RELATIONAL CONTRACTS AND THE COMMON LAW[1]

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1 I am going to explore a particular aspect of contract law that is gaining increasing prominence in recent years. This is the concept of relational contracts and the concept of good faith in commercial relations as it is approached in the common law jurisdiction. This speech is going to do that by concentrating on four areas:

(a) History and overview.

(b) Characterisation: what type of contract is relational?

(c) The English common law approach.

(d) The future.

2 Any consideration of relational contracts requires, in the common law context, analysis of the presence in a commercial agreement of an implied term of good faith. An implied term or duty of good faith is something to which the common law has been traditionally hostile. However, in order properly to analyse and consider this, it is necessary to examine some historical context. Without understanding the Civil Code origins of the concept, it is possible to fall into confusion. Stepping back and looking at the purpose of any system of law, whether civil or common law, they all have the same aim, which is to regulate relations between members of society. As societies become more sophisticated, so the number and type of laws become more complex, but the essential aim remains the same.

I. History and overview

3 Legal scholars and jurists have always been interested in Roman law. At most universities, most undergraduates will commence their studies by studying Roman Law. At some, such as Cambridge and Glasgow Universities, first year law undergraduates are required to study Roman law. Views differ on why this is, but there is no doubt that consideration of traditional Roman legal concepts can give a law student grounding in certain principles of property and contract, as well as some historical interest in entirely outdated concepts that were widely practised in the ancient world such as slavery. Obviously, these still regrettably survive today in some areas of the world, but in Roman times there was a developed and sophisticated

1 This keynote address was delivered at the Singapore Mediation Lecture 2024 on 29 August 2024. An abridged version of the panel discussion which followed this address is found at pp 17–28 of this issue.

legal system that included matters such as the legal responsibility for acts of one's slaves.

4 So let us give the person responsible for this part of the story of relational contracts his full and proper name – Petrus Sabbatius Iustinianus Augustus, or as we now call him, the Emperor Justinian. He was emperor in 527 AD or CE, which means he was the Eastern Roman Emperor, based in Constantinople, because by then the two parts of the Roman Empire had split under Constantine the Great who founded Constantine in 330 CE.

5 Just to put these legal developments into context, by 410 CE the Roman occupation of Britain had already occurred but had come to an end; the Britons, Angles, Saxons, Celts and Picts had fought between each other a number of battles. This period of British history is vague. The Battle of Mons Badonicus was fought at some point in the late 5th or early 6th century, and resulted in the Britons stopping the westward encroachment of the Anglo-Saxons. However, it was probably not a battle but a siege; nobody knows whether the Britons were besieging the Anglo-Saxons or *vice versa*; and nobody knows precisely when it happened, or where. There is scant historical fact available about it. One of the sources describes it simply as the last great slaughter.[2]

6 The Emperor Justinian was, at about the same time as this, demonstrating a far more sophisticated way of life and degree of civilisation at the opposite end of Europe to the great slaughter somewhere in Britain. He decided to embark upon a project far more cerebral in scope than slaughter: he decided to codify Roman law. The Corpus Juris Civilis, which is the name for the project as a whole, was ordered by him. Its contemporary name is the Justinian Code, or Codex Justinianus and this is one part of the Corpus Juris Civilis. The first version of the Code was thought of as insufficient or incomplete, so a second version or edition was published in 534 CE, and this consists of 12 books. Book one is ecclesiastical law, sources of law and duties of higher offices; books two to eight were private law; book nine crime; and books ten to 12 were administrative law (what in the 21st century is called public law). This structure is based on ancient classifications that, effectively, survive to this day. Consider this description of the 12 books with the Law Commission of England and Wales. There are four Commissioners, each tasked with a different legal field. These are: (a) commercial and common law; (b) property law, family and trusts; (c) crime; and (d) public law and the law in Wales. The categorisation in the Code is broadly replicated in that division.

7 The Justinian Code is usually seen as the end point of the Roman legal system as it affects the Roman Empire. If the starting point is the so-called Twelve Tables in about 449 BCE, the time span of Roman law covers a period of about 1,000 years.

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2 Gildas, *De Excido et Conquestu Britanniae*.

8 The laws that were included in the Twelve Tables were a way publicly to display rights that each citizen had in Rome both in the public and private sphere. These Twelve Tables displayed – traditionally thought of as a display in the Forum in Rome itself – what had been previously understood in Roman society as the unwritten laws. The public display of the tablets allowed for a more balanced society between the Roman patricians[3] who were educated and understood the laws of legal transactions, and the Roman plebeians[4] who had little education or experience in understanding law. By revealing the unwritten rules of society to the public, the Twelve Tables provided a means of safeguard for the plebeians allowing them the opportunity to avoid financial exploitation and added balance to the Roman economy.[5]

9 So Roman law was essentially codified towards the end of this period of a millennium. Why does this matter in the context of what is being considered today? There are two answers to that. Firstly, Roman law is the foundation of the civil system of law, which is the most widely used system across the world today. The Germanic civil law code which became effective in 1900, the *Burgerliches Gesetzbuch*, codified private law across the whole of Germany and was a result of the different German states or regions combining into one country or empire. Some areas such as Bavaria had their own codes already, but not all, and the *Burgerliches Gesetzbuch* was in contrast with what had been the case far earlier in early Medieval Germany, known as *leges barbarorum*. This means laws of the barbarians.

10 The French Revolution abolished most remaining vestiges of feudalism, and the Napoleonic Code of 1804 was drawn up by a committee or commission of four eminent jurists, although Napoleon himself chaired some of the commission sessions and was heavily involved and supportive of it – hence why it is named after him, although it is also called the Code Civil. Amended heavily since then, it is still in force, this has been adopted in a great many countries across the world.

11 It drew heavily on the Justinian Code and adopted the division of law into different chapters or sections or categories, drawn from Justinian. That had divided the law into those dealing with persons, things and actions. Similarly, the Napoleonic Code divided the law into four sections: persons, property, acquisition of property and civil procedure (the latter moved into a separate code in 1806).

12 A duty of good faith is a Civil Code concept. It has its roots in Roman concepts of *fides*, the word which appears in phrases that we still use today – *bona fides*. It was one of the important virtues which were held by

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3 "Patrician" *Wikipedia* <https://en.wikipedia.org/wiki/Patrician_(ancient_Rome)> (accessed 1 November 2024).

4 "Plebeians" *Wikipedia* <https://en.wikipedia.org/wiki/Plebeians> (accessed 1 November 2024).

5 "Roman economy" *Wikipedia* <https://en.wikipedia.org/wiki/Roman_economy> (accessed 1 November 2024).

the ancient Romans, the others including strength, valorous conduct, piety and moral rectitude.

13 *Bona fides* is a Latin phrase meaning "good faith". Its ablative case[6] is *bona fide*, meaning "in good faith", and this can be translated in English as an adjective to mean "genuine". While *fides* may be translated as "faith", it embraces a range of meanings within a core concept of "reliability", in the sense of trust between two parties for the potentiality of a relationship. For the Romans *bona fides* was to be assumed by both sides, with implied responsibilities and both legal and religious consequences if broken. According to Roman law,[7] "*bona fides* requires that what has been agreed upon be done" and was the principle of acting with integrity. The source for that quotation is 19.2.21 of Justinian. A Roman citizen was expected to have the virtue of *fides*, amongst the other virtues that were considered important.

14 This is important – in order properly to understand the concept of good faith in a commercial contract, you have to start with what good faith means. Essentially, in a civil code jurisdiction, this is a concept that is applied to contractual relations.

15 Returning to the common law and its quite different roots and historical development, perhaps understandably the Napoleonic Code, imposed on countries conquered by Napoleon or colonised by the French, was never particularly attractive in 19th century England and Wales. A large amount of time, effort, lives and treasure were expended to winning wars against the French. French law was never particularly attractive to the common law world.

16 Common law contract theory is quite different to the civil concept. With certain exceptions such as illegality and contracts for purposes contrary to the public interest, parties are entirely free to agree such terms as they wish. Outside those terms, they are generally free to act as they wish. There are some other more recent exceptions, such as payment terms in construction contracts, but the essential freedom to contract remains a central theme.

II. Characterisation: what type of contract is relational?

17 I now turn to the landmark judgment by Leggatt J – now Lord Leggatt JSC – in *Yam Seng Pte Ltd v International Trade Corporation Ltd*[8] ("*Yam Seng*"). This case has been instrumental in shaping our

6 "Ablative" *Wikipedia* <https://en.wikipedia.org/wiki/Ablative_(Latin)> (accessed 1 November 2024).

7 "Roman law" *Wikipedia* <https://en.wikipedia.org/wiki/Roman_law> (accessed 1 November 2024).

8 [2013] EWHC 111.

understanding of relational contracts and offers significant insights into their practical applications and potential challenges.

18 To set the stage, let us first distinguish between relational contracts and transactional contracts. Transactional contracts are typically characterised by a clear, discrete exchange of goods, services, or money, with the terms of the agreement explicitly outlined and the relationship between the parties often limited to the duration of the contract's performance. Examples include a one-time purchase of goods or a simple service agreement. In contrast, relational contracts are underpinned by a long-term relationship between the parties. These contracts are marked by their ongoing, dynamic nature, and the mutual trust and co-operation that evolve over time. They often lack complete specificity in terms of obligations and expectations at the outset, instead relying on the relationship's inherent trust to navigate any uncertainties or changes that arise. Examples will include long-term supply agreements, franchise agreements, and other contracts where, *eg*, it is not possible to predict with certainty all that will or may occur during the life of the contract. I am not going to deal with contracts of employment because good faith is required and expected in those but they are a particularly specialised subset of contract.

19 The theoretical underpinning of relational contracts can be traced back to the work of an American legal scholar Ian Macneil, who introduced the concept in the 1970s. Macneil's theory suggests that traditional contract law, with its focus on transactions and formalism, is ill-suited to govern the complexities of long-term relationships. He argued for a more flexible approach, one that acknowledged the social and economic context within which contracts operate. Macneil identified several characteristics of relational contracts, including:

(a) Duration: relational contracts typically span a long period, often without a fixed end date.

(b) Mutual benefit and co-operation: parties engage in a co-operative relationship aimed at mutual benefit, which may require ongoing adjustments and renegotiations.

(c) Informality: these contracts may rely less on formal documentation and more on unwritten understandings and practices.

(d) Social embeddedness: the relationship between the parties is often influenced by social norms and personal relationships, making the context critical to understanding the contract.

20 The *Yam Seng* case brought the concept of relational contracts into sharp focus within English law. In this case, Yam Seng Pte Ltd, a distributor of fragrance products, claimed that International Trade Corporation Ltd ("ITC") had breached the distribution agreement by supplying products to other distributors at lower prices and providing false information regarding product availability and pricing. The judgment explicitly

recognised the relational nature of the contract between Yam Seng and ITC. The judge observed that the agreement contained several hallmarks of a relational contract:

> (a) Long-term relationship: the distribution agreement was intended to govern an ongoing relationship rather than a single transaction.
>
> (b) Mutual trust and co-operation: the parties had to co-operate closely to ensure the success of the distributorship.
>
> (c) Implied terms of good faith: the judge emphasised that relational contracts often involve implied obligations of good faith and fair dealing, which are necessary to give business efficacy to the contract.

21 Leggatt J's reasoning hinged on the idea that in relational contracts, the parties' expectations and obligations cannot be fully captured by the explicit terms of the agreement. Instead, there are implicit understandings that are crucial to the contract's successful performance. In this case, ITC's actions undermined the trust and co-operation essential to the distributorship, constituting a breach of the implied terms of good faith.

22 At its core, the duty of good faith entails an expectation that parties will deal with each other of course honestly, but also fairly and sincerely, refraining from actions that would undermine the trust and co-operation fundamental to their relationship. Fidelity to an agreed common purpose is an essential component of good faith. Parties should adhere to the spirit of the agreement and not just its literal terms, ensuring that the mutual benefits intended by the contract are realised for the benefit of both. They would deal with one another *bona fides*. You can see how an understanding of the concept from the Justinian Code onwards can help understanding. There is more to it than a requirement to act honestly, or a requirement not to act dishonestly, if that is different.

23 That such a concept is recognised in English law is, I suggest, clear. I have explained *Yam Seng* in 2013. Other cases since then have also dealt with or touched upon it.

24 It has, sometimes in the past and in my view wrongly, been suggested that there was no such concept in English law. For example, the 2018 edition of *Chitty on Contracts*[9] had stated the following:

> In his view, for this purpose, while good faith may have the significance of honesty, 'not all bad faith conduct would necessarily be described as dishonest. Other epithets which might be used to describe such conduct include "improper", "commercially unacceptable" or "unconscionable"'. With respect, the implication of such an implied term applicable generally (or even widely) to commercial

9 (Sweet & Maxwell, 33rd Ed, 2018) at para 1-058.

> contracts would undermine to an unjustified extent English law's general position rejecting a general legal requirement of good faith. Subsequent judicial comments on Leggatt J.'s discussion have suggested that it should not be seen as establishing a principle of general application to all commercial contracts, but rather as recognising a particular example of a contract *where a term as to good faith (meaning honesty) should be implied*. In particular, in ***Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)*** Jackson L.J. noted that, while there is no general doctrine of 'good faith' in English contract law, a duty of good faith may be implied by law as an incident of certain categories of contract, citing ***Yam Seng Pte Ltd*** as an example. [emphasis added in italics; emphasis in bold italics in original]

25 There were two distinct respects in which I considered that passage to be wrong. Firstly, a term requiring good faith does not only mean honesty. Statements that equate the two are simply wrong. They ignore what good faith means. There is more to a duty of good faith than a requirement to act honestly. It includes honesty, but there is more to it than that. Secondly, by stating that English law generally *rejected* a legal requirement of good faith, the passage in Chitty was ignoring the historical development in this respect. Saying that English law rejects a legal requirement of good faith is a statement that is far too wide. What the cases make clear is that such a duty will not be routinely applied to all commercial contracts.

26 In *MSC Mediterranean Shipping Co SA v Cottonex Anstalt*,[10] an appeal from Leggatt J at first instance, Moore-Bick LJ said:[11]

> The judge drew support for his conclusion from what he described as an increasing recognition in the common law world of the need for good faith in contractual dealings. The recognition of a general duty of good faith would be a significant step in the development of our law of contract with potentially far-reaching consequences and I do not think it is necessary or desirable to resort to it in order to decide the outcome of the present case.

27 It should be noted that Moore-Bick LJ did *not* say that there was no such concept, but rather that it was neither necessary nor desirable to resort to it in that case. I consider this as consistent with, and further support for, the concept of relational contracts in English law, that is to say those that have an implied duty of good faith.

28 In *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd*[12] Beatson LJ stated as follows:[13]

> One manifestation of the flexible approach referred to by McKendrick and Lord Steyn is that, in certain categories of long-term contract, the court may be more willing to imply a duty to co-operate or, in the language used by Leggatt J in *Yam Seng PTE v International Trade Corp Ltd* [2013] EWHC 111 (QB) at [131],

10 [2016] EWCA Civ 789.
11 *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789 at [45].
12 [2016] EWCA Civ 396.
13 *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 at [67].

> [142] and [145], a duty of good faith. Leggatt J had in mind contracts between those whose relationship is characterised as a fiduciary one and those involving a longer-term relationship between parties who make a substantial commitment. The contracts in question involved a high degree of communication, co-operation and predictable performance based on mutual trust and confidence and expectations of loyalty 'which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements'. He gave as examples franchise agreements and long-term distribution agreements. Even in the case of such agreements, however, the position will depend on the terms of the particular contract. Two examples of long-term contracts which did not qualify are the long-term franchising contracts considered by Henderson J in *Carewatch Care Services Ltd v Focus Caring Services Ltd and Grace* [2014] EWHC 2313 (Ch) and the agreement between distributors of financial products and independent financial advisers considered by Elisabeth Laing J in *Acer Investment Management Ltd and another v The Mansion Group Ltd* [2014] EWHC 3011 (QB) at [109].

29 Stating in a particular case that the contract in that case is *not* a relational contract is not the same as stating that there is no such concept recognised in English law. In *Amey Birmingham Highways Ltd v Birmingham City Council*[14] Jackson LJ stated:

> *The contract before the court is a PFI contract intended to run for 25 years. It may therefore be classified as a relational contract*. In recent years there has been much academic literature on relational contracts and on the question whether they are subject to special rules. See, for example, Professor Hugh Collins' paper 'Is a relational contract a legal concept?' in *Contracts in Commercial Law* (Degeling and others, Thomson Reuters 2016). For good reason, none of that literature has been cited to us and I do not venture into those contentious issues. [emphasis added]

30 There is no doubt that the implied duty of good faith remains a subject of judicial and academic debate and some uncertainty. Several factors contribute to this ambiguity. For example, good faith is inherently context-specific, varying with the nature of the relationship, industry norms and specific circumstances of each case. This variability makes it challenging to establish a clear, uniform standard. Also, there is no definitive statement of what is required as an ingredient or feature that is determinative, or even relevant. There is no doubt that makes it more difficult to define. But it does not mean that it does not exist.

III. English common law approach

31 Part of the issue is that if there is to be such a component of such a contract, it would be an implied one. One therefore has to start with the process of implication of terms.

32 There are a number of other first-instance cases that have found it to be present.

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14 [2018] EWCA Civ 264 at [92].

33 In *Sheikh Al Nehayan v Kent*[15] the Sheikh, a member of the Royal Family of Abu Dhabi, agreed to invest in Mr Kent's luxury hotel business. Leggatt J heard the case but by the time it ended he had moved to the Court of Appeal. He himself stated:[16]

> It does not follow from the conclusion that he did not owe any fiduciary duties to Mr Kent that the Sheikh's entitlement to pursue his own self-interest was untrammelled. I have previously suggested in *Yam Seng Pte Ltd v International Trade Corp* [2013] EWHC 111 (QB), at [142], that it is a mistake to draw a simple dichotomy between relationships which give rise to fiduciary duties and other contractual relationships and to treat the latter as all alike. In particular, I drew attention to a category of contract in which the parties are committed to collaborating with each other, typically on a long term basis, in ways which respect the spirit and objectives of their venture but which they have not tried to specify, and which it may be impossible to specify, exhaustively in a written contract. *Such 'relational' contracts involve trust and confidence but of a different kind from that involved in fiduciary relationships. The trust is not in the loyal subordination by one party of its own interests to those of another. It is trust that the other party will act with integrity and in a spirit of cooperation*. The legitimate expectations which the law should protect in relationships of this kind are embodied in the normative standard of good faith. [emphasis added]

34 In *Bristol Groundschool Ltd v Intelligent Data Capture Ltd*[17] the parties agreed to collaborate to produce training manuals for pilots. The claimant provided the content, and the defendant converted that into an electronic application, which was jointly published and marketed. When the parties fell out, and in anticipation of their joint venture coming to an end, the claimant secretly accessed the defendant's database and downloaded material, later using this downloaded material to continue selling the electronic training manuals. One issue was whether the secret download was a breach of contract. There was no express term of the contract which prohibited it. But Mr Richard Spearman QC, sitting as a deputy High Court judge, characterised the joint venture agreement as a relational contract and held that there was an implied term of the contract requiring good faith in its performance. The defendant had breached that term by engaging in conduct that "would be regarded as commercially unacceptable by reasonable and honest people".

35 Further, in so far as there is any suggestion that good faith means only honesty, I consider that this is in direct conflict with the *dicta* of Leggatt J in *Sheikh Al Nehayan v Kent*[18] where he said:

> … In *Paciocco v Australia and New Zealand Banking Group Limited* [2015] FCAFC 50, para 288, in the Federal Court of Australia, Allsop CJ summarised the usual content of the obligation of good faith as an obligation to act honestly and with fidelity to the bargain; an obligation not to act dishonestly and not to

15 [2018] EWHC 333 (Comm).
16 *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [167].
17 [2014] EWHC 2145 (Ch).
18 [2018] EWHC 333 (Comm) at [175].

> act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained. In my view, this summary is also consistent with the English case law as it has so far developed, with the caveat that the obligation of fair dealing is not a demanding one and does no more than require a party to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people …

36 There is a useful explanation of terminology in the dicta of Dove J in *D&G Cars Ltd v Essex Police Authority (No 2)*[19] who said:

> By the use of the term 'integrity', rather as Leggatt J uses the term 'good faith', the intention is to capture the requirements of fair dealing and transparency which are no doubt required … There may well be acts which breach the requirement of undertaking the contract with integrity which it would be difficult to characterise definitively as dishonest. Such acts would compromise the mutual trust and confidence between the parties in this long-term relationship without necessarily amounting to the telling of lies, stealing or other definitive examples of dishonest behaviour.

It is clear that in that case there was considered to be more to such an obligation than acting honestly (or not acting dishonestly).

37 In one of the judgments in the "*Post Office* litigation" concerning Horizon called *Bates v Post Office Ltd* ("*Bates*"), I set out in judgment No 3 (Common Issues)[20] a list of the characteristics or features that would ordinarily be expected to be present if a contract were to be categorised as relational. I am not going to talk about the *Post Office* litigation and as is well known there is a respected convention that judges do not comment on cases in which they have been involved. All I am going to do is read out the list that appears in that part of the publicly available judgment:

> 1. There must be no specific express terms in the contract that prevents a duty of good faith being implied into the contract.
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> 2. The contract will be a long-term one, with the mutual intention of the parties being that there will be a long-term relationship.
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> 3. The parties must intend that their respective roles be performed with integrity, and with fidelity to their bargain.
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> 4. The parties will be committed to collaborating with one another in the performance of the contract.
>
> 5. The spirits and objectives of their venture may not be capable of being expressed exhaustively in a written contract.
>
> 6. They will each repose trust and confidence in one another, but of a different kind to that involved in fiduciary relationships.

19 [2015] EWHC 226 (QB) at [175].

20 See *Bates v Post Office Ltd (No 3) (Common Issues)* [2019] EWHC 606 (QB) at [725].

> 7. The contract in question will involve a high degree of communication, co-operation and predictable performance based on mutual trust and confidence, and expectations of loyalty.
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> 8. There may be a degree of significant investment by one party (or both) in the venture. This significant investment may be, in some cases, more accurately described as substantial financial commitment.
>
> 9. Exclusivity of the relationship may also be present.

38 This was not produced as being an exhaustive list. No single one element of the above list is determinative, with the exception of the first one. This is because if the express terms prevent the implication of a duty of good faith, then that will be the end of the matter.

39 It can therefore be seen that there is no need to become distracted to any appreciable degree about the process of implying terms.

40 In *Amey Birmingham Highways Ltd v Birmingham City Council*[21] Jackson LJ stated that the PFI contract in that case was 5,190 pages long, excluding discs, plans and documents incorporated by reference. For those not used to counting pages, that number equates (approximately) to between 12 and 15 lever arch files, excluding the discs, plans and other documents. Detailed and lengthy contract terms do not of themselves mean that a contract cannot be a relational one, as is clear from that case.[22]

41 It must also be remembered in terms of implication of terms that the question of whether or not a term is necessary is to be judged at the date the contract is made. As Lord Neuberger stated in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*:[23]

> First, the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy.

42 That the exercise must be performed as at the time the contract is made is essential. The pitfalls of doing otherwise were made clear in *Bou-Simon v BGC Brokers LP*.[24] Asplin LJ, giving the leading judgment, stated:[25]

> In my view, therefore, the reasonable reader, taking into account all of the express terms of the Agreement and the surrounding circumstances at the time it was executed and applying commercial common sense, would not consider

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21 [2018] EWCA Civ 264 at [7].
22 See *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264 at [92].
23 [2015] 3 WLR 1843 at [23].
24 [2018] EWCA Civ 1525.
25 *Bou-Simon v BGC Brokers LP* [2018] EWCA Civ 1525 at [18].

> the Implied Term either so obvious that it goes without saying or to be necessary for business efficacy in the sense that the Agreement would lack commercial or practical coherence without it.

IV. The future

43 It is safe to say that the approach advocated by Lord Leggatt and advanced in other cases, including the ones that I have mentioned, has not attracted universal acclamation and approval across the whole of the judicial spectrum.

44 In *UTB LLC v Sheffield United Limited*,[26] Fancourt J considered a number of legal issues, such as the validity of the contract, specific performance and s 994 of the Companies Act, and more importantly whether good faith could be implied into the Investment and Shareholders' Agreement. In his judgment Fancourt J acknowledged the previous decisions in *Yam Seng* and *Bates*, however explained the danger in using the term "relational contract", in that one is not clear about what exactly is meant by it:[27]

> There is a great range of different types of contract that involve the parties in long-term relationships of varying types, with different terms and varying degrees of detail and use of language, and to characterise them all as 'relational contracts' may be in one sense accurate and yet in other ways liable to mislead.

Fancourt J declined to decide the issue by identifying and weighing likely indicia of such a contract.

45 In his view, the question was whether a reasonable reader of the contract would consider that an obligation of good faith was obviously meant or whether the obligation is necessary to the proper working of the contract. The overall character of the contract in issue will of course be highly material in answering that question but so will its particular terms, as recognised by the principle that no term may be implied into a contract if it would be inconsistent with an express term.

46 In *Russell v Cartwright*,[28] Falk J considered an implied duty of good faith in her judgment. The issue here involved individual references to good faith, which were scattered through the clauses of the contract. The claimant nevertheless wished to argue that the contract contained a broader idea of good faith. Falk J noted that rather than trying to identify whether the contract under scrutiny was a "relational contract" (as per the language in *Yam Seng*), the better starting point was the conventional test for the implication of terms.[29] Applying that analysis, the existence of narrowly

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26 [2019] EWHC 2322 (Ch).
27 *UTB LLC v Sheffield United Limited* [2019] EWHC 2322 (Ch) at [202].
28 [2020] EWHC 41 (Ch).
29 *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* at [87].

defined express obligations of good faith in the joint venture agreement, was a strong indicator against the implication of some broader obligation of good faith.[30]

47 She rejected the implication of a wider, more general, idea, and said:[31]

> The existence of express good faith obligations indicates that when the parties intended to impose an obligation of good faith they did so, strongly suggesting that implying a more general good faith obligation would be inconsistent with the express terms.

48 It is of course the simple application of orthodox contract law that implied terms cannot conflict with express terms. Nevertheless, if any single reference to good faith in one clause rules out the application of a broader idea of good faith, that could potentially limit the power of the English implied term. Given the frequency with which individual references to good faith are made in contractual clauses, is the implied term likely to be of any use at all?

49 Falk J also observed, *obiter*, that even if there was some broader obligation of good faith to be implied, its scope was limited in nature and still entitled the defendants to pursue their own commercial interests,[32] drawing the conclusion that the scope for imposing fiduciary duties and far-reaching duties of good faith in commercial joint venture arrangements are limited, particularly where the relationship is structured to facilitate each joint venture pursuing their own commercial interests.

50 So development of this area of the common law is not necessarily assured in any particular direction. Of course, there is a balance to be found between honouring the written terms of a contract and recognising the unwritten expectations that characterise relational contracts. This can be particularly challenging in jurisdictions with a strong emphasis on the literal interpretation of contracts. Also, the concept of good faith and fair dealing may vary across different legal and cultural contexts. What is considered commercially acceptable in one jurisdiction may not be viewed similarly in another. This poses challenges for international contracts and cross-border disputes.

51 Yet, the fact that this is a fledgling concept does not mean that the common law cannot accommodate it. Before the 1930s, somebody who sold a bottle of ginger beer with a snail in it might not consider they owed any duty of care to the consumer of that product, or that the consumer might be their neighbour in law. Obviously, that changed. The concept of a duty of care has moved and evolved in the almost 100-year period since then.

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30 *Russell v Cartwright* [2020] EWHC 41 (Ch) at [89].
31 *Russell v Cartwright* [2020] EWHC 41 (Ch) at [89].
32 *Russell v Cartwright* [2020] EWHC 41 (Ch) at [97]–[98].

52 Turning to Singapore in particular, there are some indications that the law here is tentatively moving towards a recognition that such doctrines do potentially have some legitimacy in the common law. The concept is also connected, although not closely, with other considerations such as undue influence and unconscionability.

53 It might be said in response to this generally that "[i]n the quest for justice, there can never be too many strings to the doctrinal bow".[33] That quotation was used in a Singapore Court of Appeal decision in *BOM v BOK*[34] by Andrew Phang Boon Leong JA himself on an appeal brought against the setting aside of a deed of trust executed by a husband in favour of his young son shortly before the wife, who had drafted the deed, instituted divorce proceedings.

54 In another more directly relevant case, namely *Ng Giap Hon v Westcomb Securities Pte Ltd*,[35] an implied term of good faith had been rejected by the same judge (sitting together with Chao Hick Tin JA and V K Rajah JA). The question arose whether a term could be implied that the company would not deprive its agent of his commission, which effectively required the implication of implied terms including those relating to dealing in good faith. The attempt to have such terms implied failed.

55 The First Implied Term was based on the broader category of "terms implied in law". However, such a term could *not* be implied. In the first instance, caution would be required as such terms would be based on broader policy considerations and would also entail implying the same term in the future for all contracts of the same type.[36]

56 Further, the content of such a term involved the doctrine of good faith, which was a fledgling doctrine in English and Singapore contract law and required much clarification, even on a theoretical level. There were differing views as to what the doctrine meant and how it was to be applied. Moreover, the case law appeared to be in a state of flux. For instance, two leading authors were of the view that good faith was inherent in *all* aspects of the law of contract and that there was therefore no reason for any term concerning good faith to be implied into a contract. Such a term had to be justified by reference to the particular circumstances of each case and not by a general principle. Therefore, until the theoretical foundations and structure of the doctrine were settled, the court would not endorse an implied duty of good faith in the Singapore context.

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33 Andrew B L Phang & Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer Law & Business, 2012) at para 732.

34 [2019] 1 SLR 349.

35 [2009] 3 SLR(R) 518.

36 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [44]–[46].

57 Accordingly, it was found that the First Implied Term should not be implied into the Agency Agreement.[37]

58 This decision was in 2008, although reported in 2009, and therefore predated the main drive in this respect in *Yam Seng* which was then continued in other cases that I have mentioned already. I do not know if it would be decided the same today here in Singapore, but in any event, there are two sentences in the headnote that are equally apposite today. This is that "[t]here were differing views as to what the doctrine meant and how it was to be applied" and "[m]oreover, the case law appeared to be in a state of flux". These statements are perhaps as true now as they were then, albeit the flux might have moved on a little more. But there are others on the panel far more immersed in the law of Singapore than I am.

59 Refining the criteria for identification of such terms is obviously something that would be needed, and under the doctrine of *stare decisis*, which is not something required in Civil Code countries which do not use such a doctrine, that requires the right cases being brought with the right subject matter before the relevant courts.

60 Other than that, there is perhaps the possibility of legislative reforms, but absent a wider commercial code it is difficult to see that would happen in the immediate or short term, at least in the UK. If there were such reform, that would at least provide a more solid legal foundation for formulating how such contracts are identified, and also assist in addressing disputes involving such contracts. The Singapore Mediation Centre has launched the INTEGRAF programme[38] earlier this year specifically to assist in resolving disputes arising in relational contracts.

61 In the context of mediation and Alternative Dispute Resolution ("ADR") I would add only this: The modern civil codes have had approximately two millennia, if not longer, in development, and about 1,500 years if one takes the date from the Justinian Code itself. Mediation and other forms of ADR can play a vital role in resolving disputes involving relational contracts, as they can other types of dispute. They also, at their heart, require collaboration between the parties and certainly good faith in dealing. I see an implied term of good faith as being part of a more sophisticated and intelligent way of considering contractual relations. Perhaps the common law, which is far younger than the civil law, is not yet sufficiently developed to embrace it as a central concept. We may have moved on a long way from the last great slaughter of the Mons Badonicus, but perhaps we have not sufficiently moved towards the Justinian Code and away from the *leges barbarorum*.

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37 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [47]–[60].

38 See "INTEGRAF" *Singapore Mediation Centre* <https://mediation.com.sg/service/integrated-appropriate-dispute-resolution-framework/> (accessed 1 November 2024).

62 Some concepts of Roman law have been embraced in the last 30 years in England and Wales. For example, the requirement for certain terms to be included in construction contracts, failing which they will be statutorily implied, those terms being those relating to payment and adjudication in the Housing Grants Construction and Regeneration Act 1996[39] is a device that must be seen as clearly taken from Roman law.

63 As we continue to grapple with the complexities of relational contracts and the content and scope of the duty of good faith, it is imperative that we adopt a flexible yet principled approach. By embracing the theoretical foundations and addressing practical challenges, we can ensure that relational contracts are analysed and interpreted in a manner that promotes fairness, co-operation and mutual benefit. Perhaps we can reclaim those Roman virtues after all. Thank you.

39 *c* 53.

PANEL DISCUSSION[40]

Moderator

Francis **GOH**
LLB (National University of Singapore); Advocate and Solicitor (Singapore); Principal Mediator, Singapore Mediation Centre; Partner and Head of International Arbitration & Mediation, Harry Elias Partnership LLP.

Panellists

The Right Honourable Lord Justice **FRASER**
The Court of Appeal of England and Wales; Chair, Law Commission of England and Wales.

Alex **WONG** Li Kok
LLB (University of London); Judicial Commissioner, Supreme Court of Singapore.

Mark **MCLAUGHLIN**
LLB, PgD (International Law) (University of Glasgow), PhD (International Law) (China University of Political Science and Law); Assistant Professor of Law, Yong Pung How School of Law, Singapore Management University.

I. Introduction

Francis Goh ("**FG**"): Welcome, everyone – it is good to see so many of you in this room. Thank you, Lord Justice Fraser ("Fraser LJ"), for your speech, thank you for reminding us that we are all humans, and the law provides a framework that allows us, irrespective of race or jurisdiction, to thrive. We are united by the law and the legal frameworks that we embrace. So, on that note of relational contracts, Fraser LJ, you were saying that it is embodying the concept of good faith that we have to have fair dealings with one another and then you tied it to mediation where you say, after all, we have to collaborate and to exercise good faith in all our dealings. Can we unpack your thinking on that a little bit more?

Fraser LJ: Well, to answer that question within the context of mediation, and because in Singapore you have recently launched the draft rules specifically for relational contracts, consider a very large infrastructure project, where parties might have reached a position of entrenchment with one another on a dispute. In a sense, that is far too late to try to resolve their differences and it is far better to avoid those conflicts becoming exacerbated. Which is why for example, early interventional guidance to

40 This panel discussion followed the 2024 Singapore Mediation Lecture. This is an abridged transcript of the dialogue between the panellists.

prevent conflicts is usually preferable for everyone concerned; whether it is a business relationship which has the potential for long life and mutual benefit. Rather than take a more binary outlook to a particular conflict which is a party saying "I am going to win, and you are going to lose", or *vice versa*, a more collaborative resolution of the parties' positions is much more likely to have long term economic benefit – both for those parties and also for society as a whole. And in a way if you look at the concept of mediation and what it is trying to achieve, even in the bitterest commercial dispute, you would like to think that a successful mediation will result in: (a) the parties settling their differences; and (b) being prepared to do business with one another going forward. So that is why I think that the concept of good faith and fair dealing are directly relevant and transferable in the sense of mediation. Because otherwise the dispute narrative becomes an endless binary "I'm going to win, you're going to lose", "I'm right and you're wrong"; these sort of fixed positions which, for anyone who has done conflicts litigation or simpler litigation, really is an outdated way of doing business and resolving disputes, I feel.

FG: Thank you, Fraser LJ, you certainly are challenging the litigation lawyers in the room to rethink the concept of winning and losing a binary outcome, *versus* taking a more holistic outcome of helping the clients do business for the long term. Judicial Commissioner Wong, Fraser LJ uses the example of a construction contract, but I want to ask you, is it only related to the construction context? We also have a slightly bigger problem in Singapore because the concept of relational contracts seems alien to Singapore law.

Judicial Commissioner Alex Wong Li Kok ("**Wong JC**"): Thank you, Francis and good morning, ladies and gentlemen. It is not lost on me during the introduction earlier that compared to Fraser LJ, I am quite a novice in judicial office and I think if I challenge his views directly, it might result in a humiliating beatdown. So, I am actually going to avoid that, and I take the view that Justice Falk – Lady Justice Faulk now, if I am not wrong – took in *Russell v Cartwright*[41] which is to look at the question that you asked Francis, from a slightly different direction. The decision in *Amey Birmingham Highways Ltd v Birmingham City Council*[42] related to a PFI (Private Finance Initiative) contract. I spent, or misspent many years of my youth as a solicitor, drafting PFI contracts. In our region they are probably better known as PPP (Public Private Partnership) contracts.

It would be helpful for me to explain why such contracts are 5,000 pages long because this will give additional context to my answer to Francis's question. It is probably not quite right to say that the contract is itself 5,000 pages long. The main body is about 200–300 pages long. That is excluding definitions, so if you look at the definitions, these are usually contained in

41 [2020] EWHC 41 (Ch).
42 [2018] EWCA Civ 264.

an appendix and the definitions section could be 150–200 pages long. The rest of the contract is made up of appendices and very detailed appendices about service provision and the payment mechanisms. As Fraser LJ pointed out, they also make reference to other documents outside of the contract like the financial model. The reason that the PFI or PPP contracts are so long is that PFI or PPP contracts are almost always project financed. If you have a project financed deal, the deal is ringfenced, meaning that it is "non-recourse financing" – there is no recourse to anything outside the project if something goes wrong or more resources are required for the project. So, that is why draftsmen of PFI or PPP contracts always make it their purpose to ensure that everything in that contract is detailed. Everything that needs to be done is set out; that is the reason why those contracts are so long and is also why any draftsman of a PFI contract will tell you that what they fear most is uncertainty.

And that comes back to the question of "why in Singapore?" and Fraser LJ mentioned *Ng Giap Hon v Westcomb Securities Pte Ltd*.[43] In Singapore, we have been reluctant to accept this implied duty of good faith at law (meaning that it is implied into particular types of contract). The argument that is being made before us today is that this implied duty of good faith at law should be implied into relational contracts. So, looking at the PFI or PPP contract in that context, if there is a rule that in a relational contract, there has to be an implied duty of good faith at law, that will strike some fear into the draftsman of those types of contracts.

The question that arises is then is a PFI or PPP contract really a relational contract? It is a long-term contract, it does go on for 25 years, but it is also a contract that is very specific and deliberately specific in wanting to make sure that the obligations and the rights of parties are properly set out within the four corners of the contract.

The other aspect of this PFI or PPP contract that is relevant is that it is not actually a 25-year contract. If you look at the contract in detail, it is actually a series of smaller contracts. A number of the key obligations and rights (commercial obligation and rights) are rebased every five years or over a certain period of time. So, the payment mechanism is actually rebased on a number of issues – through market sounding or through indexation. In that regard, it is in fact not necessarily to be seen as a 25-year contract but actually a series of contracts within those 25 years. Again, we have to ask ourselves the question whether that sort of contract is a relational contract, and that is the starting point. Maybe I will just pause there Francis, that is the basis of which I think, in Singapore, we fear labelling relational contracts as a whole as contracts that should have an implied duty of good faith at law.

FG: Thank you, Wong JC. So basically, the Singapore approach is if you have a long-term contract, draft everything, anticipate everything as much

43 [2009] 3 SLR(R) 518.

as possible. On that note, Prof McLaughlin, where would a scheme like INTEGRAF fit in? Sounds to me, if you are able to anticipate everything, you leave no margin for error, so it looks like a dispute waiting to happen. Where would INTEGRAF fit even though we do not have a doctrine of relational contract?

Mark McLaughlin ("**MML**"): Thank you Francis and thank you Fraser LJ for such an interesting and I think very timely discussion on relational contracts. So, on that point of whether you can foresee the commercial issues in the context of your dispute; the belief that you can do that keeps us all employed as dispute resolution professionals. One of the factors described in Fraser LJ's judgment in *Bates v Post Office*[44] includes the "spirits and objectives may not be capable of being expressed exhaustively". It seems to me that that would apply to many, many commercial contracts. The nature of commerciality, beyond pure transaction, suggests a relationship. So, the question is one of policy. Do we extend protections beyond those expressed contracts, in the way that Fraser LJ has described? The thing that struck me most about the judgments on relational contracts was the language that was used would be familiar to all of the mediators in this room, and I wrote them down as Fraser LJ was speaking.

A passage quoted from *Yam Seng Pte Ltd v International Trade Corporation Ltd*[45] says: "The trust is not in the loyal subordination by one party of its interest to those of another. It is trust that the other party will act with integrity and in a spirit of cooperation." It is the second sentence that I think could come out from the mouth of a mediator. It is trust that the other party will act with integrity and in the spirit of co-operation, and that sounds like a mediator's opening statement – something that a mediator would say, and that language is throughout the judgment: "long term", "mutual intention", "integrity", "committed to collaborating", "high degree of communication" – all of these and the non-exhaustive list in this judgment. I would recommend that you read the judgment if you are interested in a relational contract because it is very comprehensive. I think it so clearly relates to the art of mediation. So that is the first point, I think the language lends itself to a mediation-type process for these types of relational contracts, that is my view as I, an academic in dispute resolution and not contract lawyer. So that is my point number one about language.

And my point number two is about how the incorporation of relational contracts in law seems to better reflect the nature of changing commercial relationships or the nature of change in general. So, I want to come back to the standards that were raised by Ian Macneil who came up with this concept of the relational contract. Fraser LJ described him as an American legal academic – he is more accurately described as a Scottish American legal academic, and I may or may not have an interest in that

44 See *Bates v Post Office Ltd (No 3) (Common Issues)* [2019] EWHC 606 (QB).
45 [2013] EWHC 111.

determination. He was in fact the Chieftain of the clan which my family is from, who leased the land of their familial castle back to the nation of Scotland for $1.00 and a bottle of whisky. So, if anyone's ideas are worth pursuing, surely, it is a person like that, though I accept that this is not strictly a legal argument. So, the four concepts that he described in his relational contract: Duration – so no fixed end date; Mutual co-operation and benefit, Informality and Social embeddedness – seems to me to be quite easily identifiable in terms of the types of relationships that may fall under those types of descriptions. And I also think that particularly duration is very important, and the interaction between time and law. Legal obligations by their nature are supposed to say: In the future these are our promises and by the nature of law promises are immune to change in circumstances. But what the relational contract approach does is it says parties intend to leave that space for adjustment in the form of that implied good faith, and it is there I think that INTEGRAF can come in. So, INTEGRAF is a system that has conflict avoidance boards which allow for things like real-time determinations and real-time negotiations, and I think it supplies the intellectual underpinnings of relationship contracts.

FG: Thank you. I think what you are saying makes a lot of sense. But there is a question now from the audience that says it seems that we are now drawing a distinction between relational contracts and other types of contracts, say consumer contracts. Is it true then that in those contracts, relationships do not matter? And perhaps, what is your take, Fraser LJ?

Fraser LJ: Well, the interesting thing both about consumer contracts and some of those other types of contracts is certainly, so far as England and Wales is concerned, there is extensive regulation and legislation governing what is permitted and what is not. In a way, you could say certainly, consumer credit terms, product liability, supply of goods and services, all of those sorts of things are subject to quite detailed statutory regimes so it is not necessary to consider an implied term of good faith in contracts such as those. Because the legislation has imposed the mechanism on those contracts and in fact if you think of provisions for things like the Unfair Contract Terms Act, they apply to consumer contracts. The difficult thing in terms of the wider commercial contracts is that there is no overarching statutory regime within which they have to be agreed. Just to expand upon or emphasise Wong JC's point about PFI contracts, that is certainly my experience of PFI contracts in practice and a little on the Bench as well. We in the UK use both PPP and PFI contracts a great deal too, I believe politically, their attraction originally was in accounting terms but also getting finance from private partners to build major projects such as hospitals. Wong JC used the expression "draftsman of the PFI contract". A huge number of PFI contracts that I saw when I was in practice did not seem to have been drafted by a single person. The main contract will only be a couple hundred pages. The schedules are extraordinarily detailed and numerous, and they always seemed to me to have been drafted by different teams of people than those who drafted the main contract. I am not sure that before those contracts were signed, any single individual person ever read the whole document from start to finish,

including all of the schedules. Because they did not always seem to mesh together the way they were intended, or to work, which is why so many of them ended up in litigation.

And when you said at the beginning of this session about the approach of relational contracts and whether it was contrary to the interests of litigators, one thing that I would observe is there are some disputes that will always end up going to litigation. There are some that *have* to go to litigation. Wong JC, Prof McLaughlin and I were talking before we came in about state investment disputes and things of that nature – where the sums may be so large, and it may be so difficult to get to the decision maker, that mediating them is impossible. I am not for a moment suggesting that the courts or that litigators and the courts have no role, but if it is a parallel, consider a family breakdown where a husband and wife are about to embark upon extraordinarily bitter proceedings about how they split the martial assets. Those marital assets can be diminished by an extraordinary amount by spending money fighting about it. It is obviously in their interests to come to mediation for an outcome as quickly and as economically as possible. Those same principles would apply so far as I am concerned to longer-term commercial agreements and relational contracts. I know the INTEGRAF rules with their Conflict Avoidance Board and the ability to have regular reviews and try to avoid conflicts starting, have the intention of nipping such disputes in the bud, essentially. That is a much more aligned way of considering the concept of good faith than going back to the binary outcome that we discussed at the beginning of this discussion.

FG: Thank you. Wong JC, back to you. I think we were hearing Fraser LJ say that this divide of relational contracts and consumer contracts is because there is product liability and other legislation that seems to govern those areas, but we do not have legislation governing relational contracts perhaps. Do some crystal ball gazing for our jurisdiction – do you think we will ever accept relational contracts as a common law doctrine, or do we have to wait for legislation?

Wong JC: I think the word "ever" has quite a lot of connotations. So, I am not going to say it will never happen. But I will say this, when I first came across this concept of relational contract and I read about what it was or was intended to mean, it seemed slightly nebulous to me. But it has evolved, including very helpfully, the criteria that Fraser LJ set out in the *Bates v Post Office* decision. So, we have seen an evolution of what at least some jurists in the common law see a relational contract to be. But I think the question we have to ask ourselves – and I am going to turn out to be a bit of a contrarian on this issue – is whether relational contracts are certain enough for us to say that, in the context of our discussion, the implied duty of good faith at law must be imposed on this group of contracts. So, I think that is the question we have to grapple with.

My personal view is this universe of relational contracts is still too wide. I am going to give you another example again from when I was in practice and

before I joined the Bench. Kevin Kwek was very kind earlier to introduce me and say that I have been working on a lot of offshore wind projects in Taiwan. Many of you may be wondering well, what is a Singapore lawyer doing working on offshore wind projects in Taiwan? Most offshore wind projects in Taiwan are project financed. The finance documents are English law-governed, but the project documents (construction documents, supply documents, *etc*) are mostly Singapore law-governed. So, we are looking at the context of what we are talking about here – relational contracts and an implication of duty of good faith by law. We need to be careful not to just look at it in the context of what is happening in Singapore. Singapore law is now being used much more widely across the region. In the context of these offshore wind projects in Taiwan using Singapore law, I wanted to refer to one specific type of contract. When I started working on these projects in Taiwan, there was very little offshore wind experience in Asia at the time, so I worked with our German colleagues and Taiwan, being a German Civil Code country, welcomed experienced German practitioners of offshore wind.

One of the key contracts that you use in offshore wind projects is called the PSA – a Preferred Supplier Agreement. And this agreement is used because there is so little capacity in offshore wind manufacturing right now in terms of turbines and a number of other key supply and installation contracts. The PSA was needed to ensure that the investors sign up these limited suppliers early and then have a fairly long negotiation process over a period of years as to pricing and specifications for that equipment. My German colleagues would tell me that it was actually very helpful for them looking at the PSA in the context of Singapore law, because they were able to specify in that agreement when specific issues had to be looked at and negotiated in good faith and when it did not, and you could leave it silent. So, I just wanted to give this point on certainty and relational contracts a little bit more context and that is where I will pause and hand back to you, Francis.

FG: Thank you Wong JC. So, Prof McLaughlin, I am going to pick up on something that Wong JC said. I think I heard him say relationships is an amorphous concept. In your experience as a litigator and in teaching mediation, can you unpack this idea of relationship and then we heard Fraser LJ talk about trust and good faith – how is that applicable in the mediation context?

MML: Well, I think there is a category of contracts where this is happening by proxy, where a kind of good faith is being read in and that is investor contracts. So, where there are investor contracts and where there is a bilateral investment treaty, most bilateral investment treaties will have some standard of Fair and Equitable Treatment and part of that, arbitrators have read in legitimate expectations. Now, it is very controversial, the concept is very amorphous. You have mentioned teaching and it is very difficult in investment arbitration to identify the representative lines of case law about how its specific provisions can be interpreted.

But I think arbitrators are kind of doing a relational type of contract analysis as part of these investment arbitrations. Because of the nature of investment, one of the criteria for identifying investment is duration, for example of how long an investment is going to be there and substantial commitment of capital. There are some elements that are overlapping in Fraser LJ's list *versus* these international investment treaties. So, I think one element where this kind of good faith concept is already existing, and this is international law and its treaties – it is controversial, states are not entirely happy with all the international investment judgments. I think that is fair to say, but I think useful and well-argued arbitration awards is one place to look to kind of flesh out this concept. And I would be interested to hear from Fraser LJ on that, though I know that he does a lot of work in that area. And on that point, investor-state mediation which leads me quite nicely on from the previous investor-state cases and references to investor-state arbitration – Fraser LJ mentioned that the internal organisation of governments makes it very difficult to mediate with the state. And historically, in the trade press, if you were to look at how many international investment arbitrations have either been discontinued, it is something like 30%–40% of cases, though unclear how many of these have resulted in settlement. Investors are in fact mediating or negotiating with states and I believe ICSID have collected data on 30 investor-state mediations. Not all of them are ICSID, but investor-state mediations have certainly taken place. And in that, in those types of mediations, all of the guidance and all of the feedback we have had from investor-state mediators who have done this, is pulling from that the relationship between the investor and the state and many of the things that they look at are within these criteria of relational contracts. How long do you plan to be there? What were the commitments like when the contract was made, what commitments were given? And so, I think certainly you can mediate with states is what I would say, and that notion of the relational contract, in international investment law, there is definitely a seed there to look at.

FG: Great points. We have an international audience here and I will be taking your questions on the international law point but we are entering the closing minutes of our panel discussion.

So, the question here is, does the panel see a convergence of civil law and common law happening, and will this happen in our lifetime? And I guess what is in the back of the questioner's mind is that in the context of ASEAN we are talking about harmonisation of laws and working together. So, any comments?

Fraser LJ: Well, I already in my speech mentioned that construction law has features of Roman Law in terms of the imposition of contractual provisions. I do see a convergence; I would be very surprised if it fully occurred in my lifetime. It probably is not a complete convergence and obviously it is difficult to predict quite how long I am going to live, but it is the sort of development that I imagine will take really quite a long time. But I entirely agree with what Wong JC said, which was, well his phrase was

"nebulous concept". I would say it is in the foothills. But to go back to the analogy I used in the speech and *Donoghue v Stevenson*, the law of torts was in the foothills in the 1930s, and now, less than a century later, it is quite a highly developed concept of not causing harm to your neighbour. There is also quite a highly developed set of parameters as to how you assess who your neighbour is in law. So maybe in less than 100 years, we will be in a much more precise position and these scenarios will be more predictable and have less of the uncertainty which I know rightly concerns some people.

FG: Wong JC, what do you think? Here in Singapore, we are right in the epicentre, we call ourselves a hub.

Wong JC: Thank you, Francis, and I think that is a big question – whether we will ever see the convergence of common law and civil law in ASEAN – and I will just give some examples again. Litigators here know that the new Rules of Court in Singapore really provide for a little more judicial activism than we have been used to in the past. So, you could argue that that is again certain learning that we are taking as a common law jurisdiction, that we are taking from the civil law.

Another very quick example from my interaction with my German colleagues. Fraser LJ, you may be familiar with this as well and one of my German colleagues, a construction lawyer actually said to me that traditionally in Germany, a construction contract could be written in about ten pages as all the rights and obligations are actually contained in the Civil Code and other codes, so you did not need to have a long construction contract. Then, he said, but when the Anglo-Saxons came, they suddenly made our construction contracts much longer. And he was not saying that in a bad context because of the much longer contract, he could also charge more for that, so I think that there is learning from both sides.

But coming back to the question of convergence, I think there will not be such convergence in my lifetime either. I think you look specifically at ASEAN, the laws that we have based on the common law in Malaysia, French Civil Code in Vietnam, Cambodia, Philippines perhaps a mix, and all that. I think what we can see and should see is a good learning from both the civil law and common law and *vice versa*. But a complete convergence, I think that would be difficult.

FG: So, Prof McLaughlin, over to you but with a slight twist. Is mediation more appropriate in a civil or a common law jurisdiction? The flipside is, is it something that needs harmonisation or is it applicable anyway?

MML: I am not sure there is a preferable jurisdiction for mediation, and I certainly would not want to disagree with my judicial panellists on whether or not civil law and common law are convergent. But what interests me as an international academic is the drivers of convergence and whether those drivers are likely to continue, or whether you think they are going to put the brakes on them. I think there are three. Firstly, international legal

practice is expanding all the time, I mean I do not know how many different nationalities we have here over the past week, everyone mixing civil and common law jurisdictions. I think we intellectually seep into each other one way or another, so I think that is the first driver. The second driver is international organisations, *eg*, UNCITRAL has rules for international commercial mediation which may or may not be adopted by states, so I think that is certainly a second driver. The third driver is digitalisation, and the fact that academics from over the world, civil and common law jurisdictions are publishing in similar journals, visiting each other, doing presentations at each other's universities. So, I think if there are good ideas from civil law jurisdictions which would work in the common law, I think these are the drivers of that of that convergence. And I think where there are divergences, are where there are divergences in values which I am not sure the law can overcome.

FG: So, the question that arose from the audience is what do you all see as the applicability of INTEGRAF – do you think it will make a big impact? It is something that is offered by the Singapore Mediation Centre ("SMC"). Is it something that can only be adopted pre-contract or post-contract? Just express some of your views around this. Francis LJ, as someone on the outside looking in, what do you think?

Fraser LJ: I would have thought contractually, best if it is adopted at the beginning but it is not necessarily fatal if it is not. There is no reason why parties cannot agree to adopt a mechanism of that nature during the course of their business relationship. I know there are special INTEGRAF rules that have been drafted. As I said earlier, the involvement of a neutral, mediation-type conflict avoidance board during the life of a long-term relationship would only help. So, I would have thought two things are of great advantage here. One is Singapore's geographical reach. It is effectively, ideally placed in, certainly, the ASEAN area, but also worldwide in terms of where you are geographically placed. Also secondly, I know in terms of your commitment to mediation generally, and its very high reputation of, *eg*, the SMC. It certainly cannot do any harm, and I imagine in two or three years, the SMC will have a range of very impressive statistics. Certainly, I would like to hope that that would happen.

FG: Wong JC, you were mentioning all these contracts earlier. How do you see INTEGRAF interplaying with them? Is it going to be a game-changer?

Wong JC: I am not as familiar with INTEGRAF as Prof McLaughlin, so I am sure he will have a better view than I. I would look at it as a parallel with something Fraser LJ is familiar with, which is dispute adjudication boards in the context of a long-term construction contract. And so anyone familiar with a FIDIC (Federation Internationale Des Ingenieurs Conseils) contract will know that there is a DAB (Dispute Adjudication Board) that can be included in that contract as an option which is an adjudication board that sits with a project throughout its lifetime, so you have someone who is familiar with the contract, adjudicating on the contract in real-time, rather

than have to go out to a third-party arbitrator or to the court. I will say this though, and in the context of my experience in this region, I think the struggle that the DAB had in this region, and my understanding is that it is different compared to other regions. The mentality that we have in this region is that we do not want to pay for something that we are not going to use, and that was one of the struggles that the DAB had when it came to having a group of adjudicators sit with the projects and being paid to sit with the project in case something went wrong. So, I think that was one of the struggles that the DAB had. INTEGRAF may work in a different context, *ie*, not needing to pay the INTEGRAF adjudicators to understand the contract, to get on board and sit with the contract parties. If payment is needed, then that is one of the elements that I think needs to be looked at in terms of trying to let it gain popularity.

FG: Thank you, Wong JC. Prof McLaughlin, you have been set up as the one that knows all about INTEGRAF. What is your take on it?

MML: So, I think there are two things I will say about this and the potential success of INTEGRAF, and the first is related to the structures and how the process is set up. SMC, I know, have done a lot of work in making sure that the rules are simple, are understandable both to users, client users and to legal users of this system. On that element, there is no question on the potential for success. But really the success of this system, and this follows on from what Wong JC has said, will be on how it is utilised. So, the success of this system will be down to the people in this room using it. Who are going to be asked to be on those files for a very similar reason that Wong JC has said, if client users do not see value, they are not going to use it.

So, the first few deployments and the first few years are going to be very important to establishing the legitimacy of that system. So those are the two things – the set-up of the rules and the people implementing those rules. And one final point which is occasionally overlooked is, for dispute resolution clauses, we as academics look at individually and say you know, these are pathological. This mediator was cited, or this arbitrator was cited and unfortunately, they are now deceased, so it is not enforceable and all those kinds of strange cases that you find. But actually, if INTEGRAF becomes part of the boilerplate dispute resolution clause of major law firms, that would be the point at which it takes off. Dispute resolution clauses, as you all know, are described quite often as midnight clauses because, the mergers and acquisition team or the business side complete all the substantive rules and then not wanting to undo the rest of the deal, put together two versions of different versions of dispute resolution clauses or do not think completely about how they are going to do it and so, if the INTEGRAF becomes integrated into those boilerplate dispute resolution clauses in major law firms, that would be a major source of its potential success.

FG: Thank you, Prof McLaughlin, it looks like we have run out of time. Some key thoughts for the audience to take away. We have heard Fraser LJ

say that you have got to change the concept of litigation; it is not just about winning and losing, it is about getting good outcomes. We have also heard about how the laws are converging, maybe not in our lifetimes but there is a reason why this is so and Fraser LJ shared with us it is that laws are the framework of human beings who are trying to regulate their activities in a good faith manner. And we have got INTEGRAF, where the SMC has rolled this out as yet another arrow in your quiver, as a dispute resolver to act in the best interest of your clients. So, learn about INTEGRAF, ask the SMC how that may help you as you plan your contracts over their lifetime. So, join me please to thank the panellists, Fraser LJ, Wong JC and Prof McLaughlin.