

# An English Lawyer Looks at American Contract Law

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When dealing with contract cases, English courts make much of their commitment to contractual certainty.<sup>1</sup> This is likely a consequence of the fact that contract law has been shaped by major commercial transactions and not by small-scale retail transactions. The paradigmatic contract, indeed, might be said to be a voyage or time charter-party or a sale of commodities. English courts tend to be acutely aware that their decisions will have an impact on sensitive, market-driven contract activity. Moreover, they are very much alive to the importance of finance in the City of London, as well as its satellite activities in insurance and dispute settlement, and so are keen not to undermine the attractions of London and English law.<sup>2</sup> This degree of concern is not one that I have detected in American judicial activity.

Referring to good faith, Lord Steyn once observed: “Since English law serves the international market place it cannot remain impervious to ideas of good faith, or of fair

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<sup>1</sup> For a recent example, see *Golden Strait Corp. v. Nippon Yusen Kubishika Kaisha (The Golden Victory)*, [2007] 2 A.C. 353.

<sup>2</sup> A striking example of this is the decision of the House of Lords in *Transfield Shipping Inc. v. Mercator Shipping Inc. (The Achilles)*, [2009] 1 A.C. 61.

dealing...[yet] English lawyers remain resolutely hostile to any incorporation of good faith principles into English law. The hostility...is intense...”.<sup>3</sup> Lord Steyn’s note of regret might reflect his training in Roman-Dutch law and not the common law. English contract and commercial lawyers lack a high moral tone. The absence of a written constitution with a bill of rights might have something to do with this; and if so the habituation of modern courts with human rights arising out of the “patriation” of the European Convention on Human Rights<sup>4</sup> might eventually come to provide the conditions for good faith norms to seep generally into English law. Subject to this, “the Nightmare vision of the judicial process as a legally uncontrolled act of lawmaking”<sup>5</sup> is one from which the English judiciary recoils. This commitment to the rule of law is evident in other ways too. Even when the law is changed, as where mistakes of law were held to be eligible for relief, English courts cling to the fiction that they are merely declaring what was always the law.<sup>6</sup>

### *Codes and Codification*

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<sup>3</sup> Steyn, Contract Law: Fulfilling the Reasonable Expectations of Honest Men, 113 L.Q.R. 433, 438 (1997).

<sup>4</sup> Human Rights Act 1998.

<sup>5</sup> Hart, American Jurisprudence through English Eyes: the Nightmare and the Noble Dream, 11 Geo. L Rev 969, 974 (1977).

<sup>6</sup> Kleinwort Benson Ltd. v. Lincoln City Council, [1999] 2 A.C. 349.

To an English common lawyer, U.S. law at times appears to have mutated into a hybrid system, part-common-law and part-civilian in character. This is the appearance presented by the Uniform Commercial Code, particularly Article 2, which seems to have acquired the character of a general contract statute. The ancestry of Article 2 can be traced back though the Uniform Sales Act 1906 to the UK Sale of Goods Act 1893. Both the 1893 Act (and its UK successor of 1979) and Article 2 contain a provision that allows access to the underlying common law, which is not a characteristic of civilian codes, but there are at least two features of Article 2 that strike an English common lawyer as civilian in character. The first is the rule of construction in UCC § 1-102(1) that the UCC be “liberally construed and applied to promote its underlying purposes and policies”. The second is the emphasis placed on general principles, namely, the principles of unconscionability in § 2-302 and good faith in § 2-103(1)(j).

The first feature strikes me as licensing in extreme cases a type of interpretation that treats the text as a mere springboard for judicial flights of fancy. Does the text have to be ambiguous for this process to be open to a judge, or may the judge disregard the plain meaning of the text? Is the text itself just a historical document, to be updated by a court, or is it a continuing and constant point of reference? Is a “dynamic” interpretation of a text permissible?

My principal concern in this paper, however, is the second feature, the emphasis placed on general principles. I propose to state my misgivings about both unconscionability and good faith, drawing appropriate comparisons with English law. In focusing on unconscionability and good faith, I shall try so far as possible to take appropriate account of the difference between the way the law appears on the page and

the way it is applied in action. Judicial restraint, when exercised, can be a powerful inhibiting factor. Moreover, it is hard to resist the conclusion that some written law exists to make a moral demonstration – law as rhetoric rather than law in action. It may be that features of the UCC imparting to it an almost civilian flourish do not alter its true character as a mirror of the common law. It should not be forgotten, too, that English case law, with one Court of Appeal and one Supreme Court, is inherently more “manageable” than the case law of fifty jurisdictions,<sup>7</sup> and that the UCC and the Restatements should be viewed with this in mind.

In this short paper, I shall not make any claim about the general superiority of English law, about which I have some misgivings. Contracts are interpreted in a contextual way that downplays the written word and opens up interpretation to a torrent of extrinsic evidence, at the same time eradicating the distinction between interpretation and implied terms.<sup>8</sup> In part, no doubt, because of the absence of a civil jury, the parol evidence rule has for a long time been more or less a dead letter, which has rendered English law particularly vulnerable to this modern interpretative approach. The controls placed upon implied terms over the last 100 years<sup>9</sup> have been no small bulwark against

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<sup>7</sup> See G. Gilmore, *The Death of Contract* 62 (1974).

<sup>8</sup> See in particular *Investors Compensation Scheme Ltd. v. West Bromwich Building Soc.*, [1998] 1 W.L.R. 896 and *Chartbrook Ltd v Persimmon Homes Ltd.*, [2009] 1 A.C. 1101.

<sup>9</sup> Notably, *The Moorcock*, 14 P.D. 64 (1889). Just how seriously the courts have taken the restrictions on implied terms can be seen in modern times in *Concord Trust v. Law Debenture Trust Corp.*, [2005] 1 W.L.R. 1591.

excessive judicial intervention in contracts. The new dispensation of contractual interpretation is a Trojan horse carrying within it the threat of such interference.

Before turning to unconscionability and good faith, I wish to add one reservation about the codal pretensions of Article 2. This concerns draftsman Karl Llewellyn's commitment to commercial usage, which has been shown to be anchored in 19<sup>th</sup> century German notions of a commercial zeitgeist. Article 2 is replete with references to "reasonable," "seasonable" and "usage," and at one time the merchant jury was seen as a conduit for giving practical expression to these notions. There is something of the antithesis of a code in such a legal philosophy. So far as the law tracks evolving mercantile usage, it throws off the shackles of a code.

The reality, however, was that the connection between Article 2 and mercantile usage, as intended by Llewellyn, never really took root. Judicial interpretation of (and judicial discretion relating to) particular expressions such as seasonable and reasonable by no means amounts to the same thing. There are times when, looking at Article 2, one wonders at its capacity to absorb almost indifferently commercial and consumer contracts. Just how "commercial" is Article 2 of the Uniform Commercial Code? Article 2 has been influential in filling out the content of the UN Convention on the International Sale of Goods 1980 (CISG), which does not apply to consumer sale transactions. Yet, with one exception,<sup>10</sup> nothing in the Convention suggests a difference in the content of

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<sup>10</sup> Article 6, which allows freedom of exclusion and modification with regard to the contents of the Convention.

commercial and consumer sales. Some of its provisions and philosophy, indeed, have been fed into the consumer sales laws of EU jurisdictions by means of an EU Directive.<sup>11</sup>

### *Unconscionability*

UCC § 2-302, one of the most celebrated provisions in the Code, was extravagantly described by its architect, Llewellyn, as “perhaps the most valuable section in the entire Code.”<sup>12</sup> At first blush, it gives new life to a line of Chancery cases featuring an exotic cast of spendthrift heirs, feckless seamen and vulnerable, income-starved people with capital assets. In England, the case law has lingered on, unreplenished, for over a century, despite Lord Denning’s attempt in modern times to fashion a broad principle of unconscionability, drawing upon these and a motley collection of other case law streams.

There is a preference in English contract law for narrower and less abstract categories, in particular, for the rules dealing with undue influence. This preference for the specific is as true for unconscionability as it is for good faith; and specificity commends itself under the modern value of transparency. An outsider must wonder what UCC § 2-302 can possibly mean and will find a particular resonance in Leff’s reminder

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<sup>11</sup> EC Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees, [1999] O.J. L171/12, transposed into English Law as Part 5A of the Sale of Goods Act 1979.

<sup>12</sup> 1 NYL Revision Comm’n, Hearings on the Uniform Commercial Code 121 (1954), as quoted by A Farnsworth, Contracts §4.28 (3d ed. 1999).

that “it is easy to say nothing with words.”<sup>13</sup> And Leff himself, protesting against the vacuity of UCC § 2-302, turned against Llewellyn his own famous dictum that “covert tools are never reliable tools.”<sup>14</sup>

I propose to look briefly at the main features of UCC § 2-302 before turning to an assessment of its practical impact. According to paragraph (1):

If the court as a matter of law finds that the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or may so limit the application of any unconscionable clause so as to avoid any unconscionable result.

The pre-Code case of *Campbell Soup Co. v. Wentz*,<sup>15</sup> cited in the Official Comments, concerned the exercise of the court’s equitable discretion to grant specific performance and not a claim for general or liquidated damages. The court came down heavily in favour of the defendant sellers contracting to supply goods at a forward delivery price

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<sup>13</sup> Leff, Unconscionability and the Code – the Emperor’s New Clause, 115 U. Pa. L.Rev. 485, 559 (1967). The introduction of exuberant words like “wholly,” “disproportionately,” “strikingly” and “grossly” does not assist.

<sup>14</sup> Id. However, another commentator saw the direct appeal to unconscionability, instead of to indirect routes of judicial attack, as demonstrative of that same dictum. A. Farnsworth, Contracts §4.28 (3d ed. 1999).

<sup>15</sup> 172 F.2d 80 (3d Cir., 1948).

that proved to be substantially below the market price prevailing on the day. Yet, had the market gone the other way because of a glut, the sellers would have benefited from a contract price exceeding the market price at delivery. In addition to *Campbell Soup*, the Official Comments cite ten illustrative decisions, all concerned with the interpretation of exclusion clauses (warranty disclaimers) or related matters. The Comments precede them by stating that the underlying principle of UCC § 2-302 “is one of the prevention of oppression and unfair surprise...and not of disturbance of allocation of risks because of superior bargaining power.”<sup>16</sup>

None of this comes remotely close to communicating what is meant by unconscionability itself. The text of the provision appears to be directed at substantive unfairness, where the bargain is not tainted by fraud, force, undue influence or any of the circumstances in which the parties arrived at their contract, but where the terms are excessively one-sided. However, the above comment, by referring to surprise, intimates that procedural unfairness, or the means by which the contract was concluded, may be material.<sup>17</sup> The distinction between procedural and substantive unfairness is crucial, since the potential scope of the provision for eroding contractual autonomy lies not so much in the former as the latter.

Richard Epstein once referred to the doctrine of unconscionability as “[o]ne of the major conceptual tools used by courts in their assault upon private agreements,”<sup>18</sup> but

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<sup>16</sup> Citing *Campbell Soup Co v. Wentz*, 172 F.2d 80 (3d Cir., 1948).

<sup>17</sup> This is of course the celebrated distinction between substantive and procedural unconscionability.

<sup>18</sup> Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. Econ. 293 (1975).

unconscionability seems subsequently to have gone to sleep, having not had the judicial impact for which its proponents hoped and its opponents feared. Apart from an early showing in consumer transactions, unconscionability has proved to be a damp squib in commercial contracts.<sup>19</sup> Its continuing existence as a sacred text and its excessive generality,<sup>20</sup> nevertheless, threaten the finality of commercial contracts. Like the first Mrs Rochester, there is a risk it will escape from the attic and wreak havoc downstairs.

Though UCC § 2-302 is not referred to in Lord Denning's judgment in *Lloyds Bank Ltd v. Bundy*,<sup>21</sup> it is more than a coincidence that his attempt therein to fashion a general principle of unconscionability is so similar to it. The case concerned an elderly farmer who in his home was prevailed upon by his son, with the bank manager in close attendance, to guarantee the son's trading debts and give the bank a charge over the farmhouse. Both father and son had accounts at the same bank branch. The son's business was foundering and the guarantee brought only the briefest of respites. The father was under intense family pressure to bail out his son's business as the bank manager was perfectly well aware. Lord Denning gathered together five disparate groups of cases dealing with duress of goods, the exploitation of expectant heirs and similar vulnerable

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<sup>19</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir., 1965). The facts predated the enactment in DC of UCC Article 2, but the court applied the same rule as either a restatement of existing or of newly coined (!) common law.

<sup>20</sup> In the words of one leading scholar, the impossibility of defining unconscionability with precision "is a source of both strength and weakness": A. Farnsworth, *Contracts* §4.28 (3d ed. 1999). This sounds good but what does it mean?

<sup>21</sup> [1975] Q.B. 326.

people, undue influence, undue pressure and salvage agreements, and fashioned from them the “single thread” of “inequality of bargaining power.” Relief would be granted where a contracting party with “grievously impaired” bargaining power received in such circumstances a consideration that was “grossly inadequate.”<sup>22</sup>

Lord Denning did not label this synthesis as unconscionability,<sup>23</sup> but that is what it amounts to. This approach was in a later case rejected by the House of Lords as unnecessary and unsuited to intervention in an area straddling gift and contract,<sup>24</sup> where undue influence was a more suitable “tool.”<sup>25</sup> This rejection of the excessively high pitch of unconscionability puts one in mind of Peter Birks’ dictum that unconscionability is to a lawyer as “small brown bird” is to an ornithologist.<sup>26</sup>

The preference shown by the House of Lords for undue influence matches the majority approach in *Lloyds Bank Ltd v. Bundy*, leading to the same conclusion that the guarantee and charge should be set aside. In the ordinary case, the doctrine of undue influence is not engaged at all in the relationship of bank and customer. But the majority,

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<sup>22</sup> [1975] Q.B. 326, 337-39.

<sup>23</sup> He reserved that expression for his second group of cases involving expectant heirs and the like.

<sup>24</sup> *National Westminster Bank plc v. Morgan*, [1985] A.C. 686, 708: “I question whether there is any need in the modern law to erect a general principle of relief against inequality of bargaining power.”

<sup>25</sup> *Id.*

<sup>26</sup> Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 *U. W.A. L.Rev.*1, 16-17 (1996).

after a scrupulous paring of the evidence, concluded that the bank manager, in his dealings over time with the father, had crossed the line that separated bank manager and confidential adviser.<sup>27</sup> The bank therefore owed the father a “fiduciary duty of care” to advise him to obtain independent advice in circumstances that “cried aloud [his] need for careful independent advice.”<sup>28</sup> Banks following this clear judicial advice may still benefit from an unequal exchange and harvest a secured guarantee given for a brief respite.<sup>29</sup>

Substantive unfairness or inequality of contractual outcome is not per se objectionable in English law.<sup>30</sup> This is entirely consistent with the way that equity has settled down to provide a body of supplementary rules and not an open-ended discretion for dispensing with legal rules. The maxim “equity follows the law” is invested with real meaning. Lord Radcliffe, in a case involving penalty clauses, once remarked that courts of equity did not take it upon themselves to be “a general adjuster of men’s bargains.” He added: “‘Unconscionable’ must not be taken to be a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other, and equity lawyers are, I notice, sometimes both surprised and discomfited by the plentitude

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<sup>27</sup> [1975] Q.B. 326, 344.

<sup>28</sup> [1975] Q.B. 326, 345.

<sup>29</sup> See *Alliance Bank v Broom*, 2 Drew & Sm. 289 (1864).

<sup>30</sup> For a criticism of English law, see Capper, *The Unconscionable Bargain in the Common Law World*, 126 L.Q.R. 403 (2010), with an extraordinary reference at 416 to “the insistence by English courts that harsh terms must be imposed on the weaker party by the stronger party in a morally reprehensible manner.”

of jurisdiction, and the imprecision of rules that are attributed to ‘equity’ by their more enthusiastic colleagues.”<sup>31</sup>

An outright rejection of unconscionability because of the way it undermines contractual certainty is also present in a famous Privy Council decision<sup>32</sup> where a purchaser, ten minutes late in completing a contract for the purchase of land in Hong Kong, was granted no relief when the vendor terminated the contract and forfeited the purchaser’s deposit. The contract had made clear provision for this. The following words of Lord Hoffmann are particularly pertinent: “The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be ‘unconscionable’ is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic.”<sup>33</sup> There could hardly be a firmer statement of the need for commercial certainty.

### ***Good Faith and Fair Dealing***

#### *A. Formation*

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<sup>31</sup> Bridge v. Campbell Discount Co Ltd., [1962] A.C. 600, 626.

<sup>32</sup> Union Eagle Ltd. v Golden Achievement Ltd., [1997] A.C. 514.

<sup>33</sup> *Id.*, 519.

An expansive doctrine of good faith and fair dealing<sup>34</sup> was written into the Restatement Second on Contracts in Alan Farnsworth's time as Reporter,<sup>35</sup> where it applied in the performance and enforcement of contracts. Despite an important article by Kessler and Fine,<sup>36</sup> which covered at some length the recognition of good faith in the formation of contracts, the principle was not expressed to apply in that area of contract law.

There had earlier been incorporated in UCC Article 2 a rule of good faith, but this rule was limited in at least two respects. First, it was not expressed as a general principle of universal application in sales law but applied only where it was expressly incorporated in a particular provision in Article 2. Secondly, good faith, so far as it exceeded honesty in fact and took in fair dealing, was expressed as a duty applicable only to merchants.<sup>37</sup> The general definition of good faith in Article 1 was initially restricted to honesty in

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<sup>34</sup> References below to good faith are to good faith and fair dealing unless otherwise stated.

<sup>35</sup> After he took over as Reporter from Braucher.

<sup>36</sup> *Culpa in Contrahendo*, Bargaining in Good Faith and Freedom of Contract: A Comparative Study, 77 Harv. L.Rev. 401 (1964).

<sup>37</sup> UCC § 2-103(1)(b).

fact<sup>38</sup> but now incorporates “reasonable commercial standards of fair dealing”.<sup>39</sup> It is not entirely clear how far this new standard extends in Article 2 to non-merchants.<sup>40</sup>

The difference between English law and American law regarding good faith and fair dealing goes to both how such norms are presented and how cases are decided. As for presentation, Bingham LJ once remarked that “English law has, characteristically, committed itself to no such overriding principle [viz., of ‘fair and open dealing’ but has developed piecemeal solutions in response to demonstrated problems of unfairness.” In the case where he uttered these remarks, a clause in the terms and conditions of a photographic library imposed very substantial holding fees on a borrower who was late in redelivering transparencies. The defendant was presented with an enormous bill for a two-week delay. Because the plaintiff had not “fairly and reasonably” brought to the defendant’s attention “this unreasonable and extortionate clause,” he had not secured the defendant’s agreement to it when the transparencies were delivered with the terms and conditions after the parties had corresponded by telephone.<sup>41</sup> The clause was not struck down for being unfair. Nor was the plaintiff “penalized” for its use of the clause. Instead,

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<sup>38</sup> UCC § 1-201(19).

<sup>39</sup> UCC § 1-201(b)(20) (excepting Article 5).

<sup>40</sup> Moses, *The New Definition of Good Faith in Article 1*, 35 *Uniform Commercial Code L.J.* 47 (2002).

<sup>41</sup> The reasoning in the court inclines towards putting a duty on the plaintiff to bring the clause to the attention of the defendant, but this is inexact. Rather, he could not fairly interpret the defendant’s conduct as agreeing to be bound by the clause.

as a matter of procedure, the plaintiff had failed to take the necessary steps to have the clause incorporated in the contract.

In outcomes, too, English and American law diverge when it comes to good faith and fair dealing norms. Now, it may be perfectly possible to gather a number of English cases and compare them against broadly similar cases decided in the United States under the broad banner of good faith and conclude there is little practical difference between the two systems. There are certainly shared values. For example, both systems reject a rule that a buyer must offer a fair price.<sup>42</sup> However, focusing for the moment on contractual formation, the clear rejection by English courts of an imposed<sup>43</sup> duty of good faith illustrates the existence of substantial differences in the two national systems of contract law. I shall demonstrate this by reference to two cases, *Teachers Insurance and Annuity Ass'n of America v. Tribune Co.*,<sup>44</sup> in a U.S. District Court, and *Walford v. Miles*,<sup>45</sup> in the House of Lords.

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<sup>42</sup> See, eg, *Market Street Associates v. Frey*, 941 F.2d 588, 594 (11th Cir., 1991): “The duty of honesty, of good faith even expansively conceived, is not a duty of candor. You can make a binding contract to purchase something you know your seller undervalues.”

<sup>43</sup> English law is moving towards the recognition of an enforceable *express* duty to negotiate in good faith: see, eg, *Petromec Inc. v. Petroleo Brasileiro SA (No 3)*, [2006] 1 Lloyd’s Rep. 121. If that is what contracting parties want, they should be allowed to have it even if there are some difficulties in determining what in fact is meant by good faith negotiating. Was Andrei Gromyko negotiating in bad faith for the USSR when he delivered an unending series of nyets?

<sup>44</sup> 670 F.Supp. 491 (SDNY, 1987). See also *Brown v. Cara*, 420 F.3d 148 (2d Cir., 2005).

In *Tribune*, Judge Pierre Leval famously distinguished between two different kinds of preliminary contractual obligations. Type I agreements contain all the terms necessary to constitute a complete contract and are binding according to their terms. Type II agreements leave open certain major terms but impose upon the parties a duty to negotiate the remaining issues in good faith. Here the parties had concluded a “binding agreement,” subject to the preparation and execution of documents satisfactory to both sides,<sup>46</sup> for a loan by plaintiff to defendant as part of a three-sided arrangement. The defendant was to sell the New York Daily News building on deferred payment terms to a third party and assign its payment rights to the plaintiff to pay down the loan. The reason for this structure was to provide the defendant with installment tax deferral of its gain on the sale of the building. Before the final agreement was prepared, the defendant halted the process until the plaintiff agreed that that the defendant might report the loan on its financial statement as an off-balance-sheet offset.<sup>47</sup> The plaintiff objected to this and claimed that the defendant was motivated by a drop in interest rates, which would have permitted it to refinance at cheaper rates if it backed out of the deal. Judge Leval held that, even if the agreement was incomplete, this was a Type II agreement and the parties had bound themselves to negotiate a final agreement in good faith. This the defendant had failed to do by raising the matter of offsetting. The court’s finding that the defendant

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<sup>45</sup> [1992] 2 A.C. 128.

<sup>46</sup> In English law, this is known as a “subject to contract” agreement, the usual means of concluding a contract for the sale of land, where, even after months of negotiations, title searches and so on, either party can freely walk away from commitment.

<sup>47</sup> The defendant was contemplating a public offering.

was in part actuated by the fall in interest rates appears to provide some sort of moralistic cover for its conclusion that the defendant was no longer free to rely upon the offset.

Turn next to the English case. *Walford v. Miles* is famous, even notorious, for Lord Ackner's assertion that "the concept of a duty to carry on negotiations is inherently repugnant to the adversarial position of the parties when involved in negotiations." Short of contractual commitment, either party, therefore, is entitled to pursue its own interests without consideration for the interests of other party.

In *Walford*, the vendor walked away from the sale of a company because of concerns about the purchaser's ability to manage it. The vendor was asked to provide a post-completion warranty of performance by the target company, and might be on the hook if the purchaser ran it poorly. The parties had agreed on a "lock-out" clause providing that, during the negotiation process, the vendor would terminate negotiations with and not entertain bids from third parties. The purchaser further claimed that the agreement contained an implied term to negotiate in good faith as long as the vendor desired to sell the target. It was this claim that attracted Lord Ackner's assertion. Presented as an implied term of a negotiation agreement, the claim failed to clear the long-standing barrier erected against judicial intervention in contracts, namely, that it be necessary to give business efficacy to the contract.<sup>48</sup> The plaintiff's claim was therefore never a strong one. Any attempt to reopen the position would be liable to rebuttal on two fronts: first, a negotiating party can substantially protect its interests by agreeing to a "break fees" clause to cover professional fees incurred in the negotiation process;

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<sup>48</sup> *The Moorcock*, 14 P.D. 64 (1889).

secondly, the incipient recognition of express agreements to negotiate in good faith puts the onus on plaintiffs to reach such an agreement.

The question whether good faith should be accorded a role in the negotiating process is akin to the question whether prior negotiations should be scrutinized in aid of interpreting a written contract, even at the expense of overriding the plain meaning of the written agreement. Despite substantial assaults on the plain meaning rule,<sup>49</sup> it appears to have held up in the majority of American jurisdictions.<sup>50</sup> English law is less committed to the parol evidence rule than is the case in the United States, but it has so far held the line against admitting evidence of prior negotiations so far as that evidence goes beyond the meaning of obscure expressions.<sup>51</sup> By somewhat different means, the two legal systems may have arrived broadly at the same position.

Nevertheless, there is a significant point of difference between English and American law in the area of formation, and that is the resistance of English law to the use of promissory estoppel to ground a cause of action short of the existence of a binding contract.<sup>52</sup> In section 205 of the Restatement Second, the duty of good faith and fair dealing is limited to the performance and enforcement of contracts. Section 90 might be

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<sup>49</sup> *See, e.g.*, *Pacific Gas & Electric Co v. GW Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968).

<sup>50</sup> *Scott* [in this collection]; *Trident Center v Connecticut General Life Assurance Co.*, 847 F.2d 564 (9<sup>th</sup> Cir., 1988).

<sup>51</sup> *Prenn v. Simmonds*, [1971] 1 W.L.R. 1381; *Rugby Group Ltd. v. ProForce Recruit Ltd.*, [2006] EWCA Civ. 69.

<sup>52</sup> *Cf.* Restatement Second § 90.

seen as a specific example of the good faith provision in the formation of contracts that did not emerge in the drafting process. The absence in English law of anything like section 90 indicates that, whilst committed to principles of waiver and promissory estoppel, English law allows their use in only a defensive way. It therefore does not have to confront the contradiction highlighted by Grant Gilmore of a promissory estoppel rule and a consideration rule sharply at variance.<sup>53</sup> In writing about formalities, Lon Fuller once pointed to the cautionary and signaling functions of formalities, which allowed a potential contractant to know that there was a gateway through which one had to pass to incur contractual liability and which also warned him about the seriousness of the matter.<sup>54</sup> The same kind of arguments might be made about consideration.

The ability of a contracting party in English law to steer firmly away from contractual commitment, as a result of limitations on the use of estoppel principles and restrictions on the implication of terms in contracts, is displayed in a Court of Appeal decision, *Baird Textile Holdings Ltd. v. Marks & Spencer plc*,<sup>55</sup> which is a world away from the relational contract philosophy of Ian Macneil.<sup>56</sup> The appellants had supplied garments to the defendant retail store over a period of thirty years. As they did with their other suppliers, who were few in number, the defendants exercised stringent controls over the manufacturing processes of the plaintiffs against a background of a “special partner relationship” and a factual expectation of “once a major supplier [to the defendants],

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<sup>53</sup> G. Gilmore, *The Death of Contract* ch. 3 (1974).

<sup>54</sup> Fuller, *Consideration and Form*, 41 *Colum. L.Rev.* 799 (1941).

<sup>55</sup> [2001] CLC 999.

<sup>56</sup> I. Macneil, *The New Social Contract* (1980).

always a supplier”.<sup>57</sup> Yet the supply contract was repeatedly entered into on yearly terms. When, as a result of major trading reverses, the defendants decided not to renew its contractual relation with the plaintiffs, the latter sought to re-characterize the contractual relationship so as to treat it as a contract of indefinite duration, terminable only upon reasonable notice, the length of which would of course depend on the length of the pre-existing relationship. Without even proceeding to trial, the court declined to imply the existence of an umbrella contract of indefinite duration, since this was not necessary as a matter of business efficacy. It also declined to find any binding representation that the defendants would continue to order garments into the future, partly on the ground of uncertainty – which garments in which styles and in which quantities? – and partly because any representation could not be used to found a cause of action. The defendants had set out deliberately *not* to create a long-term relationship recognized in law and they had succeeded. And who is to say the decision is wrong, when the defendants were suffering major and entrenched trading reverses and had commitments to their own employees and shareholders? English law does not recognise factual expectations in contract and this case was to be no exception.

It is not merely the case that English law does not allow waiver or promissory estoppel to ground a cause of action, in the way of section 90. Rather, so firmly is the doctrine of consideration still upheld that even a clear and specific promise to hold a contractual offer open will not be binding,<sup>58</sup> still less an offer upon which the other party

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<sup>57</sup> The witness statement of a former chairman of the defendants supplied to the plaintiffs.

<sup>58</sup> *Routledge v. Grant*, 4 Bing 653 (1828).

might reasonably rely upon to remain open for a period.<sup>59</sup> English law stands by the rule that a binding offer has to be purchased by means of an option contract. Even in a system that maintains the need for consideration, there will always be a place for artificial contracts, especially of the unilateral kind, though it should not be imagined that their existence will freely be inferred. Such a contract might, for example, be found where a potential franchisee is encouraged to incur significant expense prior to the grant of the franchise on terms broadly agreed.<sup>60</sup> The inference of a contract of this kind should not be expected to arise as a routine matter, and it should not be supposed that one party's pre-contract reliance costs will be re-characterized as benefit conferred on the other and thus subject to a restitutionary action.<sup>61</sup>

### *B. Performance and Enforcement*

Section 205 of the Restatement Second imposes a duty of good faith and fair dealing in the enforcement of contracts. When I looked at the scope of this duty some time ago,<sup>62</sup> I was struck by the way that reported cases invoking the good faith principle could readily be classified under the heads of interpretation and implied terms. One case

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<sup>59</sup> Cf. UCC § 2-205.

<sup>60</sup> Cf. *Hoffman v. Red Owl Stores*, 133 N.W.2d 267 (Wis., 1965).

<sup>61</sup> *Regalian Properties plc v. London Dockland Development Corp.*, [1995] 1 W.L.R. 212.

<sup>62</sup> *Bridge, Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?*, 9 *Canadian Business L.J.* 385 (1984).

in particular, cited in the Reporter's note, laid out for me the limitations of good faith. It held that a contracting party could consent by contract to behavior of the other party that would otherwise breach the good faith standard.<sup>63</sup> The terms of the contract thus limited the range of that party's legitimate contractual expectations. Considerations extrinsic to contractual expectations did nevertheless emerge in some of the enforcement cases, notably where issues concerning contempt of court<sup>64</sup> and competition<sup>65</sup> came to the fore. So far as they engaged community standards, these could just as easily be expressed in terms of public policy or illegality, and all legal systems give a role more or less to such considerations.

Measuring the impact of good faith in American law by results, therefore, it was hardly a case of the New World, in a bout of prelapsarian nostalgia for its lost idealistic soul, meeting the cynical Old World in an encounter scripted by Henry James. Moreover, the same concern about the vacuity of unconscionability could be repeated for good faith. The suspicion that good faith in section 205 might amount to little more than a moral flourish was also bolstered by the way that no sanction was stipulated for breach of the good faith standard. Even the unconscionability rule in UCC § 2-302 provides for a remedial outcome. As for the literature, the most substantial contributions came from Robert Summers, whose views of good faith may be summarized as "It's what the courts

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<sup>63</sup> VTR Inc. v. Goodyear Tire & Rubber Co, 303 F.Supp.773 (SDNY, 1969).

<sup>64</sup> L'Orange v. Medical Protection Co., 394 F.2d 57 (6th Cir., 1968).

<sup>65</sup> Shell Oil Co v Marinello, 307 A.2d 598 (N.J., 1973).

do anyway” and “You know bad faith when you see it,”<sup>66</sup> and from Steven Burton, who in a sober piece found a rational underpinning for the existing rule of good faith in the prevention of attempts to recapture forgone contractual opportunities.<sup>67</sup> The two approaches could hardly have been more different. The one seemed intent on finding the presence of good faith behind formal legal reasoning, and the latter intent on minimizing its potential disruptive impact.

Has good faith made any headway in the last quarter of a century? Good faith still surfaces when contracts are interpreted and terms are implied.<sup>68</sup> The acid test for determining whether good faith does more than serve a rhetorical purpose is to see whether it is actually used to prevent one contracting party from rendering a type of performance or otherwise behaving in a way which would otherwise be permitted under the contract, or would restrict a party from enforcing contractual rights otherwise available. When the UCC Permanent Editorial Board issued its Commentary No. 10 on 1-

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<sup>66</sup> Summers, ‘Good Faith’ in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L.Rev. 195 (1968); Summers, The General Duty of Good Faith: Its Recognition and Conceptualization, 67 Cornell L.Rev. 810 (1982).

<sup>67</sup> Burton, Good Faith Performance of a Contract within Article 2 of the Uniform Commercial Code, 67 Iowa L.Rev. 1 (1981).

<sup>68</sup> *Market Street Associates v. Frey*, 941 F.2d 588, 595 (11th Cir., 1991): “It would be quixotic as well as presumptuous for judges to undertake through contract law to raise the ethical standards of the nation's business people. The concept of the duty of good faith like the concept of fiduciary duty is a stab at approximating the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute.”

203, the answer, if one treated that document as a summative statement of the role of good faith, was that good faith operated in only a subsidiary way since it did not “support an independent cause of action;” rather, it merely “directs a court towards interpreting contracts within the commercial context in which they are created, performed and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached.”<sup>69</sup> This appears to be consistent with the mass of case law on good faith.<sup>70</sup>

Despite this, it has been asserted that the duty of good faith is tantamount to a tortious duty and is therefore one that overrides the provisions of the contract. The Supreme Court of Vermont, in a case where an fuel supplier was prevented from invoking an automatic termination clause triggered by the death of a key employee of the distributor, stated that “an action for its breach is really no different from a tort action, because the duty of good faith is imposed by law and is not a contractual term that the parties are free to bargain in or out as they see fit.”<sup>71</sup> Thus the widow of the key employee had an expectation that the fuel company might negotiate a new agreement with her or buy her out at a fair price or allow her sufficient time to sell the business to a

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<sup>69</sup> Farnsworth observes that this is inconsistent with Comment 8 to UCC § 2-309(3) which, dealing with reasonable notice of termination and the striking down as unconscionable of any contractual clause dispensing with reasonable notice, refers to good faith: Contracts §7.17 note 14 (3<sup>rd</sup> ed 1999).

<sup>70</sup> See, e.g., *Dalton v. Educational Testing Service*, 663 N.E.2d 289 (N.Y., 1985); *Duquesne Light Co. v Westinghouse Electric Corp.*, 66 F.3d 604 (3d Cir., 1995).

<sup>71</sup> *Carmichael v. Adirondack Bottled Gas Co.*, 635 A.2d 1211, 1216 (Vt., 1993).

third party. This seems to be a minority approach<sup>72</sup> because other courts have not allowed good faith to override the contract.<sup>73</sup>

Furthermore, apart from Commentary 10 and the general confinement of good faith to matters that can be dealt with by other means, there are other refreshing signs of judicial efforts to prevent good faith from getting out of hand. Judge Posner has most aptly said: “The particular confusion to which the vaguely moralistic overtones of ‘good faith’ give rise is the belief that every contract establishes a fiduciary relationship.”<sup>74</sup> In a case where, after the termination by the principal of a distribution agency, the agent unsuccessfully sought a period of notice and commission entitlement in excess of what was explicitly agreed in the contract, Judge Easterbrook firmly stated: “Parties to contracts are entitled to seek, and retain, personal advantage...Contract law does not require parties to be fair, or kind, or reasonable, or to share gains or losses equitably.”<sup>75</sup> It

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<sup>72</sup> But see also *Re Vylene Enterprises Inc*, 30 F.3d 1472 (9th Cir., 1996), where the opening by the franchisor of a competing restaurant less than a mile and a half away was a breach of the duty of good faith, despite the fact that the franchisee had not been granted an exclusive territory.

<sup>73</sup> *Riggs National Bank of Washington DC v. Lynch*, 36 F.3d 370 (4th Cir., 1994); *General Aviation Inc v. Cessna Aircraft Co*, 915 F.2d 1038 (1990); *Grand Light & Supply Co. v. Honeywell Inc.*, 771 F.2d 672, 679 (2d Cir., 1985).

<sup>74</sup> *Market Street Associates v. Frey*, 941 F.2d 588, 593 (11th Cir., 1991).

<sup>75</sup> *Industrial Representatives v. CP Clare Corp.*, 74 F.3d 128 (7th Cir., 1996), citing *Original Great American Chocolate Chip Cookie Co. v. River Valley Cookies Ltd.*, 970 F.2d 273, 282 (7th Cir, 1992).

is not the function of the law to fashion a contract that a more equal balance of bargaining power might have produced.

It is comforting to be told that U.S. courts “generally utilize the good faith duty as an interpretive tool to determine ‘the parties’ justifiable expectations’, and do not enforce an independent duty divorced from the specific clause”.<sup>76</sup> Thus the court in the case in question declined to recognise a 40-year warranty period for steam generators conjured up from a contract that made no mention of it.

So what, then, is the harm in having an expansive duty of good faith in Article 2 and in the general law of contract? It may not be great if litigation occurs in the right court before the right judge. Yet there is always the risk that the duty might be extensively applied regardless of the terms of the contract. Even if a duty of good faith did not exist, a court disposed to solutions of this kind might well manufacture them by other means. If good faith is kept within bounds, the criticism is that it is a redundancy. Like a mannequin in a shop window, it is making a demonstration that does not match the human transactions taking place within. Judge Posner has written: “We could of course do without the term ‘good faith,’ and maybe even without the doctrine. We could...speak instead of implied conditions necessitated by the unpredictability of the future at the time the contract was made.”<sup>77</sup> The danger remains, nevertheless, that good faith could be released from its straitjacket by well-meaning courts handling hard cases. That means that contractual certainty cannot be taken for granted.

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<sup>76</sup> *Duquesne Light Co. v. Westinghouse Electric Corp*, 66 F.3d 604 (3d Cir., 1995).

<sup>77</sup> *Market Street Associates v. Frey*, 941 F.2d 588, 595 (11th Cir, 1991).

The Unidroit Principles of International Commercial Contracts lay down a principle of good faith and fair dealing<sup>78</sup> and provide, moreover, as though they were a free-standing law or statute, that the parties are not at liberty to exclude or limit it.<sup>79</sup> If they are not free to exclude good faith expressly, it follows *a fortiori* that they may not do so impliedly by agreeing to terms that are inconsistent with it. Express duties of good faith bear the seeds of that kind of development. The more rhetorical freight that good faith carries, the more benighted contracting parties will seem when they seek to exclude it.

There is of course no express duty of good and fair dealing in the performance and enforcement of contracts in English law. A system of law uncodified by Restatement or statute cannot manufacture such a duty. Even if such a duty were treated as an implied term of the contract, it could be repelled by an inconsistent express term. Such controls as exist on exemption and similar clauses do not safeguard implied terms of the contract, with the exception of the duty not to act negligently.<sup>80</sup> The courts at the highest level have also refused to sanction implied terms in the contract on the ground that it would be reasonable to do so.<sup>81</sup> It will take some time to consider whether the more relaxed approach to contractual interpretation that has prevailed in very recent times will lead in

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<sup>78</sup> (2004), Article 1.7(1).

<sup>79</sup> Article 1.7(2).

<sup>80</sup> Unfair Contract Terms Act 1977, s.2.

<sup>81</sup> *Liverpool City Council v. Irwin*, [1977] A.C. 239.

time to an understated good faith standard of performance, though not expressed in so many words.<sup>82</sup>

Apart from this, it is useful to highlight a few key English cases whose outcome can only be described as repelling any duty of good faith and fair dealing. The clearest examples are to be found in the commodities trade. English courts have declined to prevent a buyer from terminating a contract for early shipment when the only reason for this has been that the rice market is in decline.<sup>83</sup> They have also prevented a buyer from substituting a ship nominated to lift a cargo when the original ship turned out to be unavailable, but a suitable and timely replacement could be found. The seller wished to quit the contract so as to take advantage of a rising market.<sup>84</sup> English courts have also allowed a short seller to insist upon a near-impossible requirement that a ship nominated to lift a cargo from a wide range of potential Australian ports be fit to enter every single port in the range, even though the Australian agency with a monopoly over barley exports<sup>85</sup> was prepared to find a cargo for the ship in question from some of those ports.<sup>86</sup> The view apparently taken by the English courts is that the avoidance of an undesirable outcome in a given case is no reason to imperil commercial certainty when the contract,

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<sup>82</sup> *Chartbrook Ltd . v. Persimmon Homes Ltd.*, [2009] 1 A.C. 1101.

<sup>83</sup> *Bowes v. Shand*, 2 App. Cas. 455 (1877).

<sup>84</sup> *Cargill Ltd. v. Continental UK Ltd.*, [1989] 2 Lloyds Rep. 290.

<sup>85</sup> And therefore at the head of the notional string that would have attached to the seller had it not been short.

<sup>86</sup> *Richco International Ltd. v. Bunge & Co. (The New Prosper)*, [1991] 2 Lloyd's Rep.

or contract standard form, is clear. If the trade does not like the result, then the form should be amended for the future.

Meanwhile, the loser licks its wounds. The consequence of the interplay between courts and trade associations is a sophisticated standard form that reveals in its contents the history of contract law in the trade concerned and that guarantees a fair measure of commercial certainty. This is especially important in string trading conditions, where the line between a derivative future contract and a physical forward delivery contract may be more notional than real. Those who argue passionately for the substitution in international commodity sales of the UN Convention on the International Sale of Goods 1980 for English law seem not to understand this point. The modern tendency towards relaxation in the interpretation of contracts, which so far has made no real impact on the commodities trade, has destructive potential.<sup>87</sup>

### ***Conclusion***

Unconscionability and good faith have the capacity to undermine commercial certainty, though American courts on the whole have so far succeeded in reining in their destructive possibilities. Subject to well-defined exceptions, business parties should be left to their own devices. Legislation dealing with commercial contracts should be practical, direct and economical, and should not seek to make a moral demonstration. A commitment to the rule of law is thwarted if important legislative texts are deprived of meaning. A country's law of contract should be what it says it is. This is the clearest

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<sup>87</sup> Reardon Smith Line Ltd.v. Yngvar Hansen-Tangen, [1976] 1 W.L.R. 989.

direction that can be given to ensure orderly legal development and encourage investment in the future through the contracting process.