

HAVE SOME (GOOD) FAITH

Why Singapore Should Imply a Duty of Good Faith into Relational Contracts

In Singapore, collaborative contracting has been promoted to increase productivity in the construction industry. Collaborative contracting involves parties adopting contractual clauses that promote collaboration. Relatedly, “relational contracts” have been defined by courts in the UK as a form of contract that involves certain features, such as parties operating with high degrees of communication, co-operation and collaboration. Additionally, relational contracts generally involve ventures that occur over an extended period with the nature, roles and obligations of the parties not exhaustively specified in writing. Courts in the UK have demonstrated an increased willingness to imply a duty of good faith into these relational contracts, contrary to the general common law position. However, the position in Singapore is that there is no implied contractual duty of good faith, except in very narrow circumstances. This article argues that courts in Singapore should follow the approach seen in the UK and imply a duty of good faith into relational contracts.

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I. Introduction

1 The construction industry in Singapore has been hindered by a lack of productivity.² A cause of this lack of productivity has been attributed to the negative implications of traditional transactional contracting models, and non-collaborative behaviours of stakeholders in construction projects.³ The Singapore Government has attempted to

1 The author thanks Dr Arthur McInnis for his guidance and support throughout the completion of this article.

2 George Ofori, Zhe Zhang & Florence YY Ling, “Key Barriers to Increase Construction Productivity: The Singapore Case” (2020) 22(5) *International Journal of Construction Management* 1 at 2.

3 Richard Fulford & Craig Standing, “Construction Industry Productivity and the Potential for Collaborative Practice” (2014) 32(2) *International Journal of Project Management* 315 at 315; George Ofori, Zhe Zhang & Florence YY Ling, (cont'd on the next page)

address these issues by encouraging the use of collaborative contracting models.⁴ This involves implementing clauses which foster collaboration between parties in construction projects. Similar to collaborative contracting, in other jurisdictions such as the UK, various decisions have concerned contracts with certain collaborative features, referred to as “relational contracts”.⁵ These cases have considered whether parties to relational contracts are obliged to act in good faith. In Singapore, courts have yet to rule specifically on relational contracts; however, they have generally taken the position that there is no implied duty of good faith, outside of narrow categories of contracts.⁶ This article seeks to address the following question: should courts in Singapore follow the developments in the UK, and imply a duty of good faith into contracts that can be characterised as relational? This question will be answered in the affirmative.

2 Part II will briefly outline issues faced in the construction industry in Singapore. This Part will also highlight the Singapore Government’s attempts to encourage collaborative contracting models. The purpose of this Part is to demonstrate the relevancy and importance of this topic, particularly in Singapore.

3 Part III will discuss the meaning and characteristics of relational contracts as recognised in foreign jurisdictions, primarily the UK. The purpose of this section is to demonstrate how relational contracts relate to collaborative contracting, and to provide context for the argument that relational contracts in Singapore should imply good faith obligations.

4 Part IV will argue that courts in Singapore should imply a duty of good faith into relational contracts. This Part will argue this by discussing the current approach to implied contractual terms and to a duty of good faith. This Part will primarily reference *Ng Giap Hon v Westcomb Securities Pte Ltd*⁷ (“*Ng Giap Hon*”), the leading case in Singapore which denies the

“Key Barriers to Increase Construction Productivity: The Singapore Case” (2020) 22(5) *International Journal of Construction Management* 1 at 2.

4 Law Reform Committee, Singapore Academy of Law, *Guide on Collaborative Contracting in the Construction Industry* (January 2022) (Chair: Paul Sandosham).

5 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB); *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch); *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch); *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396; *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm); *Bates v Post Office (No 3)* [2019] EWHC 606 (QB); *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC).

6 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518; *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 at [44]; *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [48] and [55].

7 [2009] 3 SLR(R) 518.

existence of an implied duty of good faith of general application, as a matter of fact and law.⁸ This Part will address the courts' reasoning for denying the existence of an implied duty of good faith, and will find that courts should imply this duty into relational contracts as a matter of law.

II. Productivity challenges in the construction industry and the use of collaborative contracting in Singapore

A. Productivity challenges in the construction industry

(1) Lack of productivity

5 The construction industry is one of the most important sectors in the economic development of a country.⁹ It is also one of the largest economic sectors in the world, accounting for approximately 13 per cent of global gross domestic product.¹⁰ However, the construction industry is inefficient and laggard.¹¹ Construction projects are complicated and subject to uncertainties, and regularly finish overbudget.¹² Cost overruns are considered to be a “regular feature” for construction ventures.¹³ Although there is variation on the percentage of inefficiency of construction projects depending on factors such as project size, project type and project location, this description of the construction industry is consistent across the globe.¹⁴

8 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518; *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 at [44]; *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [48] and [55].

9 Saurav Dixit, “Evolution of Studies in Construction Productivity: A Systemic Literature Review (2006–2017)” (2019) 10(3) *Ain Shams Engineering Journal* 555 at 555.

10 Filipe Barbosa *et al*, *Reinventing Construction: A Route to Higher Productivity* (McKinsey Global Institute, February 2017) at p 1.

11 Richard Fulford & Craig Standing, “Construction Industry Productivity and the Potential for Collaborative Practice” (2014) 32(2) *International Journal of Project Management* 315 at 315.

12 Abdulelah Aljohani, Dominic Ahiaga-Dagbui & David Moore, “Construction Projects Cost Overrun: What Does the Literature Tell Us?” (2017) 8(2) *International Journal of Innovation Management and Technology* 137 at 137.

13 Sebastian Morris, “Cost and Time Overruns in Public Sector Projects” (1990) 25(47) *Economic and Political Weekly* M154 at M154.

14 Abdulelah Aljohani, Dominic Ahiaga-Dagbui & David Moore, “Construction Projects Cost Overrun: What Does the Literature Tell Us?” (2017) 8(2) *International Journal of Innovation Management and Technology* 137 at 137.

6 The construction industry is the most inefficient industry in Singapore.¹⁵ The sector's growth rate measures only at half of the country's overall growth rate.¹⁶ Construction productivity has remained low over the last decade, despite numerous government projects and incentives which attempt to encourage productivity.¹⁷ This is significant as low productivity in the construction industry impacts economic development generally.¹⁸ The industry contributes to the activities of other sectors, including manufacturing, trading, transportation, finance and insurance.¹⁹ Further, the inefficiency of the industry is particularly important in Singapore. Singapore's construction industry is currently dependent on foreign labour.²⁰ Increased productivity of construction projects can assist in preventing the industry's growth from being constrained by trends in the availability of foreign labour.²¹

(2) *Fragmentation*

7 A key cause of this lack of productivity in the construction industry, in Singapore and elsewhere, can be attributed to the fragmented nature of construction projects.²² Traditional contracting models in

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- 15 George Ofori, Zhe Zhang & Florence YY Ling, "Key Barriers to Increase Construction Productivity: The Singapore Case" (2020) 22(5) *International Journal of Construction Management* 1 at 2.
 - 16 George Ofori, Zhe Zhang & Florence YY Ling, "Key Barriers to Increase Construction Productivity: The Singapore Case" (2020) 22(5) *International Journal of Construction Management* 1 at 2.
 - 17 George Ofori, Zhe Zhang & Florence YY Ling, "Key Barriers to Increase Construction Productivity: The Singapore Case" (2020) 22(5) *International Journal of Construction Management* 1 at 2.
 - 18 Chan Swee Lean, "Empirical Tests to Discern Linkages between Construction and Other Economic Sectors in Singapore" (2001) 19(4) *Construction Management & Economics* 355 at 355; Wesam Salah Alaloul *et al*, "A Systematic Review of Life Cycle Assessment and Life Cycle Cost Analysis for Pavement and a Case Study" (2021) 13 *Sustainability* 4377.
 - 19 George Ofori, Zhe Zhang & Florence YY Ling, "Key Barriers to Increase Construction Productivity: The Singapore Case" (2020) 22(5) *International Journal of Construction Management* 1 at 2.
 - 20 George Ofori, Zhe Zhang & Florence YY Ling, "Key Barriers to Increase Construction Productivity: The Singapore Case" (2020) 22(5) *International Journal of Construction Management* 1 at 2.
 - 21 George Ofori, Zhe Zhang & Florence YY Ling, "Key Barriers to Increase Construction Productivity: The Singapore Case" (2020) 22(5) *International Journal of Construction Management* 1 at 2.
 - 22 Ali Mohammed Alashwal & Patrick Sik-Wah Fong, "Empirical Study to Determine Fragmentation of Construction Projects" (2015) 141(7) *Journal of Construction Engineering and Management* 19 at 19. See also Filipe Barbosa *et al*, *Reinventing Construction: A Route to Higher Productivity* (McKinsey Global Institute, February 2017) at p 48, demonstrating the correlation between fragmentation in construction projects and productivity.

the industry are characterised by “siloed” participants, processes and duties in a project.²³ Participants in a construction project include clients, consultants, project managers, architects, engineers, contractors, subcontractors and suppliers.²⁴ These parties are involved in various project development stages including programming, designing and building.²⁵

8 There are several consequences of this fragmentation. Parties in a construction project tend to act for their own interests, rather than in the interests of the project as a whole.²⁶ Parties are brought in to complete certain aspects within the project’s lifecycle and aim to maximise individual profits as their obligations relate to specific tasks.²⁷ Parties have little incentive to increase the overall outcomes in the venture.²⁸ Fragmentation has resulted in poor communication, co-ordination and a lack of trust between stakeholders.²⁹ This results in delays in information dissemination, resulting in parties having to demobilise and remobilise before executing the next stage of the project’s lifecycle.³⁰ Poor communication and co-operation also negatively contribute to

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- 23 George Ofori, Zhe Zhang & Florence YY Ling, “Key Barriers to Increase Construction Productivity: The Singapore Case” (2020) 22(5) *International Journal of Construction Management* 1 at 2; Jennifer Hardi & Steve Pittard, “If BIM is the Solution, What is the Problem? A Review of the Benefits, Challenges and Key Drivers of BIM Implementation within the UK Construction Industry” (2015) 3(4) *Journal of Building Survey, Appraisal & Valuation* 366 at 367; Reza Ghassemi & Burcin Becerik-Geber, “Transitioning to Integrated Project Delivery: Potential Barriers and Lessons Learned” (2011) *Lean Construction Journal* 32 at 34; David W Martin & Anthony D Songer, “Covenants Verses Contracts in Collaborative Project Delivery Systems” (2004) 6(2) *Construction Information Quarterly* 1.
- 24 Low Jeoy Chow, Danny Then & Martin Skitmore, “Characteristics of Teamwork in Singapore Construction Projects” (2005) 6(1) *Journal of Construction Research* 15 at 15–16.
- 25 Low Jeoy Chow, Danny Then & Martin Skitmore, “Characteristics of Teamwork in Singapore Construction Projects” (2005) 6(1) *Journal of Construction Research* 15 at 15–16.
- 26 Reza Ghassemi & Burcin Becerik-Geber, “Transitioning to Integrated Project Delivery: Potential Barriers and Lessons Learned” (2011) *Lean Construction Journal* 32 at 34.
- 27 Reza Ghassemi & Burcin Becerik-Geber, “Transitioning to Integrated Project Delivery: Potential Barriers and Lessons Learned” (2011) *Lean Construction Journal* 32 at 32.
- 28 Low Jeoy Chow, Danny Then & Martin Skitmore, “Characteristics of Teamwork in Singapore Construction Projects” (2005) 6(1) *Journal of Construction Research* 15 at 18.
- 29 George Ofori, Zhe Zhang & Florence YY Ling, “Key Barriers to Increase Construction Productivity: The Singapore Case” (2020) 22(5) *International Journal of Construction Management* 1 at 5.
- 30 Mounir El Asmar *et al*, “Quantifying Performance for the Integrated Project Delivery Systems as Compared to Established Delivery Systems” (2013) 139(11) *Journal of Construction Engineering and Management* 1 at 10.

problem identification, conflict resolution, the development of mutually acceptable solutions, and the avoidance of misunderstandings between parties.³¹ Delays in information dissemination have been identified as the leading barrier to increasing productivity in the construction industry in Singapore.³² These implications of fragmentation in the construction industry reduce productivity by contributing to projects finishing over-schedule, over-budget and being of a lower quality.³³

(3) *Adversarial and litigious attitudes to construction contracts*

9 Productivity in the construction industry is constrained by historically litigious and adversarial attitudes to construction contracts. Parties' adversarial approaches to contractual negotiation and execution lead to "conflicts, litigation, and often ... disastrous project[s]".³⁴ This is the result of competitive contracting and misaligned contractual structures, resulting in hostile environments, risk aversion and a lack of transparency.³⁵ Clients operating within adversarial relationships are more likely to challenge requests for approvals, force compliance with directions by withholding funds, and control the work of other stakeholders.³⁶ These attitudes restrain trust and contribute to breakdowns in communication between parties. Litigious approaches to construction projects result in "small issues easily escalat[ing] into major disputes, causing costly delays and ending in formal litigation".³⁷

10 These litigious mindsets are especially present in Singapore. Contracting in the construction industry in Singapore involves a lack of alignment of objectives between teams and a poor relationship-building

31 Yan Ning & Florence Yean Yng Ling, "Boosting Public Construction Project Outcomes through Relational Transactions" (2013) 140(1) *Journal of Construction Engineering and Management* 1 at 5–6.

32 George Ofori, Zhe Zhang & Florence YY Ling, "Key Barriers to Increase Construction Productivity: The Singapore Case" (2020) 22(5) *International Journal of Construction Management* 1.

33 Reza Ghassemi & Burcin Becerik-Geber, "Transitioning to Integrated Project Delivery: Potential Barriers and Lessons Learned" (2011) *Lean Construction Journal* 32 at 32.

34 Mohan M Kumaraswamy *et al*, "Reconstructing Cultures for Relational Contracting" (2005) 131(1) *Journal of Construction Engineering and Management* 1065 at 1072.

35 Filipe Barbosa *et al*, *Reinventing Construction: A Route to Higher Productivity* (McKinsey Global Institute, February 2017) at p 51.

36 Ole Jonny Klakegg, Julien Pollack & Lynn Crawford, "Preparing for Successful Collaborative Contracts" (2021) 13(1) *Sustainability* 289 at 290.

37 Ole Jonny Klakegg, Julien Pollack & Lynn Crawford, "Preparing for Successful Collaborative Contracts" (2021) 13(1) *Sustainability* 289 at 290.

culture among team members.³⁸ In 2019, a study involving directors, project managers, quality surveyors and engineers in the construction industry in Singapore found that the greatest barrier to the adoption of contracts that encouraged collaboration and resource sharing involved “inherent difficulties in changing organisational culture”.³⁹ This was found to be a greater barrier than factors including “lack of incentives/financial support” and “lack of legislative regulation”.⁴⁰ These cultural barriers were characterised by “distrust between project stakeholders”, as well as the “collision of different corporate cultures” and “historical adversarial [cultures] in the construction industry”.⁴¹ Parties are hostile to open communication and relationship-building, due to a lack of trust between parties and “fear of the unknown”.⁴²

B. Collaborative contracting

(1) The meaning of “collaborative contracting”

11 “Collaborative contracting” refers to the implementation of contracting practices which foster collaboration and co-operation between parties.⁴³ It seeks to incorporate features that are different from traditional fixed price, lump-sum contracts and emphasises co-ordination and the development of relationships involving shared trust, joint problem solving and open communication.⁴⁴ Examples of collaborative contracting provisions include express obligations to co-operate, early warning and risk management processes, sharing of cost risks and timely completion

38 Florence Yean Yng Ling, M Motiar Rahman & Tiong Lian Ng, “Incorporating Contractual Incentives to Facilitate Relational Contracting” (2006) 132(1) *Journal of Professional Issues in Engineering Education and Practice* 57 at 64.

39 Na Zhang *et al*, “Collaborative Contracting in the Singapore Construction Industry: Current Status, Major Barriers and Best Solutions” (2020) 27(1) *Engineering, Construction and Architectural Management* 3115 at 3124.

40 Na Zhang *et al*, “Collaborative Contracting in the Singapore Construction Industry: Current Status, Major Barriers and Best Solutions” (2020) 27(1) *Engineering, Construction and Architectural Management* 3115 at 3124.

41 Na Zhang *et al*, “Collaborative Contracting in the Singapore Construction Industry: Current Status, Major Barriers and Best Solutions” (2020) 27(1) *Engineering, Construction and Architectural Management* 3115 at 3319.

42 Florence Yean Yng Ling, M Motiar Rahman & Tiong Lian Ng, “Incorporating Contractual Incentives to Facilitate Relational Contracting” (2006) 132(1) *Journal of Professional Issues in Engineering Education and Practice* 57 at 57.

43 Na Zhang *et al*, “Collaborative Contracting in the Singapore Construction Industry: Current Status, Major Barriers and Best Solutions” (2020) 27(1) *Engineering, Construction and Architectural Management* 3115 at 3115–3116.

44 Owen Hayford, *Collaborative Contracting and Procurement* (DLA Piper, 2020) at pp 48–49.

incentives, and performance-based fees.⁴⁵ Collaborative contracting models can involve partnering, managing contractors and integrated project delivery that may help to build long-term relationships.⁴⁶

12 Collaborative contracting appears to have arisen from discourse on relational contract law.⁴⁷ Academic interpretations of the meaning of relational contracting and relational contract law as a theoretical concept (as distinguished from “relational contracts” that have been formulated by courts, which will be discussed in Part III below) remain controversial.⁴⁸ Further, the distinction between collaborative contracting and relational contracting has not been extensively explored in academic discussions.⁴⁹ However, the focus of this article is not on taxonomic distinctions between potentially contested and intersecting concepts. This article will not focus on relational contracting’s role in the development of relational contracts, nor will it focus on the degree to which collaborative contracting differs from traditional contracting models. It is sufficient, for the purposes of this article, to say that collaborative contracting broadly involves the adoption of clauses and practices which promote collaboration between parties in the construction industry.

45 Owen Hayford, *Collaborative Contracting and Procurement* (DLA Piper, 2020) at pp 48–49.

46 Owen Hayford, *Collaborative Contracting* (PricewaterhouseCoopers, 2018) at p 4.

47 “Relational contracting” as a term was coined by Ian MacNeil, who highlighted that many contracts are often interested in the establishment of a relationship that goes beyond the exchange given in a transaction: Ian MacNeil, “The Many Futures of Contracts” (1974) 47 *Southern California Law Review* 691 at 695 and 733. See also Donald B King, “Reshaping Contract Theory and Law – Death of Contracts II Part One: Generalised Consent with Lawmade Obligations” (1994) 7 *Journal of Contract Law* 245.

48 Relational contract theory and relational contracting have promoted contracting that focuses on the development of traits such as anti-discreteness, long-duration transactions, personal interactions of parties and room for future co-operation and opportunity: see Sai On Cheung, Kenneth T W Yiu & Pui Shan Chim, “How Relational are Construction Contracts?” (2006) 132(1) *Journal of Professional Issues in Engineering Education and Practice* 48 at 48–49. See also Ole Jonny Klakegg, Julien Pollack & Lynn Crawford, “Preparing for Successful Collaborative Contracts” (2021) 13(1) *Sustainability* 289 at 290. However, as will be demonstrated in Part III, the courts in the UK have adopted a definition for relational contracts.

49 Some sources refer to collaborative and relational contracting as interchangeable terms (see, for example, David M Van Slyke, “Collaboration and Relational Contracting” in *The Collaborative Public Manager: New Ideas for the Twenty-first Century* (Rosemary O’Leary & Lisa Blomgren Bingham eds) (Georgetown University Press, 2009) at p 137. Other sources have discussed relational contracting as a form of collaborative contracting (Ole Jonny Klakegg, Julien Pollack & Lynn Crawford, “Preparing for Successful Collaborative Contracts” (2021) 13(1) *Sustainability* 289 at 290).

(2) *The adoption of collaborative contracting in the construction industry*

13 Collaborative contracting has been adopted in the construction industry to alleviate some of the challenges involving fragmentation and adversarial attitudes, as outlined in Part II above. It has been described as “one of the key catalysts for improving construction productivity”.⁵⁰ Construction projects are increasingly using alternative contracting models across the globe.⁵¹ It has been estimated that the improvement of collaboration and contracting alone can increase global productivity in the construction industry by 8 to 9 per cent, resulting in cost savings of 6 to 7 per cent.⁵² The Government of the United Kingdom has also implemented models of construction procurement which promote collaboration and transparency, as well as frameworks that encourage integrated teams, with shared risks and alignment between party objectives.⁵³ Collaborative contracting has also been encouraged in Australia and Hong Kong.⁵⁴

14 The use of collaborative contracting in the construction industry has been promoted by the Singapore Government. Singapore’s Building and Construction Authority (“BCA”), a statutory board under the Ministry of National Development, identified collaborative contracting as a core focus of the Construction Industry Transformation Map.⁵⁵

50 Ole Jonny Klakegg, Julien Pollack & Lynn Crawford, “Preparing for Successful Collaborative Contracts” (2021) 13(1) *Sustainability* 289 at 289–290.

51 Filipe Barbosa *et al*, *Reinventing Construction: A Route to Higher Productivity* (McKinsey Global Institute, February 2017) at p 6.

52 Filipe Barbosa *et al*, *Reinventing Construction: A Route to Higher Productivity* (McKinsey Global Institute, February 2017) at p 6.

53 *Construction 2025 – Industrial Strategy: Government and Industry in Partnership* (HM Government, July 2013) at p 37 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/210099/bis-13-955-construction-2025-industrial-strategy.pdf> (accessed 3 April 2023); *Improving Infrastructure Delivery: Alliancing Code of Practice* (HM Treasury, 2015) at pp 9–10 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/487294/alliancing_code_of_practice_18122015.pdf> (accessed 3 April 2023).

54 *National Alliance Contracting Guidelines: Guide to Alliance Contracting* (Australian Government, 2015) <https://www.infrastructure.gov.au/sites/default/files/migrated/infrastructure/ngpd/files/National_Guide_to_Alliance_Contracting.pdf> (accessed 3 April 2023); Shoeb Ahmed Memon *et al*, “Collaborative Behaviour in Relational Contracting Projects in Hong Kong: A Contractor’s Perspective” (2021) 13(1) *Sustainability* 5375.

55 “Built Environment Industry Transformation Map (ITM)” *Building and Construction Authority* <<https://www1.bca.gov.sg/buildsg/construction-industry-transformation-map-ITM>> (accessed 3 April 2023); *Construction ITM Launch at SCPW* (Building and Construction Authority, 24 October 2017) at p 1 <<https://www.mti.gov.sg/-/media/MTI/ITM/Built-Environment/Construction/Construction->

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Collaborative contracting has been identified as a significant aspect of strengthening collaboration in construction procurement frameworks and practices.⁵⁶ In January 2022, the Singapore Academy of Law's Law Reform Committee released the *Guide on Collaborative Contracting in the Construction Industry*⁵⁷ ("GCCCI"). The GCCCI serves to promote collaborative contracting for construction projects,⁵⁸ highlighting examples of collaborative contracting and clauses that foster collaboration. These include contractual commitments requiring parties to co-operate in good faith, early warning and risk management mechanisms, and payment arrangements which give parties interests in the outcome of the project, as opposed to a specific task in the project's lifecycle.⁵⁹ The GCCCI's promotion of collaborative contracting has been inspired by frameworks which promote collaboration in the UK, Australia and Hong Kong.⁶⁰ These provisions are currently being piloted in selected public sector projects in Singapore.

15 The BCA has also piloted the use of "Option Module E (Collaborative Contracting)" as a provision to the Public Sector Standard Conditions of Contract⁶¹ ("PSSCOC"). This provision is optional and may be adopted in addition to PSSCOC terms, which are used for

ITM-Factsheet.pdf> (accessed 3 April 2023). See also Ezani Rais Bin Shaiks Salim, *The 'I' in Collaborative Contracting* (Threesixty Contract Advisory Pte Ltd, August 2018) <<https://surbanajurong.com/wp-content/uploads/2018/08/Article-on-Collaborative-Contracting-Final.pdf>> (accessed 3 April 2023).

- 56 *Construction ITM Launch at SCPW* (Building and Construction Authority, 24 October 2017) at p 5 <<https://www.mti.gov.sg/-/media/MTI/ITM/Built-Environment/Construction/Construction-ITM-Factsheet.pdf>> (accessed 3 April 2023). See also Ng Man Hon, "Collaborative Procurement Practices: The Key Towards Industry Transformation", presentation at BuildSG LEAD Forum (21 May 2021) at pp 5 and 12 <[https://www.bcaa.edu.sg/docs/librariesprovider2/webinar/20210520-blf-collaborative-procurement-practices-\(for-dissemination\).pdf?sfvrsn=cbbf294f_0](https://www.bcaa.edu.sg/docs/librariesprovider2/webinar/20210520-blf-collaborative-procurement-practices-(for-dissemination).pdf?sfvrsn=cbbf294f_0)> (accessed 3 April 2023).
- 57 Law Reform Committee, Singapore Academy of Law, *Guide on Collaborative Contracting in the Construction Industry* (January 2022) (Chair: Paul Sandosham).
- 58 Law Reform Committee, Singapore Academy of Law, *Guide on Collaborative Contracting in the Construction Industry* (January 2022) (Chair: Paul Sandosham) at p 1.
- 59 Law Reform Committee, Singapore Academy of Law, *Guide on Collaborative Contracting in the Construction Industry* (January 2022) (Chair: Paul Sandosham) pp 2–3.
- 60 Law Reform Committee, Singapore Academy of Law, *Guide on Collaborative Contracting in the Construction Industry* (January 2022) (Chair: Paul Sandosham) pp 2–3; "Public Sector Conditions of Contract (PSSCOC)" *Building and Construction Authority* <<https://www1.bca.gov.sg/procurement/post-tender-stage/public-sector-standard-conditions-of-contract-psscoc>> (accessed 3 April 2023).
- 61 Law Reform Committee, Singapore Academy of Law, *Guide on Collaborative Contracting in the Construction Industry* (January 2022) (Chair: Paul Sandosham) at pp 8–9.

all public sector construction projects.⁶² Option Module E requires communication between the parties through early notification of certain events, the establishment of a dispute resolution board and performance incentives to encourage contractors to achieve certain targets.⁶³ Option Module E contains no express requirement for either party to act in good faith. The GCCCI has highlighted Option Module E's intention of encouraging collaborative working relations between employers and contractors, where parties will use their best endeavours to act in a "spirit of mutual trust and cooperation", with mutual obligations for prompt notification of time or cost overruns, and the use of a dispute resolution board to facilitate dispute avoidance and early resolution.⁶⁴

III. The meaning of "relational contracts" in foreign jurisdictions

16 Courts in Singapore have not yet considered the meaning of relational contracts. However, courts across the common law world have discussed relational contracts as a category of contract that is defined by the presence of certain factors. These factors involve features of collaborative contracting, including requirements of communication, collaboration and co-operation. Relational contracts also involve long-term arrangements and agreements where the totality of the venture is not entirely specified in writing.

17 In the UK, courts have described relational contracts as those that "do not fit" the model of contracts that involve performance as a simple exchange or involve fiduciary relationships.⁶⁵ Relational contracts are contracts that involve a "longer term relationship between the parties [where] they make a substantial commitment", and "may require a high degree of communication, cooperation, and predictable performance

62 "Public Sector Conditions of Contract (PSSCOC)" *Building and Construction Authority* <<https://www1.bca.gov.sg/procurement/post-tender-stage/public-sector-standard-conditions-of-contract-psscoc>> (accessed 3 April 2023).

63 *Option Module E: Collaborative Contracting* (Building and Construction Authority) at E1-E3 <https://www1.bca.gov.sg/docs/default-source/docs-corp-procurement/option-module-e-on-collaborative-contracting---sent.pdf?sfvrsn=3191bf46_2> (accessed 3 April 2023).

64 Law Reform Committee, Singapore Academy of Law, *Guide on Collaborative Contracting in the Construction Industry* (January 2022) (Chair: Paul Sandosham) at pp 8-9.

65 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) at [142].

based on mutual trust and confidence”.⁶⁶ Leggatt J in *Sheikh Al Nehayan v Kent*⁶⁷ (“*Nehayan v Kent*”) regarded relational contracts as:⁶⁸

... 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.

In 2019, in *Bates v Post Office (No 3)*⁶⁹ (“*Bates v Post Office*”) the England and Wales High Court of Justice (“EWHC”) recognised relational contracts as an established “*specie*” of contract in English law.⁷⁰ The court highlighted a series of *indicia* which are relevant when determining the existence of a relational contract, including features such as a mutual intention of the parties to be involved in a long-term relationship, with requirements of collaboration and co-operation.⁷¹ These factors have been favourably cited in later judgments.⁷² However, the *indicia* is not an exhaustive list, and courts will consider the totality of the arrangement.⁷³ In *Bates v Post Office*, after considering the *indicium*, the court concluded that a 25-year private financial initiative contract involving the operation of post office branches was a relational contract.⁷⁴ This *indicium* was also favourably cited in *Essex County Council v UBB Waste (Essex) Ltd*⁷⁵ (“*Essex County Council v UBB Waste*”) which similarly concluded that a 25-year contract for a construction project that involved a design, build and operation of a waste management facility was a relational contract.⁷⁶

18 The meaning of “relational contracts” has been explored in other common law jurisdictions. In Hong Kong, in the District Court case of *Chubb Life Insurance v Shing Pui Keung*,⁷⁷ it was mentioned in *obiter dicta* that relational contracts involve long-term relationships and substantial commitments between the parties, and include arrangements such as joint venture agreements, franchise agreements and long-term distribution

66 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) at [142]; this was also favourably quoted in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 at [67], *per* Beatson LJ.

67 [2018] EWHC 333 (Comm).

68 *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [152].

69 [2019] EWHC 606 (QB).

70 *Bates v Post Office (No 3)* [2019] EWHC 606 (QB) at [702].

71 *Bates v Post Office (No 3)* [2019] EWHC 606 (QB) at [725].

72 *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC) at [67]; *Mark Faulkner v Vollin Holdings Limited* [2022] EWCA Civ 137 at [236]; *cf* *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [203].

73 *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC) at [67].

74 *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC) at [726].

75 [2020] EWHC 1581 (TCC).

76 *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC) at [112].

77 [2022] HKCU 770.

agreements.⁷⁸ In Australia, the meaning of “relational contracts” has not been substantially explored by higher courts, but has been considered briefly by lower courts. The term “relational contract” has been described as a “long term” agreement and “a contract that involves not merely an exchange, but also a relationship, between the contracting parties.”⁷⁹ Relational contracts are considered to involve expectations of loyalty and interdependence, where the “norms of the ongoing relationship ... supplement the express contractual obligations.”⁸⁰ In Canada, a relational contract is considered to be a contract that sets out the rules for close co-operation that the parties wish to maintain over a long period.⁸¹

IV. An implied duty of good faith in relational contracts in Singapore

A. *Implied terms in Singapore: Implied in fact and law*

19 Courts in Singapore have adopted the English common law’s general approach that terms in contracts can be implied as a matter of fact or law. A term implied in law, once applied, will be applied in all future contracts of that particular type.⁸² Therefore, the potential application is broader than a term implied in fact, as a term implied in law extends to future cases relating to the same issue with respect to the same category of contract, considering the intention of the parties to the contract.⁸³

20 The concept of terms implied in law is now “firmly woven into the tapestry of [Singapore] contract law.”⁸⁴ It aids in achieving a “just and fair” result.⁸⁵ However, they are confined to “exceptional circumstances.”⁸⁶ The court is cautious of the precedent that an implied term may set.⁸⁷ A recent example of a term implied in law in Singapore law includes the

78 *Chubb Life Insurance v Shing Pui Keung* [2022] HKDC 1391 at [30] and [33].

79 *Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd* (2009) 261 ALR 501 at [242]; *Centreplex Pty Ltd v Noahs Rosehill Water Pty Ltd* [2019] WASC 252 at [29].

80 *Binary Pty Ltd v Rams Financial Group Pty Ltd* [2019] QSC 33 at [84], citing *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506 at [42]–[44], per Thomas J.

81 *Churchill Falls (Labrador) Corp v Hydro-Québec* [2018] SCJ No 46 (4th) 1 at [66]–[67], per Gascon J.

82 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [35].

83 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [35].

84 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [40].

85 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [40].

86 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [40].

87 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [38], citing *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR(R) 927 at [42]–[44].

2021 case of *Tonny Permana v One Tree Capital Management*,⁸⁸ where it was found that agency contracts have an implied obligation for the agent to act with reasonable skill, care and diligence when performing duties for their principals.⁸⁹

21 The implication of terms as a matter of fact involves assessment of the specific contractual and factual matrix of the case. When implying terms in fact, courts consider two principal criteria. First, the court considers whether the term that is proposed to be implied is “so obvious that it goes without saying” and second, that it is “necessary to give business efficacy to the contract”.⁹⁰ As observed in *UTB LLC v Sheffield United Ltd*⁹¹ (“*UTB LLC v Sheffield*”), although these limbs are “theoretically alternatives”, they will often both be satisfied, as a term will be “obvious to the reasonable reader because it is necessary to give the contract commercial and practical coherence in accordance with its intended effect”.⁹² The process of implication involves consideration of the construction of the contract as a whole.⁹³

B. A duty of good faith as a matter of law

22 In the context of relational contracts, it may be that implying a duty of good faith as a matter of law will yield the same result as implying a duty of good faith as a matter of fact. As discussed above, terms implied in law apply to all future contracts of that particular type and characteristics that give rise to a relational contract as a type of contract (such as mutual trust and co-operation) may also lend itself to the assessment of the parties’ intention to imply a duty of good faith as a matter of fact.

23 However, it is preferable that a duty of good faith is implied as a matter of law in relational contracts. This is because it guarantees that relational contracts will require parties to act in duty of good faith. Parties will not need to establish that a duty of good faith is “so obvious it goes without saying” and that it is “necessary to business efficacy”.

88 [2021] 5 SLR 477.

89 *Tonny Permana v One Tree Capital Management Pte Ltd* [2021] 5 SLR 477 at [160]–[163].

90 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [30]–[31]; *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [174]; *Marks and Spencer plc v BNP Paribas Securities Trust Company (Jersey) Ltd* [2015] 3 WLR 1843 at [21], *per* Lord Neuberger.

91 [2019] EWHC 2322 (Ch).

92 *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [197].

93 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [155]. See also *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) at [132]; *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at [5].

This guarantee is particularly important to relational contracts in the construction industry, which have attempted to improve productivity including by reducing litigious attitudes of parties, as outlined in Part II above. Implying a duty of good faith as a matter of law creates certainty that relational contracts require good faith conduct by parties.

C. *An implied duty of good faith: The current approach in Singapore and the case of Ng Giap Hon v Westcomb Securities Pte Ltd*

24 Courts in Singapore have yet to rule on relational contracts, or whether there is an implied duty of good faith in these contracts. However, the general position is that an implied duty of good faith does not exist. The leading authority is *Ng Giap Hon*,⁹⁴ and the position has been maintained in the *obiter dicta* of subsequent decisions.⁹⁵

(1) *The facts of Ng Giap Hon v Westcomb Securities Pte Ltd*

25 *Ng Giap Hon* involved a claim for an entitlement to commission due in respect of placement shares in initial public offerings allocated to two companies.⁹⁶ The appellant was a remisier with a stockbroking company engaged under an agency agreement. It was argued that there was a breach of an implied duty of good faith, as a matter of law, resulting from the agency relationship.⁹⁷ In the alternative, it was alleged that there was a breach of an implied duty of good faith, as a matter of fact, in the agency agreement which implied that the company would not do anything to deprive the agent from earning a commission.⁹⁸

(2) *Rationale of the court in Ng Giap Hon v Westcomb Securities Pte Ltd*

26 In *Ng Giap Hon*, the Court of Appeal found that there was no implied duty of good faith as a matter of law.⁹⁹ Although the case deals with an agency relationship, the reasoning provided is sufficiently broad that it can extend to other categories of contract. In this case, there were two primary reasons for rejecting an implied duty of good faith as a matter of law: first, the court was concerned about an implied duty

94 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518.

95 See, for example *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 at [44] and *Cheah Peng Hock v Luzhou Bio-Chem Technology Ltd* [2013] 2 SLR 577 at [48] and [55].

96 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [5]–[8].

97 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [5]–[8].

98 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [5]–[8].

99 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [5]–[8].

of good faith's potential to influence the "sanctity of the contract"; and second, the court was concerned about broader policy considerations involving application to future cases and uncertainty in the requirements to satisfy an implied duty of good faith.¹⁰⁰ It will be demonstrated that in the context of a relational contract, this reasoning is not persuasive.

(3) *An implied duty of good faith and the "sanctity" of the contract*

27 In *Ng Giap Hon*, the Court of Appeal was concerned that implying a duty of good faith as a matter of law would infringe on the "sanctity" of the contract.¹⁰¹ The concern is that including an additional term in a contract, which the parties had not agreed upon in their initial negotiations, would infringe the parties' ability to deal freely.¹⁰² Therefore, an implied term should be confined narrowly to exceptional circumstances and in accordance with established rules and principles.¹⁰³

(a) The ability to confine an implied duty of good faith narrowly to relational contracts

28 The Court of Appeal's reasoning that an implied duty of good faith would infringe on the "sanctity" of the contract can be disputed as an implied duty of good faith can be confined narrowly to relational contracts. As outlined in Part III above, a relational contract has been defined by courts in foreign jurisdictions, such as the UK, to include provisions relating to co-operation and communications.¹⁰⁴ Relational contracts also tend to occur over a long period and the nature, roles and obligations are not entirely specified in writing.¹⁰⁵ As a result, an implied duty of good faith would only influence a limited category of contract, therefore demonstrating that the sanctity of contracts would not be infringed upon.

100 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [39] and [45].

101 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [45].

102 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [45].

103 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [45].

104 See also *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) at [142]; *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 at [67], *per* Beatson LJ; *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [152]; and *Bates v Post Office (No 3)* [2019] EWHC 606 (QB) at [702].

105 See *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) at [142]; *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 at [67], *per* Beatson LJ; *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [152]; and *Bates v Post Office (No 3)* [2019] EWHC 606 (QB) at [702].

(b) The nature of relational contracts

29 Further to the foregoing, the use of relational contracts constitutes an exceptional circumstance to which an implied duty of good faith is necessary. Implication of such a term would not unduly infringe upon the intentions of the parties as the nature of relational contracts is such that it requires parties to maintain an ongoing and close relationship. The characteristics of these contracts is that co-operation and communication is required for the contracts to function. Given that these contracts often occur over an extended period, the entire nature, rights and obligations of the parties are not specified in writing. An implied duty of good faith would enhance the characteristics of these contracts and give effect to the intention of the parties at the time of creating the contract. Parties to this category of contract conducting themselves in good faith goes to the very essence of these type of contracts and without good faith, these contracts are inoperable.

30 It may be argued that if a duty of good faith should be implied because of the characteristics of the contract, then courts should consider each matter on a case-by-case basis to ensure that the requisite factors exist. Therefore, a duty of good faith should be implied as a matter of fact and not as a matter of law. However, this approach fails to recognise that a relational contract is inherently unique to traditional “arms’ length” transactions, as it requires parties to communicate, co-operate and perform with mutual trust and confidence.¹⁰⁶ Further, it is contrary to policy objectives that relational contracts have been created (particularly in the construction industry) to address, being that traditional contracting models encourage adversarial attitudes, as outlined in Part II above.

(4) *The application of precedent and uncertainty in the requirements to satisfy a duty of good faith*

31 The Singapore Court of Appeal also denied the existence of an implied duty of good faith as a matter of law due to concerns regarding the application of precedent, as an implied term in law applies to future cases relating to the same issue with respect to the same category.¹⁰⁷ First, the Court of Appeal alleged that “[t]he doctrine of good faith is very much a fledgling doctrine in English and (most certainly) Singapore

106 *Bates v Post Office (No 3)* [2019] EWHC 606 (QB) at [714]; citing *Greenclose Ltd v National Westminster Bank plc* [2014] EWHC 1156 (Ch) at [150]; *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) at [142], which was also favourably quoted in *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 at [67], per Beatson LJ.

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

contract law”.¹⁰⁸ As a result, courts should be careful to imply terms on this basis. Second, the court emphasised that there have been several formulations of the concept of good faith in academic literature that are inconsistent with each other.¹⁰⁹ Some of the academic views cited include arguments that an implied duty of good faith includes subjective and objective elements, arguments against an implied duty of good faith, as well as arguments that good faith is inherent in “all aspects of the law of contract” and that “there is therefore no reason for any term concerning good faith to be implied into a contract”.¹¹⁰ As a result, the court stated that it “would not endorse an implied duty of good faith in the Singapore context” until “the theoretical foundations and structure of the doctrine [is] settled”.¹¹¹

32 There are several arguments that can be made against the Court of Appeal’s rejection of an implied duty of good faith in law, as a matter of uncertainty, when applied to the context of relational contracts. Each of the arguments will be outlined below.

(a) The substantial body of law concerning an implied duty of good faith in relational contracts

33 Contrary to the Court of Appeal’s comments that there was not a substantial body of law concerning an implied duty of good faith in the UK, since the 2013 case of *Yam Seng Pte Ltd v International Trade Corporation Ltd*¹¹² (“*Yam Seng*”), courts in the UK have extensively considered whether there is an implied duty of good faith in relational contracts.¹¹³ Although the law has not reached a stage of “settled clarity”, nor has the case been considered by the Supreme Court of the United Kingdom, there is a substantial body of decisions by the EWHC and the England and Wales Court of Appeal (“EWCA”).¹¹⁴ Since *Yam Seng*, the EWHC and EWCA have frequently found in favour of there being an implied duty of good faith when a contract is deemed to be relational as in *Bristol Groundschool Ltd v Intelligent Data Capture Ltd*¹¹⁵ (“*Bristol Groundschool*”) in 2014, *Globe Motors Inc TRW Lucas Varity Electric*

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

109 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [51].

110 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [52].

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

112 [2013] EWHC 111 (QB).

113 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).

114 *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [196].

115 *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch).

Steering Ltd in 2016,¹¹⁶ *Nehayan v Kent*¹¹⁷ in 2018, *Bates v Post Office Ltd*¹¹⁸ in 2019 and *Essex County Council v UBB Waste*¹¹⁹ in 2020. This is due to the courts' findings that the law should protect the trust parties have "in relationships of this kind ... in the normative standard of good faith".¹²⁰ Further, in the case of *Bates v Post Office*, it was found that although there was no general duty of good faith in all commercial contracts, a duty of good faith could be implied into some contracts.¹²¹ A duty of good faith was thus determined with reference to whether or not the contract was relational.¹²² This demonstrates that the doctrine of good faith, specifically in the context of relational contracts, has substantial common law precedent, which can be adopted into Singapore law.

34 A counterargument may be that this is a development in the UK, and Singapore law has not developed the judicial foundations to support an implied duty of good faith in relational contracts. It may be argued that implying a duty of good faith in relational contracts in Singapore does not support an incremental development in the law. However, these views can be disputed. First, as mentioned, Singapore has adopted the English common law position on implied terms and can refer to English contract law to provide the judicial foundations for an implied duty of good faith. Second, an implied duty of good faith in relational contracts can be achieved by following existing tests for implied terms in law generally; that is, by considering relational contracts as a "category" of contract and assessing the implications of implying the term to all future contracts of that particular type.¹²³

(b) The role of the court in clarifying the law

35 In *Ng Giap Hon*, the Court of Appeal discussed the inconsistencies in academic discourse surrounding good faith. This was used to justify denying an implied duty of good faith.¹²⁴ However, the Court of Appeal should not shy away from deciding whether there is a duty of good faith merely because of inconsistencies in the law or a lack of prior recognition of a duty of good faith. It is the role of the court to resolve such uncertainties. In the case of *Bates v Post Office*, it was similarly commented that arguments that deny an implied duty of good faith on

116 [2016] EWCA Civ 396.

117 *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm).

118 *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch).

119 *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC).

120 *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [152].

121 *Bates v Post Office (No 3)* [2019] EWHC 606 (QB) at [721].

122 *Bates v Post Office (No 3)* [2019] EWHC 606 (QB) at [721].

123 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [40].

124 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [51].

the basis that an implied duty of good faith has not previously been found as a legal principle are “wholly circular”.¹²⁵

36 Additionally, it has been quoted in *Ng Giap Hon* with respect to terms implied in law, that “a certain measure of uncertainty will always be an integral part of the judicial process, and hence, of the law itself”.¹²⁶ It is the court’s role “to [not] add unnecessarily to the uncertainty that already exists”.¹²⁷ In the context of relational contracts, finding in favour of an implied duty of good faith could *assist* in clarifying the standard of conduct that is required of parties. An implied duty of good faith would prevent parties to relational contracts from being held to the same standard of dealing as parties to competitive, transactional agreements.

(c) The requirement of good faith: Is it too uncertain?

37 The Court of Appeal also highlighted the lack of clarity in the concept of good faith and used this in support of denying an implied duty of good faith. There is merit to this argument. As has been outlined by courts in the UK, what good faith requires ultimately depends on the facts of the case.¹²⁸ Because what is required of a duty of good faith is highly context-dependent, it has been said that it is “unnecessary and perhaps impossible to attempt to spell out an exhaustive description of what this obligation involve[s]”.¹²⁹ This might contribute to a sense of incoherence.

38 However, there have been common themes to what is required of a duty of good faith, as identified by courts in the UK.¹³⁰ These include an objective standard of determining a breach of good faith, as well as good faith requiring, at a minimum, honesty. In *Yam Seng*, it was said that good faith “includes the core value of honesty”.¹³¹ An example of a breach of good faith may therefore involve deceiving another person by making a false statement and intending that the other person rely on this

125 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB); *UTB LLC v Sheffield United Ltd* [2019] EWHC 2322 (Ch); *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch); *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396; *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm); *Bates v Post Office (No 3)* [2019] EWHC 606 (QB); *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC).

126 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [39]; citing *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 at [90].

127 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [39]; citing *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 at [90].

128 *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [150].

129 *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [150].

130 See Part III above.

131 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) at [141].

statement.¹³² In *Bristol Groundschool*, the court stated that a breach of honesty is “commercially unacceptable” and in *Essex County Council v UBB Waste*, it was said that “dishonest conduct will be a breach of the duty of good faith”.¹³³ Additionally, courts in the UK have attempted to limit the scope of a duty of good faith. In *Yam Seng*, it was recognised that English contract law may be less willing to go as far as Bingham LJ’s concept of “playing fair”.¹³⁴ This demonstrates that the concept of good faith is not unascertainable.

39 Further, the Singapore Court of Appeal *has* been able to determine the requirements of a duty of good faith with reference to the law in the UK. In the case of *HSBC Institute Trust Services v Toshin Development Singapore*,¹³⁵ the Court of Appeal upheld an *express* term that required parties to act in good faith as legally valid. The court applied the case law in the UK surrounding a duty of good faith generally, and found that the “core meaning” of good faith was honesty and “observing accepted commercial standards of fair dealing”.¹³⁶ This demonstrates that a duty of good faith is not uncertain to such an extent as to render it inapplicable and begs the following question: if an express requirement of parties to act in good faith is not void for uncertainty, then why is an implied obligation for parties to act in good faith deemed too uncertain?

IV. Conclusion

40 This article has argued that courts in Singapore should imply a duty of good faith into relational contracts. It began by outlining contracting issues in the construction industry in Singapore and how collaborative contracting, which involves the implementation of clauses that foster collaboration between parties, has been promoted to alleviate these issues. This article then discussed the meaning of relational contracts in foreign jurisdictions; namely those defined by communication, co-operation and collaboration. Relational contracts also include features such as a long duration and not specifying the entirety of the parties’ roles. Based upon this, it was then argued that courts in Singapore should imply a duty of good faith into relational contracts and that *Ng Giap Hon* is no longer

132 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) at [142].

133 *Essex County Council v UBB Waste (Essex) Ltd* [2020] EWHC 1581 (TCC) at [161].

134 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB) at [121].

135 [2012] 4 SLR 738.

136 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [1] and [45].

persuasive in the context of relational contracts, when read against more recent authority in the UK.
