing good faith, see Paul MacMahon, 'Good Faith and Fair Dealing as an Underenforced Legal Norm' (2015) 99(6)

a general obligation of good faith was intended to form a part of a broader programme aimed at reforming the general law of contract, so as to align commercial law with dynamics and realities of transactional practice.[39] In its current version, shaped by the 2001 revision, the UCC generally defines good faith as honesty in fact and the observance of reasonable commercial standards of fair dealing.[40] As such, the requirements for judging a party's good faith are twofold and embrace subjective standards of acting honestly and, complementarily, objective standards of reasonableness.[41] This expanded definition under the UCC follows what marked the *Restatement*'s authoritative approach.[42] Without limiting the scope of application of the formula, it conceptualises good faith performance or enforcement of a contract in terms of faithfulness to an agreed common purpose and consistency with the justified expectations of the other party, but at the same time – of community standards of decency, fairness or reasonableness.[43] A non-binding authority, the *Restatement* represents the consensus views of the common law systems of the different states,[44] and has considerably impacted American judge-made law.[45] There is not, however, a unanimous understanding of good faith throughout the states.[46] Along with the UCC, the *Restatement* provided a persuasive perspective on good faith which has been contemplated in the comparative surveys in other common law jurisdictions.

The influence of United States law is evident in the development of good faith in Australia.[47] Central to the emergence of good faith doctrine has been a series of cases initiated in the early 1990s in New South Wales[48] where the position under

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Minnesota Law Review 2051, 2060; Pargendler (n 3) 151; Reynolds (n 30) 392, 395–6; Catherine Pedamon and Radosveta Vassileva, 'The "Duty to Cooperate" in English and French Contract Law: One Channel, Two Distinct Views' (2019) 14(1) Journal of Comparative Law 1.

[39] MacMahon (n 38) 2060; Burton (n 31) 213.

[40] UCC § 1-201(b)(20).

[41] Jay M Feinman, 'Good Faith and Reasonable Expectations' (2014) 67(3) Arkansas Law Review 525, 551–2; Knapp and others (n 37) 497; Halberda (n 8) 251.

[42] Halberda (n 8) 251.

[43] American Law Institute, *Restatement (Second) of Contracts* (1981) § 205 cmt (a).

[44] Hunter (n 31) 8.

[45] Halberda (n 8) 251.

[46] See Hunter (n 31) 9.

[47] Elisabeth Peden, 'Contractual Good Faith: Can Australia Benefit From the American Experience?' (2003) 15(2) Bond Law Review 186; John W Carter, 'Good Faith in Contract: Why Australian Law is Incoherent' (Legal Studies Research Paper No 14/38, Sydney Law School, March 2014) 6; Halberda (n 8) 236, 250–3.

[48] *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 ('*Renard*'); *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91 ('*Hughes Bros*'); *Burger King Corp v Hungary Jack's Pty Ltd* [2001] NSWCA 187; *Overlook Management BV v Foxtel Management Pty Ltd* [2002] NSWSC 16;

the UCC and the *Restatement* has been explicitly referred to.[49] Importantly, what distinguishes New South Wales from other Australian states is that it reformed its judicial system, by providing for the concurrent administration of law and equity, as recently as in the 1970s.[50] It is argued that while there continue to be doubts and controversies, and the legal settings are ever-changing across states, the concept of good faith as the underlying principle of contract law appears to have been acknowledged in New South Wales.[51] However, not only is the authority of the much-referenced cases, *Renard*[52] and *Hughes Bros*,[53] called into question, but also the limited circumstances under which New South Wales courts have recognised an obligation of good faith – specifically, where contractual discretion was involved, cast doubts on whether the position is already settled.[54] Although questionable, the first and leading of the series of formative cases, *Renard*[55] is considered to have originated the idea of recognising good faith in contracts through construction techniques, yet without concretising it in terms of the distinction between implication in fact and in law.[56] This latter question remains problematic and open to debate, as it has not been clarified by the High Court of Australia in several cases where the good faith-related arguments were invoked.[57] In *Royal Botanic*

Adventure World Travel Pty Limited v Newsom [2014] NSWCA 174; *Bartlett v ANZ Banking Group Limited* [2016] NSWCA 30. See Hunter (n 31) 16; Halberda (n 8) 242, 247.

[49] Hunter (n 31) 16; Halberda (n 8) 251–2.

[50] Halberda (n 8) 242. See also Turner (n 16) 1.

[51] Halberda (n 8) 243, 253–4. See also Robert McDougall, 'The Implied Duty of Good Faith in Australian Contract Law' [2006] 2 New South Wales Judicial Scholarship 2; Tyrone M Carlin, 'The Rise (and Fall?) of Implied Duties of Good Faith in Contractual Performance in Australia' (2002) 25(1) UNSW Law Journal 99, 123; Hunter (n 31) 16–18.

[52] *Renard* (n 48).

[53] *Hughes Bros* (n 48).

[54] Carlin (n 51) 103–12. See also Howard Munro, 'The "Good Faith" Controversy in Australian Commercial Law: A Survey of the Spectrum of Academic Legal Opinion' (2009) 28(1) The University of Queensland Law Journal 167, 167, 173.

[55] *Renard* (n 48).

[56] Marcel Gordon, 'Discreet Digression: The Recent Evolution of the Implied Duty of Good Faith' (2007) 19(2) Bond Law Review 26; Jessica Viven-Wilksch, 'Good Faith in Contracts: Australia at the Crossroads' (2019) 1 Journal of Commonwealth Law 273, 280, 314; Raczynska (8) 73; Halberda (n 8) 242; Alex Wan and Peng Guo, *Good Faith Obligation: A Comparative Perspective* (Springer Singapore 2024) 5, 97–117. See also Ryan Catterwell, *A Unified Approach to Contract Interpretation* (Hart Publishing 2020) 211.

[57] *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 186 ALR 289 ('*Royal Botanic Gardens*'); *Commonwealth Bank of Australia v Barker* [2014] HCA 32. See Carlin (n 51) 110–11, 120–1; Warren Swain, '"The Steaming Lungs of a Pigeon": Predicting the Direction of Australian Contract Law in the Next 25 Years' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing 2017) 96; Viven-Wilksch (n 56) 284–5, 314; Raczynska (8) 73; Viven-Wilksch (n 4) 109; David Christie, Séverine Saintier

Gardens,[58] while admitting a growing tendency to imply into private contractual dealings a covenant of good faith and fair dealing,[59] the Court's position was to emphasise the absence of a definite statement on 'whether both in performing obligations and exercising rights under a contract, all parties owe to one another a duty of good faith; and, the extent to which, if such were to be the law, a duty of good faith might deny a party an opportunistic or commercial exercise of an otherwise lawful commercial right'.[60] A significant reason why a reception of a general principle of good faith is viewed with scepticism is that arguably the doctrines thus far developed by courts do incorporate various aspects of such obligations.[61] These uncertainties notwithstanding, the Australian case law is claimed to reflect and adhere to a distinct 'implied duty model' of good faith, yet the courts proceed circumspectly in imposing by implication such duties on the parties.[62] There are instances of adjudication involving good faith which are purported to evince its acknowledgement in Australian contract law.[63] One such case is *Paciocco v Australia and New Zealand Banking Group Ltd* ('*Paciocco*'),[64] where – while admitting the ongoing scepticism of the judiciary – the Federal Court of Australia resorted to good faith declaring it to be 'a conception that has been recognised as an implication or feature of Australian contract law attending the performance of the bargain and its construction and implied content'[65] as well as an exemplification of 'the presence of values in the common law'.[66] Additionally, the usual content of the obligation of good faith was summarised as 'an obligation to act honestly and with a fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably

and Jessica Viven-Wilksch, 'Industry-Led Standards, Relational Contracts and Good Faith: Are the UK and Australia Setting the Pace in (Construction) Contract Law?' (2022) 43(2) Liverpool Law Review 287, 289; Anthony Davidson Gray, 'Relational Contract Theory, the Relevance of Actual Performance in Contractual Interpretation and Its Application to Employment Contracts in the United Kingdom and Australia' (2023) 52(2–3) Common Law World Review 61, 77; Halberda (n 8) 253–4.

[58] *Royal Botanic Gardens* (n 57).

[59] ibid [87].

[60] ibid [156]. See also, more recently, *Brad Teal Pty Ltd v Evr Group Pty Ltd* [2024] VCC 485 [136]; *Votua Pty Ltd v Lineal Developments Pty Ltd* [2024] VCC 1699 [523], stating that 'the High Court is yet to recognise a universal implied duty of good faith in contract performance'.

[61] Susan Kiefel, 'Good Faith in Contractual Performance': A background paper for the Judicial Colloquium, Hong Kong, September 2015, <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/kiefelj-2015-09.pdf> accessed 2 July 2024.

[62] Raczynska (8) 73.

[63] See Chen-Wishart and Dixon (n 27) 194.

[64] [2015] FCAFC 50, (2015) 236 FCR 199.

[65] ibid [287].

[66] ibid.

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'.[67] Significantly, the conceptualisation of good faith in *Paciocco* was relied upon by the English High Court in a recent influential decision on the implication of good faith terms.[68] Also worthy of note is the fact that good faith is presumed to constantly underlie the discussions on the duties to co-operate and exercise discretionary rights in a reasonable manner, which have been enforced by Australian courts.[69] These exist as default rules of law implemented, in most cases, as implied terms in law or rules of construction.[70] What informs such duties and standards of co-operation in contract law is the need to protect the performance interests of the parties.[71] Apart from being implemented through the judge-made law – which apparently reflects a rather conservative approach to contract,[72] the notion of good faith has also been markedly introduced in Australian law over the last decade through targeted industry-specific statutory regulation.[73] A duty on parties to act in good faith has been expressly included in a number of codes of conduct, both mandatory and voluntary, legislated by the Federal Australian Parliament to regulate the operation and trading practices of particular industries.[74] Under the first in a set of mandatory industry codes prescribed under the Competition and Consumer Act 2010 (Cth)[75] – the Franchising Code of Conduct enacted in 2014,[76] the obligation of good faith, conceived within the meaning of the unwritten law,[77] comprises the requirements to act honestly and not arbitrarily, and to co-operate to achieve the purposes of the agreement.[78] Subsequent industry codes have also been designed to promote and support good

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[67] ibid [288]. See also Christie, Saintier and Viven-Wilksch (n 57) 302; Halberda (n 8) 243–4.

[68] *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Kent* [2018] EWHC 333 (Comm) ('*Al Nehayan*') [175]. See Paul S Davies, 'The Basis of Contractual Duties of Good Faith' (2019) 1 Journal of Commonwealth Law 1, 11; Christie, Saintier and Viven-Wilksch (n 57) 302–3; Halberda (n 8) 244; Leggatt (n 27) 461, 471.

[69] Viven-Wilksch (n 56) 285–6. See also Ryan Catterwell, 'Co-Operation and Prevention in Contract Law' (2023) 47(1) Melbourne University Law Review 112, 132.

[70] Catterwell (n 69) 115, 152.

[71] ibid 115.

[72] Viven-Wilksch (n 4) 119–120.

[73] ibid 120–3. See also Christie, Saintier and Viven-Wilksch (n 57) 291–2.

[74] Viven-Wilksch (n 4) 97, 120–1. See also Andrew Terry, 'The Unusual Place of Industry Codes of Conduct in the Regulatory Framework' (2022) 45(2) UNSW Law Journal 649, 664.

[75] Competition and Consumer Act 2010 (Cth) (Australia). See Viven-Wilksch (n 4) 121.

[76] Competition and Consumer (Industry Codes—Franchising) Regulation 2014 (Cth) (Australia).

[77] ibid cl 6(1).

[78] ibid cl 6(3). See also Robert W Emerson, 'The Faithless Franchisor: Rethinking Good Faith in Franchising' (2022) 24(2) University of Pennsylvania Journal of Business Law 411, 470–1; Viven-Wilksch (n 4) 121.

faith as an enforceable obligation, foregrounding business integrity, ethics and the relationships between the parties.[79] Arguably, this Australian legislative approach is indicative of the recognition of implicit dimensions of contracting, and notably of its relational qualities.[80] What is referred to, and substantially drawn upon here[81] is the tenets of the American relational theory of contracts[82] which has recently had – as will be exposed – a pivotal, although not uniform,[83] influence over contract law in a number of common law jurisdictions and beyond.

Likewise, comparative arguments have had a prominent influence on how the Canadian common law approach to good faith recently evolved. Notably, American law, along with the civil law of Quebec, is among the major points of reference brought up in the course of the development of good faith in Canada.[84] The advancement in case law was preceded by the publication of two subsequent reports by the Ontario Law Reform Commission,[85] both invoking the American authorities and recommending the recognition of a doctrine of good faith in the performance and enforcement of contracts in line with the position under the *Restatement (Second) of Contract*.[86] Most consequentially, in 2014 the Supreme Court of Canada in *Bhasin v Hrynew* (‘*Bhasin*’)[87] adopted a principled approach to good faith which is argued to have innovated the common law account of contracting.[88] In departing

[79] Viven-Wilksch (n 4) 121.

[80] ibid 97, 120–1, 123. See also Christie, Saintier and Viven-Wilksch (n 57) 292.

[81] See Viven-Wilksch (n 4) 99.

[82] For the origins of the relational theory of contract, see especially Stewart Macaulay, ‘Non-contractual Relations in Business: A Preliminary Study’ (1963) 28(1) American Sociological Review 55; Ian R Macneil, ‘The Many Futures of Contracts’ (1974) 47 Southern California Law Review 691; Ian R Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* (Yale University Press 1980). See also David Campbell (ed), *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell 2001); David Campbell, Linda Mulcahy and Sally Wheeler (eds), *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (Palgrave Macmillan 2013); David Campbell (ed), *Stewart Macaulay: Selected Works* (Springer 2020); Campbell (n 27) 47–50; Jonathan Morgan, ‘Professor Ian Roderick Macneil (1929–2010)’ in James Goudkamp and Donal Nolan (eds), *Scholars of Contract Law* (Hart Publishing 2022); DiMatteo (n 1) 308–12; Jay M Feinman, ‘Recapturing Relational Contract Theory’ (2024) Rutgers Law School Research Paper (forthcoming).

[83] See, eg, Campbell (n 27) 47–8.

[84] O’Byrne and Cohen (n 30) 21; Halberda (n 8) 251–2.

[85] Ontario Law Reform Commission, *Report on Sale of Goods* (1979) vol 1, 163–171; Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987) 165–175.

[86] See Reynolds (n 30) 392–3; Halberda (n 8) 251.

[87] [2014] SCC 71, [2014] 3 SCR 494.

[88] See Bertolini (n 20) 375–6; Reynolds (n 30) 389; Raczynska (n 8) 73–4; Stephen Waddams, ‘Good Faith in the Supreme Court of Canada’ in Michael Furmston (ed), *The Future of the Law of Contract* (Informa Law 2020); Catherine Mitchell, *Vanishing Contract Law: Common Law in the Age of Contracts* (Cambridge University Press 2022) 189; John D McCamus, ‘The Supreme Court of Canada and the Development of a Canadian Common Law of Contract’ (2022) 45(2) The

from the historical Anglo-Canadian common law's resistance to a generalised and independent doctrine of good faith performance of contracts, much of the Court's criticism regarded its not conforming to the civil law of Quebec and the majority of jurisdictions in the United States.[89] What is borne out of this course of comparative analysis in *Bhasin* is the underlying influence of the civilian approach on good faith in Anglo-Canadian law.[90] First, the reliance on the Civil Code of Quebec,[91] which has historically been based on the French Civil Code,[92] led to a civil-law-like conceptualisation of good faith as a relatively extensive doctrine of a general application.[93] Further, insofar as the argumentation in *Bhasin* drew on the American authorities, including the UCC, it is maintained that – given the German law-inspired position of the latter – the development of good faith in Canadian common law was thus indirectly informed by the civilian tradition.[94] References were also made to developments in the United Kingdom and Australia where good faith in contract performance has received increasing prominence, though without being embraced as a stand-alone doctrine.[95] Relatedly, and in parallel to the comparative surveys, of import for the reasoning in *Bhasin* were the relationalist arguments.[96] Drawing on empirical research on relational norms and expectations of commercial parties, the Canadian Supreme Court substantiated the necessity of a basic level of honesty and good faith in contractual dealings.[97] On that account, the Supreme Court in *Bhasin* was of the view that articulating a general organising principle of good faith and recognising a duty to act honestly in the performance of contractual obligations appear to be instrumental in bringing certainty and coherence to

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Manitoba Law Journal 7, 37–42; Marcus Moore, 'Developments in Contract Law: The 2020-2021 Term – Appeals to Fairness' (2022) 106 Supreme Court Law Review, 2nd Series 3, 23–5; Robert M Yalden, 'New Perspectives on Good Faith in Contractual Negotiation' (2023) 67(2) Canadian Business Law Journal 165, 181–2; Brandon Kain, *Good Faith in Canadian Contract Law*, Vol 1–2 (LexisNexis Canada 2024).

[89] *Bhasin* (n 87) [32, 41, 82]. See also Reynolds (n 30) 392, 416; Halberda (n 8) 250. For criticism, see Waddams (n 88) 37; Giliker (n 9) 184–5, 188–9.

[90] Rosalie Jukier, 'From La Beauce to Le Bayou: A Transsystemic Voyage' (2019) 12(1) Journal of Civil Law Studies 1, 30. See also Reynolds (n 30) 404. For criticism, see Waddams (n 88) 38, 47.

[91] *Civil Code of Québec*, CQLR c CCQ-1991.

[92] *Code Civil* [Civil Code] (France). See Jukier (n 90) 5–6.

[93] Bertolini (n 20) 362, 366–7, 368; Daniele Bertolini, 'Toward a Framework to Define the Outer Boundaries of Good Faith in Contractual Performance' (2021) 58(3) Alberta Law Review 573, 577; Jukier (n 28) 90–1, 98; Reynolds (n 30) 391, 394.

[94] Reynolds (n 30) 392, 395–6.

[95] *Bhasin* (n 87) [57, 58]. See Halberda (n 8) 250.

[96] *Bhasin* (n 87) [60–1]. See also Zhong Xing Tan, 'Disrupting Doctrine? Revisiting the Doctrinal Impact of Relational Contract Theory' (2019) 39(1) Legal Studies 98, 111.

[97] *Bhasin* (n 87) [60–1]. See also Tan (n 96) 111.

contract law in a way that is consistent with reasonable commercial expectations.[98] An organising principle, conceived in terms of a requirement of justice, has been perceived as an independent standard that underpins and is manifested in more specific legal doctrines governing contractual performance.[99] It is argued that by defining good faith as an organising principle thus understood, the Supreme Court circumvented the concerns connected with the implication of contract terms.[100] Instead of being thought of as an implied term, the duty of honest performance, flowing directly from the common law organising principle of good faith, was conceptualised as a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance.[101] Designed to operate irrespective of the intentions of the parties, this non-excludable duty is analogised with equitable doctrines which impose limits on the freedom of contract.[102] Such an approach has been summarised as an instantiation of a macro-level intervention whereby a new and distinct foundational principle in contract is introduced, capable of originating a novel common law duty of honest contractual performance.[103] On these grounds, the judgement in *Bhasin* is considered to exemplify a type of intervention to accommodate relational norms through reconstruction in common law, referred to as 'reconstructive relationalism'.[104] As indicated in the Supreme Court's pronouncement, the organising principle of good faith requires that in performing the contract a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner.[105] Therefore, the application of this standard entails a highly context-specific perspective on honesty and reasonableness in performance, but at the same time warrants consistency with fundamental commitments of the common law of contract, with its focus largely on the freedom of contracting parties to pursue their individual self-interest.[106] It was thus ascertained that the proposed approach to good faith does not interfere with the pursuit of self-interest, since a contracting party can prioritise their own

[98] *Bhasin* (n 87) [62].

[99] ibid [63–4]. See also Mitchell (n 88) 189; Kain (n 88) Vol 1 ch 2, Vol 2 ch 6.

[100] Gray (n 57) 77. See also Raczynska (8) 73.

[101] *Bhasin* (n 87) [74–5]. This approach to good faith duty has been uphold by the Supreme Court of Canada in *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District* [2021] SCC 7 ('*Wastech*') [91, 94]. See also Mitchell (n 88) 191; Daniele Bertolini, 'Unpacking Entire Agreement Clauses: On the (Elusive) Search for Contractually Induced Formalism in Contractual Adjudication' (2021) 66(3) McGill Law Journal 465, 489.

[102] *Bhasin* (n 87) [74–5]. See also Waddams (n 88) 29, 36, 39; Bertolini (n 101) 496; Giliker (n 9) 186–7.

[103] Tan (n 96) 111. See also Viven-Wilksch (n 4) 101.

[104] Tan (n 96) 111. See also Christie, Saintier and Viven-Wilksch (n 57) 305; Viven-Wilksch (n 4) 101.

[105] *Bhasin* (n 87) [65]. See also Mitchell (n 88) 190.

[106] *Bhasin* (n 87) [69–70]. See also Giliker (n 9) 185.

interests, as long as they do not infringe the basic duty of honesty.[107] The centrality of the general organising principle of good faith established in *Bhasin*, and likewise of the good faith doctrines deriving therefrom, was recently confirmed and expanded – not without criticism[108] – by the Supreme Court of Canada in *CM Callow Inc v Zollinger* ('*Callow*')[109] and in *Wastech*.[110] Both these decisions, marked by tensions between the majority and the minority reasoning, are viewed as seeking to explicate the persisting legal uncertainties of the applicability of the *Bhasin* approach.[111] In clarifying the good faith doctrine of the duty of honest performance, the Supreme Court in *Callow* endorsed the expansion of the application of the duty of honesty 'to the performance of all contracts and, by extension, to all contractual obligations and rights'.[112] While it has been asserted by the Court that the very nature of such a duty, as a contract law doctrine, 'gives rise to the requirement of a nexus with the contractual relationship',[113] which thereby defines its scope and averts commercial uncertainty, this conceptualisation is criticised as incomplete.[114] The *Wastech* judgment sought to define the content and the source of the general duty to exercise contractual discretionary powers in good faith – by spelling out that such a duty 'will be breached where the exercise of discretion is unreasonable, in the sense that it is unconnected to the purposes for which the discretion was granted',[115] and that it 'is not an implied term, but a general doctrine of contract law that operates irrespective of the intentions of the parties' and, 'like the duty of honest performance', 'should be understood to be obligatory in all contracts'.[116] Yet, thus construed, the test adopted in *Wastech* has raised doubts regarding the extent of the court's power to police the exercise of contractual discretion.[117]

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[107] See Mitchell (n 88) 190.

[108] See Vanessa Di Feo, '*CM Callow v Zollinger, Reconceptualized through the Tort of Negligent Misrepresentation' (*2022) 27 Appeal 103; Krish Maharaj, 'Good Faith Not Good for Consistency: Irreconcilable Results in *Wastech* and *Callow*' (2022) 55(2) UBC Law Review 511; Anna SP Wong, 'Duty of Honest Performance: A Tort Dressed in Contract Clothing' (2022) 100(1) Canadian Bar Review 95.

[109] [2020] SCC 45. See also Bertolini (n 101) 469, 496; Bertolini (n 93) 575–6, 586–90, 612–14; Giliker (n 9) 187–8; Mitchell (n 88) 189; Moore (n 88) 25–34; Halberda (n 8) 245; Yalden (n 88) 182.

[110] *Wastech* (n 101). See also Bertolini (n 101) 469, 496; Bertolini (n 93) 575–6, 580–86, 608–12; Vanessa Di Feo, 'You've Got to Have (Good) Faith: Good Faith's Trajectory in Anglo-Canadian Contract Law Post-*Wastech* and the Potential for a Duty to Renegotiate' (2022) 45(1) Dalhousie Law Journal 35; Giliker (n 9) 189–90; McCamus (n 88) 42–3; Mitchell (n 88) 190–1; Moore (n 88) 34–48; Halberda (n 8) 250, 253; Yalden (n 88) 183.

[111] Bertolini (n 93) 576. See also Giliker (n 9) 187–90.

[112] *Callow* (n 109) [53]. See Bertolini (n 93) 575.

[113] *Callow* (n 109) [66].

[114] Bertolini (n 93) 575. Di Feo (n 110) 19; Giliker (n 9) 188–9.

[115] *Wastech* (n 101) [88].

[116] ibid [94].

[117] Bertolini (n 93) 576. See also Di Feo (n 110) 19, 25; Giliker (n 9) 189–90.

While England and Wales are among the common law jurisdictions recently marked by an increased interest in and a debate over good faith in contracting, the direction of judicial developments in English law contrasts with how this question has been addressed in other Commonwealth laws, and in American law.[118] What is apparent is an attempt, yet originating in and confined to lower courts, to recognise good faith in contractual performance as an implied term in relational contracts.[119] Considered a landmark decision[120] of prime importance to this line of case law is *Yam Seng Pte Limited v International Trade Corporation Limited* ('*Yam Seng*').[121] Contrary to the objections inherent in English common law towards a doctrine of good faith[122] and the persistent leaning to piecemeal solutions in response to unfairness in contract,[123] *Yam Seng* argued for a refined approach based on a broad comparative perspective.[124] Not only were other common law jurisdictions – such as the United States,[125] Canada,[126] Australia,[127] and New Zealand[128] referenced, but the focus also was on mixed jurisdictions – exemplified by Scottish law,[129] and on civil law systems, with a direct resort to the Roman law experience.[130] Furthermore, the latter were pointed to as the source of the penetration of good faith requirements into English law through the European Union legislation.[131] These comparative arguments were complemented by a recourse to the relational contract theory, and mostly to its foundational

[118] See Mitchell (n 88) 189–192; Cartwright (n 9) 34; Leggatt (n 27) 455.

[119] Mitchell (n 88) 177–8, 190–2; Halberda (n 8) 238–9; Leggatt (n 27) 455–6.

[120] See Tan (n 96) 110; Cartwright (n 9) 34; David Campbell, 'Plus ça change, plus c'est la même chose: *Mackie Motors* v *RCI* and *Baird Textiles* v *Marks and Spencer*' (2024) 87(4) Modern Law Review 1010, 1010– 11; Gray (n 20) 104; Halberda (n 8) 238.

[121] [2013] EWHC 111 (QB).

[122] See generally Giliker (n 9) 178; Cartwright (n 9) 34; Gray (n 20) 93–7; Halberda (n 8) 238–9; Leggatt (n 27) 455. See also Gunther Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies' (1998) 61(1) Modern Law Review 11.

[123] *Yam Seng* (n 121) [121–4], citing Bingham LJ (as he then was) in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 [439]; *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 [27]. See also Chen-Wishart and Dixon (n 27) 187, 195; Raczynska (8) 66; Cartwright (n 9) 32; Gray (n 20) 113; Halberda (n 8) 237–8, 254.

[124] Halberda (n 8) 250. See also Leggatt (n 27) 464–7.

[125] *Yam Seng* (n 121) [125].

[126] ibid [126].

[127] ibid [127–8].

[128] ibid [129].

[129] ibid [130].

[130] ibid [124–5]. See also Jukier (n 28) 86; Shy Jackson, 'Good Faith under English Law: Evolution or Revolution?' (2020) 55 Derecho & Sociedad 33, 34; Halberda (n 8) 250, 252–3.

[131] *Yam Seng* (n 121) [124]. As well, not without bearing were the pressures, at the time of the judgement, towards a more unified European law of contract in which the good faith principle plays a significant role. See ibid; Giliker (n 9) 178–9; Cartwright (n 12) 11, 68; Cartwright (n 9) 27; Halberda (n 8) 252; Gray (n 20) 131; Perry (n 26) 42.

part emphasising the weight of social context to understanding contractual exchanges.[132] The reasoning in *Yam Seng* was centred on identifying implicit shared values and norms of behaviour which compose, along with matters of fact known to the parties, the relevant background against which contracts are made.[133] These were exemplified by an expectation of honesty, a quality essential to commerce, which is highly trust-dependent.[134] Observance of such standards of commercial dealing was defined as one of two principal aspects of good faith, in addition to fidelity to the parties' bargain.[135] Still, the requirements of good faith were characterised in terms of context sensitivity.[136] Consistent with this view is the *Yam Seng*'s finding that an implied duty to perform in good faith would arise in relational contracts – ones involving a longer term relationship between the parties which they make a substantial commitment, and requiring a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, while at the same time entailing expectations of loyalty implicit in the parties' understanding and necessary to give business efficacy to the arrangements.[137] The judicial engagement with the implied term of good faith in later cases, including *Al Nehayan*,[138] *Bates v Post Office Ltd No 3*[139] and *Essex County Council v UBB Waste (Essex) Ltd*[140] tended to further articulate the concept of relational contracts.[141] However, to the extent that the approach advanced in *Yam Seng* is found to be irreconcilable with the existing doctrines of the classical-style English contract law, it proves to be controversial.[142] Problematically, the impact of the implied term is sought to be hampered by the judiciary's readiness to subsume it within the traditional law, whereby the operation of the good faith obligation is exposed to restraints.[143] Also, an approach argued for in academia is that the development of good faith be limited and consistent with English law model of contract, without imposing positive duties on parties but rather giving effect to their own intentions through implied terms.[144] This, in turn,

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[132] *Yam Seng* (n 121) [142]; Leggatt (n 27) 460. See also Mitchell (n 88) 181–2; Perry (n 26) 7, 42–3.

[133] *Yam Seng* (n 121) [134].

[134] ibid [135]. See also Mitchell (n 88) 182.

[135] *Yam Seng* (n 121) [138–40]. See also Raczynska (8) 78–9.

[136] *Yam Seng* (n 121) [141].

[137] ibid [142]. See also Giliker (n 9) 182–3; Cartwright (n 9) 35, 37; Leggatt (n 27) 456–60.

[138] *Al Nehayan* (n 68).

[139] [2019] EWHC 606 (QB), [2019] All ER (D) 100.

[140] [2020] EWHC 1581 (TCC).

[141] See Raczynska (n 8) 82–3; Mitchell (n 88) 182–3, 185–6; Viven-Wilksch (n 4) 109, 110–7; Cartwright (n 9) 34; Leggatt (n 27) 460–4.

[142] Mitchell (n 88) 183–4, 185–6, 192–3, 201. See also Raczynska (n 8) 87; Halberda (n 8) 254.

[143] For the criticism of this approach see Mitchell (n 88) 186, 189.

[144] Chen-Wishart and Dixon (n 27) 231–2; Cartwright (n 9) 37. See also Halberda (n 8) 254–5.

appears to entail minimising the significance and practical value of the concept of the relational contract as a legally recognised distinct category.[145] A relatively recent case decided by the Court of Appeal, *Mackie Motors (Brechin) Ltd* v *RCI Financial Services Ltd*,[146] addressing the category of relational contracts, allegedly exemplifies a distancing in adjudication from the understanding of good faith, and the special status of relational contractual contexts, set out in *Yam Seng*.[147] However, while legal discussion continues on the recognition of good faith and reception of relational contracts in English law, what is anticipated is that it is presumably likely to develop, through an enhanced exchange of ideas among judiciaries, along with other common law jurisdictions, mostly Australian and Canadian laws.[148] Interestingly, it is suggested to prospectively appeal for evidence not only from the latter, but also from civil law jurisdictions, such as French contract law, in the practicalities of good faith contracting under English law.[149] This argument conceivably bears relevance, given the recent enlargement of the scope of the principle of good faith under the 2016 reform of the French Civil Code.[150] More generally, what has been identified as a factor in developing and recurring to good faith in the English judiciary is the increasing interaction between civil and common law lawyers, mostly within international arbitration.[151]

III. THE EVOLVING CIVIL–COMMON LAW DIMENSION OF POLICING COMMERCIAL CONTRACTS

What is apparent from the above overview of the most recent legal developments across Commonwealth jurisdictions is a measurable and direct impact of the respective civil law-derived conceptualisations on how common law has addressed and accommodated good faith obligations in contracts. While the approaches adopted towards acknowledgement of good faith do diverge, they have concurrently referenced, and been informed by, the civilian account.

[145] Mitchell (n 88) 186. See also Viven-Wilksch (n 4) 117–9; Campbell (n 120) 1011, 1016–18.

[146] [2023] EWCA Civ 476, [2023] All ER (D) 15 (May). This decision upheld the High Court's position in *Mackie Motors (Brechin) Ltd v RCI Financial Services Ltd* [2022] EWHC 1942 (Ch), [2022] All ER(D) 40 (Aug).

[147] See Campbell (n 120) 1010–18.

[148] Halberda (n 8) 255. See also Munro (n 54) 179; Swain (n 57) 96–7.

[149] Cartwright (n 9) 28, 37.

[150] *Code Civil* [Civil Code] (France) art 1104: 'Contracts must be negotiated, formed and performed in good faith. This provision is a matter of public policy'. See Solène Rowan, *The New French Law of Contract* (Oxford University Press 2022) 33, 35–44, 51–2, 256–7.

[151] Jackson (n 130) 34, 49.

There is also, however, a broader identifiable context of the ongoing interactions between civil and common law involving the axiological rationales behind good faith duties in commercial contracting. This is arguably reflected through the parallelisms in the course and dynamics of developments in contracts between decodifying civil law systems and common law departing from its classical account of the law of contract.[152] Characteristically, the parallel processes resulting in a divergence from the two 19th-century paradigms previously in place in both legal traditions are significant for the direction of contract regulation. Whereas the decodification translates into the erosion of contract law frameworks centred on the concept of a civil code originated in the nineteenth century, the corresponding changes in common law record the disintegration of the Anglo-American general theory of contract.[153] Also, of weighty significance is the extent to which these twofold processes involve, and draw upon, the advancement in the relational theory of contract.[154]

Debated in academia since the 1970s,[155] decodification denotes a range of ongoing advancements in continental private law that undermine the authority of, and the logical-interpretive categories behind, a general reasoned systematisation of rules and principles which had been theorised in the seventeenth and eighteenth centuries, and endorsed in the ensuing major codifications of the nineteenth century.[156] It is characterised as an objectively occurring process within the sequence of stages of the development of private law.[157] While its main impact is on the structure and rank of private law norms within the codified systems, it at the same time affects jurisprudence and the practicalities of legal transactions.[158] Still, what symptomises the decodifying pressure is the decrease of the internal coherence and clarity of the code-centric laws, mostly following the rise in prominence of the extra-code special legislation, which is largely the effect of the parallel and related

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[152] Dajczak (n 11) 88–93, 101–2; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 145–8. See also Longchamps de Bérier, 'Common law' (n 11) 27, 30–32, 48.

[153] Dajczak (n 11) 88–93, 101–2; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 145–8. See also Rémy Cabrillac, 'The Codifications at the Beginning of the Twenty-First Century' in Michele Graziadei and Lihong Zhang (eds), *The Making of the Civil Codes: A Twenty-First Century Perspective* (Springer 2023) 18; Pia Letto-Vanamo, 'The European and the Transnational in Historical Perspective' in Anna Beckers and others (eds), *The Foundations of European Transnational Private Law* (Hart Publishing 2024) 169.

[154] Dajczak (n 11) 90, 93. See also Mitchell (n 88) 33.

[155] Natalino Irti, *L'età della decodificazione* (Giuffrè 1979).

[156] Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 138, 145.

[157] See ibid 138–9.

[158] ibid 137, 144–5, 147; Jan Rudnicki, 'Formal and Material Decodification of Civil Law' in Chen Su, Franciszek Longchamps de Bérier and Piotr Grzebyk (eds), *Theory and Practice of Codification: The Chinese and Polish Perspectives* (Social Sciences Academic Press 2019).

processes of Europeanisation and globalisation in private law.[159] This has a direct effect on contract law, and is conducive to unfolding the emerging perception of a contract, mostly by foregrounding a jurisprudential dimension of its nature.[160] A growing feature accentuated in commercial contexts is that contracts appear to be the object of relational thinking.[161] Such an understanding implies a revision and refinement of how to comprehend the *pacta sunt servanda* principle, whereby rather on adherence to what was promised, the focus will be on the creditor's legitimate expectations at the time of the contract.[162] Incorporating the perspective of legitimate expectations of the creditor – traceable back to the ancient discourse on contracts – currently tends to be enhanced in law-making.[163] What is anticipated, then, is to broadly appreciate a flexible, jurisprudential approach to determining the scope of contractual duties, extended beyond the confinement to the parties' promises and statutory provisions, in the judicial effort to pursue the social and economic sense of a contract.[164] Thereby, the contract law's attention is sought to be directed to the non-explicit aspect of contracting. Yet, the resort to these criteria falls outside of what has been pertinent to the nineteenth- and twentieth-century civil law codification in delimiting the contractual freedom, on the basis of the parties' arrangements being contrary to law or good morals.[165] This arguably demonstrates the gradual decline of the then originated paradigm of codification designed to warrant legal certainty.[166]

In functional terms, the crisis of the paradigm of codification in the civilian legal systems is deemed to correspond to the demise and anachronism of the nineteenth-century Anglo-Saxon dogmatic account of contract law, referred to as classical contract law and associated with legal formalism.[167] While reflecting the legal setting of the 1970s, nearly coincident with the decodification claim were

[159] Tomasz Giaro, 'Dekodyfikacja.: Uwagi historyczno-teoretyczne' in Franciszek Longchamps de Bérier (ed), *Dekodyfikacja prawa prywatnego: Szkice do portretu* (Wydawnictwo Sejmowe 2017) 29–30; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 138–9, 144; Rudnicki (n 158) 127–8; Cabrillac (n 153) 18; Aleksander Grebieniow and Jan Rudnicki, 'O postępach dekodyfikacji prawa cywilnego w Polsce w 2023 r. – trzy przykłady legislacyjne' [2024] 2 Forum Prawnicze 3; Letto-Vanamo (n 153) 169.

[160] Dajczak (n 11) 101; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 145.

[161] Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 145.

[162] See Dajczak (n 11) 89–90, 101.

[163] ibid 93, 100. This is illustrated by *Code Civil* [Civil Code] (France) art 1166. See also Rowan (n 150) 108.

[164] Dajczak (n 11) 100–1. See also Wojciech Dajczak, 'Europejska tradycja prawna – od klasyfikacji przez kodyfikację do ograniczeń i niepewności w typologii umów' in Franciszek Longchamps de Bérier (ed), *Dekodyfikacja prawa prywatnego w europejskiej tradycji prawnej* (Wydawnictwo Uniwersytetu Jagiellońskiego 2019) 95.

[165] Dajczak (n 11) 101.

[166] ibid.

[167] ibid 89, 101; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 145.

the arguments contending the impracticality of the American general theory of contract.[168] The theory – likewise intended to inform a universal, coherent and rational system of principles, rules and concepts applicable through formal and deductive modes of legal reasoning – had envisioned what is apprehended as 'a surrogate for codification'.[169] Also, its crucial premises were commitment to party autonomy and freedom of contract, along with the emphasis on the parties' individual self-interest and economic rationality.[170] The major criticism of the then developed classical liberal account of contract law was the failure of its axioms about the centrality of the terms of the parties' agreement and the prominence of the doctrine of consideration.[171] These were questioned in view of the twentieth-century developments in the law of contract in common law jurisdictions embracing modern equitable doctrines, such as promissory estoppel, unconscionability and good faith.[172] The supplantation of the classical contract law rules by more realistic counter-norms developed into its 'neo-classical' form.[173] Yet, the key conceptual framework which has been evolved over the past decades in opposition to the classical autonomy-oriented contract law is the relational theory of contract.[174] It disputed the traditional model of contract conceptualised as an abstract, self-interested transaction, isolated from its actual social context and disregarding the parties' expectations not expressed in their agreement.[175] As an alternative, the relational theory argued for a broad normative account of contract, with the focus on transactional dynamics instead of on a static apprehension of an objectivised content of the parties' promises.[176] Instrumental to this is due regard to the socially-embedded context of implicit expectations of the parties, as well as the pursuit of the integrity of relations and minimisation of conflicts.[177] Importantly, the relationalist arguments tended to impugn the classical model's commitment to notional certainty and predictability of contract law as a means

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[168] Grant Gilmore, *The Death of Contract* (Ohio University Press 1974).

[169] ibid 101–2; Dajczak (n 11) 88–9. See also Mitchell (n 88) 30–1.

[170] See Mitchell (n 88) 30–1; DiMatteo (n 1) 248–266.

[171] Dajczak (n 11) 87–9; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 145. See also Mitchell (n 88) 32.

[172] See Carlin (n 51) 99; Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Oxford University Press 2015) 74; DiMatteo (n 1) 267, 308, 311.

[173] Mitchell (n 88) 39–40, 51; DiMatteo (n 1) 308.

[174] Dajczak (n 11) 90–3; Campbell (n 27) 48, 60; Giliker (n 9) 181; Morgan (n 82) 295; Mitchell (n 88) 6, 33, 38–46, 192; DiMatteo (n 1) 308–12, 353. See also Jonathan Morgan, 'Contract Law as Regulation: Relational and Formalist Approaches' in Andrew Johnston and Lorraine Talbot (eds), *Great Debates in Commercial and Corporate Law* (Red Globe Press 2020) 11–20.

[175] Dajczak (n 11) 90–1; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 146; Ainslie (n 24) 35; Mitchell (n 88) 38–9.

[176] Dajczak (n 11) 91–2; Mitchell (n 88) 38.

[177] Dajczak (n 11) 91–2, 100–1; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 146–7. See also Ainslie (n 24) 34–5; Giliker (n 9) 181–2; Mitchell (n 88) 33, 38; DiMatteo (n 1) 310.

for contract planning in commercial contexts.[178] Endorsing the perception of contracts as instruments of future planning entailed that under the classical law of contract the extent of contractual liability was circumscribed by agreement.[179] By contrast, the relational theory emphasised the need for a flexible and dynamic scheme of extending contractual liability so as to embrace the instances of violation of duties not arising from the parties' promises.[180] While there is scepticism over an overarching application of the relational approach as a general theory of contract, it plausibly provides values and norms which neo-classical contract law fails to capture.[181] Good faith is among the doctrines in which contract law's relational elements have been acknowledged by the American legal scholarship.[182] Still, it should be noted that the relational contract theory has fallen subject to critiques of the economic analysis of law approach, most of which follow from neo-formalism – a line of scholarship arguing for a strict system of formalist interpretation in business contracts, devoid of equitable adjustments.[183] This is substantiated by a claim that the formalism of the classical contract law is vindicated by empirical studies and relational theory.[184]

Problematically, the complexity of this intertwined context of the parallel strands in civil and common law development is supposed to increase. The growing position and impact of common law in the globalising legal settings arguably contributes to compounding the process of decodification of private law in continental jurisdictions.[185] Not only is there a general trend towards Anglo-Americanisation of the law[186] and of the modes of contracting, especially of the contract drafting techniques,[187] but also consequential shifts in contract doctrines and regulation are driven by the pursuit of advantage in the competitive market for laws and international commercial dispute resolution.[188] The distinctiveness of

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[178] Mitchell (n 88) 32. See also Dajczak (n 11) 92; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 145–6.

[179] Mitchell (n 88) 30, 32. See also Dajczak (n 11) 92.

[180] Dajczak (n 11) 91–2.

[181] DiMatteo (n 1) 311.

[182] ibid. See also Mitchell (n 88) 48–9.

[183] Mitchell (n 88) 48; Morgan (n 174) 11; DiMatteo (n 1) 303–4, 308–9.

[184] Mitchell (n 88) 48.

[185] Longchamps de Bérier, 'Common law' (n 11) 27, 36–42, 49.

[186] ibid 26.

[187] Piotr Machnikowski, Justyna Balcarczyk and Monika Drela, *Contract Law in Poland* (Kluwer Law International 2020) 42–3; Louise Merrett and Antonia Sommerfeld, 'Incentives for Choice of Law and Forum in Commercial Contracts: Predicting the Impact of Brexit' (2020) 28(3) European Review of Private Law 627, 640; Cartwright (n 26) 74. See also Kaczorowska (n 10) 127.

[188] Mitchell (n 88) 17, 147. See also Gilles Cuniberti, 'The International Market for Contracts: The Most Attractive Contract Laws' (2014) 34(3) Northwestern Journal of International Law & Business 455; Morgan (n 174) 4; Jacek Jastrzębski, 'Breach of Contract: A Converging Concept and Its Future in Civil Law' (2023) 31(4) European Review of Private Law 671, 694.

common law in these contexts affects the way in which civilian legal systems tend to be structured. This is exemplified by the recent 2016 reform of the French Civil Code, with the underlying objective being to render French contract law more attractive internationally and competitive with common law regimes.[189] In an effort to accommodate the international business, and thereby prove superior to the commercially-oriented common law paradigm,[190] the French reform sought to simultaneously endorse the inherent core values of substantive fairness and balanced solutions.[191] An instantiation of the enhanced powers for the court intervention to rebalance the contract is the reinforcement of and prominence attached to the principle of good faith under the modernised French Civil Code.[192] However, whereas lacking a consistent approach to the competing values of freedom of contract, transactional certainty, and the promotion of fairness, the reform is argued to have resulted in an internal incoherency and major uncertainties.[193]

Concurrently, the insights into the nature and consequences of the process of decodification in civilian systems can presumably inform arguments in the controversy surrounding the scope for contract codification in common law jurisdictions. One relatively recent and debatable example of such an initiative is the reform proposal contemplated by the Australian Commonwealth Attorney--General's Department in the 2012 Discussion Paper.[194] Interestingly, among the principal drivers of the contract law reform covered by the Paper, importance was

[189] Rowan (n 150) 4–8, 258; Solène Rowan, 'The 2016 Reform of French Contract Law: Some Recent Developments' (2025) Cambridge Yearbook of European Legal Studies 1. See also Bénédicte Fauvarque-Cosson, 'National Reforms: New Instruments Towards Converging Rules within Europe? The Example of the French Contract Law Reform (2016)' in Francisco de Elizalde (ed), *Uniform Rules for European Contract Law? A Critical Assessment* (Hart Publishing 2018) 108, 113.

[190] In view of these objectives of the reform, much criticism rests with its failure to adequately converge with the distinctive attributes of common law – such as transactional certainty and predictability, the degree of party autonomy, minimal judicial intervention and the absence of a general institutional empowerment to undermine contractual terms based on moral open-ended standards. See Rowan (n 150) 258. While the international competition with common law jurisdictions was among the major rationales behind the reform, of significance were also the references to uniform contract law instruments, including the Principles of European Contract Law (PECL) and the UNIDROIT Principles of International Commercial Contracts (2010). See ibid 20, 51–2, 260–1.

[191] ibid 256–9.

[192] ibid 256–7.

[193] ibid 257–9. See also Solène Rowan, 'The Reform of French Contract Law: The Struggle for Coherency' in TT Arvind and Jenny Steele (eds), *Contract Law and the Legislature: Autonomy, Expectations, and the Making of Legal Doctrine* (Hart Publishing 2020) 234–6.

[194] Attorney-General's Department (Cth), *Improving Australia's Law and Justice Framework: A Discussion Paper Exploring the Scope for Reforming Australian Contract Law* 2012. See Luke Nottage, 'The Government's Proposed Review of Australia's Contract Law: An Interim Positive Response' in Mary Keyes and Therese Wilson (eds), *Codifying Contract Law: International and Consumer Law Perspectives* (Routledge 2014); Luca Siliquini-Cinelli, 'Taking (Legal) Traditions Seriously, or Why Australian Contract Law Should Not Be Codified: An Unconventional Inquiry'

attached to elasticity as a means to support the operation of relational contracts by the use of flexible, gap-filling concepts like good faith.[195] Also, there has been a renewed interest in codifying English contract law, coinciding with the increase in formalism in contract law reasoning.[196]

Still, while not pretending to be conclusive,[197] parallelising the critical directions of the paradigm reorientation in contract laws in both legal traditions reveals a crucial quality of the emerging legal frameworks: the growing weight of the jurisprudential component of contract law.[198] This further requires a prospective attention to the manner of argumentation and interpretive exercise in contracts, with a view to proportionate the axiology of legal certainty and substantive fairness within the ambit of the law of contract.[199] Whereas the common law-specific case-by-case approach appears to be more apt to conform to these jurisprudential qualities, the civilian jurisdictions are all the more expected to assimilate the premises of the ongoing process of decodification in the attempt to facilitate the operation of contract law.[200] One of the prognostications related to the decodifying pressure is the increased role of general clauses in contract law, along with the quest for objectivised methods of ascertaining and substantiating values that are intrinsic to contracts.[201]

IV. THE IMPLICATIONS OF THE JURISPRUDENTIALLY ORIENTED PARADIGM FOR GOOD FAITH CONTRACTING IN CIVIL AND COMMON LAW

The engagement with the analogies drawn between the systemic changes ongoing in civil law and in common law is suggestive of an emphasis on value-

(2015) 34(1) University of Queensland Law Journal 99; John Eldridge, 'Contract Codification: Cautionary Lessons from Australia' (2019) 23(2) The Edinburgh Law Review 204.

[195] See Nottage (n 194) 133; Eldridge (n 194) 216.

[196] Mitchell (n 88) 18. See also Eldridge (n 194) 205, 223; Steiner (n 14) 35–6; 30, 39.

[197] See Dajczak (n 11) 102.

[198] ibid 100–2; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 144–8.

[199] See Dajczak (n 11) 101–2; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 147–8. For a relational perspective on contract interpretation, and the role for good faith in the interpretive exercise in diverse jurisdictions, see also Shida Galletti, 'Contract Interpretation and Relational Contract Theory: A Comparison between Common Law and Civil Law Approaches' (2014) 47(2) The Comparative and International Law Journal of Southern Africa 248; Zoe Gounari, 'Developing a Relational Law of Contracts: Striking a Balance between Abstraction and Contextualism (2021) 41(2) Legal Studies 177; Viven-Wilksch (n 4) 124; Feinman (n 82) 30–1; Gray (n 20) 166–8, 173–202.

[200] Dajczak (n 11) 101; Longchamps de Bérier, 'Decodification of Contract Law' (n 11) 147–8.

[201] See Dajczak (n 164) 95.

-driven functions of the law of contract. Inasmuch as these parallel processes have foregrounded the jurisprudential constituent of contract law, there emerges a complex framing from which to develop a generalised perspective on good faith contracting in commercial contexts.

Consequentially, a jurisprudential outlook furthers a critical approach to balancing the autonomy-oriented normative values, on the one hand, and the objectives and standards implemented institutionally through contract, on the other.[202] In civilian jurisdictions, the growing weight of general clauses – such as good faith – gives grounds to anticipate a renewal of what had distinguished the Roman law jurisprudential discourse in view of judicial interpretive competences and proficiency at a sovereign case-by-case analysis and valuation according to equity and fairness.[203] Moreover, the greater advertence to the complementarities between transactional certainty and substantive fairness in contracts can be conducive to articulating a coherent rationale to inform the operation of statutory contract law. Notably, an argumentatively-structured programme of norm-setting in contract law was adopted under the Polish Code of Obligations of 1933 which is no longer in force.[204] While of the highest legislative qualities and jurisprudential authority, the underlying axiology of this enactment remains under-researched, especially in contract law scholarship. It substantiated the idea of a modern law of obligations, conceived as a function of twofold, intersecting and at the same time mutually limiting legislative thoughts: first – to provide an appropriate protection to the interests of the parties to legal transactions, and second – to pursue the common good of the society as a whole.[205] The corollary to the respective premises was a congruous recognition of the principle of security of transactions and protection of reliance along with the principle of transactional fairness and a societally sensitive policy for a number of contractual relations.[206] Of crucial importance to the latter were the requirements of good faith. Arguably, with its

[202] For more on perceiving contract law in terms of balance between autonomy and institutionalism, see Catterwell (n 1) 1069–76, 1092. See also Bagchi (n 6).

[203] See Krzysztof Amielańczyk, 'W poszukiwaniu antycznej genezy klauzul generalnych, czyli o wartościach i wartościowaniu w prawie rzymskim' (2016) 63(2) Annales Universitatis Mariae Curie-Skłodowska: Sectio G 27, 38–9.

[204] *Rozporządzenie Prezydenta Rzeczypospolitej z dnia 27 października 1933 r. – Kodeks zobowiązań* (Decree of the President of the Republic of Poland of 27 October 1933 – Code of Obligations) (Journal of Laws No 82 item 598, as amended) (n 24).

[205] See generally Roman Longchamps de Bérier, 'Zasady kodeksu zobowiązań' (1934) 14 Ruch Prawniczy, Ekonomiczny i Socjologiczny 77.

[206] ibid. See also Bogna Kaczorowska, 'Regulating Contracts: The Evolving Normative Contexts in Light of the Rationales Informing the 1933 Polish Code of Obligations' (2024) 139 Przegląd Prawa i Administracji (forthcoming).

commitment to avoiding excessive formalism[207] and averting extremely individualistic attitudes in contracting,[208] this approach anticipated and concretised what is now of major concern within the context of debate on policing commercial contracts. The pertinence of the question of balancing values inherent in contract law is manifest under common law, as it presently stands. Actually, instead of into an antinomy, the recent changes in the common law of contract are contended to translate into a balance struck between party autonomy and societally oriented, non-autonomy normative standards, whereas there are shifts between these values.[209] Yet, it is claimed that the latest dynamics of contract law represents a move towards increased autonomy of commercial parties.[210] Conversely, the gradually growing attention to the duty of good faith, in combination with the acknowledgement of duties to co-operate, serves an institutional objective, and is viewed as a shift in favour of maintaining institutional standards.[211] In the definition of primary obligations, however, these instantiations of the policy-directed axiology tend to be outweighed by the broader enhancement of freedom of contract.[212] Still, while not without criticism, the emerging paradigm drawing on the relational theory substantiates arguments for restoring the common law of contract's intrinsic function of communicating values and standards of contracting, such as those imported by good faith.[213] It is through this perspective that further insights can be developed into the prospects for the recognition in common law of a duty to negotiate in good faith. Enrooted in the civil law tradition, such a duty is generally rejected under common law.[214] Following the increased focus across Commonwealth jurisdictions on good faith in contract performance, the question of its potential extension to negotiations is a matter of debate in England and Wales[215] and in Canada,[216] but also in Australia.[217] Although reservations and objections persist, the addressing of such advancements reveals a number of respects in which the practice of contracting might be affected by the pursued

[207] Uzasadnienie projektu kodeksu zobowiązań z uwzględnieniem ostatecznego tekstu kodeksu w opracowaniu głównego referenta projektu prof. Romana Longchamps de Bérier: Art. 1–167 [Explanatory Memorandum, Code of Obligations (Poland)] (1934) 4 Komisja Kodyfikacyjna Rzeczypospolitej Polskiej: Podkomisja Prawa o Zobowiązaniach 155.

[208] ibid 63; Longchamps de Bérier (n 205) 88.

[209] Catterwell (n 1) 1067, 1069, 1073.

[210] ibid 1068.

[211] ibid 1077, 1081–4.

[212] ibid 1084.

[213] Mitchell (n 88) 176, 191–2.

[214] DiMatteo (n 1) 46–7, 283–4.

[215] Giliker (n 9) 176–8, 190–8.

[216] ibid 190, 198–9; Yalden (n 88) 166–212. See also DiMatteo (n 1) 47, 285–6, 288–90.

[217] Jack O'Connor, 'The Enforceability of Agreements to Negotiate in Good Faith' (2010) 29(2) University of Tasmania Law Review 177; Swain (n 57) 95.

commercial morality. These relate, first, to the potential enforceability of express terms to negotiate some element of an existing commercial contract in good faith, taking into account the context of the contract and the nature of the parties' relationship.[218] As well, though less plausible, the acceptance of pre-contractual agreements to negotiate the main contract in good faith is contemplated.[219] Relevance is also attached to commercial practicalities involving specific good faith obligations in early-stage agreements whereby – rather than being placed within a pre-contractual, ie non-binding setting – the negotiation process is structured through contracts and receives a contractual dimension.[220]

In addition, the jurisprudentially sensible approach unfolds a critical point at the intersection of commercial contract law and the practice of contracting – specifically, the ever expanding area of private ordering detached from the state-endorsed legal framework.[221] The emerging private rule-making systems cover a manifold range of forms of alternative, bottom-up normative settings,[222] and arguably accommodate diverse interests of commercial contracting parties. While there are instances of autonomy-oriented, formalised contractual self-regulation shaped in pursuit of predictability and certainty,[223] a number of *de facto* developed contract rules and dispute resolution systems adheres to relational norms.[224] Within governance through contract design and express contract terms, a combination of both vague standards and precise rules tends to be used in formulating contractual rules, wherein the main determinants of the parties' strategy are realities of the transactional environment and business incentives.[225] Further, among the modalities of private ordering, particular attention is drawn

[218] Giliker (n 9) 193–4.

[219] ibid 194–7.

[220] Yalden (n 88) 169.

[221] See generally Brownsword, van Gestel and Micklitz (n 2) 1, 13–5; Andrew Hutchison and Franziska Myburgh, 'International Commercial Contracts: Autonomy and Regulation in a Dynamic System of Merchant Law' in Andrew Hutchison and Franziska Myburgh (eds), *Research Handbook on International Commercial Contracts* (Edward Elgar Publishing 2020) 1–2; Matthew Jennejohn, 'Do Networks Govern Contracts?' (2022) 47(2) Journal of Corporation Law 333, 335; Mitchell (n 88) 12–3, 87–114; DiMatteo (n 1) 353–4; Bogna Kaczorowska, 'The Regulatory Relevance and Legitimacy of Contract Law in Juxtaposition to Private Ordering' (2024) 3 Supreme Court Law Review, 3rd Series 79.

[222] See Mitchell (n 7) 26; Mitchell (n 88) 12, 91–94, 202; Jennejohn (n 221) 335–45; Mimi Zou, 'When AI Meets Smart Contracts: The Regulation of Hyper-Autonomous Contracting Systems?' in Martin Ebers, Cristina Poncibò and Mimi Zou (eds), *Contracting and Contract Law in the Age of Artificial Intelligence* (2022).

[223] Mitchell (n 88) 40, 93–94; Tomer S Stein, 'Rules vs. Standards in Private Ordering' (2022) 70(5) Buffalo Law Review 1835, 1841; Naveen Thomas, 'Rational Contract Design' (2023) 74(4) Alabama Law Review 967, 970–1032.

[224] See DiMatteo (n 1) 353.

[225] Stein (n 223) 1841; Thomas (n 223) 970.

to industry-specific governance by specialist trade associations and professional organisations.[226] These apparently prioritise the economic, organisational and market-driven imperatives, whereas the enforcement of agreements is legitimised by conventions of the rule-creating contracting and interpretive community.[227] Highly contextualised industries feature relational norms that are incorporated through industry customs to which the parties must conform.[228] More recently, there is a focus on exchange networks which circulate reputational information on contracting across markets,[229] where informal reputation-based sanctions serve as informal tools for enforcing contractual obligations.[230] Whereas such sanctions are supposed to foster trust-building processes,[231] the dependence by commercial parties on these regimes may be hindered by the governance costs associated with the risk of an unintended spread of technical information to third parties across the network connection.[232] A matter of growing concern is the use of autonomous algorithm-enabled systems of contract regulation designed to automate commercial transactions, mostly those based on distributed ledger technology and artificial intelligence tools, such as data-driven machine learning.[233] Due to their objective, technically-determined constraints, the scope of application of these algorithm-facilitated settings is reduced to a relatively narrow array of transactions.[234] One reason is the formality of non-contextual programming languages which precludes the integration of open-ended standards – such as good faith – into the algorithmic format of the encoded arrangements.[235] Similar arguments inform the rationale against the automation of contract interpretation in its entirety by the

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[226] Mitchell (n 88) 88–98; DiMatteo (n 1) 304, 353–4.

[227] Mitchell (n 7) 27; Mitchell (n 88) 98.

[228] DiMatteo (n 1) 353–5.

[229] Mitchell (n 7) 24–5, 41; Mitchell (n 88) 91, 202; Jennejohn (n 221) 337.

[230] Jennejohn (n 221) 340–4.

[231] Mitchell (n 7) 24–5.

[232] Jennejohn (n 221) 337, 339, 346–8.

[233] See generally Eliza Mik, 'The Resilience of Contract Law in Light of Technological Change' in Michael Furmston (ed), *The Future of the Law of Contract* (Informa Law 2020); Eliza Mik, 'AI in Negotiating and Entering into Contracts' in Larry A DiMatteo, Cristina Poncibò and Michel Cannarsa (eds), *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* (Cambridge University Press 2022); Mitchell (n 88) 23–4; Zou (n 222) 41; DiMatteo (n 1) 347–8, 356; Spencer Williams, 'Edge Contracts' (2023) 25(3) University of Pennsylvania Journal of Business Law 839; Krzysztof Riedl, 'Wykładnia umów zredagowanych z wykorzystaniem generatywnej sztucznej inteligencji (AI)' (2024) 33(2) Kwartalnik Prawa Prywatnego 197.

[234] See Mitchell (n 7) 40.

[235] ibid. See also Michel Cannarsa, 'Interpretation of Contracts and Smart Contracts: Smart Interpretation or Interpretation of Smart Contracts?' (2018) 26(6) European Review of Private Law 773, 779–80.

most advanced artificial intelligence models, while restricting their role to merely assisting in the judicial exercise.[236]

V. CONCLUSION

Contextualising the scrutiny of good faith obligations within the evolving interrelations between civil and common law affords a comprehensive perspective on the intricacies of policing commercial contracts across jurisdictions. The comparative arguments informing the latterly increased critical focus on good faith in common law derive much from civilian concepts, while further embracing Commonwealth and American laws. This imparts to the common law of contract equitable elements in commercial contexts where, notionally, the emphasis falls on legal and transactional certainty and predictability.[237] Notably, the systemic developments that underscore value-driven functions of contract law enhance a jurisprudential approach to contract regulation and to the contracting process. The apparent twofold parallel departure from the codification paradigm in continental civil law systems and from the classical Anglo-American contract law furthers a more flexible, axiology-laden reasoning in contracts. Inasmuch as the practicalities of transactions are growingly problematised by the dynamics of different forms of governance, a jurisprudentially oriented account not only contributes to concretising the perception of good faith duties, but also, more generally, advances commercial morality in terms of complementarity and balance between autonomy normative values and other institutionally pursued objectives and standards.

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[236] Ryan Catterwell, 'Automation in Contract Interpretation' (2020) 12(1) Law, Innovation and Technology 81. See also Ryan Catterwell, 'Cognition, Automation and the Future of Contract Law' in John Eldridge and Timothy Pilkington (eds), *Australian Contract Law in the 21st Century* (The Federation Press 2021); Martin Ebers, 'Artificial Intelligence, Contracting and Contract Law: An Introduction' in Martin Ebers, Cristina Poncibò and Mimi Zou (eds), *Contracting and Contract Law in the Age of Artificial Intelligence* (Hart Publishing 2022) 36; Yonathan Arbel and David A Hoffman, 'Generative Interpretation' (2024) 99(2) New York University Law Review 451.

[237] See Halberda (n 8) 235–6.

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