GOOD FAITH IN THE PERFORMANCE OF COMMERCIAL CONTRACTS REVISITED

Singapore contract law does not recognise a general doctrine of good faith. Its existence and scope have been a matter of great controversy, igniting a bewildering array of authorities and academic debates throughout the common law world. This paper revisits the controversy and explores the possibility of implying an obligation of good faith into the performance of commercial contracts in the Singapore context, in light of recent significant developments in other common law jurisdictions where the doctrine has attracted recognition.

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I. Good faith in common law jurisdictions

1 The doctrine of good faith has its proponents as well as opponents from among the judiciary and academia. Scholarly papers and case commentaries on this contentious issue have sprouted around the Commonwealth. A survey of major common law countries, apart from the US where good faith is established, reveals that although the doctrine is not lacking in supporters, there is yet a firm endorsement of its general application.

2 This article seeks to discuss the implication of good faith in the performance of a concluded contract. The issue of whether there is a duty of good faith in the context of pre-contract negotiations[1] goes beyond the scope of this article.

A. Singapore

3 The current position is that an obligation of good faith performance is not part of Singapore contract law. This was decided by

1 The decision in *Walford v Miles* [1992] AC 128 that an agreement to negotiate is not binding is apparently good law in Singapore: *Climax Manufacturing Co Ltd v Colles Paragon Converters (S) Pte Ltd* [1998] 3 SLR(R) 540; *United Artists Singapore Theatres Pte Ltd v Parkway Properties Pte Ltd* [2003] 1 SLR(R) 791; *Grossner Jens v Raffles Holdings Ltd* [2004] 1 SLR(R) 202.

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the Court of Appeal in *Ng Giap Hon v Westcomb Securities Pte Ltd*[2] ("*Ng Giap Hon*"). The case concerned an agency agreement where the appellant was a remisier with the respondent stockbroking firm. He sought to recover payment of commission due to him in respect of placement shares allocated to S and A, two of the respondent's customers. The appellant claimed that S and A were in fact his customers by reason of the fact that S had opened a trading account with the respondent through him, while A would have opened an account through him had the respondent not "hijacked" A as its own customer. One of the issues raised on appeal was whether there was an implied duty of good faith between the appellant and the respondent as agent and principal. The court found that the respondent was not legally bound to allot the placement shares through the appellant even though S had opened a trading account with the respondent through the appellant. In the case of A, the placement shares he subscribed for did not go through the respondent but through another company. The appellant was therefore not entitled to the commission that he claimed was due to him. Andrew Phang Boon Leong JA (delivering the judgment of the court) dealt with the issue of implied terms at some length. He determined that a duty of good faith fell to be considered under the broader category of terms implied by law, a category firmly entrenched in local contract law. He went on to distinguish between terms implied by law and terms implied in fact. A term implied by law sets a precedent for all future contracts of that particular type, whereas a term implied in fact does not create any precedent as the court is only concerned with arriving at a just and fair result in the particular context of that case. For this reason, Phang JA advised that the court should be more careful in implying terms as a matter of law than in implying terms in fact. As to the applicable tests for the latter, the court reiterated the celebrated "business efficacy"[3] and "officious bystander"[4] tests as being firmly established in Singapore contract law. Although the relationship between the two tests is not as clear in Singapore as in English law, the court preferred to view them as complementary[5] rather than as alternative tests, with the "officious bystander" test being the practical mode by which the "business efficacy" test is implemented. The court thus concluded, having regard to the relevant historical and judicial background and the general logic involved.

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2 [2009] 3 SLR(R) 518.

3 *The Moorcock* (1889) 14 PD 64 at 68, *per* Bowen LJ.

4 MacKinnon LJ in *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206 at 227 affirmed [1940] AC 701. It means "that is what a reasonable person would understand it to mean". The test emphasises the need for the court to be satisfied that the proposed implication spells out what the contract would reasonably be understood to mean.

5 The "complementarity" characterisation of the tests was re-affirmed by the same court in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193.

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4 Returning to the present issue, the court held that good faith could not be implied as a matter of law into the agency agreement for the following reasons: (a) it would undermine the concept of sanctity of contract, unless required in exceptional circumstances and in accordance with legal principles; (b) it tends to generate some uncertainty with the use of broader policy considerations as the criteria; (c) it sets a precedent for implying the same term in all future contracts of the same type; (d) it involves the doctrine of good faith which is "a fledgling doctrine" in contract law in England and other common law jurisdictions, and definitely in Singapore;[6] (e) the doctrine needs clarification as to its meaning and application in view of the differing academic opinions; (f) the doctrine is far from settled in view of the vigorous arguments against it;[7] (g) the case law is apparently in a "state of flux", notably in the US, Australia and Canada; and (h) on the basis of leading academic opinion[8] that good faith is inherent in all aspects of contract law, there is no reason for the court to imply good faith into a contract.

5 For these reasons, the court concluded that much clarification is required, even on a theoretical level and until "the theoretical foundations [and] structure of this doctrine are settled", it would be inadvisable to apply it in the practical sphere.[9] This was the strongest reason for the Court of Appeal's reluctance to imply an obligation of good faith in contractual performance under Singapore law.

B. England

6 The Singapore approach is consistent with English contract law which does not recognise an overriding legal principle of good faith of general application. However, a notable shift from this position was taken in *Yam Seng Pte Ltd v International Trade Corp Ltd*[10] ("*Yam Seng*") where Leggatt J implied a duty of good faith into a distribution agreement and suggested that such a duty could exist in English contract law in certain circumstances. This novel approach breaks new ground. *Yam Seng* is notably the first English case to consider and review contractual good faith performance in some depth in the context of a long-term commercial contract. The plaintiff in this case was a company incorporated in Singapore. It entered into a distribution agreement with

6 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [47].
7 Notably by Bridge in Michael G Bridge, "Does Anglo-American Law Need a Doctrine of Good Faith?" (1984) 9 CBLJ 385.
8 John Carter & Elisabeth Peden, "Good Faith in Australian Contract Law" (2003) 19 JCL 155; Elisabeth Peden, *Good Faith in the Performance of Contracts* (Australia: LexisNexis Butterworths, 2003) ch 6.
9 *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518 at [60].
10 [2013] EWHC 111.

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the defendant English company under which the plaintiff was granted exclusive rights to distribute "Manchester United" branded products in specific territories. At the start of negotiations, the defendant misrepresented to the plaintiff that it already had a licence in respect of the products which, in fact, was only obtained at a later stage. Fifteen months into the contract, the plaintiff terminated the agreement on the basis of the defendant's repudiatory breaches in: (a) failing to ship orders promptly; (b) failing to make products available; (c) undercutting agreed prices; and (d) providing false information knowing that the plaintiff would rely on it. The plaintiff pleaded, *inter alia*, that there was an implied term of the agreement that the parties would deal with each other in good faith. It sought damages for breach of contract and misrepresentation and succeeded in all its claims.

7 In considering the good faith issue, Leggatt J acknowledged that English contract law does not generally recognise good faith performance. However, such a duty is already established in certain contracts such as employment and partnership contracts or where the parties are in a fiduciary relationship such as trusteeship. He observed that while English law is not ready to recognise good faith as a duty implied by law, even as a default rule, in all commercial contracts, he saw no difficulty in implying such a duty in any contract based on the presumed intention of the parties using the established methodology for implying terms into contracts. The presumed intention will be assessed objectively on "whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people".[11] Understood in this way, Leggatt J did not find anything novel or foreign to English law in introducing an implied duty of good faith. This is consonant with the theme running through English law that reasonable expectations must be protected[12] and is a concept already reflected in well-established authority.[13] In this case, the absence of standards of open and honest behaviour on the part of the defendant was contrary to the reasonable expectations of commercial morality in business transactions. Such an expectation of honesty is so obvious that "it goes without saying".[14] By holding that good faith could be implied based on the presumed intentions of the parties and the particular context of the case, Leggatt J was widening the scope for the implication of good faith in contract law. He did not analyse this as an obligation implied by law, unlike the Singapore Court of Appeal.

11 *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 at [144].

12 See *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 at 196, *per* Lord Steyn, and Johan Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433.

13 See *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 at [145] for a list of authorities.

14 *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 at [137].

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8 Referring to the reasons for the reluctance of English law to recognise a general duty of good faith, Leggatt J made the following observations:

> (a) Since the content of the duty is heavily dependent on the factual matrix of the case and on the rules of construction, its recognition is entirely consistent with the case-by-case approach favoured by common law. Hence, it is unnecessary to adopt civil law methods in order to accommodate the principle.
>
> (b) As the basis of the duty is the presumed intention of the parties and the meaning of their contract, implying a duty would not restrict the parties' freedom in pursuing their own interests.
>
> (c) A further consequence of (b) is that it is open to the parties to modify the scope of the duty by express terms in the contract.
>
> (d) The duty can be described as one of good faith and fair dealing. Fair dealing can be defined by the contract and by the standards which the parties reasonably presume without the court imposing its own views on the parties.
>
> (e) The fact that English courts are less willing than other legal systems to interpret good faith as requiring a high level of openness should be viewed as a difference of opinion about what constitutes good faith and fair dealing in certain commercial contexts, rather than a refusal to recognise these principles.
>
> (f) The fear that implying a duty of good faith would lead to excessive uncertainty is unjustified. There is nothing vague or unworkable about the concept. It is no more uncertain than the interpretation of contracts.

Furthermore, Leggatt J noted that good faith has been implemented in various European Union ("EU") legislation[15] and has long since been recognised in civil law countries and in the US. He also noted its growing recognition in other common law jurisdictions such as Canada, Australia, New Zealand and much nearer home, Scotland. Leggatt J,

15 See, *eg*, Council Directive 86/653/EEC (18 December 1986) (coordination of the laws of the Member States relating to self-employed commercial agents); Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999 No 2083) (UK) contain a requirement of good faith. The Principles of European Contract Law proposed by the Commission on European Contract Law and the European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* (COM(2011) 635 final, 11 October 2011) also embody a general duty to act in accordance with good faith and fair dealing.

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therefore, concluded that the "traditional English hostility"[16] towards good faith in the performance of contracts is "misplaced" and "swimming against the tide",[17] although he doubted that English law is as yet ready to recognise good faith performance in all commercial contracts.

9 *Yam Seng* is an important development in English contract law, even though it is clear that the duty of good faith will not be implied in all cases but on a case-by-case basis, consistent with the common law approach. It is clearly a case which was decided on its own facts. The implication of good faith was heavily dependent on the presumed intention of the parties against the relevant context and the rules of construction. *Yam Seng* will therefore not set a precedent for future cases of the same type.

10 In two subsequent cases involving express obligations of good faith, certain observations were made regarding the *Yam Seng* approach. Beatson LJ observed in the Court of Appeal case of *Mid Essex Services Hospital NHS Trust v Compass Group UK and Ireland Ltd*[18] ("*Mid Essex*"), that Leggatt J's decision emphasised that good faith is sensitive to context, that the test of good faith is objective, namely, whether honest and reasonable people would regard the conduct as commercially unacceptable and that its content is established through a process of construction of the contract. However, Jackson LJ took the view that there is no general doctrine of good faith in English contract law, except that good faith is implied by law as an incident of certain kinds of contracts such as insurance, employment and partnerships. He concluded that "if the parties wish[ed] to impose such a duty, they must do so expressly".[19] *Yam Seng* is distinguishable from *Mid Essex*, where the contract contained an express obligation of good faith. It was therefore unnecessary for the court to imply good faith in the latter case.

11 The issue of good faith was revisited in *TSG Building Services plc v South Anglia Housing Ltd*[20] ("*TSG*") in the context of contract termination. The contract there expressly required the parties to "work together and individually in the spirit of trust, fairness and mutual co-operation" and to act "reasonably" in respect of "all matters"

16 See *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 at [123], citing from Ewan McKendrick, *Contract Law* (Palgrave Macmillan Law Masters, 9th Ed, 2011) at pp 221–222.

17 *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 at [153] and [124].

18 [2013] EWCA Civ 200.

19 *Mid Essex Services Hospital NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 at [105].

20 [2013] EWHC 1151.

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governed by the contract.[21] The High Court held that this did not impose a duty of good faith on the contractual right of termination. Neither could good faith be implied into the contract since the parties had expressly provided how they were to work together, thus leaving no room for the court to imply such a duty. While Aikenhead J viewed the judgment of Leggatt J as "extremely illuminating and interesting", he would not draw from it any principle of general application to all commercial contracts. He did not see that implied obligations of honesty and fidelity, considered by Leggatt J as aspects of good faith, impinged on the present case in the absence of any suggestion of dishonesty in the decision to terminate.[22] *Yam Seng* is distinguishable from *TSG* in two ways: first, the implication of good faith would circumscribe what the parties had already expressly agreed in the contract; and second, the implication of good faith was not necessary to the decision.

12 The contentious issue of good faith in contract performance awaits the authoritative determination by the Supreme Court and, in particular, whether it will affirm the *Yam Seng* approach.

C. Australia

13 In *Yam Seng,* Leggatt J considered the existence of the contractual duty of good faith to be now well established in Australia, although the limits and precise juridical basis of the doctrine remain unsettled. He found that good faith was recognised in a substantial body of Australian case law, including further significant decisions of the New South Wales Court of Appeal in *Alcatel Australia Ltd v Scarcella*,[23] *Burger King Corp v Hungry Jack's Pty Ltd*[24] and *Vodafone Pacific Ltd v Mobile Innovations Ltd*.[25] This development stems from the New South Wales' Court of Appeal case of *Renard Constructions (ME) Pty v Minister for Public Works*[26] ("*Renard*"). In his seminal judgment, Priestley JA introduced an obligation of good faith and fair dealing in commercial contracts and observed that such an implication is a reflection of community expectations of contractual behaviour. The requirement could be either implied in fact or in law and that in some situations there is no real distinction between the types of implication. However, there has been much academic disapproval of the disregard for and

21 *TSG Building Services plc v South Anglia Housing Ltd* [2013] EWHC 1151 at [4].
22 *TSG Building Services plc v South Anglia Housing Ltd* [2013] EWHC 1151 at [46].
23 (1998) 44 NSWLR 349.
24 [2001] NSWCA 187.
25 [2004] NSWCA 15.
26 (1992) 26 NSWLR 234.

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misunderstanding of the law relating to implication in fact and in law.[27] The High Court of Australia has yet to decide the question and declined to do so in *Royal Botanic Gardens and Domain Trust v Sydney City Council*[28] where it considered the case to be inappropriate for a discussion of the issue. The Hon Robert McDougall, writing extra-judicially,[29] said that until the Legislature or High Court states otherwise, the duty of good faith is here to stay. He also wrote that the obligation is not, however, at least in New South Wales, imposed in all contracts or in all contracts of a particular class, far less is it imposed regardless of the intention of the parties.

D. New Zealand

14 The doctrine of good faith is not yet established law but has its advocates such as Thomas J in his dissenting judgment in the Court of Appeal case of *Bobux Marketing Ltd v Raynor Marketing Ltd*.[30] A number of New Zealand cases have considered the circumstances in which good faith may be implied[31] and the issue of a good faith doctrine awaits the decision of the Supreme Court.

E. Scotland

15 In *Yam Seng*, Leggatt J referred to the judgment of Lord Clyde in *Smith v Bank of Scotland*[32] as strong authority for the view that Scottish law recognises a broad principle of good faith and fair dealing. Some opponents, however, have argued that the principle of good faith endorsed by Lord Clyde is unlikely to extend beyond the facts of the case which involved inter-spousal security transactions and cannot support a general doctrine in Scots Law. Nevertheless, there is increasing support for the doctrine of good faith in Scots Law.[33]

27 The Hon Marilyn Warren AC, "Good Faith: Where Are We at?" [2010] 34(1) MULR 344.

28 (2002) 186 ALR 289.

29 Robert McDougall, "The Implied Duty of Good Faith in Australian Contract Law" (2006) 108 *Australian Construction Law Newsletter* 28, available at <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_mcdougall210206> (accessed 1 October 2013).

30 [2002] 1 NZLR 506 at 517.

31 See, *eg*, *Vero Insurance New Zealand Ltd v Fleet Insurance & Risk Management Ltd* CIV 2007-404-1438 (HC Auckland) (21 May 2007).

32 1997 SC (HL) 111 at 121.

33 See J Edward Bayley, *A Doctrine of Good Faith in New Zealand: Contractual Relationships* (2009) (LLM thesis, University of Canterbury, New Zealand) at p 39.

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F. Canada

16 Canadian courts have yet to recognise an overriding general principle of good faith.[34] The Supreme Court of Canada confined their discussion of good faith to the wrongful dismissal action before them without recognising a generalised duty of good faith performance.[35] As O'Connor ACJO observed in *Transamerica Life Canada Inc v ING Canada Inc*[36] in the context of commercial contracts:

> Unlike the situation in the United States where the duty of good faith in the performance or enforcement of commercial contracts has been broadly recognised, Canadian courts have not developed a comprehensive and principled approach to the implication of duties of good faith in commercial contracts. As Professor McCamus points out, many questions about the nature and scope of such duties have yet to be resolved. Indeed, it remains an open question whether implied duties of good faith add anything to the other available common law doctrines that apply to contracts.

While the Ontario Law Reform Commission agreed that good faith may not be a recognised contract law doctrine, it is implicit in Canadian contract law "to the extent that the common law of contracts, as interpreted and developed by our courts reflects the reality that good faith is very much a factor in everyday contractual transactions".[37] It concluded that:[38]

> … statutory recognition of the doctrine of good faith would serve to synthesize the various strands of good faith analysis in the case law. Moreover, the literature reveals that a generalized doctrine of good faith would conform to commercial realities.

G. US

17 The doctrine of good faith has long been recognised in the US. As far back as 1918, the New York Court of Appeal said in *Wigand v Bachmann-Bechtel Brewing Co*[39] that "every contract implies good faith and fair dealing between the parties to it". The Uniform Commercial Code, adopted by many states, provides in Art 1-203 that "every contract or duty within this Act imposes an obligation of good faith in its

34 Recently, the Ontario Court of Appeal in *Kang v Sun Life Assurance Company of Canada* 2013 ONCA 118 reiterated that the jurisprudence on the duty of good faith and fair dealing is not settled in Canada.

35 *Wallace v UGG* [1997] 3 SCR 701.

36 (2003) 68 OR (3d) 457 at [52].

37 Ontario Law Reform Commission, *Report on the Amendment of the Law of Contract* (1987) at p 166.

38 Ontario Law Reform Commission, *Report on the Amendment of the Law of Contract* (1987) at p 174.

39 222 NY 272 at 277.

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performance or enforcement". Under Art 1-102(3), it is not possible to exclude the doctrine in most cases. Similarly, the American Law Institute's *Restatement (Second) of Contracts* (1981) states in § 205 that "every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement". However, the Singapore Court of Appeal in *Ng Giap Hon* cited academic opinion[40] that "the American doctrine of good faith is no longer as settled as it used to be thought and is in a state of flux". This has been well discussed elsewhere and goes beyond the ambit of this article.

H. Civil law jurisdictions

18 Many civil law systems recognise an overriding principle that parties should act in good faith in making and carrying out contracts. The doctrine of good faith, derived from Roman Law, is entrenched in civil law countries including Germany, France, Italy, Belgium, the Netherlands, Poland, Portugal, Spain, Switzerland, China, Japan, Republic of Korea, Israel, the Province of Quebec and the State of Louisiana. For example, the Contract Law of the People's Republic of China[41] provides in Art 6 that in exercising their rights and performing their obligations, the parties shall observe the principles of honesty and good faith. Although good faith is settled, its application is not without its uncertainties.[42]

I. Attempts at harmonising contract law

19 (a) The Commission on European Contract Law[43] prepared the Principles of European Contract Law, intended to apply within the EU. Article 1.201 provides for obligations of good faith and fair dealing which the parties may not exclude or limit.

(b) Good faith and fair dealing is one of the fundamental ideas underlying the UNIDROIT Principles of International Commercial Contracts 2010[44] ("UNIDROIT Principles"). Article 1.7 provides that each party must act in accordance with good faith and fair dealing in international trade. What is not good faith includes abuse of rights such as malicious behaviour by exercising rights merely to damage the other party or for

40 Howard O Hunter, "The Growing Uncertainty about Good Faith in American Contract Law" (2004) 20 JCL 50.

41 Adopted 15 March 1999.

42 Werner Ebke & Bettina Steinhauer, "The Doctrine of Good Faith in German Contract Law" in *Good Faith and Fault in Contract Law* (Jack Beatson & Daniel Friedman eds) (Oxford University Press, 1995) at p 171.

43 It is independent from any national obligations.

44 Published by the International Institute for the Unification of Private Law.

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purposes other than the one granted. The obligations of good faith and fair dealing cannot be excluded.

(c) The EU's Draft Common Frame of Reference[45] provides in Art 1:103 that good faith and fair dealing refers to a standard of conduct characterised by honesty, openness, consideration for the interests of the other party to the transaction or relationship in question.

(d) Last but not least, the Convention on the International Sale of Goods[46] ("CISG") provides in Art 7(1) that in the interpretation of the Convention, regard is to be had to the observance of good faith in international trade. Singapore has joined 79 other common law and civil law countries, as contracting states. The CISG has been re-enacted as the Singapore Sale of Goods (United Nations Convention) Act.[47]

II. Discussion

20 The above survey shows that apart from civil law countries and the US, the doctrine of good faith in contract performance has been widely debated but has yet to be universally adopted in the common law world. The views and arguments of distinguished judges and leading academics are highlighted below.

A. Difficulty in defining good faith

21 This difficulty has often been cited as a reason against the recognition of good faith as a doctrine of general application. As yet, there is no widely accepted definition of "good faith" in contract law and there are different views about the content of the obligation. It is a "catch-all phrase" that could embrace honesty and fair dealing, fidelity to the bargain, observing reasonable commercial standards of fair dealing and acting consistently with the reasonable expectation of the parties. Good faith requires a core value of honesty and is conveyed by expressions such as "playing fair", "coming clean" and "putting one's cards face upwards on the table".[48] It is in essence a principle of fair, open dealing. Priestly JA in *Renard* equated good faith with reasonableness

45 Study Group on a European Civil Code and Research Group on EC Private Law, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (European Law Publishers, 2009).

46 United Nations Convention on Contracts for the International Sale of Goods (1489 UNTS 3) (11 April 1980; entry into force 1 January 1988).

47 Cap 283A, 2013 Rev Ed.

48 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at 439, *per* Bingham LJ (as he then was).

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while Anthony Mason[49] is often cited as suggesting that the concept includes at least three related notions: (a) co-operation in achieving the contractual objects or loyalty to the promise; (b) compliance with honest standards of conduct; and (c) compliance with standards of conduct which are reasonable having regard to the interests of the parties. McCamus[50] suggests a possible approach of stitching together the existing rules of common law which appear to implement the duty of good faith. On this basis, the duty of good faith may be defined as: (a) the duty to exercise discretionary powers conferred by contract reasonably and for the intended purpose; (b) the duty to co-operate in securing performance of the main objects of the contract; and (c) the duty to refrain from strategic behaviour designed to evade contractual obligations. Article 1-201(19) of the Uniform Commercial Code defines good faith as honesty in fact in the conduct of the transaction concerned. In the sale of goods provision, Art 2-103(1)(b) defines good faith in the case of a merchant as honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. Leggatt J's proposed test of good faith in *Yam Seng* has been noted above.

22 Given the difficulty in defining good faith and the different contexts in which the word is used, some commentators have relied on a negative proposition or "excluder definition" such as good faith is "not acting in bad faith" or "not improper, commercially unacceptable or unconscionable conduct". In his very influential paper, Summers introduced the argument that good faith is basically an "excluder", namely, "a phrase with no general [positive] meaning … of its own".[51] Following Summers,[52] Belobaba[53] explained that more precision can be given to the concept by focusing on bad faith which is more easily identified and good faith can be defined as the absence of that conduct. An excluder definition of good faith is found in the UNIDROIT Principles. In the absence of any general definition and with the growing acceptance of good faith in contract law, parties should consider incorporating express terms of good faith into the contract and clarify the scope of the obligation. Such a provision is found in the two English cases of *Mid Essex Hospital* and *TSG*, referred to above.

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49 Cambridge Lectures 1993. Anthony Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000) 116 LQR 66.

50 John D McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance" [2004] 29 Advoc Q 72.

51 Robert S Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54 Va L Rev 195 at 262.

52 Robert S Summers, "The General Duty of Good Faith – Its Recognition and Conceptualization" (1982) 67 Cornell LR 810.

53 Edward P Belobaba, "Good Faith in Canadian Contract Law" in Law Society of Upper-Canada, *Special Lectures 1985, Commercial Law: Recent Developments and Emerging Trends* (Toronto: R De Boo, 1985) at p 73.

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B Academic controversy

23 Academic debate continues over the desirability of recognising a generalised duty of good faith. Opponents of good faith are notably Michael Bridge[54] and Girard.[55] The latter took the view that good faith should not simply be transported into the common law context without a wholesale rethinking of the nature of contractual obligations, something to be undertaken only by the Legislature. The oft-cited reasons against the recognition of a generalised concept of good faith and the counter-arguments are revisited below.

(1) An incremental approach

24 The preferred method of English law is to proceed incrementally by developing piecemeal solutions to demonstrated problems of unfairness rather than by enforcing overriding principles.[56] Bridge preferred the existing common law approach to the adoption of a vague general standard. In response to this, Farnsworth saw little basis for Bridge's fears of abuse of the doctrine. While the doctrine did not bring any fundamental change in American law or thinking of its lawyers, it "provided a useful basis for generalising from particular cases … and for analysing their similarities and differences".[57]

(2) Uncertainty

25 It is feared that the adoption of good faith will undermine contract certainty to which English law has always placed great weight. This is founded on the difficulty in defining the scope and content of good faith.[58] With uncertainty come potential disputes and increased costs. In *Yam Seng*, Leggatt J considered this fear to be unjustified.

(3) Freedom and sanctity of contract

26 The concept of good faith is at variance with the fundamental principle of freedom of contract and the ethos of individualism whereby

54 Michael G Bridge, "Does Anglo-American Law Need a Doctrine of Good Faith?" (1984) 9 CBLJ 385.

55 Philip Girard, "'Good Faith' in Contract Performance: Principle or Placebo" (1983) 5 Sup Ct L Rev 309.

56 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433 at 439, *per* Bingham LJ (as he then was).

57 E A Farnsworth, "Comment on Michael Bridge's Paper" (1984) 9 CBLJ 426 at 430.

58 Warren CJ in *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSC 228 saw the difficulty of defining the scope and content of good faith as being inconsistent with the role of law in achieving commercial certainty. If the duty exists, it means there is a standard of contractual conduct that should be met. That standard is nebulous and commercial morality is vague.

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parties are free to bargain and pursue their own self-interests as long as they do not breach the contract. Imposing external standards of conduct such as good faith on the parties would be contrary to the principle of freedom and sanctity of contract. Leggatt J's response was that since the implication of good faith is based on the presumed intention of the parties and the meaning of their contract, implying the duty would not restrict the parties in pursuing their own interests. Moreover, parties are free to include an express contractual term to modify the scope of the duty.

(4) Good faith inherent in contract law

27 Academic commentators have argued that good faith is not an independent concept but inherent in all aspects of contract law so that there is no reason for it to be implied into a contract.[59] Even if good faith is not part of the law, in many cases the application of particular principles would achieve the same result. The counter-argument is dealt with below.

(5) The theoretical basis of good faith needs to be settled

28 This was the main reason of the Singapore Court of Appeal and other opponents of the good faith doctrine. This will be explored further below.

29 Proponents of the doctrine include notably Farnsworth and Belobaba. The arguments in favour of a generalised concept of good faith are highlighted below.

(6) Common law already recognises the concept of good faith

30 Feinman[60] pointed out the misunderstanding that good faith is a special doctrine that does not easily fit within the structure of contract law. In his view, good faith is simply another embodiment of the basic principle of contract law which is the protection of reasonable expectations. McCamus[61] stated similarly that many common law existing doctrines appear to manifest a policy of encouraging good faith.

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59 See, *eg*, John Carter & Elisabeth Peden, "Good Faith in Australian Contract Law" (2003) 19 JCL 155; Elisabeth Peden, *Good Faith in the Performance of Contracts* (Australia: LexisNexis Butterworths, 2003); and *Transamerica Life Canada Inc v ING Canada Inc* (2003) 68 OR (3d) 457 at [52], *per* O'Connor ACJO.

60 Jay M Feinman, "Good Faith and Reasonable Expectations" (4 April 2013), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245144> (accessed 1 October 2013).

61 John D McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance" [2004] 29 Advoc Q 72.

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Given that existing rules are expressions of good faith, recognising good faith at common law would not impose any new contractual obligations but simply consolidate existing doctrinal approaches. As MacQueen[62] explains, the reason why these rules need to be reinforced by a generalisation is that the articulation of the general principle enables the identification and solution of problems which the existing rules do not or seem unable to reach. This is well illustrated by the history of the good faith doctrine in Germany and by *Smith v Bank of Scotland* where a general duty of good faith enabled the House of Lords to deal with a problem for which there was no satisfactory answer in the existing specific rules of Scots law. MacQueen concluded that the principle may remain latent or continue to be stated in general terms without doing too much damage to the important values of certainty and predictability in the law.

(7) Benefits of recognising good faith

31 Commentators have argued that recognising the doctrine will bring the law more into accord with the reasonable expectations of the parties that they will act in good faith and give effect to these expectations. By promoting fairness, trust and co-operation, it will preserve commercial relationships. It will deter opportunism and unethical behaviour and increase the likelihood of the contract remaining beneficial over the long-term and be consistent with the parties' freedom to act in self-interest.

(8) Harmonisation of contract law

32 Recognising good faith will bring common law into line with civil law systems. Such internationalisation of contract law would be forward thinking.

C. Is good faith to be implied by law, implied in fact or by construction?

33 It is clear that the duty is regarded as one arising by implication but how it may arise is unclear. The nature of the implication has been spelled out in different terms.[63] There are three methods: (a) implication by law; (b) implication in fact; and (c) implication as a matter of

62 Hector L MacQueen, "Good Faith in the Scots Law of Contract: An Undisclosed Principle?" in *Good Faith in Contract and Property Law* (Angelo D M Forte ed) (Oxford, Hart Publishing, 1999) at pp 5–37.

63 Robert McDougall, "The Implied Duty of Good Faith in Australian Contract Law" (2006) 108 *Australian Construction Law Newsletter* 28, available at <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_mcdougall210206> (accessed 1 October 2013).

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construction. A hybrid of these has also been used. Views differ as to whether the duty of good faith arises by implication of law in all contracts, in certain kinds of contracts, by implication in fact in certain specific situations or whether it arises on the proper construction of a contract. The methodology has differed from jurisdiction to jurisdiction and at times within the same jurisdiction itself. For example, Australian courts have considered good faith as arising in various ways.

(1) Implication as a matter of law

34 Implication by law occurs when the court considers that certain contracts should as a matter of policy contain certain terms regardless of the intentions of the parties. In the present context, it means that good faith will be implied as a necessary incident of a definable class of contractual relationship. In what classes of contracts should good faith be implied? The Australian High Court suggested in *Breen v Williams*[64] that the requirement for implying a new term in law is that it must be necessary for the reasonable or effective operation of the type of contract before the court, taking into account the policy considerations relevant to that type of contract. The test of necessity is to "prevent the enjoyment of contractual rights being rendered nugatory, worthless, or, perhaps, be seriously undermined".[65]

35 By imposing terms that the court thinks are necessary, to what extent is it interfering with the freedom of contract? This is an issue of policy rather than theory or practicality. The Hon Robert McDougall[66] took the view that the interests of certainty should not be interfered with when informed parties have adequate bargaining power and negotiate at arm's length. There are adequate remedies to deal with misrepresentation and unconscionable conduct. Those policy arguments militate against implication in law, at least in commercial contracts. However, they should be taken into account in considering implication in fact, in particular in considering the "obvious" and "business efficacy" criteria.

36 The Singapore Court of Appeal categorised the implication of good faith as a matter of law. Australian decisions at first instance and particularly by the New South Wales Court of Appeal have suggested

64 (1996) 186 CLR 71.

65 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 450.

66 Robert McDougall, "The Implied Duty of Good Faith in Australian Contract Law" (2006) 108 *Australian Construction Law Newsletter* 28, available at <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_mcdougall210206> (accessed 1 October 2013).

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that the correct basis is to imply good faith in law as a legal incident of a commercial contract.[67]

(2) Implication in fact

37 By implying terms, the court seeks to fill a gap in the contract to give effect to the parties' presumed intentions. Terms are implied in fact where it is assumed that both parties would have included the term if they had thought about it. The two overlapping tests which have been developed by the courts to ascertain the intention of the parties are the "officious bystander" and "business efficacy" tests (referred to as the "traditional tests"). When implying a term, Lord Simon of Glaisdale suggested in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*,[68] that the following conditions (which may overlap) must be satisfied: (a) it must be reasonable and equitable; (b) it must be necessary to give business efficacy to the contract so that no term may be implied if the contract is effective without it; (c) it must be so obvious that it "goes without saying"; (d) it must be capable of clear expression; and (e) it must not contradict any express term of the contract.

38 These were considered by the Singapore Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*[69] ("*Sembcorp Marine*") as additional requirements to the traditional tests that simply restated the basic overriding principle that a term is not to be implied into a contract lightly. The court in turn proposed a three-step process which will be highlighted below.[70] It also clarified the meaning of certain terms which had been used loosely. "Interpretation" of contractual terms involves ascertaining the meaning of the parties' expressions in a contract. "Construction" of a contract seeks to ascertain the parties' intentions, both actual and presumed, arising from the contract as a whole without necessarily being confined to the specific words used. "Implication" of contract terms seeks to fill a gap in the contract to give effect to the presumed intentions of the parties. This clarification is helpful to the analysis below.[71]

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67 See, *eg*, *Hughes Aircraft Systems International v Air Services Australia* (1997) 76 FCR 151; *Pacific Brands Pty Ltd v Underworks Pty Ltd* [2005] FCA 288; *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Burger King Corp v Hungry Jack's Pty Ltd* [2001] NSWCA 187; *Vodafone Pacific Ltd v Mobile Innovations Ltd* [2004] NSWCA 15; *Overlook Management BV v Foxtel Management Pty Ltd* [2002] NSWSC 17; and *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (1993) 31 NSWLR 91. John Carter & Elisabeth Peden, "Good Faith in Australian Contract Law" (2003) 19 JCL 155 observed that the New South Wales Court of Appeal decisions (up to 2001) preferred good faith to be implied as a term by law.

68 (1977) 180 CLR 266 at 282–283.

69 [2013] 4 SLR 193.

70 See para 48 below.

71 See paras 39–50 below.

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39 Australian decisions at first instance and by the Victorian Court of Appeal have also approached the issue of good faith as one of implication in fact. This approach is evident in *Yam Seng* where the implication of good faith depended very much on the facts of the case and the relevant background. These included not only facts known to the parties but also shared values and norms of behaviour. Many of the norms specific to a particular trade or commercial activity may be taken for granted without being explicitly spelt out in the contract. The aspects of good faith such as honesty, standards of commercial dealing and fidelity to the parties' bargain are so obvious that "it goes without saying". These requirements are also necessary to give "business efficacy" to commercial transactions. Thus, *ad hoc* implication of good faith as a term in fact remains a possibility in the right circumstances.[72]

(3) Implication as an exercise in the construction of the contract as a whole

40 In the Privy Council case of *Attorney General of Belize v Belize Telecom*[73] ("*Belize*"), Lord Hoffmann considered the basis on which courts imply terms into contracts. His main point was that the implication of a term is an exercise in the construction of the instrument as a whole and the court's concern is to discover what the instrument means. The traditional tests for implying a term in fact are not different or cumulative tests but rather different ways of approaching what is ultimately always a question of construction. Lord Hoffmann proposed a new formulation: "what the [contract], read as a whole against the relevant background, would reasonably be understood to mean?"[74] He regarded Lord Simon's five requirements in *BP Refinery* "as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means".[75]

41 Lord Hoffmann's broad test of construction[76] was rejected by the Singapore Court of Appeal in *Foo Jong Peng v Phua Kia Mai*[77] as being too uncertain in its application. The court, however, did concede

72 See, *eg*, *Renard Constructions (ME) Pty v Minister for Public Works* (1992) 26 NSWLR 234; *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSC 228 are unanimous that the *ad hoc* implication is appropriate in Victoria where one party's vulnerability to exploitation by another's conduct exists.

73 [2009] 1 WLR 1988; [2009] UKPC 10.

74 *Attorney General of Belize v Belize Telecom* [2009] 1 WLR 1988 at 1994; [2009] UKPC 10 at [21].

75 *Attorney General of Belize v Belize Telecom* [2009] 1 WLR 1988 at 1995; [2009] UKPC 10 at [27].

76 It would appear that Lord Hoffmann's approach only applies to terms implied in fact and not to terms implied in law.

77 [2012] 4 SLR 1267.

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that the process of implication does involve a specific form of interpretation that is separate and distinct from the general interpretation of express terms. In rejecting Lord Hoffmann's proposition, the court affirmed[78] that the more specific tests of "business efficacy" and "officious bystander" are an "integral" and "indispensable" part of the law on implied terms in Singapore. These tests provide the court with specific and concrete guidance in the absence of express provision and encompass the strict criterion of necessity which could be used to ascertain the presumed intention of the parties. It is significant that in *Belize*, Lord Hoffmann made certain observations about the traditional tests. He pointed out the risks of detaching the "business efficacy" test from the basic process of construction; likewise, the "officious bystander" test may obscure the objectivity which informs the whole process of construction.[79] Interestingly, the Court of Appeal in *Sembcorp Marine* also acknowledged that the "business efficacy" test has had its share of criticism[80] but affirmed that the standard for the implication of terms remains one of necessity, and not the standard of reasonableness implicit in Lord Hoffmann's proposition. It reiterated that reasonableness is a necessary but insufficient condition for the implication of a term. Thus, it must be necessary to imply a term to give "business efficacy" to the contract.

42 It is interesting that in *Yam Seng*, Leggatt J suggested that implication can be analysed as an exercise in the construction of the contract as a whole or based on traditional tests. As a matter of construction, it is hard to envisage any contract which would not reasonably be understood to require honesty in its performance. The same conclusion is reached if the traditional tests for the implication of a term are used. The requirement that parties will behave honestly is so obvious that it "goes without saying". Such a requirement is also necessary to give business efficacy to commercial transactions.[81]

43 Lord Hoffmann's approach finds support in Australia. The Hon Marilyn Warren AC acknowledged[82] that:

> … good faith as a doctrine does not exist independently of the rules surrounding the construction and interpretation of contracts, or the rules of implication. Whilst the process of contract interpretation is distinct from the process of implying terms into a contract, it can

78 Also by the same court in *eSys Technologies Pte Ltd v nTan Corporate Advisory Pte Ltd* [2013] 2 SLR 1200 and *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193.

79 *Attorney General of Belize v Belize Telecom* [2009] 1 WLR 1988 at 1994–1995; [2009] UKPC 10 at [22]–[23] and [25].

80 *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 at [85]–[88].

81 *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 at [137].

82 The Hon Marilyn Warren AC, "Good Faith: Where Are We at?" [2010] 34(1) MULR 344 at 349.

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> sometimes be difficult to separate the two. This is particularly so with regard to good faith, which appears to be obscured by what may be a merging of the two processes (interpretation and implication) in the arena of good faith.

She suggested a shift from strict construction of commercial contracts to a more purposive construction to give commercial contracts a business-like interpretation taking into consideration the language used, circumstances addressed by the contract and intended objects or commercial purpose.

44 Further support is found in the observations of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*[83] that:

> … in some cases, it is more useful to identify implied terms as rules of construction of which the modern and better view is that these rules of construction are not rules of law so much as terms implied, in the sense of attributed to the contractual intent of the parties …

Similarly, Peden regards the duty of good faith as one that arises on the proper construction of the contract. In other words, "implication in fact is a rule of construction".[84] As the Hon Robert McDougall pointed out,[85] this approach has two benefits: (a) it focuses on the actual intention of the parties (ascertained objectively) viewed against the factual matrix in which the contract was made; and (b) it is likely to produce an outcome not based on a concept of indeterminate content – "good faith" – but on an obligation precisely ascertained, by a process of construction, for a particular contract.

45 However, with regard to the overlap between construction and implication in at least some cases, he was not sure whether it was necessary or as a matter of practicality to refine or resolve the dispute. Whatever the basis for the implication of the term, it cannot stand in the face of contrary contractual intention.

(4) A hybrid formulation

46 It is interesting that Priestley and Handley JJA implied in *Renard* a term of good faith in fact or in law. Priestly JA called this

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83 (1995) 185 CLR 410 at 449.

84 Elisabeth Peden, *Good Faith in the Performance of Contracts* (Australia: LexisNexis Butterworths, 2003) takes the view that the principle of good faith is not to be seen as implying a term but rather a principle that governs the implication of terms and the construction of contracts generally.

85 Robert McDougall, "The Implied Duty of Good Faith in Australian Contract Law" (2006) 108 *Australian Construction Law Newsletter* 28, available at <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_mcdougall210206> (accessed 1 October 2013).

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implication a "hybrid" between the two. The Singapore court in *Ng Giap Hon* also alluded to this possibility. It stated that if the respondent stockbroking firm had embarked upon a deliberate and systematic campaign of sabotaging the appellant at every possible turn, it would be both logical as well as necessary for the court to imply a term that such conduct would not be permitted. In such extreme circumstances, a term implied in law and not just a term implied in fact would be incorporated to prevent such wrongful conduct by the respondent.

III. Proposals

A. Good faith: A doctrine of general application or by implication in fact?

47 The highest court in Singapore has rejected a doctrine of good faith of general application in contract law and the implication of good faith as a matter of law. It has also rejected the implication of terms within the concept of the construction of contracts, although this approach is not without sound authority.[86] However, the above review shows that certain common law courts are creeping towards recognising good faith with regard to certain types of commercial contracts. This article suggests that in appropriate circumstances, good faith could be implied as a term in fact on a case-by-case basis depending on the factual matrix, the relationship between the parties and the commercial context.

(1) The Singapore law on implied terms in fact and its application to good faith

48 In *Ng Giap Hon*, the Court of Appeal stated[87] that in determining whether a term should be implied in fact into a contract, everything depends, in the final analysis, upon the actual facts and context of the case before the court. The question is: "does the particular factual matrix before the court give rise to circumstances that make it necessary to imply the term based on both the traditional tests?" In *Sembcorp Marine*, the same court summarised its views on the implication of terms into a contract. First, the process of implication is an exercise in gap-filling to give effect to the parties' presumed intentions. Second, it is only when the parties did not consider the term at all and left a gap that it would be appropriate for the court to consider implying a term. Third, the traditional tests used in conjunction and complementarily, remain the prevailing approach for the implication of

86 *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 at 450; Gerard McMeel, *The Construction of Contracts* (Oxford University Press, 2nd Ed, 2011) at para 1.17.

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

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terms under Singapore law. Fourth, the court may consider other legal bases apart from business efficacy to determine that a particular term accords with the presumed intention of the parties. However, business efficacy is clearly the best basis in the commercial context as it can safely be assumed that commercial parties are rational and seek business efficacy in their transaction. Fifth, the threshold for implying a term is necessarily a high one. The law will only imply a term if it is necessary, a concept already built into the traditional tests. These observations led the court to propose a three-step process for the implication of terms. The first step is to ascertain how the gap arose. Implication will be considered only if the gap arose because the parties did not contemplate the gap. The second step is to consider whether it is necessary in the business or commercial sense to imply a term in order to give business efficacy to the contract. Finally, the court considers the specific term to be implied. It must be one which, having regard to the need for business efficacy, satisfies the "officious bystander" test.

49 Applying the above principles specifically to the implication of good faith, this article submits that the relevant question should be whether it is necessary in the commercial sense to imply the term in order to give business efficacy to the contract and whether it is so obvious that it "goes without saying". This article further suggests that with specific reference to relational, commercial contracts (which may be long-term), the particular factual matrix of the case may give rise to circumstances that make it necessary to imply good faith based on both the traditional tests. In such relational contracts, there is a reasonable expectation that certain business norms and commercial morality will prevail in the relationship and it is to give business efficacy to such contracts that it is necessary that good faith be implied. Furthermore, an expectation of good faith is so obvious that "it goes without saying". As Ian Macneil[88] wrote, good faith is a relational concept that should apply to relational contracts where relationships evolve over long periods of time. It will be recalled that in *Yam Seng*, the respondent breached the good faith obligation by knowingly providing misleading information. In those circumstances, it was necessary to imply an obligation of good faith based on the presumed intentions of the parties in order to make the relationship work. On the other hand, in *Ng Giap Hon*, there was no wrongful conduct on the part of the respondent stockbroking firm. It did not embark on a deliberate and systematic campaign to sabotage the appellant. In those circumstances, it was unnecessary to imply good faith.

88 Ian R Macneil, "Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law" (1977–1978) 72 *Northwestern University Law Review* 854.

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50 This article therefore suggests a case-by-case approach to the implication of good faith. First, this approach is consistent with the preference to develop Singapore law incrementally in response to particular problems rather than by enforcing broad overarching principles. Second, it will assuage concerns about freedom of contract since the implication of a term can be negated by express provision or necessary implication. Public policy concerns about freedom and certainty of contracts are more relevant to implication by law rather than to implication in fact. Third, even though good faith is already covered by many established common law principles such as misrepresentation and unconscionable conduct, implication in fact will be another way of achieving the same purpose. As McCamus explains:[89]

> Recognition of a good faith duty may facilitate the implication of terms in contracts more aggressively than the traditional doctrines on implied terms would permit. It may also provide a firmer basis than we now have for argument by analogy from the existing categories of good faith cases.

Finally, where there is an imbalance of bargaining power, it may be necessary, in an appropriate case, to imply a good faith obligation in order to give business efficacy to the contract where it is so obvious that it "goes without saying". The reluctance in imposing good faith where parties are of equal bargaining power and negotiating at arm's length has an underlying policy reason of achieving certainty in commerce. This policy reason is more relevant to implication by law rather than to implication in fact.

B. Categories of contracts where good faith is implied

51 Certain contracts are more susceptible to the duty of good faith than others. These have been identified as joint venture agreements, partnerships, agency agreements, franchise agreements, distributorship agreements and leases. They may involve a longer term relationship and substantial commitment. Leggatt J in *Yam Seng* observed that such relational contracts require a high degree of communication, co-operation and predictable performance based on mutual trust and confidence in order to give them business efficacy. For example, distributorship agreements require parties to communicate effectively and co-operate with each other in performance. Recognising good faith will support these contracts, preserve commercial relationships and facilitate investments and projects which require ongoing co-operation. McCamus categorised the leading Canadian decisions where good faith

89 John D McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance" [2004] 29 Advoc Q 72 at 101.

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performance was invoked as: (a) those imposing limits on the exercise of contractual discretionary powers; (b) those imposing duties to co-operate in achieving fulfilment of the objectives of the agreement; and (c) those precluding parties from evading contractual obligations. In none of these cases, he observed, was the analysis of good faith necessary to the decision in question. The decisions were arrived at by traditional contract principles. Much of the work accomplished by the good faith doctrine can be accomplished by more traditional means. In fact, a good faith performance obligation is manifest in a number of common law doctrines which require the performance of contracts in good faith. Notwithstanding this, McCamus concluded that recognising good faith at common law would simply consolidate existing doctrinal approaches.

C. Definition of good faith

52 The difficulties in defining good faith and the adoption of an "excluder analysis" have been explored above.[90] Should the difficulty in coming up with a precise definition of good faith prevent its implication? This article suggests that this should not hinder its implication in an appropriate case and that the meaning and content of good faith in any particular case can be derived from the factual matrix of that case and the commercial background. Moreover, parties can incorporate express terms of good faith into the contract and clarify the scope of the obligation. In fact, the Singapore Court of Appeal has upheld an express contractual term to negotiate in good faith.[91] It observed that good faith entails acting honestly and observing commercial standards of fair dealing. If an express obligation of good faith can be upheld, there is good reason to imply good faith performance where the circumstances proposed above warrant such an implication.

D. Theoretical foundations of a good faith norm

53 The Singapore court in *Ng Giap Hon* referred to the uncertainty surrounding the theoretical basis for the doctrine of good faith. This was addressed by Jori Munukka[92] in his discussion on the theoretical foundations of a good faith norm. They are summarised as follows:

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90 See paras 21–22 above.

91 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738. The court reasoned that such a clause is fairly common in Asian business contracts and consistent with the Asian cultural value of promoting consensus whenever possible. It is also in the public interest to "promote the consensual disposition of any potential disputes": *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [40].

92 Jori Munukka, "Harmonisation of Contract Law: In Search of a Solution to the Good Faith Problem" (2005) 48 *Scandinavian Studies in Law* 229.

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(a) **Morality and justice**. This was dismissed as lacking strength and one that cannot convincingly stand on its own.

(b) **Mutually expressed intent**. Good faith standards, although not explicitly stated, can be construed from other explicit terms, so called implication by construction, or just construction. This is probably the most important form of inferring good faith in contracts.

(c) **Implied terms and default law**. Implication in fact is founded on mutual intent. Implication can also be made in law. This can be described as a process of applying default rules.[93]

(d) **Reliance and expectations**. The rule based on justifiable reliance or expectations covers much of the assumed good faith norm but does not give sufficient coverage for example to secondary obligations.

54 Munukka considered that the best way to connect the differing views on good faith was to find a common denominator for these views. None of the concepts of honesty, morality, reliance, implication or construction stood the test. He therefore proposed "contractual proportionality" as an alternative theoretical basis. The principle of contractual proportionality[94] means that "outcomes and the obligations ought to be proportional to the position on each side and to each other, considering the circumstances in all stages of the contract". In his view:[95]

> … a duty of good faith built on a principle of proportionality has the strength that it can be adopted by any legal order, and thus create a common ground for comparison and discussion. It … also covers all functions of the Western legal concepts of good faith.

Contractual proportionality is a civilian law concept and its use as the theoretical basis for implication of terms will be novel to common law. In the common law jurisdictions where a good faith obligation was implied, the basis of the implication was (b), (c), (d) or a hybrid of these. As submitted above, the suggested basis in the Singapore context is to imply good faith as a term in fact.

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93 These refer to two ways of implication in law: (a) in the absence of an express term, bring in the rule implied in law; and (b) start from the implied term and then find that there is no agreement to nullify the implied term. Jori Munukka, "Harmonisation of Contract Law: In Search of a Solution to the Good Faith Problem" (2005) 48 *Scandinavian Studies in Law* 229 at 247.

94 Similar expressions are used in German law and discussed in French law: Jori Munukka, "Harmonisation of Contract Law: In Search of a Solution to the Good Faith Problem" (2005) 48 *Scandinavian Studies in Law* 229 at 250.

95 Jori Munukka, "Harmonisation of Contract Law: In Search of a Solution to the Good Faith Problem" (2005) 48 *Scandinavian Studies in Law* 229 at 250.

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IV. Conclusion

55 The law in this area is not settled in the common law world although it is creeping towards a recognition of good faith in certain jurisdictions. No doubt good faith has played a substantial role in Singapore contract law through specific rules rather than a broadly stated general principle as in the civilian legal systems. Even if good faith is rejected as a doctrine of general application, this article suggests that it may be necessary to imply good faith into certain relational, long-term commercial contracts based on the presumed intention of the parties in order to give business efficacy to those agreements. Viewed in this way, implication of good faith on a case-by-case basis will pose little threat to commercial certainty or hinder the incremental development of Singapore contract law.

56 The duty to have regard to good faith is already part of Singapore law by virtue of the ratification and enactment of the CISG into domestic law.[96] The CISG provisions include good faith.[97] Article 7(1) defines good faith as a guideline for the interpretation of the CISG. Good faith also influences the content of the contract as a source of obligations. Thus, Singapore courts hearing disputes involving the CISG must consider good faith, while it need not currently do so in other contractual disputes involving domestic contract law.[98] Recognition of good faith will result in harmonisation of approach within the Singapore legal system. After all, the main reason for adopting the CISG was harmonisation of law with new trading partners. It will also bring Singapore contract law closer to American and EU law and the civil law of other major trading partners, in particular China, South Korea and Japan, which are also contracting states to the CISG. The prospect of international acceptance of good faith and the internationalisation of contract law will definitely strengthen the agreed basis for doing global business.

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96 As the Sale of Goods (United Nations Convention) Act (Cap 283A, 2013 Rev Ed).

97 See, *eg*, United Nations Convention on Contracts for the International Sale of Goods (1489 UNTS 3) (11 April 1980; entry into force 1 January 1988) Arts 8(1), 16(2)(b), 21(2), 29(2), 37, 38, 40, 49(2), 64(2), 82 and 85–88.

98 A good example is *MCC-Marble Ceramic Center Inc v Ceramica Nuova D'Agostino SpA* 144 F 3d 1384 (11th Cir, 1998) where the US Court of Appeal overruled the application of the parol evidence rule (domestic law) where the United Nations Convention on Contracts for the International Sale of Goods (1489 UNTS 3) (11 April 1980; entry into force 1 January 1988) applied to the contract.

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